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By dap Date 9/30/2011

RICHARD M. NIXON - Testimony/ Deposition

PMK file

Kreindler file

Nixon Files

WATERGATE SPECIAL PROSECUTION FORCE

DEPARTMENT OF JUSTICE

LAW

Memorandum

TO : Peter Kreindler

DATE: May 30, 1975

FROM : Kenneth Geller KG

SUBJECT: Administration of oath to Richard Nixon

Here are my preliminary findings on the question of who would be authorized to administer an oath to Richard Nixon in the proposed deposition in California.

Statutes of the United States authorize various officers to administer oaths in certain types of proceedings. The only statutes which would appear applicable to this situation are the following:

1. United States magistrates. 28 U.S.C. § 636(a)(2).

2. Justices and judges of the United States. 28 U.S.C. 459.

3. Each federal clerk of court and his deputies. 28 U.S.C. § 959.

4. The Vice President of the United States. 5 U.S.C. § 2903(c)(1).

5. "An individual authorized by local law to administer oaths in the State, District, or territory or possession of the United States where the oath is administered." 5 U.S.C. § 2903(c)(2). I have not yet checked California law but I would assume this category would include California judges and notaries public.

Several other provisions which would be nice to use do not seem applicable. Rule 6(c) of the Criminal Rules authorizes the foreman of a grand jury to administer oaths, but I would assume that is limited to actual grand jury proceedings and not proceedings ancillary to a grand jury. Similarly, Rule 28(a) of the Civil Rules provides that "the court in which [an] action is pending" may appoint a person to administer oaths in a deposition, but this obviously is not a deposition being taken pursuant to the Federal Rules of Civil Procedure. Finally,

5 U.S.C. § 303 provides:

> An employee of an Executive department lawfully assigned to investigate frauds on or attempts to defraud the United States, or irregularity or misconduct of an employee or agent of the United States, may administer an oath to a witness attending to testify or depose in the course of the investigation.

More work must be done on this section, but I have tentatively concluded that our subjects of inquiry would not fall within those enumerated. Indeed, the only reported decision construing section 303 viewed the statute quite narrowly and reversed a perjury conviction. United States v. Doshen, 133 F.2d 757 (3d Cir. 1943).

My tentative conclusion, therefore, is that we use the services of a United States magistrate who, of the categories of persons listed above, can probably be depended upon to be most discreet.

More to come.

cc: Mr. Ruth

WATERGATE SPECIAL PROSECUTION FORCE
United States Department of Justice
1425 K Street, N.W.
Washington, D.C. 20005
July 2, 1975

Wm. Snow Frates, Esq.
Floyd Pearson Stewart Proenza
& Richman, P.A.
Twelfth Floor Concord Building
Miami, Florida 33130

Dear Mr. Frates:

This is to reiterate the telephone conversation you and I had this afternoon concerning your letter of June 30, 1975, to Mr. Ruth requesting a copy of the testimony that Mr. Nixon gave under oath.

As I informed you, we are not free to disclose that testimony without an order of court pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure. For your information, I am enclosing a copy of the stipulation that was ordered filed by Chief Judge Hart which discloses the circumstances of the examination of Mr. Nixon. I also wish to inform you that it is our understanding that Mr. Hundley will be filing something in court on Monday on behalf of Mr. Mitchell with respect to this matter.

Sincerely,

Peter M. Kreindler

Peter M. Kreindler
Counsel to the Special
Prosecutor

Enclosure

Nixon testimony

Washington Star-News

16 PAGE

7/2/75 DATE

Let's hear witness Nixon

Almost a year after the Watergate scandal climaxed in the resignation of President Nixon, we are as reluctant as anyone to start wallowing again. The thought of being confronted with a new tome of dialogue about cover-up strategies, tape gaps, packages of money, plumbers, enemies lists, Haldeman-Ehrlichman: It is hardly the way to greet the Glorious Fourth in this pre-Bicentennial year.

But the possibility of such a call to duty must be faced. Richard Nixon, after years of ducking and being too sick for service as a sworn witness to the events that wrecked his administration and menaced the American constitutional system, has been questioned under oath before an oddly convened grand jury session in California. His testimony is properly secret at this point, and we do not favor any extra-legal leakage through the grand jury seal. His answers to the special prosecutor, too, cannot result in any charges against him for his actions while president, because of the sweeping pardon granted him last September by his appointed successor, President Ford.

There are persuasive reasons why Nixon's version of the Watergate story — one that necessarily addresses the incriminating questions in a more pointed way than his eventual memoirs will — should be an important part of the historical record covering one of the great traumas of American politics. Any insight into his motivation and behavioral failings could help voters in their consideration of future would-be presidents, and presidents in their approach to the job and their view of the proper bounds of presidential power. The information could put to rest any lingering doubts about whether Nixon should have been routed from office when and in the manner he was.

Nixon's personal role could bear on the guilt of already-tried Watergate defendants, and those who might be charged in future indictments. (Only his illness staved off his testimony in the cover-up trial, and lawyers for John Ehrlichman and H.R.Haldeman may seek to peruse the grand jury transcript for help in appealing those convictions.) Nixon also is a newly available witness in Watergate-related civil suits, so there is a chance that parts of his story will be extracted in other legal proceedings.

The grand jury transcript, for that matter, cannot be more than a partial and fragmented account of the complicated Watergate affair despite the 11 hours Nixon spent on the stand. The special prosecutor's office apparently sought to tie up loose ends (like the 18½-minute tape gap and the money-handling role of C.G. Rebozo) preparatory to making its final report, and to decide whether further prosecutions were in order. We don't know for certain what was covered, how effective the questioning was or how open were the former president's replies.

We still hope to learn the substance of Nixon's sworn account, through the special prosecutor's report, through a court-approved opening of the grand jury minutes and/or through further, public testimony by the former president. It may not be pleasant reading, but the instruction thus obtained should be worth a brief, final wallow.

Nixon Testimony

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
JUN 27 1975
JAMES F. DAVEY, Clerk

IN RE JANUARY 7, 1974 GRAND JURY	:	Misc. No. 75-184

STIPULATION

WHEREAS on June 23 and 24, 1975, Richard M. Nixon voluntarily submitted to an examination under oath at the San Mateo Loran Station, United States Coast Guard, San Diego County, California, said examination conducted by the Watergate Special Prosecution Force on matters subject to pending Grand Jury investigations, said examination ancillary to and with the consent (based on the health of Richard M. Nixon and other legal considerations) of the January 7, 1974 Grand Jury of the United States District Court for the District of Columbia, and said examination attended by two Grand Jurors with the approval of the Chief Judge of this Court; and

WHEREAS said examination was taken for presentation to and to be made a part of the minutes of the aforesaid Grand Jury; and

WHEREAS Richard M. Nixon, because inquiries have been made concerning this matter, desires that the fact of this proceeding be made public, but only with the consent of the Court; and

WHEREAS the Special Prosecutor has no objection thereto;

NOW, THEREFORE, counsel for Richard M. Nixon and the Special Prosecutor on this 26th day of June, 1975, hereby stipulate that this statement shall be filed with the Court.

HENRY S. RUTH, JR.
Special Prosecutor

HERBERT J. MILLER, JR.
Counsel for Richard M. Nixon

So ordered:

CHIEF JUDGE

Dated: 6/26/75
6:45 p.m.

Nixon testimony

STATEMENT ISSUED BY MR. MILLER'S OFFICE - 6/27/75

As appears from the stipulation filed in the United States District Court for the District of Columbia by the Special Prosecutor and the attorney for former President Nixon yesterday, Mr. Nixon on Monday and Tuesday of this week was examined under oath at the Coast Guard station in and what used to be the Western White House in San Clemente, California. Some members of one of the Watergate grand juries were present. The examination was conducted by several members of the office of the Special Prosecutor and consisted of a total of approximately eleven hours of questioning over the two day period. The examination covered a wide range of subjects.

Mr. Nixon was not under subpoena. His sworn testimony in California for the District of Columbia grand jury was voluntary and responsive to the expressed desires of the office of the Special Prosecutor for his testimony relative to the grand jury's ongoing investigations. It was the former President's desire to cooperate with the office of the Special Prosecutor in the areas which that office desired to interrogate him, and it was Mr. Nixon's feeling in view of the anticipated length of his testimony,

the present state of his health, and the complications inevitably attendant to extended travel, the examination would be most efficiently conducted in California.

Mr. Nixon's decision to testify followed consultation with his medical advisors. The examination itself was conducted on Monday and Tuesday, June 23 and 24, 1975.

Nixon Testimony

WATERGATE SPECIAL PROSECUTION FORCE DEPARTMENT OF JUSTICE

Memorandum

TO : ALL STAFF DATE: June 27, 1975

FROM : Henry S. Ruth, Jr.

SUBJECT:

As some of you know, on Monday and Tuesday of this week, under extreme precautions of confidentiality both preceding and during the two days, members of this Office took sworn testimony from Mr. Nixon about matters pending before Grand Jury III. The attached stipulation was released this morning by Chief Judge Hart at the Courthouse and reflects the only matters about the sworn testimony that are permitted to become public knowledge.

Consequently, no member of this staff shall speak to members of the press, friends, and other persons concerning any aspect relating to the actual occurrence or content of the testimony. As to those who were present during the testimony, no comments shall be made outside the Office concerning any aspect of what he or she saw or heard. In other words, we are treating this, as is our obligation, as we would any other matter involving grand jury testimony. Members of the press may try to reach you at home or in the office at any time of day or night for any scrap of detail. None should be furnished. All calls should be referred to John Barker.

There will be no exceptions to the above ground rules and no violation thereof will be countenanced.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE JANUARY 7, 1974 GRAND JURY	:	Misc. No.

STIPULATION

WHEREAS on June 23 and 24, 1975, Richard M. Nixon voluntarily submitted to an examination under oath at the San Mateo Loran Station, United States Coast Guard, San Diego County, California, said examination conducted by the Watergate Special Prosecution Force on matters subject to pending Grand Jury investigations, said examination ancillary to and with the consent (based on the health of Richard M. Nixon and other legal considerations) of the January 7, 1974 Grand Jury of the United States District Court for the District of Columbia, and said examination attended by two Grand Jurors with the approval of the Chief Judge of this Court; and

WHEREAS said examination was taken for presentation to and to be made a part of the minutes of the aforesaid Grand Jury; and

WHEREAS Richard M. Nixon, because inquiries have been made concerning this matter, desires that the fact of this proceeding be made public, but only with the consent of the Court; and

WHEREAS the Special Prosecutor has no objection thereto;

NOW, THEREFORE, counsel for Richard M. Nixon and the Special Prosecutor on this 26th day of June, 1975, hereby stipulate that this statement shall be filed with the Court.

HENRY S. RUTH, JR.
Special Prosecutor

HERBERT J. MILLER, JR.
Counsel for Richard M. Nixon

So ordered:

CHIEF JUDGE

Dated: _____

Nixon Testimony

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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HENRY S. RUTH, JR.
Special Prosecutor

HERBERT J. MILLER, JR.
Counsel for Richard M. Nixon

So ordered:

CHIEF JUDGE

Dated: _____

Ehrlichman
Nixon testimony

WATERGATE SPECIAL PROSECUTION FORCE
United States Department of Justice
1425 K Street, N.W.
Washington, D.C. 20005

May 28, 1975

Herbert Miller, Esquire
Suite 500
2555 M Street, N. W.
Washington, D. C. 20037

Dear Mr. Miller:

Enclosed are materials pertinent to the investigations into the causes of the 18 1/2 minute gap in the tape of a conversation recorded on June 20, 1972, and into certain unreported campaign funds (UCF). Additionally, we are enclosing transcripts of various recorded conversations relevant to the "Gray" and "wiretap" investigations. In those instances in which we are supplying transcripts not used at the trial of United States v. Mitchell, et al, we caution you that these are preliminary drafts and do not necessarily constitute complete transcriptions of all that is on these various recordings. We believe, however, that they are sufficiently precise to assist your client in refreshing his recollection on these subjects. We are in the process of completing several other transcripts and these will be supplied to you shortly.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

Richard J. Davis

Richard J. Davis
Assistant Special Prosecutor

Enclosures

Nixon Testimony

WATERGATE SPECIAL PROSECUTION FORCE DEPARTMENT OF JUSTICE

Memorandum

TO : Peter Kreindler DATE: May 30, 1975

FROM : Kenneth Geller KG

SUBJECT: Administration of oath to Richard Nixon

Here are my preliminary findings on the question of who would be authorized to administer an oath to Richard Nixon in the proposed deposition in California.

Statutes of the United States authorize various officers to administer oaths in certain types of proceedings. The only statutes which would appear applicable to this situation are the following:

1. United States magistrates. 28 U.S.C. § 636(a)(2).

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3. Each federal clerk of court and his deputies. 28 U.S.C. § 959.

4. The Vice President of the United States. 5 U.S.C. § 2903(c)(1).

5. "An individual authorized by local law to administer oaths in the State, District, or territory or possession of the United States where the oath is administered." 5 U.S.C. § 2903(c)(2). I have not yet checked California law but I would assume this category would include California judges and notaries public.

Several other provisions which would be nice to use do not seem applicable. Rule 6(c) of the Criminal Rules authorizes the foreman of a grand jury to administer oaths, but I would assume that is limited to actual grand jury proceedings and not proceedings ancillary to a grand jury. Similarly, Rule 28(a) of the Civil Rules provides that "the court in which [an] action is pending" may appoint a person to administer oaths in a deposition, but this obviously is not a deposition being taken pursuant to the Federal Rules of Civil Procedure. Finally,

5 U.S.C. § 303 provides:

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More work must be done on this section, but I have tentatively concluded that our subjects of inquiry would not fall within those enumerated. Indeed, the only reported decision construing section 303 viewed the statute quite narrowly and reversed a perjury conviction. United States v. Doshen, 133 F.2d 757 (3d Cir. 1943).

My tentative conclusion, therefore, is that we use the services of a United States magistrate who, of the categories of persons listed above, can probably be depended upon to be most discreet.

More to come.

cc: Mr. Ruth

RJD:HSR:bas

WATERGATE SPECIAL PROSECUTION FORCE
United States Department of Justice
1425 K Street, N.W.
Washington, D.C. 20005

May 23, 1975

Herbert J. Miller, Jr., Esq.
Miller, Cassidy, Larroca & Lewin
2555 M Street NW.
Suite 500
Washington, D.C. 20037

Dear Mr. Miller:

At our meeting with you and Mr. Mortenson on May 20, and with Mr. Mortenson on May 21, we detailed at length the areas in which we intend to seek the grand jury testimony of your client, Richard Nixon. As we indicated at these sessions, we are willing to supply the principal documents which would be used during questioning and which should be helpful in refreshing your client's recollection about the pertinent events in which the grand jury is interested.

We are enclosing copies of the principal documents which will be used in connection with the inquiry into the selection of certain ambassadors and the use of the Internal Revenue Service with respect to Lawrence O'Brien. In those instances where you already have the document involved, we are only identifying on the attached list the document number and package date in which it can be located. In the O'Brien area, there are also a few documents that should remain in our custody. But we would certainly consent to the examination of these documents by you or your designated associate in this office.

As we assemble documents in other areas, we will make them available to you. In addition, as we receive further documents or continue to review our files, other pertinent materials may come to our attention. When and if this occurs, we will advise you of any significant materials.

file
chron
Ruth (2)
Davis
Kreindler ✓

I understand from Mr. Mortenson that by Monday, May 26, you will provide us a medical report on the current status of your client's health and his ability to travel to Washington, D.C., for testimony. I also understand that you want to talk further about the date and place of the proposed testimony. On that basis, we have not yet served a grand jury subpoena; but if it becomes necessary to serve such a subpoena, we intend, as you agreed, to make the subpoena returnable on May 29. Of course, voluntary testimony would be postponed until sometime in the middle of June 1975.

Sincerely,

HENRY S. RUTH, JR.
Special Prosecutor

Enclosure

Nixon testimony

The Washington Post

Page 9

Date 5/20/75

Nixon Deposition Sought in Tap Suit

Attorneys moved yesterday to take sworn testimony from Richard M. Nixon in connection with the wiretapping of 13 former government officials and four newsmen.

A notice was filed in U.S. District Court here stating that attorneys for Morton H. Halperin, a former White House aide who brought the lawsuit, would take Nixon's "deposition upon oral examination . . . on Friday, June 27, 1975, or such other date as may be agreed upon between parties, at a place subsequently to be determined in or near San Clemente, Calif., before an officer duly qualified to administer an oath."

William G. Hundley, Nixon's attorney, said in an interview he would oppose the notice on the ground that the former President is immune from prosecution in civil proceedings. The government has already submitted a brief in which it argues that Nixon should be dismissed as a defendant in the case.

It was understood that the notice of deposition was a device to test whether the courts would compel Nixon to testify even if he is dismissed as a defendant.

Halperin's suit names Secretary of State Henry A. Kissinger and five former top officials of the Nixon administration as defendants as well as Nixon himself. Also named are the Chesapeake & Potomac Telephone Co. and four "John Doe" defendants employed by the FBI and other government agencies.

Under the terms of the wiretap provisions of the Omnibus Crime Control and Safe Streets Act of 1968, each defendant could be assessed damages of up to $75,000 for the taps, according to Halperin's suit.

WATERGATE SPECIAL PROSECUTION FORCE DEPARTMENT OF JUSTICE

Memorandum

TO : Files DATE: May 19, 1975

FROM : Peter M. Kreindler PMK

SUBJECT: Nixon Testimony

Stan Mortenson called this morning to ask whether we would delay issuing the subpoena until Wednesday. I stated that I would have to confer with Mr. Ruth, but that in no event would we delay issuance if it would mean that we would have to change the return date or that in a motion to quash, it would be argued that they had been given less notice. After conferring with Mr. Ruth and Mr. Davis, it was decided that we would agree not to issue the subpoena until Wednesday, and I called Mr. Mortenson, telling him that we expected to hear from him ~~at~~ by noon, Wednesday.

cc: Mr. Ruth
Mr. Davis
Mr. Geller

Nixon testimony Greindler Room 916C

May 16, 1975

Herbert J. Miller, Esquire
2555 M Street, N. W.
Suite 500
Washington, D. C. 20037

Dear Mr. Miller:

As we have indicated in the past, this office has been evaluating its need to question your client, Richard M. Nixon, in connection with various investigations being conducted by us. It has now been decided that it is necessary to do so. After consulting with the Grand Jury, we have determined that his testimony is required in connection with certain areas of continuing inquiry. Accordingly, we plan to issue a subpoena on May 19, 1975 requiring your client's presence before the Grand Jury on May 29, 1975.

We expect that we will be able to cover the areas of inquiry before the Grand Jury in eight hours of questioning, spread over a two-day period. During that time we plan on covering questions in the following general areas:

1. The circumstances surrounding an 18 1/2 minute gap in the tape of a meeting between Mr. Nixon and Mr. Haldeman on June 20, 1972.

2. Any receipt of large amounts of cash by Charles G. Rebozo or Rosemary Woods on Mr. Nixon's behalf and financial transactions between Mr. Nixon and Mr. Rebozo.

3. Attempts to prevent the disclosure of the existence of the National Security Council wiretap program through removal of the records from the FBI, the dealing with any threats to reveal their existence, and the testimony of L. Patrick Gray at his confirmation hearings.

4. Any relationship between campaign contributions and the consideration for Ambassadorships for Ruth Farkas, J. Fife Symington, Jr., Vincent deRoulet, Cornelius V. Whitney and Kingdon Gould, Jr.

5. The obtaining and/or release of information by the White House concerning Lawrence O'Brien through use of the Internal Revenue Service.

In each of these inquiries, the attorney principally involved in the investigation is prepared, prior to Mr. Nixon's appearance, to discuss with you in more detail the subject matter that your client will be questioned about, to make available any transcripts we have of pertinent tapes, and to identify the principal documents which will be used in the Grand Jury. Additionally, we stand ready to consider any reasonable request you may make aimed at preserving the normal confidentiality of a Grand Jury appearance and at avoiding any unnecessary inconvenience to Mr. Nixon. As we already have told you, if necessary, we are prepared to seek permission to convene the Grand Jury in another secure place in the District of Columbia other than the courthouse. Also, as we discussed with you on May 13th, if Mr. Nixon is prepared to voluntarily appear in the Grand Jury, we would be willing to postpone the date of that appearance to sometime in June.

There are also a small number of subject matters about which we would like to question Mr. Nixon, but for which a Grand Jury appearance will not be necessary. We are, of course, willing to provide you with the same detail about these subjects as we are about those proposed for Grand Jury questioning.

It also may be necessary to ask Mr. Nixon some questions concerning the deletion of specified material from the submission of transcripts of Presidential conversations to the House Judiciary Committee on April 30, 1974. If your client is willing, we are prepared to discuss this with him in an interview. If, however, he declines to be interviewed on this subject, then we would also include this in the areas of Grand Jury inquiry. I should add, however, that it may be unnecessary to speak with Mr. Nixon about this matter if we are able to ask Mr. Buzhardt and Mr. St. Clair a limited number of questions.

As mentioned above, we will be issuing a subpoena on May 19th. Since we assume that you would like this subpoena to be served with a minimum of inconvenience to your client or publicity, we will contact you at that time to discuss the procedure for service.

Sincerely,

HENRY S. RUTH, JR.
Special Prosecutor

cc: File
Chron
Ruth
Gruenler
Davis

Nixon Delivery

RADIO TV REPORTS, INC.

4435 WISCONSIN AVE. N.W., WASHINGTON, D. C. 20016, 244-3540

FOR WATERGATE SPECIAL PROSECUTION FORCE

PROGRAM CBS Evening News STATION WTOP TV CBS Network

DATE May 15, 1975 7:00 PM CITY Washington, D. C.

PROBE SET ON FALSIFIED WHITE HOUSE TRANSCRIPTS

BOB SCHIEFFER: Just over a year ago, then President Nixon released edited transcripts of a number of his taped White House conversations. The President has nothing to hide, he told a national TV audience; the transcripts, he said, will tell it all.

But as time passed and the actual tapes became available, it became evident that the White House editing had itself served to further the Watergate cover-up. Now that editing has come under official investigation.

Daniel Schorr has that story.

DANIEL SCHORR: The Judiciary Committee's own transcripts of the Nixon tapes showed important changes and omissions from the White House version. As the result, CBS News learned today, Special Prosecutor Henry Ruth is asking the grand jury to act under a law making it a crime to falsify material subpoenaed in a congressional investigation. A spokesman confirmed that the Prosecutor is conducting an investigation of what went into preparing the White House document.

Being called as witnesses, it's understood, are General Alexander Haig, who was President Nixon's chief of staff, and J. Fred Buzhardt, the White House lawyer who worked most closely on the tapes.

The magazine New Republic says that former Special Counsel James St. Clair, who has denied any role in the tapes, is also being called. His introduction to the transcript attested to its accuracy. In one briefing, St. Clair called the transcript Mr. Nixon's, quote, "work product," unquote. Mr. Nixon's lawyer, Herbert J. Miller, wouldn't comment today on the possibility that the ex-President may be called as a witness.

Daniel Schorr, CBS News, Washington.

Nixon testimony PMC

DRAFT
5/16/75

Dear Mr. Miller:

As we have indicated in the past, this office has been evaluating its need to question your client, Richard M. Nixon, in connection with various investigations being conducted by us. It has now been decided that it is necessary, to do so. After consulting with the Grand Jury, we have determined that his testimony is required ~~before them~~ in connection with certain areas of continuing inquiry. We ~~therefore, now~~ plan to issue a subpoena on May 19, 1975 requiring your client's presence before the Grand Jury on May 29, 1975.

We expect that we will be able to cover the areas of inquiry before the Grand Jury in eight hours of questioning, spread over a two-day period. During that time we plan on covering questions in the following general areas:

1. The circumstances ~~causing the creation of~~ surrounding an 18 1/2 minute gap in the tape of a meeting between Mr. Nixon and Mr. Haldeman on June 20, 1972; ~~(and the non-existence of a tape of a meeting between Mr. Nixon and Mr. Dean on April 15, 1973.)~~?

Dates

no basis for criminality

2. The collection of funds by Charles G. Rebozo on Mr. Nixon's behalf and financial transactions between them.

3. Attempts to prevent the disclosure of the existence of the National Security Council wiretap program through removal of the records from the FBI, the dealing with any threats to reveal their existence, and the testimony of L. Patrick Gray at his confirmation hearings.

4. The relationship between campaign contributions and the consideration for Ambassadorships for Ruth Farkas, J. Fife Symington, Jr., Vincent deRoulet, Cornelius V. Whitney and Kingdon Gould.

5. The obtaining and/or release of information concerning Lawrence O'Brien through use of the Internal Revenue Service.

In each of these inquiries, the attorney principally involved in the investigation is prepared, prior to Mr. Nixon's appearance, to discuss with you in ~~much greater~~ detail the subject matter that your client will be questioned about, to make available any transcripts we have of pertinent tapes, and to identify the principal documents which will be used in the Grand Jury. Additionally, we stand ready to consider

any reasonable request you may make aimed at preserving the decorum of Mr. Nixon's appearance. As we already have told you, if necessary, we are prepared to seek permission to convene the Grand Jury in a secure place in the District of Columbia other than the courthouse. Also, as we discussed with you on May 13th, if Mr. Nixon is prepared to voluntarily appear in the Grand Jury, we would be willing to postpone the date of that appearance to sometime in June.

There are also certain subject matters about which we would like to question Mr. Nixon, but for which a Grand Jury appearance will not be necessary. These include questions concerning the contributions from the milk industry to the 1972 campaign, the relationship of those contributions to the decision in March, 1971 to adjust the price support for milk, and conversations between Mr. Nixon and Richard Kleindienst in March, 1972 concerning the latter's confirmation hearings. We are, of course, willing to provide you with the same detail about these subjects as we are about those proposed for Grand Jury questioning.

It also may be necessary to ask Mr. Nixon some questions concerning the deletion of specified material from the submission of Presidential conversations to the House Judiciary Committee on April 30, 1974. If your client is willing, we

are prepared to discuss this with him in an interview. If, however, he declines to be interviewed on this subject, then we would also include this in the areas of Grand Jury inquiry. I should add, however, that it may be unnecessary to speak with Mr. Nixon about this matter if we are able to ask Mr. Buzhardt and Mr. St. Clair a limited number of questions.

As mentioned above, we will be issuing a subpoena on May 19th. Since we assume that you would like this subpoena to be served with a minimum of inconvenience to your client or publicity, we will contact you at that time to discuss the procedure for service.

Sincerely,
~~Very truly yours,~~

HENRY S. RUTH, JR.
Special Prosecutor

WATERGATE SPECIAL PROSECUTION FORCE DEPARTMENT OF JUSTICE

Memorandum

TO : Files DATE: May 8, 1975

FROM : Peter M. Kreindler PMK

SUBJECT: Nixon Testimony

See Losavi v. Kikel, Colorado Supreme Court 3/17/75, 17 Crim. Law Reporter 2117 -- attorneys subpoenaed to the grand jury must appear to testify; only can claim attorney-client privilege with respect to specific questions.

HS/rbar

Nixon - Testimony

WATERGATE SPECIAL PROSECUTION FORCE

DEPARTMENT OF JUSTICE

Memorandum

TO : Files

DATE: April 7, 1975

FROM : Henry Ruth

SUBJECT: Meeting with Jack Miller

Following the Mortenson-Miller meeting with Ruth-Davis-Geller on Wednesday, April 2, Miller asked to see me alone. He brought up the following two topics:

1. Ronald Ziegler was having trouble interesting any prospective employer in talking with him until the end of all Watergate investigations. Miller asked if we had any kind of clearance system whereby we told people if they were under investigation any longer. I told Miller that on many occasions members of this office had informed prospective employers that a named person was not the subject of investigation by this office. Miller asked if we could give Ziegler any kind of a letter. I said I preferred to talk with employers because so-called "clearance" letters were misused sometimes and I was especially concerned about that in Ziegler's case. I also said that we had to talk with Ziegler about the "Bluebook" investigation. Miller said he would tell Ziegler what I had said. I assured him that we were just as concerned about the fairness issues about persons allegedly involved in "Watergate" as we were about ensuring the completeness of our investigations. I told him that Ziegler was not a candidate for indictment at this time.

2. Miller said he was very concerned about possible grand jury testimony by Nixon. He said that with all of Nixon's health and other problems, Miller had no way of knowing that Nixon would have sufficient concentration, acuteness and preparation to guarantee that he would not inadvertently misspeak himself in the grand jury. Miller said he was concerned as a lawyer that he might be voluntarily giving up many documents that in turn provide a rich basis for our questioning of Nixon. I said that we were reviewing the problem of Nixon testimony, that our investigations were now so well along that the matter of some extra documents probably would not make a difference in our determinations about grand jury testimony and that we were considering the various options of interview, sworn statements of various kinds and grand jury testimony. Miller said that he knew

I could not give an answer now and that he did not expect one now. He said he merely wanted to express one of his concerns as they debated the issue of turning over the so-called "non-designated" documents.

cc:

Mr. Kreindler
Mr. Davis
Mr. Geller

file
chron
Ruth (2)

DRAFT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	Crim. No. 74-110
	)	
JOHN N. MITCHELL, et al.	)	
	)	
Defendants.	)	

MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO DEFENDANT EHRLICHMAN'S MOTION FOR LEAVE TO DEPOSE RICHARD M. NIXON

The United States submits this memorandum in opposition to the motion of Defendant Ehrlichman for leave to depose Richard M. Nixon on January 6, 1975.[1/]

At the outset it should be clear that Mr. Ehrlichman's motion is not simply a motion for leave to take a pre-trial deposition that will not interfere with or delay the trial. Mr. Ehrlichman has asked this Court to permit a deposition beginning on January 6, 1975, and lasting for an indefinite period. The deposition thus would begin weeks after the ~~time~~ date this case otherwise could be expected to go to the jury,

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[1/] Counsel for Mr. Haldeman have indicated that they will file a similar motion on behalf of Mr. Haldeman. Although the same legal principles will control the disposition of both motions, it may be necessary for the government to file a response to Mr. Haldeman's motion to demonstrate that Mr. Nixon's testimony is not "indispensable" to Mr. Haldeman's defense.

and it undoubtedly would continue for a significant period of time.[2/] In short, Mr. Ehrlichman is seeking a suspension of the trial for at least four or five weeks, and his motion must be treated as a motion for a continuance.

The question for the Court, then, is whether a complex trial involving several defendants and a sequestered jury should be interrupted to allow one defendant the possibility of eliciting testimony from a witness when that testimony, if it can be obtained, might not be exculpatory and in any event would be cumulative.[3/] As we show below, Mr. Ehrlichman's motion should be denied for the following reasons: (1) there is substantial doubt whether Mr. Nixon in fact will be able to give a deposition on or around January 6, 1973; (2) Mr. Ehrlichman has not tendered an

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[2/] Under the guidelines proposed by the panel of physicians, Mr. Nixon only could be deposed for two hours a day and perhaps less if the attending physician believed that the deposition created too much strain for the deponent. It is inconceivable under these circumstances that the deposition could be completed in less than two or three weeks. Counsel for Mr. Ehrlichman have indicated that they would interrogate Mr. Nixon about numerous meetings and related matters running the full length and breadth of the conspiracy that has been charged.

Even if this testimony could be obtained in several hours (over a period of three or four days), it is certain that there would be extensive cross-examination by the government. Counsel for Mr. Haldeman also has indicated that they would insist on extensive questioning.

[3/] Mr. Ehrlichman correctly notes that in order to obtain leave to take a deposition under Rule 15(a) of the Federal Rules of Criminal Procedure, he must show that the deponent may not be available as a witness, that his testimony is material, and that there may be a failure of justice if the deposition is not taken. Comparable standards apply with respect to a deposition by the government or the defense under 18 U.S.C. § 3503. See United States v. Singleton, 460 F.2d 1148 (2d Cir. 1972), cert. denied, 410 U.S. 984 (1973). Since Mr. Nixon's testimony would be cumulative, there is some question whether Mr. Ehrlichman would be entitled to a deposition. Certainly, the lack of a deposition will not result in a "failure of justice."

offer of proof showing that Mr. Nixon's testimony would be exculpatory; and (3) Mr. Nixon's testimony is not "indispensable" because it would be cumulative of the testimony of other witnesses and documentary evidence, including tape recordings.

ARGUMENT

1. Mr. Nixon May Not Be Able to Give a Deposition.

At a minimum, Mr. Ehrlichman seeks a continuance from late December, when the case is expected to go to the jury, until January 6, the earliest date Mr. Nixon can be deposed. The Court could not even grant this limited continuance with the assurance that Mr. Nixon's testimony would be obtained. The experts' "estimation" that Mr. Nixon should be able to give a deposition by January 6, 1975, is based upon the assumption that Mr. Nixon's "recovery proceeds at the anticipated rate, and there are no further complications" and is "subject to modification by unknown future medical developments." As this Court well knows, Mr. Nixon's medical condition has changed abruptly and unexpectedly in the past.[4/]

In order to justify a continuance to secure the testimony of a witness even under ordinary circumstances -- when there is no sequestered jury -- the moving party must show "that the witness can probably be obtained if the continuance is granted." Neufield v. United States, 118 F.2d 375, 380 (D.C. Cir. 1941), cert. denied, 315 U.S. 798 (1942). Thus,

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[4/] In his first report to the Court on

in Eastman v. United States, 153 F. 2d 80, 84-85(8th Cir.), cert. denied, 328 U.S. 852 (1946), the court of appeals upheld the denial of a continuance to obtain the deposition of a witness in the Armed Forces stationed in Europe where "the motion did not show definitely that the testimony would be available at the next term." More recently, in Dearinger v. United States, 468 F.2d 1032, 1035(9th Cir. 1972), the court reached a similar result due in part to the existence of "some doubt as to the ultimate availability of [the] witness."

Although doubt about the availability of Mr. Nixon to give a deposition by itself might not require denying the relief sought, it places a heavier burden upon Mr. Ehrlichman to demonstrate compelling circumstances for the continuance.

2. Mr. Ehrlichman Has Not Made Any Showing that Mr. Nixon's Testimony Would Be Exculpatory

The government does not question that Mr. Nixon -- alleged to be a participant in the conspiracy in this case -- would be able to give testimony relevant to issues that are material to the guilt or innocence of defendants. But a defendant seeking a continuance to obtain his testimony cannot rest on that conclusion. He must show what Mr. Nixon's testimony would be, Neufield v. United States, supra, 118 F.2d at 380, and that it would afford his defense "substantial favoring evidence." United States v. Harris, 436 F. 2d 775, 777(9th Cir. 1970). See also Babb v. United States, 210 F.2d 473 (5th Cir. 1954);

Eastman v. United States, supra, 153 F.2d at 84-85. Ordinarily, this showing must be made by submitting an affidavit of the proposed witness.[5/] Mr. Ehrlichman has failed to make any concrete showing at all as to what Mr. Nixon's testimony would be. All the Court is offered is the speculation of Mr. Ehrlichman's counsel that Mr. Nixon's testimony would aid Mr. Ehrlichman's defense. At best, Mr. Ehrlichman has outlined incidents and areas on which he hopes Mr. Nixon may testify in his favor.[6/] But it is not enough to make the conclusory and blanket assertion that "Mr. Nixon is an indispensable witness because he will be able to testify as to the sequence of events involved in the Watergate matter, that Mr. Ehrlichman was not part of a conspiracy, and that Mr. Ehrlichman never entertained the corrupt intent as required under 18 U.S.C. §1503" (Ehrlichman Memorandum at 4). For example, a continuance to obtain the testimony even of a witness alleged by the government to have participated in the crime and conceded to have "material information," is properly denied where counsel only advises the court generally that the witness' testimony is important to "the whole truth." Payton v. United States, 222 F.2d 794, 796 (D.C. Cir. 1955).

[5/] There is a significant difference between what one may tell counsel and what he would testify to under oath at trial or in the course of a deposition. Thus, in virtually all cases mandating severance on the ground that a defendant seeks to offer the testimony of a co-defendant, the precise exculpatory material to be offered through the testimony of the co-defendant was placed before the trial court through a reliable oral or documentary representation of the co-defendant. See, e.g., Byrd v. Wainwright, 428 F.2d 1017, 1021 (5th Cir. 1970); United States v. Echeles, 352 F.2d 892, 897 (7th Cir. 1965); United States v. Gleason, 259 F. Supp. 282, 283 (S.D.N.Y. 1966).

[6/] Mr. Ehrlichman, of course, has not indicated whether he has attempted to obtain an affidavit from Mr. Nixon or why he has failed to do so.

The Court thus is left in the dark to speculate itself whether Mr. Nixon's testimony on balance would be favorable to Mr. Ehrlichman. We point out here that it is at least as likely that Mr. Nixon would testify that he had no specific recollection as to many of the events on which he would be questioned.[7/]

3. The Testimony of Mr. Nixon Would be Merely Cumulative.

Even if Mr. Ehrlichman could make the requisite offer of proof and demonstrate that Mr. Nixon would be available, he would not be entitled to a continuance in order to take Mr. Nixon's deposition. Contrary to Mr. Ehrlichman's assertion, Mr. Nixon's testimony is not "indispensable." As the analysis below shows, his testimony at most would be merely cumulative of the testimony Mr. Ehrlichman will give, the testimony already given by Messrs. Haldeman and Dean and other witnesses, and the evidence that is available from the tape recordings of conversations with Mr. Nixon.[8/] It is well settled in this Circuit and elsewhere that the trial court has discretion to deny a continuance to obtain testimony that would be only cumulative of that of the defendants and other witnesses. See, e.g., United States v. Reed, 476 F.2d 1145, 1147 n.1 (D.C. Cir. 1973); Jackson v. United States, 330 F.2d 445 (5th Cir. 1964); United States v. Lustig, 163 F.2d 85, 89 (2d Cir.), cert. denied, 332 U.S. 775 (1947).

[7/] Mr. Ehrlichman has not even pointed to any private statements by Mr. Nixon indicating what Mr. Nixon's testimony would be.

[8/] Recordings of admissible conversations are the "most reliable evidence possible of a conversation." Lopez v. United States, 373 U.S. 427, 439-40 (19); cf. United States v. White, 401 U.S. 745, 753 (19).

The first area cited by Mr. Ehrlichman in his motion is Mr. Nixon's testimony that he never conveyed to Mr. Ehrlichman the substance of his conversation with Defendant Haldeman at 10:04 a.m. on June 23, 1972, a portion of which has been played for the jury (Government Exhibit 1). The Government will contend that in this conversation Mr. Nixon approved an approach to the CIA by Defendants Haldeman and Ehrlichman for the purpose of impeding the FBI's Watergate investigation. Mr. Ehrlichman was present, of course, at the later meeting that day between Messrs. Haldeman, Helms, and Walters and heard what the CIA officials were told by Mr. Haldeman. Mr. Ehrlichman can testify that he was not told by Mr. Nixon prior to that later meeting of Mr. Nixon's earlier conversation with Defendant Haldeman, and both Defendants Haldeman and Ehrlichman can testify that they had no conversation about the 10:04 a.m. Nixon/Haldeman meeting at any time, if that is the case. Moreover, Mr. Ehrlichman's log and President Nixon's Daily Diary show no contact between Nixon and Ehrlichman between the 10:04 a.m. Nixon/Haldeman meeting and the later meeting with the CIA officials. Accordingly, Mr. Nixon's testimony on this point would merely be cumulative of Defendant Ehrlichman's testimony, Defendant Haldeman's testimony, and additional documentary evidence. In any event, this matter is not dispositive of the ultimate issue of Mr. Ehrlichman's role in this approach since any culpability he has would rest in large part on the fact of his presence at the meeting with Haldeman, Helms, and Walters, and his knowledge of what occurred at that time -- a subject on which Mr. Ehrlichman and Mr. Helms can testify and on which Mr. Haldeman and Mr. Walters already have testified.

The second area cited by Defendant Ehrlichman is Mr. Nixon's testimony that Ehrlichman "always" took the position that there should be full disclosure about Watergate. The only specific time period cited in the motion, however, refers to meetings between Mr. Ehrlichman and Mr. Nixon in August 1972.[9/] Mr. Ehrlichman himself can testify to these meetings to the same extent as could Mr. Nixon. Moreover, there is discussion on some of the tape recordings already played to the jury about this matter. On April 16, 1973, at 9:50 a.m. (Government Exhibit 24, 24a, p. 13), Mr. Ehrlichman reminded the President about a plan in the summer of 1972 by which Clark MacGregor would make a "full disclosure" and "the ide was that you'd be out of town and it wouldn't get on you, remember?" Mr. Nixon affirmed that he did recall that, but shortly after said, "Oh, we all know that's a phony." Not only is this tape recording available for Mr. Ehrlichman to corroborate his own testimony concerning any discussion with the President, but on the tape Mr. Ehrlichman mentioned that "we" discussed the plan with Mr. Nixon and also that he thought he had done a memo on it. This raises additional possibilities, not alluded to in Mr. Ehrlichman's motion, that two additional sources

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[9/] With respect to Defendant Ehrlichman's position on this matter in March and April of 1973, the majority of defendant's conversations with Mr. Nixon were tape recorded and have been subpoenaed by the Government in this case. Those that have not been played to the jury are available for Mr. Ehrlichman to play in his case, if relevant and admissible. The jury can judge for itself from these recordings what position Defendant Ehrlichman and President Nixon were taking at that time.

of evidence exist as to this matter: Mr. Haldeman's testimony and certain documentary evidence.

The third area cited by ~~defendant~~ Mr Ehrlichman in his motion involves a conversation between himself and President Nixon on or about July 4, 1974, in which the President told him that clemency for the Watergate burglars was out of the question. Again, Mr. Ehrlichman can testify to such a conversation to the same extent as could Mr. Nixon. Moreover, it is unclear what bearing such a conversation would have on later activities of Mr. Ehrlichman in this connection, to which the President was not privy, or to discussions between Mr Ehrlichman and Mr Nixon in March and April 1973 which are tape recorded. Finally, it is unclear whether such testimony should ~~properly~~ be regarded as "favorable" to ~~defendant~~ Mr. Ehrlichman since it raises the puzzling issue of why the matter of clemency for these burglars should have arisen in July 1972 if the President and Mr. Ehrlichman believed at that time that the burglars had no connection whatsoever with CRP or the White House.

The fourth area cited in the motion is Mr. Nixon's testimony that the "purpose" of the La Costa meetings in February 1973 was to ~~play~~ formulate a strategy for the upcoming Senate hearings. Mr. Dean and Mr. Haldeman have already so testified, as can Mr. Ehrlichman, and the Government has never contended otherwise. Mr. Richard Moore, who is on defendant Ehrlichman's latest witness list, could also so testify.

The fifth area cited in ~~defendant~~ Mr Ehrlichman's motion relates to President Nixon's assignment of Mr. Dean in February 1973 to "coordinate all Watergate-related matters."

Mr. Ehrlichman, of course, can testify to any such discussions he had alone with Mr. Nixon to the same extent as could Mr. Nixon. The most logical witnesses to any such assignment, however, would be Mr. Dean, who purportedly received it, and Mr. Haldeman, through whom ~~it is apparently~~ The assignment probably would have been relayed. ~~if done indirectly by the President.~~ Both have testified in this case. In addition, most of Mr. Dean's conversations with the President in this period are available to ~~defendant~~ Mr Ehrlichman on tape recordings.

The sixth and final area of Mr. Nixon's testimony cited in the Ehrlichman motion relates to the President's assignment of Mr. Dean to prepare a report on Watergate, Dean's failure to produce such a report, instructions allegedly given to Mr. Ehrlichman thereafter, and Mr. Ehrlichman's subsequent "report" to the President. As to any conversations between Mr. Dean and ~~President~~ Mr. Nixon on this point, the tape recordings of ~~said~~ those conversations have already been played to the jury. Mr. Dean and Mr. Haldeman have testified about Mr. Dean's failure to produce a final report, ~~and the reasons therefor~~, and Mr. Nixon's testimony could add nothing to these issues. Mr. Ehrlichman has previously testified in a number of forums that President Nixon instructed him to undertake an investigation on March 30, 1973, at a meeting around noontime, and a tape recording of that meeting (showing, the Government will contend, no such instruction) is available to ~~defendant~~ Mr Ehrlichman. And Mr. Ehrlichman's "report" to the President on April 14 ~~can~~ could only have been made in conversations all of which were tape recorded and produced pur-

suant to the Government's trial subpoena. Thus, Mr. Nixon's testimony could add nothing whatsoever in this area either.

In summary, Defendant Ehrlichman's motion completely fails to make any factual showing that Mr. Nixon's testimony would in any way be indispensable to defendant's case or, indeed, that it would be anything but cumulative not only of Defendant Ehrlichman's testimony but also of the testimony of other witnesses, documentary evidence, and tape recordings.

4. It Would Not be Proper to Unsequester the Jury in Order to Grant a Continuance

As we have shown above, Mr. Ehrlichman hasn not made a showing that would warrant a significant continuance, even if the jury were not sequestered. Of course, the burden he faces in this case is even higher because there is a sequestered jury. It is in this context that the Court must weigh the factors mandating against a continuance. In this regard, the government strongly opposes the suggestion that the jury be released during any continuance, even if all defendants waive any Fifth or Sixth Amendment rights to raise prejudicial publicity during the continuance as a ground for a mistrial. Unsequestering the jury,

~~Non-sequestering this jury~~, albeit for a brief period, ~~of time~~, will negate the scrupulous efforts ~~thus far successfully undertaken~~ by this Court to insure that this jury will adjudicate the defendants' guilt or innocence based on the evidence heard in the courtroom uncontaminated by ~~and not from~~ impressions or facts gathered from outside sources, including reporters and family members.

The decision to sequester a jury rests with the sound discretion of the trial judge, see, e.g., Baker v. United States, 401 F.2d 958, 968 (D.C. Cir. 1968), cert. denied, 400 U.S. 965 (1970), Carter v. United States, 252 F.2d 608, 612 (D.C. Cir. 1957), (in order to insure the defendant's and the public's right to a fair trial) and the judge may exercise this discretion whether or not the defendant ~~requests or~~ opposes sequestration for the instant. For example, the Court of Appeals approved the sequestration of the jury in the trial of Bobby Baker, a close aide of President Johnson because:

1) ~~Appellant~~ Baker was a prominent national figure; 2) his activities had been highly publicized; 3) he had moved to dismiss the indictment on the ground of extensive prejudicial publicity, ~~biasing the grand jury,~~ and 4) television, radio and newspapers had requested accommodations in the courtroom. See Baker v. United States, supra,

Similarly, the trial judge in the trial of Judge Otto Kerner sequestered the jury over Kerner's objections. See United States v. Isaacs, 364 F. Supp. 895, 899-900 (N.D. Ill. 1973), conviction aff'd 493 F.2d 1124 (7th Cir.), cert. denied ___ U.S. ___, 42 L.W. 3692 (1974). See also United States v. Holovachka, 314 F.2d 345 (7th Cir.), cert. denied, 374 U.S. 809 (1963).

The facts requiring sequestration in this case are more compelling than those in cases such as Baker and Isaacs, and in these circumstances the trial judge has an affirmative duty to exercise his powers to insure a fair trial for the defendants and the government. See Sheppard v. Maxwell, 384 U.S. 333, 363 (1966). Here, ~~in the latter~~ in addition to the normal publicity attendant on this case, there unquestionably will be and television reports ~~one can expect~~ end-of-the-year articles/surveys on the entire Watergate incident, culminating with Mr. Nixon's resignation, President Ford's pardon of Mr. Nixon, and this trial. Moreover, it would

be unreasonable to expect that ~~there would not from~~ family and friends of the jurors, and perhaps not even the press, would attempt to discuss the case with the jurors. Under these circumstances, the Court has the duty to continue to insulate the jury from the impact of outside sources ~~which~~ that may affect the jury's impartial consideration of the defendants' guilt or innocence

CONCLUSION

For the reasons stated above, the motion of Defendant Ehrlichman should be denied and the jury should remain sequestered

Respectfully submitted.

Nixon - Testimony/Deposition

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	]	
v.	]	Criminal Case No. 74-110
JOHN N. MITCHELL, et al.,	]	
DEFENDANTS	]	

FILED

JAMES F. DAVEY, Clerk

ORDER

On September 4, 1974, the defendant Ehrlichman issued a subpoena to Mr. Richard M. Nixon to appear as a witness in this case and to produce "all documents, books records, tape recordings, graphs, charts, photographs, phonograph records and other tangible materials which refer to or relate to the concealment or cover-up of the break-in" into the Democratic National Headquarters. The subpoena directed Mr. Nixon to appear on the 30th day of September, 1974, but by agreement of counsel the appearance date was extended until such time as the defendant commenced the presentation of his case. Although the United States also subpoenaed Mr. Nixon as a witness in this cause, counsel for the government announced the government would not seek to have its subpoena enforced.

On the 3rd day of October, 1974, Mr. Richard M. Nixon, through his counsel, moved the Court to quash the subpoena issued by defendant Ehrlichman alleging that the physical condition of the witness made such appearance impossible without creating a serious risk of permanent injury or incapacitation. The portion of the motion dealing with the witness's health was supported by an affidavit of counsel for the witness and an affidavit of Dr. John C. Lungren. On November 7, 1974, counsel for Mr. Nixon

filed a second affidavit purporting to supply current medical data on the witness's physical condition.

On the 17th day of October, 1974, the Court orally granted that portion of the motion to quash dealing with the production of materials and postponed decision on the motion insofar as it sought to quash the ad testificandum portion of the subpoena until a date closer to the time when defendant Ehrlichman would commence to present his case.

The Court was advised by counsel for the government on or around November 11, 1974, that it would complete its case-in-chief within two weeks. Being so advised, the Court scheduled argument for 4:15 p.m., November 13, 1974, on the remaining portion of the motion to quash. Counsel for Mr. Nixon was advised of the scheduled date of the argument, and counsel for all parties were advised the Court was considering the appointment of a panel of eminent physicians to examine Mr. Nixon and to report to the Court on the physical condition of the witness.

The issue framed by the subpoena to Mr. Nixon and the motion to quash came on for hearing on the 13th day of November, 1974, and after argument of counsel and consideration of the positions of all parties, the Court finds that the interest of defendant Ehrlichman and the proper administration of justice require that the Court appoint a panel of three eminent physicians to make an investigation and to report to the Court on the matters set forth below. The three physicians hereinafter named have been contacted and have agreed to serve on such a panel, to make the necessary investigation and to report to the Court on their findings. In view of the foregoing, it is

ORDERED that Doctors Charles Anthony Hufnagel, Richard Starr Ross and John A. Spittell, Jr. are hereby appointed, authorized and directed to conduct such examination as they deem necessary and appropriate and, thereafter, to advise the Court (1) whether Mr. Nixon is presently able to travel to Washington and testify as a witness in this cause; (2) if not, when, in their opinion, Mr. Nixon would be able to so appear and testify; (3) whether Mr. Nixon is able to appear and testify at a site near his home; (4) if not, when, in their opinion, Mr. Nixon would be able to so appear and testify; (5) whether, if Mr. Nixon is not now able to appear and testify in this case either in Washington or a site near his home, he is able to be deposed by the parties in this case; (6) if Mr. Nixon is not physically able at the present time to give a deposition when, in their opinion, he would be able to give such a deposition; (7) if Mr. Nixon is physically able to submit to a deposition, the conditions under which such deposition should be taken in order to avoid serious risk of injury to his health. Doctor Hufnagel shall act as Chairman of this panel.

FURTHER ORDERED that the physicians shall conduct such examination as is necessary to complete a report to the Court on the matters set forth above, including review of pertinent medical records and a physical examination of the witness.

FURTHER ORDERED that the panel of physicians shall secure the approval of Mr. Nixon or his attorney prior to any examination of confidential records and prior to any physical examination of Mr. Nixon. Should Mr. Nixon refuse access to appropriate and necessary medical records or refuse to submit to an appropriate physical examination, the said panel shall report immediately to the Court.

FURTHER ORDERED that the panel of physicians shall be empowered to consult with or seek the assistance of other competent medical personnel as they may deem necessary in performing the duties assigned them therein.

FURTHER ORDERED that the necessary investigation shall commence forthwith, and the panel shall report to the Court its findings, either on an interim or final basis, by the 29th day of November, 1974.

Dated this 13th day of November, 1974.

John J. Sirica
United States District Judge

Approved for entry:

James F. Neal
Counsel for the United States

Counsel for Defendant Mitchell

Counsel for Defendant Haldeman

Counsel for Defendant Ehrlichman

Counsel for Defendant Mardian

Richard Nixon

WATERGATE SPECIAL PROSECUTION FORCE DEPARTMENT OF JUSTICE

Memorandum

TO : James F. Neal DATE: September 18, 1974

FROM : Peter F. Rient
PFR

SUBJECT: Deposing Mr. Nixon Pursuant to 18 U.S.C. 3503.

I have been asked to research the question whether the provisions of 18 U.S.C. 3503 permit the Government to take the deposition of former President Nixon for possible use at the trial of United States v. Mitchell, et al. My conclusion is that, given the exceptional circumstances of this case and the liberal construction afforded Section 3503 by the courts, we should be permitted to take Mr. Nixon's deposition for possible use at trial.

I. Statutory Requirements for Taking and Use of Depositions by Government.

18 U.S.C. 3503(a) and (f) provide for the taking of depositions by the Government and for their use at trial. In pertinent part, these sections read as follows:

> (a) Whenever due to exceptional circumstances it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved, the court at any time after the filing of an indictment or information may upon motion of such party and notice to the parties order that the testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place....A motion by the Government to obtain an order

> under this section shall contain certification by the Attorney General or his designee that the legal proceeding is against a person who is believed to have participated in an organized criminal activity.
>
> * * *
>
> (f) At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: That the witness is dead; or that the witness is unable to attend or testify because of sickness or infirmity; or that the witness refuses in the trial or hearing to testify concerning the subject of the deposition or part offered; or that the party offering the deposition has been unable to procure the attendance of the witness by subpena. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts. (Emphasis added.)

In order to take a deposition for use at trial, therefore, the Government must move for an order permitting the taking of such a deposition and must support the motion with a showing of "exceptional circumstances" and a certification that the proceeding is against a person who is believed to have participated in an organized criminal activity. In order to use such a deposition at trial, the Government mustshow that at the time of trial the witness deposed is dead, is too ill to attend, refuses to testify, or cannot be compelled by subpoena to appear

II. Judicial Construction of the Statutory Requirements.

Whether the Government may take a deposition pursuant to Section 3503 depends on its ability to show the existence of "exceptional circumstances" and to make the "organized criminal activity" certification. The only cases which I have found that deal with these issues are Second Circuit cases, United States v. Singleton, 460 F.2d 1148 (2d Cir. 1972), cert. denied, 410 U.S. 984 (1973) and United States v. Carter, 493 F.2d 704 (2d Cir. 1974). Both cases treat these issues favorably to the Government and provide substantial support for the argument that we should be permitted to take Mr. Nixon's deposition in United States v. Mitchell, et al.

A. "Exceptional Circumstances" Requirement.

The Singleton case was a prosecution for the sale of narcotics to a Government agent in which the Government was permitted to take the deposition of one Morris, an informer who helped to arrange the sale and acted as an intermediary in many of the dealings. The trial court granted the Government's motion to depose Morris upon a showing that he was too ill with leukemia to leave his home in Alabama to attend the scheduled trial in New York. On appeal, defendant Singleton challenged the trial court's finding of "exceptional circumstances" which justified taking the deposition "in the interest of justice." The Court

of Appeals rejected this challenge, saying:

> The House Judiciary Committee Report . . . indicates that motions under § 3503(a) are to be granted for the same reasons permitted defendants by Fed.Rules of Crim.P., Rule 15(a), which provides for depositions, "[i]f it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice ..." This test is quite adequate, and we adopt it here for the purpose of defining "exceptional circumstances." Morris' situation fits it squarely. (United States v. Singleton, supra, at 1154).[1/]

Similarly, the lower court in United States v. Carter, supra found the existence of "exceptional circumstances" upon representations by the Government, supported by a doctor's affidavit, that a critical Government witnesses had suffered a serious heart attack and could not be expected to travel from his home in Seattle to appear for trial in New York for several months. See United States v. Podell, 369 F. Supp. 151, 152-53 (S.D. N.Y. 1974). Nevertheless, the district court refused to order a deposition on the ground that the crimes charged (conspiracy to defraud the United States, bribery, conflict of interest, making false statements and perjury) did not constitute

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[1/] Although Singleton was decided by a 2-1 majority, there is nothing in the dissenting opinion which casts doubt on the validity of test adopted by the majority in defining "exceptional circumstances."

"organized criminal activity" when engaged in by a congressman, a lawyer and a businessman.

In granting the Government's petition for a writ of mandamus, the Court of Appeals endorsed the lower court's finding of "exceptional circumstances" in language which appears to expand the test adopted in Singleton. The court stated:

> In view of the circumstances set forth here, we believe the issuance of the extraordinary writ is fully justified. The Government's case, if not terminated, is at least jeopardized if the deposition of the witness Kinsey is not permitted. Counsel for the defendants and the defendants have been invited to attend the deposition. See 18 U.S.C. § 3503(b). The crimes charged here are serious and a cloud of suspicion hangs over the heads of those not usually suspect. The court below commendably urged the parties to seek an early review and resolution of the present dispute by this court in view of the importance and significance of the question. We believe that justice dictates, both for the Government and the defendants, that all the evidence which is relevant be ascertained and presented in this case, and we therefore grant the writ requested by the Government and direct the court below to issue the order permitting the deposition of the witness Kinsey. (United States v. Carter, supra, at 709.) (Emphasis added.) 2/

Applying the principles of these cases to the situation at hand, it appears that we can make a sufficient showing that "exceptional circumstances" exist which justify deposing Mr.

2/ Although Carter was a unanimous decision, one of the three judges concurred only in the result. However, his concurring opinion does not question the validity of the "exceptional circumstances" test applied in either Singleton or Carter.

Nixon "in the interest of justice." Certainly, it appears at this time that Mr. Nixon, because of his health, may be unable to attend the trial and that his testimony would be material. The harder question is "whether it is necessary to take his deposition in order to prevent a failure of justice." Rule 15(a), F.R.Cr.P.; United States v. Singleton, supra, at 1154. On this question, we can make a two-pronged argument. First, Mr. Nixon's testimony may be essential to establish the foundation for the introduction of certain Presidential tape recordings at trial. Second, Mr. Nixon will not be a defendant at the trial even though the proof will show that he was a ringleader and the chief beneficiary of the conspiracy charged in the indictment. Under these circumstances, it can fairly be said that the Government's case will be jeopardized if the deposition is not permitted and that justice dictates that all relevant evidence be ascertained and presented in this case. Cf., United States v. Carter, supra, at 709.

B. "Organized Criminal Activity" Certification.

As noted above, a motion by the Government to take a deposition pursuant to 18 U.S.C. 3503 must be accompanied by a certification that "the legal proceeding is against a person believed to have participated in an organized criminal activity This requirement raises three questions: (1) what constitutes "organized criminal activity;" (2) under what circumstances

will the court look behind the Government's certification;" and (3) who is the appropriate person to make such a certification in this case?

(1) Definition of "Organized Criminal Activity":

The term "organized criminal activity" is not defined in the statute itself. However, Congressman Poff, in describing Section 3503 to members of the House of Representatives, stated that the term "is broader in scope than the concept of organized crime; it is meant to include any criminal activity collectively undertaken..." 116 Cong. Rec. 35293 (Oct. 7, 1970). And Senator Hruska, a co-sponsor of the bill, advised the Senate that the term included all criminal activity that was "not an isolated offense by an isolated offender." 116 Cong. Rec. 36294 (Oct. 12, 1970) According to Congressman Poff, the purpose for allowing the taking of depositions in such cases is to prevent intimidation or bribery of witnesses by persons with "access to collective criminal power." 116 Cong. Rec. 35293 (Oct. 7, 1970).

The most definitive judicial construction of "organized criminal activity appears in United States v. Carter, supra. There, the trial court refused to permit the taking of a deposition in a case involving white collar defendants charged with conspiracy to defraud the United States, bribery and perjury, construing the term "organized criminal activity"

narrowly to mean "gangsterism, racketeering and syndicate activity of clandestine criminal groups."[3/] The Court of Appeals, granting the Government's petition for a writ of mandamus, rejected this narrow construction, saying:

> Even if we were free to question the determination of the Attorney General, we could not accept the proposition that the Congress did not intend to include corruption, obstruction of justice and perjury within the purview of the statute. [footnote omitted] While crimes of violence engineered by gangs of thugs are of course repulsive and clearly within the concept of organized criminal activity, the concerted corruption charged here is equally odious. The fact that the alleged perpetrators are presumably respectable and entrusted with responsibility by an electorate or a profession or by stockholders does not suggest, in our view, that they are incapable of engaging in organized criminal activity. We all stand equal before the bar of criminal justice, and the wearing of a white collar, even though it is starched, does not preclude the organized pursuit of unlawful profit. (United States v. Carter, supra, at 708.) (Emphasis added.)

On the basis of the legislative history of Section 3503 and the opini in Carter, it appears that we can make a substantial argument that the case of United States v. Mitchell, et al. involves "organized criminal activity" within the meaning of the statute. To begin with the crimes involved in our case are

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3/ This was essentially the position adopted by the dissenting judge in Singleton and by the concurring judge in Carter.

virtually identical to those in Carter, albeit that pecuniary gain does not appear to have motivated the major conspirators in our case. Second, the criminal activities in our case were plainly organized, rather than isolated or sporadic. Finally, the activities engaged in by the defendants here were designed to achieve the very purpose which the "organized criminal activity" requirement was intended to meet, to wit, influencing witnesses through the exertion of organized criminal power. Taken together, all of these factors support a certification that the case of United States v. Mitchell, et al. involves "organized criminal activity."

As a caveat to this conclusion, however, it should be pointed out that the panels of the Second Circuit in Singleton and Carter were each composed of a district court judge sitting by designation, and that in each case the two circuit court judges took opposite sides on the proper interpretation of the term "organized criminal activity." Thus, it is entirely possible that if the issue arises in the Second Circuit again the court, en banc, may adopt the narrow view of the dissenting judge in Singleton and the concurring judge in Carter.[4/] At the moment, however, the law is in our favor.

4/ It should be noted that the trial of United States v. Podell, the prosecution which gave rise to the Carter case, began on September 17, 1974.

(2) Conclusiveness of Certification.

In the Singleton case, the court made it clear that the Government's certification that the prosecution "is against a person who is believed to have participated in an organized criminal activity" is not subject to challenge except upon a showing by the defendant of "bad faith" by the Government. The Court stated:

> This limitation on the use of § 3503 depositions is one to be exercised by the Government, and the decision whether or not a proceeding is against a person believed to have participated in organized criminal activity is to be made by the Attorney General or his designee and not by the court. The defendant's analogy to the necessity for a court to find probable cause under the Fourth Amendment is not apt because the wording of § 3503(a) indicates that Congress did not intend for the organized crime certification to be subjected to a judicial determination. [Footnote omitted.]
>
> Congress' choice of the Attorney General or his designee to make the certification may have been to insure political accountability, see United States v. Robinson (5 Cir. Jan. 12, 1972) (No. 71-1058), or to centralize decision making, cf. United States v. St. Regis Paper Co., 355 F.2d 688, 693 (2 Cir. 1966), or because the Attorney General is in the best position to know, but for whatever reason, the trial court is not to make a de novo determination of whether or not the proceeding is against a person believed to have participated in an organized criminal activity. Unless the defendant shows bad faith on the part of the Government, the court is only to ascertain whether or not there has been a proper certification as required by statute. (United States v. Singleton, supra, at 1154.) (Emphasis added.)

The court reaffirmed these principles in the following language in the Carter case:

> The court below found that while the crimes charged in the indictment here were heinous, they were not properly characterized as organized criminal activity. The certification was, for this reason, determined to be without a basis in fact and therefore made in "bad faith." While purporting to follow Singleton, the Court below was plainly disregarding it. The determination of whether or not the defendants were engaging in organized criminal activity is to be made by the Attorney General or by his disignee and not by the court. This is what Singleton held. It cannot be circumvented by a finding that the Assistant Attorney General was acting in "bad faith" because the court here disagreed with the Government's determination that the defendants were believed to have participated in organized criminal activity. Under Singleton, the burden is upon the defendant to establish bad faith on the part of the Government and there is not a scintilla of evidence of bad faith in the record before us and, in fact, no such evidence is suggested in the opinion below. Presumably, the Attorney General had information at his disposal upon which the certification could be made. (United States v. Carter, supra, at 707-08) (Emphasis added.)

In view of the opinions in Singleton and Carter (subject to the caveat mentioned above), and the circumstances showing "organized criminal activity" in this case, it seems that the Government can provide the requisite certification here without fear of a judicial determination of "bad faith."

(3) Appropriate Person to Make Certification.

Section 3503 requires a certification "by the Attorney General or his designee." In both Singleton and Carter,

a certification from Assistant Attorney General Henry Petersen, pursuant to the authority conferred on him by 28 C.F.R. 0.59(b) was found to be sufficient.[5/] Since the regulation does not require certification by a specific individual, it would appear that the authority to certify could be delegated to the Special Prosecutor. See United States v. Giordano, 42 U.S.L.W. 4642 (May 13, 1974). This being the case, the question is whether such authority has, in fact, been delegated to the Special Prosecutor. The Special Prosecutor's charter provides:

> In particular, the Special Prosecutor shall have full authority...for:
>
> * * *
>
> -- determining whether or not application should be made to any Federal court for a grant of immunity...or other court orders;
>
> * * *
>
> -- initiating and conducting prosecutions...and handling all aspects of cases within his jurisdiction...

These provisions would appear to give the Special Prosecutor the authority to submit to the court the required certificate and, in any event, any doubt about the matter could be dispelled by a specific designation of authority by the Attorney General.

5/ The cited regulation confers upon the Assistant Attorney General, or any Deputy Assistant Attorney General, of the Criminal Division authority to make the certification required by Section 3503.

severance cases relating to defendants' desire to call co-D

US v Shuford, 454 F 2d 772, 778

Byrd v Wainwright, 428 F 2d 1017 (5th Cir 1970)

US v Martinez, 486 F 2d 15, 22-23 (5th Cir 1973)

US v Echeles, 352 F 2d 892, 897-88 (7th Cir 1965).

Wright § 225 @ 458

In the Matter of UNITED STATES of America, Petitioner.
Petition for a Writ of Mandamus.
No. 6550, Original.

United States Court of Appeals
First Circuit.
Heard June 14, 1965.
July 16, 1965.

Government's original proceeding for mandamus protesting an order permitting a defendant in a criminal case to take depositions of prospective government witnesses. The Court of Appeals, Aldrich, Chief Judge, held that the defendant should not have been granted such permission on the bare assertion that the witnesses might not be able to appear but that the court would not issue mandamus, assuming that the district judge would vacate his order without such.

Decision in accordance with opinion.

1. Mandamus ⇐61

Nothing in the policy of limiting prosecution appeals precluded mandamus review of the decision that defendant in criminal case could take depositions of government's two proposed principal witnesses on bare assertion that they might not be able to appear. Fed.Rules Crim. Proc. rule 15(a), 18 U.S.C.A.

2. Criminal Law ⇐163

Defendant would not be put in double jeopardy by action upon government's mandamus petition to review the grant of permission to defendant in criminal case to take depositions of government's two proposed principal witnesses. Fed. Rules Crim.Proc. rule 15(a), 18 U.S.C.A.

3. Mandamus ⇐61

In the light of general importance of the question whether defendant in criminal case should have been granted permission to take depositions of government's two proposed principal witnesses on bare assertion that they might not be able to appear, Court of Appeals to which a mandamus petition had been addressed would not exercise normal reluctance to take jurisdiction prior to trial. Fed.Rules Crim.Proc. rule 15(a), 18 U. S.C.A.

4. Mandamus ⇐143(1)

The government acted with sufficient diligence when on May 21 it petitioned for mandamus to review the May 5 grant of permission to defendant in criminal case to take depositions of government's two proposed principal witnesses. Fed. Rules Crim.Proc. rule 15(a), 18 U.S.C.A.

5. Criminal Law ⇐633(1)

District courts have a large measure of discretion when applying rules of procedure.

6. Mandamus ⇐61

If district court misconstrued criminal rule in permitting defendant to take depositions of prospective government witnesses it acted without power, in the sense that the Court of Appeals could review its ruling by mandamus. Fed. Rules Crim.Proc. rule 15(a), 18 U.S.C.A.

7. Depositions ⇐11

Defendant was not entitled to take depositions of prospective government witnesses on bare assertion that witnesses might not be able to appear for trial. Fed.Rules Crim.Proc. rule 15(a), 18 U.S. C.A.

8. Depositions ⇐11

In rule permitting defendant to take deposition if it appears that prospective witness may be unable or prevented from attending trial, that his testimony is material and that it is necessary to take his deposition to prevent failure of justice, inability to attend trial is not merely alternative condition and word "or" is not to be inserted following word trial. Fed.Rules Crim.Proc. rule 15(a), 18 U.S. C.A.

John L. McCullough, Atty., Dept. of Justice, with whom Fred M. Vinson, Jr., Acting Asst. Atty. Gen., Francisco A. Gil, Jr., U. S. Atty., and Jay M. Vogelson,

Atty., Dept. of Justice, were on memorandum, for petitioner.

Harvey B. Nachman, San Juan, P. R., with whom Nachman & Feldstein, San Juan, P. R., was on memorandum, for intervening respondent.

Before ALDRICH, Chief Judge, LUMBARD*, Chief Judge, and LEWIS*, Circuit Judge.

ALDRICH, Chief Judge.

During the pendency of an indictment in the District Court of Puerto Rico against intervenor respondent, hereinafter defendant, the government's answer to a bill of particulars having disclosed the names of its two proposed principal witnesses, the defendant moved for court permission to take their deposition. For authority he relied upon F.R.Crim.P. 15(a). This rule provides for the taking of a deposition by a defendant "[i]f it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice * * *." At the hearing, the defendant stated that one of the named witnesses resided in Florida, and the other in Puerto Rico. He made no showing with respect to their ability or inability to attend the trial except the bare assertion that they might not be able to appear. The government, in opposition, stated that its case was essentially dependent upon these witnesses and that it had every intention and expectation of producing them. Remarking that it was always possible, in spite of the government's assurances, that a witness might not be able to attend a trial, the court granted defendant's motion. Its order was made on May 5, 1965. The government appealed on May 17, and sought to prosecute the appeal forthwith, but has now abandoned it. On May 21 it sought to file a petition for mandamus. We ordered the depositions stayed and placed the petition on the June calendar for hearing.

[1, 2] We must first consider whether it can be appropriate for the government to seek extraordinary relief in a criminal case when its ordinary rights of appeal are severely limited. Carroll v. United States, 1957, 354 U.S. 394, 77 S.Ct. 1332, 1 L.Ed.2d 1442; 18 U.S.C. § 3731. No cases even closely in point have been cited to us, nor have we found any.[1] However, the present question is one upon which the government could seek appellate relief, and do so prior to verdict. Should the order remain in effect and the witnesses refuse to testify or the government fail to produce them, and should the court as a result enter an order of contempt, appeal would lie. Bowman Dairy Co. v. United States, 1951, 341 U.S. 214, 71 S.Ct. 675, 95 L.Ed. 879 (F.R.Crim.P. 17(c)). Alternatively, if the court should dismiss the indictment because of the government's noncompliance, see, e. g., United States v. Germany, D.C.M.D.Ala., 1963, 32 F.R.D. 421, an appeal would lie from the dismissal. 18 U.S.C. § 3731. Action upon the government's petition at this point in the case will not put defendant twice in jeopardy. Cf. Fong Foo v. United States, 1962, 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629. Accordingly, nothing in the policy of limiting prosecution appeals precludes review of this question.

[3] We see no reason why the government should not be able to do directly what it could effectuate indirectly. Furthermore, in the light of the general importance of the question, this does not seem a case where we should exercise our normal reluctance to take jurisdiction prior to trial. Schlagenhauf v. Holder, 1964, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152; Madison-Lewis, Inc. v. MacMahon, supra.

* Sitting by designation.

1. In Madison-Lewis, Inc. v. MacMahon, 2 Cir., 1962, 299 F.2d 256, the court did grant a petition for mandamus to review a portion of an order for depositions in a criminal case, but the petitioner was the defendant.

W. E. RIPPON & SON, as owner of the SHEERLEGS PLUTO, et al., Libelant-Appellee,

v.

UNITED STATES of America, as owner of the U.S.N.S. OCKLAWAHA, Respondent-Appellant.

No. 303, Docket 29291.

United States Court of Appeals
Second Circuit.

Argued Jan. 20, 1965.

Decided June 18, 1965.

Proceeding to recover for salvage services. The United States District Court for the Southern District of New York, Thomas F. Croake, J., adjudged that libelant recover $45,230.53 and that all other libels and complaints be dismissed and appeal was taken. The Court of Appeals, Moore, Circuit Judge, held that where salvor's salvage efforts consisted of putting out two anchors, its equipment was wholly unable to free Naval vessel that had gone aground on reef, three large Navy vessels and directional skill of person other than person aboard salvor's vessel and fortuitous high tide were required to float vessel from reef, and salvor risked only $56,000 worth of property, salvage award of $45,230.53 was excessive and award should be reduced to $22,730.53.

Decree modified and award reduced.

1. Salvage ⇐18

Although person who directed salvor's launch during salvage operation with respect to Navy vessel was employee of Air Force, his services must be included in calculation of award to salvor.

2. Salvage ⇐18

Salvor's recovery for salvage services with respect to Navy vessel would not be reduced by excluding worth of work of its Libyan employees, although reciprocity under Libyan law had not been shown, where salvor was a bona fide British partnership. Public Vessels Act, § 5, 46 U.S.C.A. § 785.

3. Salvage ⇐51

Court of Appeals has power to reduce salvage award considered excessive.

4. Salvage ⇐27

Stingy award to salvor contravenes good public policy.

5. Salvage ⇐51

Amount allowed by trial court to salvor is not to be lightly disturbed.

6. Salvage ⇐27

Disproportionate amount should not be awarded to salvor as salvage award.

7. Salvage ⇐30

Where salvor's salvage efforts consisted of putting out two anchors, its equipment was wholly unable to free Naval vessel that had gone aground on reef, three large Navy vessels and directional skill of person other than person aboard salvor's vessel and fortuitous high tide were required to float vessel from reef, and salvor risked only $56,000 worth of property, salvage award of $45,230.53 was excessive and award should be reduced to $22,730.53.

Albert D. Jordan, New York City (Valicenti, Leighton, Reid & Stock, Robert J. Nicol, New York City, of counsel), for libelant-appellee.

Philip A. Berns, Atty., Dept. of Justice, Washington, D. C. (John W. Douglas, Asst. Atty. Gen., Morton S. Hollander, Chief, Appellate Section, Civil Division, Southern Dist. of New York, Louis E. Greco, Atty. in Charge, Admiralty & Shipping Section, Dept. of Justice, Harry L. Hall, Atty., Admiralty & Shipping Section, Dept. of Justice, Washington, D. C., of counsel, Robert M. Morgenthau, U. S. Atty., for Southern Dist. of New York, New York City, on the brief), for respondent-appellant.

Before MOORE, FRIENDLY and MARSHALL, Circuit Judges.

MOORE, Circuit Judge.

This is an appeal by the United States from a salvage award of $45,230.53 in admiralty to libelant, W. E. Rippon &

[4] Some thought, however, should be given to the timeliness of the petition. In In re United Shoe Mach. Corp., 1 Cir., 1960, 276 F.2d 77, we held that remedy by way of mandamus must be promptly sought, and suggested that the appropriate time was the normal appeal period. In a criminal case there are various appeal periods. A government appeal, as distinguished from a defendant's, is thirty days. F.R.Crim.P. 37(a)(2). It is true that the time for commencing discretionary interlocutory appeals in civil cases is ten days. 28 U.S.C. § 1292(b). But cf. 18 U.S.C. § 1404 permitting the government thirty days to appeal from the suppression of evidence in narcotics prosecutions. We make allowance in this particular case for the fact that the availability of remedy by way of mandamus might not readily occur to counsel. Without suggesting that we would do so in other instances, we will hold that the government acted with sufficient diligence.

[5, 6] The defendant contends that if the court erred at all, it merely abused its discretion. The government's position is that the court was without power. A district court's "power" is an elusive thing; its unfounded action can be highly efficacious. Cf. Fong Foo v. United States, supra. District courts do have a large measure of discretion when applying rules of procedure, see Chemical & Industrial Corp. v. Druffel, 6 Cir., 1962, 301 F.2d 126 (F.R.Civ.P. 26, 30, 33), but we believe that if the district court misconstrued the present rule it acted without power, in the sense that we may review it. Schlagenhauf v. Holder, supra.

[7, 8] Coming to the merits, we regard the court's interpretation of Rule 15(a) as plainly wrong. It would serve no purpose to list the discussion and activities during the past decade regarding the desirability of amending the criminal rules to provide for the amount of discovery permitted under the rules of civil procedure.[2] The district court's view of Rule 15(a), if correct, means that much of this discussion was unnecessary. Its order either made the provision regarding inability to attend the trial meaningless for all practical purposes, a construction we could hardly accept, or, as defendant contends, read into the statute the word "or" to follow the comma. We cannot accept that construction, either.

Defendant's dichotomy would make a showing of inability to attend the trial an alternative condition only, and permit a deposition to be taken of any witness whenever it appears desirable in the interest of justice. If defendant's interpolation is proper, defendant must accept the other alternative, and support the proposition that the rule means that if a witness is shown to be unable to attend the trial his deposition may be taken even though it does not appear that his testimony will be material or that justice will be served. Neither grammar nor reason call for such a result. The defendant cites a number of district court cases. None squarely pass on this question. Even the occasional language on which he relies is at best ambiguous. The order of the district court must be vacated.

In accordance with our usual practice we shall refrain from issuing a writ of mandamus at this time because we may assume that the District Judge will vacate his order without such.

2. Numerous authorities, most of them favoring increased discovery, are cited in the Advisory Committee's Note to Rule 16, Judicial Conference of the United States, Committee on Rules of Practice and Procedure, 2nd Preliminary Draft of Proposed Amendment to Rules of Criminal Procedure for the United States District Courts, 14 (March 1964).

SEE ALSO 223 F2d 871 246 F2d 537 328

of irrelevancy and outside the scope of direct examination was made, and was upheld. Each ruling might well have gone the other way, but each falls within the large discretionary area accorded to trial judges. We find no error; and clearly, no prejudicial error.

Further error is claimed (V) in the use by the government prosecutor of several leading, argumentative and suggestive questions of the witness James Miller; (VI) in sustaining an objection to a question asked of the witness Jerry Carrol; (VII) in failing to sustain an objection to one question asked of the witness Bryan purporting to rebut evidence developed by defense counsel in questioning Carrol; (VIII) in admitting testimony of Agent Spohr purporting to impeach Jerry Carrol.

We will not burden this opinion by listing the methods used by the prosecutor in attempting to revive the failing memory (a) of a witness from whom the government had previously obtained a written statement inconsistent with his then testimony; (b) of another witness (Carrol) whose testimony was, to say the least, remarkably hazy. The witnesses were young men at the delayed time of trial; they were younger, of course, when the events occurred.

It is axiomatic that one of the best defenses in criminal matters, if no other exists, is to try the police officers or the witnesses who have turned state's evidence. Any such attempt is bound to involve questions as to the admissibility of alleged impeaching, or "shoreing-up", questions. Suffice to say that we are satisfied there was no prejudicial error committed by the court in ruling on any of such matters herein mentioned, nor did any or all of them prevent a fair trial.

IX

[5] Error was claimed in excluding a question calling for a conclusion of the witness Lohman.[2] Objection was made, and sustained. The ruling was proper.

Finally, defendants urge that it was error to refuse to strike an answer given by the witness Yvonne Ladd. In the context of the previous testimony given by her, we find no error.

There here exists, in our opinion, no reasonable probability that any of the claimed "minor errors" may have affected the jury's verdict, either singly or accumulatively. Appellants received a fair trial. The judgments are, and each is, affirmed.

UNITED STATES of America,
Appellee,

v.

Dinty Warmington WHITING, James R. Crowe and Walter J. Sarnitz,
Defendants-Appellants.

No. 264, Docket 27196.

United States Court of Appeals
Second Circuit.

Argued March 8, 1962.

Decided Sept. 20, 1962.

Defendants were convicted in the United States District Court for the Southern District of New York, Charles M. Metzner, J., after trial by jury, of sending cables between New York and Rio de Janeiro in furtherance of means to defraud banks and of conspiring to send such fraudulent cables in violation of federal conspiracy statute, and they appealed. The Court of Appeals, Marshall, Circuit Judge, held that evidence sustained convictions and that government's summation referring to anti-American rioting in Latin America was not sufficiently prejudicial to require reversal.

Affirmed.

2. "Q. Now, as a consequence of Mrs. Dege's being arrested on March the 7th of 1958, Mr. Albert Bryan has not returned to jail, has he?"

1. Conspiracy ⇐47
Telecommunications ⇐363

Evidence sustained conviction for sending cables between New York and Rio de Janeiro in furtherance of scheme to defraud banks and of conspiring to send such fraudulent cables in violation of federal conspiracy statute. 18 U.S.C.A. §§ 371, 1343.

2. Conspiracy ⇐47
Telecommunications ⇐363

To sustain convictions for sending cables between New York and Rio de Janeiro in furtherance of scheme to defraud banks and of conspiring to send such cables in violation of federal conspiracy statute, there must be evidence from which jury could conclude beyond reasonable doubt that defendants devised scheme to defraud banks by means of false representations, that they caused communications to be sent in interstate or foreign commerce for purpose of executing fraudulent scheme and that they acted as part of illegal conspiracy. 18 U.S.C.A. §§ 371, 1343.

3. Conspiracy ⇐11

That alleged scheme to defraud by sending cables between New York and Rio de Janeiro failed of its purpose was not defense. 18 U.S.C.A. §§ 371, 1343.

4. Depositions ⇐6, 37

Motion made under rule authorizing court to order taking of depositions upon showing that prospective witness may be unable to attend is addressed to discretion of trial court; it should be granted only in exceptional cases; and moving party has burden of demonstrating availability of proposed witnesses and their willingness to appear, materiality of testimony which it is expected they will give, and that injustice will result if motion is denied. Fed.Rules Crim.Proc. rule 15 and subd. (a), 18 U.S.C.A.

5. Depositions ⇐33

Denial of motion under rule authorizing court to order taking of depositions is discretionary, if motion is made after unexcused delay or on eve of trial. Fed. Rules Crim.Proc. rule 15 and subd. (a), 18 U.S.C.A.

6. Depositions ⇐33

Denial of motion to have depositions of persons in Brazil taken was discretionary, where motion was made only after considerable delay and on opening day of trial. Fed.Rules Crim.Proc. rule 15(a), 18 U.S.C.A.

7. Witnesses ⇐350

Defendant who testified on direct examination that he had never been convicted of crime was properly cross-examined as to his prior conviction by United States Military Government Court, even if offense was not felony or crime of moral turpitude.

8. Criminal Law ⇐1171(1)

Government's summation referring to anti-American rioting in Latin America, in prosecution for sending cables between New York and Rio de Janeiro in furtherance of scheme to defraud banks, was not sufficiently prejudicial to require reversal. 18 U.S.C.A. §§ 371, 1343.

J. Robert Lunney, New York City, for appellant, Dinty Warmington Whiting.

Theodore Krieger, New York City (Albert J. Krieger, New York City, on the brief), for defendants-appellants, James R. Crowe and Walter J. Sarnitz.

David R. Hyde, Asst. U. S. Atty., Southern District of New York (Robert M. Morgenthau, U. S. Atty., So. District of New York on the brief), for appellee.

Before WATERMAN, KAUFMAN and MARSHALL, Circuit Judges.

MARSHALL, Circuit Judge.

This is an appeal by three defendants, Dinty Warmington Whiting, James R. Crowe, and Walter J. Sarnitz, from judgments of conviction entered in the United States District Court for the Southern District of New York, Metzner, J., on March 30, 1961, after a trial by jury. The three defendants were each convicted on three substantive counts (Counts I, II, and III) charging separate violations of 18 U.S.C.A. § 1343 by the sending of cables between New York and Rio de Janeiro in furtherance of a scheme to de-

fraud. They were also convicted on a fourth count (Count IV) of conspiring to send these fraudulent cables in violation of 18 U.S.C.A. § 371, the federal conspiracy statute. The defendant Whiting was sentenced to serve four years and seven months in prison on each count, the defendant Crowe to serve four years and ten months in prison on each count, and the defendant Sarnitz to serve four years and five months in prison on each count, with the sentences of each defendant to run concurrently.

Two additional defendants, Lawrence J. Kunz and Victor J. Mari, pleaded guilty to Count IV and were each sentenced to serve one year in prison. Indictments against them as to Counts I, II, and III were dismissed. At trial both men testified as Government witnesses.

[1] Although the appellants make certain claims of erroneous and prejudicial rulings by the trial court, which will be considered presently, their appeal is based primarily upon the contention that the evidence presented by the Government did not fairly establish beyond a reasonable doubt their guilt of the crimes charged. We have carefully considered the record and find the evidence ample to support the judgment of the District Court. Because we find no merit to any of the other claims made by the defendants, the judgments of conviction must be affirmed.

On the basis of the evidence introduced by the Government, the jury could have found the following facts:

In August 1960 Sarnitz approached Mari and Kunz, both employees of the Bank of America-International in New York, with an offer of $125,000 for Mari and $250,000 for Kunz if they would send a cable from the Bank of America-International to the Banco do Brasil in Rio de Janeiro, using a confidential international banking cable code known only to a few employees of each bank, including Kunz. Both men accepted the offer. Meetings were held by Mari, Kunz, Sarnitz, and Crowe; Sarnitz made at least three telephone calls to Whiting in Rio de Janeiro. A cable—which originally named Whiting as beneficiary but later was changed to name Crowe—was drafted. Finally, on August 16, 1960, after Crowe had flown to Rio de Janeiro, Kunz transmitted over the Bank of America's wire to the Banco do Brasil the cable that forms the basis of Count I:

"WE HAVE RECEIVED PAYMENT ORDER VALUED AT US DOLLARS THREE MILLION FROM BANCO DI NAPOLI NEW YORK STOP UNDER INSTRUCTIONS OF JAMES RILEY CROWE AS BENEFICIARY THEREOF WE HEREBY TRANSFER AND CREDIT THIS PAYMENT ORDER TO YOUR ACCOUNT OR YOUR ASSIGNEE."

The message was repeated five times bearing the amount of $3,000,000. On a sixth message, the amount was changed to $5,000,000, making a total of $20,000,000.

When the Banco do Brasil received this cable, it sent a return cable to the Bank of America requesting confirmation. Later that same day Whiting went to the office of All America Cables and Radio in Rio de Janeiro and sent to the Bank of America in New York the cable which forms the basis of Count II:

"DISREGARD AND CANCEL CABLE TODAY SATELGERAL RIO."

The term "SATELGERAL" is the cable code name for Banco do Brasil-General Management. On the line of the form requesting the name of the sender, Whiting wrote, "J. Feirrara & Cia, Av. Rio Branca 164." Both cables—the request for confirmation sent by Banco do Brasil and the "disregard and cancel" cable sent by Whiting—were given to the appropriate official in the Bank of America, but no action was taken. Sarnitz also talked to Whiting by telephone during this period.

The following day, August 17, 1960, Sarnitz received from Kunz the confidential banking test code number for that day as well as several secret cable code words; he then went to the Western Union office in the Waldorf-Astoria Ho-

tel in New York and sent to the Banco do Brasil the telegram which forms the basis of Count III:

> "FIVETHREE SIX BSUUI WE CONFIRM PAYMENT ORDERS JAMES RILEY CROWE FROM AUGUST SIXTEENTH IN ALL PARTICULARS EXCEPT FINAL THREE WORDS IN ALL SIX MESSAGES QUOTE OR YOUR ASSIGNEES UNQUOTE WHICH ARE HEREBY DELETED XRUID."

The words "FIVETHREE SIX," "BSUUI," and "XRUID" were written in the secret bank code. On the line of the Western Union form requesting the name of the sender, Sarnitz wrote "Frederick Johnson, Hotel Gladstone, N. Y." When this message was received, the Banco do Brasil again sent a cable to the Bank of America requesting confirmation. Upon receipt of that cable in New York, the Bank of America began an investigation. All five defendants were subsequently arrested.

[2] To sustain these convictions there must be evidence from which the jury could conclude beyond a reasonable doubt (1) that the defendants devised a scheme to defraud the banks involved by means of false representations; (2) that they caused the communications listed in the indictment to be sent in interstate or foreign commerce for the purpose of executing the fraudulent scheme; and (3) that they acted as part of an illegal conspiracy.

[3] The Count I cable sent by Kunz from the Bank of America to the Banco do Brasil was clearly false and fraudulent. It was sent without the knowledge of any authorized official of the Bank of America. The Banco di Napoli had not transmitted to the Bank of America the payment orders mentioned in the cable, the Bank of America had not received the payment orders mentioned and did not intend to transfer and credit them to the Banco do Brasil, and Crowe was not a customer of the Banco di Napoli or the Bank of America. Although no money was ever paid out to the defendants by the Banco do Brasil, the fact that a scheme to defraud fails of its purpose is not a defense. Hoffman v. United States, 249 F.2d 338, 341 (9th Cir. 1957). And it should be noted that the comptroller of the Bank of America testified that in his opinion had the Banco do Brasil relied upon the Count I cable and paid out the funds, the Bank of America would have been held liable.

The Count II and Count III cables were similarly false and fraudulent. Although the Count II cable was signed by the cable code name meaning the Banco do Brasil, that Bank did not authorize its transmission and had no knowledge that it was being sent. The Count III cable, although including secret cable code words, was sent, like the Count I cable, without the knowledge or authority of the Bank of America. And neither Whiting nor Sarnitz signed his real name on the cable form line asking the name of sender. Both cables were designed to prevent an investigation by the two banks involved.

The evidence as to all three defendants is clearly sufficient as to all the constituent elements of the crimes alleged, including knowledge and intent, to sustain their convictions. There was a substantial basis in the Government's evidence from which the jury could have found that Sarnitz was directly implicated in the bribe offered to Mari and Kunz, the fabrication of the Count I cable, and the fabrication and actual sending of the Count III cable. There was also substantial basis in the Government's evidence from which the jury could have found that Crowe was a part of the conspiracy from the beginning, that he met with Sarnitz, Kunz, and Mari in New York, and that he flew to Rio de Janeiro in order to become the "beneficiary" of the conspiratorial scheme.

Although the Government's case against Whiting is not as clear as that against Sarnitz and Crowe, there is nonetheless substantial evidence from which the jury could have inferred guilt. He admitted sending the Count II cable and although he claims he did not sign the

name of the Banco do Brasil to it, the jury has resolved that contention against him. He was in telephone communication with Sarnitz during the final stages of the scheme. The complicated version of his actions in Brazil which Whiting made the basis of his defense was for the jury to accept or reject. We are satisfied that its rejection of Whiting's defense and its acceptance of the Government's version of the facts is based upon substantial evidence.

[4, 5] The defendant Whiting also contends on this appeal that it was error for the trial court to deny his successive motions, made under Rule 15 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., to take the depositions of five persons residing in Brazil. Rule 15(a) provides that a court may order the taking of depositions upon a showing "that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice * * *." Although the reported cases are not extensive, they are consistent in holding that a motion made under Rule 15 is addressed to the discretion of the trial court, Heflin v. United States, 223 F.2d 371 (5th Cir. 1955); that it is to be granted only in "exceptional situations," United States v. Glessing, 11 F.R.D. 501 (D.Minn.1951); and that the moving party has the burden of demonstrating the availability of the proposed witnesses and their willingness to appear, United States v. Ausmeier, 5 F.R.D. 395 (E.D.N.Y.1946), the materiality of the testimony which it is expected they will give, United States v. Glessing, supra, and that injustice will result if the motion is denied, United States v. Grado, 154 F.Supp. 878 (W.D.Mo.1957). It is within the discretion of the trial court to deny the motion if it is made after "unexcused delay," Heflin v. United States, supra, or on the "eve of trial," United States v. Broker, 246 F.2d 328 (2nd Cir. 1957), cert. denied, 355 U.S. 837, 78 S.Ct. 63, 2 L.Ed.2d 49. The District Court was correct in holding that the motion and supplementary affidavits submitted by Whiting failed to meet these standards.

Counsel for Whiting moved on January 10, 1961 for an order authorizing the taking of the depositions of five persons residing in Brazil. Neither the motion nor the supplementary affidavit of January 18, 1961 did more than allege, in conclusory terms, the availability of the five proposed witnesses. Nor did either of these papers make a convincing showing that the anticipated testimony of the proposed witnesses would be material to any defense available to Whiting. At the hearing on the motion on January 16, 1961, counsel for Whiting pressed his contention that at least one of the proposed witnesses could give testimony relevant to the Count II cable sent from Brazil to New York, but he declined to admit or deny that Whiting sent the cable, or to indicate what form Whiting's defense to the charge involving that cable would take. Consequently, he was unable to demonstrate that the proposed testimony would be material to or would help to establish Whiting's defense or that the proposed testimony "would tend to exonerate" him. United States v. Broker, supra 246 F.2d at 329. The District Court properly characterized Whiting's papers at this stage as "vague and indefinite."

[6] However, on February 14, 1961, the first day of trial, Whiting testified at a hearing on his motion for reduction of bail. During his testimony he admitted sending the Count II cable from Brazil to New York and conceded that it was in his own handwriting. His counsel then asked the court to reconsider his motion to take foreign depositions in the light of Whiting's testimony. The court noted that "Mr. Whiting testified for an hour and a half this morning and practically very little of what he said on the stand appeared in [his] papers * * * his papers nowhere give one-tenth of what he said on the stand today," even though counsel for Whiting had "known this information for two months." The court therefore denied the motion "at this time at 20 minutes after three on the opening

day of trial." Under these circumstances it is unnecessary to consider whether Whiting's testimony at the bail hearing supplied the link of materiality which was missing earlier. We think that the District Court was well within its allowable discretion in denying a motion made only after considerable delay, Heflin v. United States, supra, and on "the eve of trial," United States v. Broker, supra 246 F.2d at 329.

[7] The defendant Sarnitz also asserts on this appeal that he was denied a fair trial by reason of prejudicial cross-examination concerning a prior conviction. We find this assertion without merit. Sarnitz denied upon direct examination that he had ever been convicted of a crime. Upon cross-examination, however, he admitted that he had been convicted of illegal trafficking in penicillin by a United States Military Government Court during the occupation of Austria in 1946. His contention on appeal is that this conviction was not admissible for impeachment purposes because it was not of a felony or a crime of moral turpitude. See United States v. Provoo, 215 F.2d 531 (2d Cir. 1954). But the characterization of the 1946 conviction is not relevant to the disposition of Sarnitz' claim. Sarnitz admits in his brief that because he testified on his own behalf, "he could be cross-examined for the purpose of impeaching his credibility." Even more narrowly, because Sarnitz testified on direct examination that he had never been convicted of a crime, he made his credibility on that particular issue a relevant area for cross-examination. As this Court said in United States v. Collatti, 245 F.2d 781, 782 (2d Cir. 1957):

> "After testifying on direct examination that he had never been convicted of any 'crime or offense,' the government's attorney was allowed to show on his cross-examination that he had, while in the army, twice been convicted of what the appellant called 'a fight assault.' We need not determine whether this would otherwise have been proper cross-examination, see United States v. Provoo, 2 Cir., 215 F.2d 531, 536, for it was permissible in contradiction of the appellant's previous testimony on the subject of his previous good conduct which he had himself put in issue."

[8] Finally, the defendants contend that the Government's summation was inflammatory and prejudicial in alluding to bribery of political officials and commenting that "if that's the way these Americans do business down in Latin American countries I think it is little wonder that we read in the papers these days of anti-American rioting in the streets down there." While we are not to be understood as sanctioning such latitudinous remarks, we do not believe that they were sufficiently prejudicial to require reversal.

We have considered the other arguments urged by the defendants and find them without merit.

We are indebted to assigned counsel for appellant Whiting for his painstaking preparation and presentation of appellant's contentions on this appeal.

Affirmed.

Leonard BURSTEN, Appellant,

v.

TOM SAWYER, INC., formerly Sawyer Downtown, Inc., Appellee.

No. 19050.

United States Court of Appeals
Fifth Circuit.

Sept. 18, 1962.

Action by a corporation for recovery of its share of profits allegedly due under a joint venture agreement, wherein defendant counterclaimed for an amount due for legal services. The United States District Court for the Southern District of Florida, Joseph P. Lieb, J., entered

with the Kentucky Civil Rights Commission. We find this statute inapplicable since by its terms it does not apply to actions commenced in the Courts.

After examination of the statutes it appears that the most appropriate provision is contained in KRS 413.120(2), which provides:

> "The following actions shall be commenced within five years after the cause of action accrued:
>
> * * * * * *
>
> (2) An action upon a liability created by statute, when no other time is fixed by the statute creating the liability."

[2] Clearly, any rights which the plaintiff may have are dependent upon the provisions of the Civil Rights Act, 42 U.S.C. § 1983, as passed by the Congress of the United States. She does not claim any injury to her person and, therefore, is not barred by the one year statute as interpreted by the Kentucky Court of Appeals. She does claim a statutory right within the meaning of the five year statute contained in KRS 413.120(2), and should be permitted to pursue that action.

The judgment of the District Court is reversed.

UNITED STATES of America,
Appellee,

v.

James Bernard SINGLETON, Defendant-Appellant.

No. 493, Docket 71-1999.

United States Court of Appeals,
Second Circuit.

Argued Feb. 4, 1972.

Decided May 12, 1972.

The United States District Court for the Southern District of New York, Lawrence W. Pierce, J., found defendant guilty of selling a narcotic to an undercover FBI agent, and defendant appealed. The Court of Appeals, Anderson, Circuit Judge, held, inter alia, that where testimony of government informer was taken under oath, in the presence of both defendant and his attorney, where the entire testimony, which included a full cross-examination, was transcribed, and where the informer was actually unavailable for the trial and the reason for his absence was not attributable to wilful or negligent government action or omission, the use of his deposition at trial, predicated on Deputy Assistant Attorney General's certification that the proceeding was against a person believed to have participated in an organized criminal activity, was constitutionally permissible.

Affirmed.

Oakes, Circuit Judge, dissented and filed opinion.

1. Criminal Law ⇐573

Whether one has been denied a speedy trial is a relative question which depends on a weighing of the circumstances; the essential elements to consider are length of delay, reason for it, extent of prejudice and whether defendant has made specific demand for a speedy trial. U.S.C.A.Const. Amend. 6.

2. Criminal Law ⇐573

Right to a speedy trial does not attach until defendant has been arrested or has become an accused.

3. Criminal Law ⇐573

Defendant was not denied his right to a speedy trial by reason of the passage of some 13 months between his arrest and indictment, where the delay was primarily the result of defendant's offer to cooperate with the government, with the possibility that successful cooperation might lead to a dropping of charges. U.S.C.A.Const. Amend. 6.

4. Criminal Law ⇐576(8)

Failure to demand a speedy trial constitutes a waiver of that right.

5. Criminal Law ⇐576(5)

While Rule 8 of the Second Circuit Court of Appeals, concerning the prompt disposition of criminal cases, dispenses with the need for demand, waiver may still be considered as a relevant factor in deciding whether the constitutional right to a speedy trial has been violated. Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, rule 8, 28 U.S.C.A.

6. Criminal Law ⇐576(8)

Thirteen-month delay between arrest and indictment was largely the responsibility of defendant and, considering the fact that he was free on bail throughout the period and had every opportunity to demand a speedy trial in timely fashion but did not do so, there was no violation of his Sixth Amendment rights. U.S.C.A.Const. Amend. 6.

7. Criminal Law ⇐574

If there is actual prejudice resulting from trial delay, there may be a claim under the Fifth Amendment, but not every delay-caused detriment to a defendant's case should abort a criminal prosecution. U.S.C.A.Const. Amend. 5.

8. Constitutional Law ⇐268(4)

Fact that government informer was unable to testify in person was not, alone, sufficient to establish that defendant was denied due process by reason of the lapse of time between the date of his criminal acts and the date of trial; furthermore, it appeared that government was on one date prepared to go to trial, when the informer was able to testify, but that the trial was postponed at defendant's request. U.S.C.A.Const. Amend. 6.

9. Criminal Law ⇐576(2)

Second circuit rules regarding prompt disposition of criminal cases did not require that charge be dismissed, where government had been ready for trial prior to date the rules went into effect; further, the continuance granted by lower court for the taking of government informer's deposition was a delay permitted for "exceptional circumstances" under the rules. Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, rules 4, 5(c) (ii), (h), 28 U.S.C.A.

10. Criminal Law ⇐662(3)

Where testimony of government informer was taken under oath, in the presence of both defendant and his attorney, where the entire testimony, which included a full cross-examination, was transcribed, and whether informer was actually unavailable for the trial and the reason for his absence was not attributable to wilful or negligent government action or omission, the use of his deposition at trial, predicated on Deputy Assistant Attorney General's certification that the proceeding was against a person believed to have participated in an organized criminal activity, was constitutionally permissible. 18 U.S.C.A. § 3503 (a).

11. Depositions ⇐14

Within meaning of statute providing that whenever, due to exceptional circumstances, it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved, the court at any time after filing of an indictment or information may upon motion of such party and notice order that the testimony of such witness be taken by deposition, "exceptional circumstances" exist if it appears that the prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition to prevent a failure of justice. 18 U.S.C.A. § 3503(a).

See publication Words and Phrases for other judicial constructions and definitions.

12. Depositions ⇐37

With respect to the taking of a deposition of a witness for use in a criminal proceeding, the trial court, after Attorney General or his designee has made the required certification that the proceeding is against a person believed to have participated in an organized criminal activity, is not to make a de

novo determination of whether the proceeding is in fact against a person believed to have participated in an organized criminal activity; unless the defendant shows bad faith on the part of the government, the court is only to ascertain whether there has been a proper certification as required by statute. 18 U.S.C.A. § 3503(a).

13. Depositions ⇐32

Certification by Attorney General or his designee that the proceeding in question is against a person believed to have participated in an organized criminal activity, thus laying the foundation for taking the deposition of a witness for use in criminal proceeding, need be in no specific technical form, although it should preferably be in writing. 18 U.S.C.A. § 3503(a).

Harry C. Batchelder, Jr., New York City (John J. Witmeyer III, and Henry Huntington Rossbacher, New York City, on the brief), for appellant.

John M. Walker, Jr., Asst. U. S. Atty., Southern District of New York (Whitney North Seymour, Jr., U. S. Atty., and Peter F. Rient, Asst. U. S. Atty., Southern District of New York, on the brief), for appellee.

Before ANDERSON and OAKES, Circuit Judges, and CLARIE, District Judge.*

ANDERSON, Circuit Judge:

James Singleton, convicted under 26 U.S.C. §§ 4705(a) and 7237 for the sale of a narcotic to an undercover F.B.I. agent, asserts on this appeal that he was denied a speedy trial, that he was convicted upon the impermissible use of a deposition of a key Government witness, and that he was improperly sentenced. The sufficiency of the evidence is not in question; and these claims do not require a detailed exposition of all of the facts in the case.

In essence, Singleton was charged with making a sale of approximately 139.5 grams of cocaine for $1800 to Agent Frederick Ford in New York City during the period August 20 to 22, 1969. Government informer Samuel Morris helped to arrange the sale and served as a middleman in many of the dealings.

The complaint was made against Singleton on January 14, 1970, and he was arrested on January 22, 1970; but, upon his offer to cooperate with the Government in its narcotics investigations, he was released on his own recognizance the same day. The indictment was returned March 10, 1971, and the case was first set down for trial on April 22, 1971, but it was then adjourned to May 18, 1971, at the defendant's request. Although Morris was present in New York and ready to testify in April, it was determined on May 17th that he was too ill with granulocytic leukemia to leave his home in Mobile, Alabama. Thereupon, the trial court granted the Government's motion to take Morris' deposition in Mobile pursuant to 18 U.S.C. § 3503 and set the final trial date for July 22, 1971.

Singleton argues that his conviction should be reversed and his indictment dismissed because the length of time which was allowed to elapse between the date of the criminal acts and the date of the trial violated his Sixth Amendment right to a speedy trial, his Fifth Amendment right to due process, Rule 48(b) of Fed.Rules of Crim.P., and the Second Circuit rules regarding prompt disposition of criminal cases.

[1] Whether or not one has been denied a speedy trial is a relative question which depends on a weighing of the circumstances, United States v. Ewell, 383 U.S. 116, 120, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966); Pollard v. United States, 352 U.S. 354, 361, 77 S.Ct. 481, 1 L.Ed.2d 393 (1957). The essential elements to consider are the length of delay, the reason for it, the extent of prejudice, and whether or not the defendant has

* Of the District of Connecticut, sitting by designation.

made specific demand for a speedy trial, United States v. Stein, 456 F.2d 844, 847 (2 Cir. 1972); United States v. Smalls, 438 F.2d 711 (2 Cir.), cert. denied, 403 U.S. 933, 91 S.Ct. 2261, 29 L.Ed.2d 712 (1971); United States ex rel. Solomon v. Mancusi, 412 F.2d 88, 90 (2 Cir.), cert. denied, 396 U.S. 936, 90 S.Ct. 269, 24 L.Ed.2d 236 (1969).

[2] It is the time between arrest and indictment, some thirteen months, which is pertinent, because the right to a speedy trial does not attach until a defendant has been arrested or has become an accused. As the Supreme Court said in United States v. Marion, 404 U.S. 307, 320, 92 S.Ct. 455, 463, 30 L.Ed.2d 468 (1971):

> "[I]t is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engages the particular protections of [the] speedy-trial provision of the Sixth Amendment."

The defendant makes no real claim of excessive post-indictment delay.

[3] As to the reason for delay, the Government asserts it was brought about by the defendant's agreement to help in further narcotics investigations with the possibility that successful cooperation might lead to a dropping of charges. Singleton agrees that three months of the delay was the result of his offer to cooperate, but he claims that this offer was terminated during the spring of 1970. The United States Attorney claims that he postponed the seeking of an indictment pursuant to a request, dated June 9, 1970, from the Bureau of Narcotics and Dangerous Drugs until the Bureau notified him on January 26, 1971, that Singleton's help had been unsatisfactory. The trial court found that the delay was attributable to the defendant. This conclusion was supported by the evidence and is dispositive of appellant's point. *See* United States v. Kabot, 295 F.2d 848, 852 (2 Cir. 1961), cert. denied, 369 U.S. 803, 82 S.Ct. 641, 7 L.Ed.2d 550 (1962); United States v. Lustman, 258 F.2d 475, 477 (2 Cir.), cert. denied, 358 U.S. 880, 79 S.Ct. 118, 3 L.Ed.2d 109 (1958).

With regard to the claim of prejudice,[1] it may be assumed that the appellant sustained a certain amount from the fact that the court and jury did not have the opportunity to observe the witness Morris, but this was brought about by Singleton's unreadiness to go to trial when Morris was in court ready to testify on April 22.

[4, 5] There remains the element of waiver. It has long been the rule of this Circuit that the failure to demand a speedy trial constitutes a waiver of that right. *Lustman, supra,* at 478, *Small, supra,* 438 F.2d at 714; cf. Dickey v. Florida, 398 U.S. 30, 36, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970). While Rule 8 of this court, concerning the prompt disposition of criminal cases, dispenses with the need for demand, waiver may still be considered as a relevant factor in deciding whether or not the constitutional right to a speedy trial has been violated.

[6] In this case, appointed counsel moved to dismiss for lack of a speedy trial shortly after they were assigned in March, 1971. Certainly the failure of the defendant to seek such relief prior to that time should not weigh heavily against him. Nevertheless it is significant that, even though he admits that he stopped cooperating in the narcotics investigations, the defendant made no attempt to have the charges dropped or to seek the appointment of counsel. The delay between arrest and indictment was largely the responsibility of the defendant, and considering the fact that he was free on bail throughout the period and had every opportunity to demand

1. The claims of prejudice were that three potential defense witnesses either could not be found or disappeared prior to trial and that the informer Morris was unable to testify in person. It is not clear just what help, if any, the three missing witnesses would have been to the defense case.

a speedy trial in timely fashion but did not do so, we conclude there was no violation of Singleton's Sixth Amendment rights.

[7, 8] Nor is there merit in the defendant's due process claim. If there is actual prejudice resulting from trial delay, there may be a claim under the Fifth Amendment, but not "every delay-caused detriment to a defendant's case should abort a criminal prosecution," *Marion, supra,* 404 U.S. at 324, 92 S.Ct. at 465. The only serious claim of prejudice was the inability of Morris to testify in person; however, that fact alone is not sufficient to establish that the defendant was denied due process, *see, e. g.,* United States v. Dickerson, 347 F.2d 783, 784 (2 Cir. 1965). Furthermore, the Government was prepared to go to trial in April, 1971, when Morris was able to testify, but the trial was postponed at the defendant's request, *see* United States v. Persico, 425 F.2d 1375, 1385 (2 Cir.), cert. denied, 400 U.S. 869, 91 S.Ct. 102, 27 L.Ed.2d 108 (1970).

Because the primary purpose of Rule 48(b) is to enforce the right to a speedy trial, *Pollard, supra,* 352 U.S. at 361 n. 7, 77 S.Ct. 481; *see also,* United States v. Dooling, 406 F.2d 192, 196 (2 Cir.), cert. denied, Persico v. United States, 395 U.S. 911, 89 S.Ct. 1744, 23 L.Ed.2d 224 (1969), no special attention need be given the Rule outside the discussion concerning the Sixth Amendment.

[9] Nor is there any merit in Singleton's claim that the Second Circuit rules regarding prompt disposition of criminal cases require the charge to be dismissed. The Government had been ready for trial prior to July 5, 1971, when the Rules went into effect, see Rule 4; and the continuance granted by the court below for the taking of Morris' deposition was a delay permitted for "exceptional circumstances" under Rule 5(c) (ii) and (h).

Singleton also claims that the use of Morris' deposition at trial, even though it was taken and used in conformity with 18 U.S.C. § 3503, was a violation of his Sixth Amendment right of confrontation because the jury was deprived of the ability to judge the demeanor of the witness.

The Supreme Court in California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), drawing from Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968), and Motes v. United States, 178 U.S. 458, 20 S.Ct. 993, 44 L.Ed. 1150 (1900), states two different tests for determining whether or not testimony is admissible. The first is that the witness is "actually unavailable, despite good-faith efforts of the State to produce him," *Green, supra,* 399 U.S. at 165, 90 S.Ct. at 1938, 1939, and the other is that the testimony may be used if "the declarant's inability to give live testimony is in no way the fault of the State," *Green, supra,* at 166, 90 S.Ct. at 1939.

Singleton, relying on the second test, asserts that Morris' inability to appear and testify in court was the fault of the Government in delaying the trial. Neither the precedents nor the evidence in the case, however, supports his position.

In most of the cases in which out-of-court testimony has been refused, the crucial point has been that unavailability had not been adequately shown, *Barber, supra,* (the prosecution made no attempt to obtain the witness from prison in another State); United States ex rel. Stubbs v. Mancusi, 442 F.2d 561 (2 Cir. 1971), cert. granted 404 U.S. 1014, 92 S. Ct. 671, 30 L.Ed.2d 661 (1972), (the prosecution had made no attempt to get the witness from Sweden); Government of Virgin Islands v. Aquino, 378 F.2d 540 (3 Cir. 1967) (the fact that the witness was without the jurisdiction and unavailable was not adequately shown); Holman v. Washington, 364 F.2d 618 (5 Cir. 1966) (inadequate showing that witness could not be produced). The situation in *Motes, supra,* in which testimony from the preliminary hearing was disallowed at trial was somewhat different, as the witness, a co-defendant who had confessed and was willing to testify, was unavailable in that he had escaped prior to trial because of the Government's negligence in keeping him in custody.

On the other hand, in most of the cases where there was actual unavailability, the testimony has generally been allowed. For example, in Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895), the Court permitted the use, at a second trial, of the testimony of two witnesses who had died after the first trial, even though the second trial was required solely because a bailiff had made prejudicial remarks to several jurors and the jury had been permitted to read a newspaper account of the trial in the juryroom while still deliberating, *see* Mattox v. United States, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892). Even more to the point is United States v. Hughes, 411 F.2d 461 (2 Cir.), cert. denied, 396 U.S. 867, 90 S.Ct. 145, 24 L.Ed.2d 120 (1969), where this court permitted the reading of testimony, at a second trial, when the witness had become insane after the first trial, even though the retrial was required because of prejudicial prosecutorial statements at the initial one, see United States v. Hughes, 389 F.2d 535 (2 Cir. 1968). *See also*, United States v. Bentvena, 319 F.2d 916, 941 (2 Cir.), cert. denied, [Ormento v. U. S., Di Pietro v. U. S., Fernandez v. U. S., Panico v. U. S., Galante v. U. S., Loicano v. U. S., Mancino v. U. S., Sciremammano v. U. S., Mirra v. U. S.] 375 U.S. 940, 84 S.Ct. 345, 346, 353, 354, 355, 360, 11 L.Ed.2d 271, 272; (1963), where the court permitted the use of prior trial testimony when a Government witness refused to return from Canada.

Because the absence of almost any Government witness may be traced in some part to governmental action or inaction, such as the failure to have an instantaneous trial, the line should not be drawn as tightly as the defendant asserts.

[10] In the present case, Morris' testimony was taken under oath, in the presence of both Singleton and his attorney, and the entire testimony, which included a full cross-examination,[2] was transcribed. *See Green, supra*, 399 U.S. at 165, 90 S.Ct. 1930; *see also, Barber, supra;* Pointer v. Texas, 380 U.S. 400, 407, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); *Mattox, supra*. Therefore, as the witness was actually unavailable and the reason for his absence was not attributable to wilful or negligent Government action or omission, the use of his deposition at trial was constitutionally permissible.

[11] Singleton, however, also challenges the use of the deposition under the terms of 18 U.S.C. § 3503(a),[3] which provides, for the first time, for the Government to take depositions in criminal actions. Subsection (a) permits a motion to the trial court to take the deposition, and subsection (f) states the circumstances, including the inability of a witness "to attend or testify because of sickness or infirmity," under which the deposition may be used at trial. The de-

2. The defendant claims that he was denied the right fully to cross-examine Morris in regard to any payments which he received from the Government; however, there was no curtailment of cross-examination on this point, and the Government stipulated at trial that Morris had received some pay, although for matters unrelated to this case.

3. 18 U.S.C. § 3503(a) reads as follows: "Whenever due to exceptional circumstances it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved, the court at any time after the filing of an indictment or information may upon motion of such party and notice to the parties order that the testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness. A motion by the Government to obtain an order under this section shall contain certification by the Attorney General or his designee that the legal proceeding is against a person who is believed to have participated in an organized criminal activity."

fendant's attack is directed at two provisions in § 3503(a) which have yet to be construed by the courts. The first is the condition that the motion is only to be granted in "exceptional circumstances [when] it is in the interest of justice," which the defendant claims do not exist in this case. The House Judiciary Committee Report,[4] however, indicates that motions under § 3503(a) are to be granted for the same reasons permitted defendants by Fed.Rules of Crim.P., Rule 15(a), which provides for depositions, "[i]f it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice . . ." This test is quite adequate, and we adopt it here for the purpose of defining "exceptional circumstances." Morris' situation fits it squarely.

Singleton also contends that the "certification by the Attorney General or his designee that the legal proceeding is against a person who is believed to have participated in an organized criminal activity" was invalid on both technical and substantive grounds; however, the defendant misunderstands the purpose and effect of this certification requirement which is not central to the overall structure of § 3503 or to its constitutionality, but was added by House amendment to the original bill "since the need for the deposing of Government witnesses appears to be most acute in cases involving organized criminal activity."[5]

This limitation on the use of § 3503 depositions is one to be exercised by the Government, and the decision whether or not a proceeding is against a person believed to have participated in organized criminal activity is to be made by the Attorney General or his designee and not by the court. The defendant's analogy to the necessity for a court to find probable cause under the Fourth Amendment is not apt because the wording of § 3503(a) indicates that Congress did not intend for the organized crime certification to be subjected to a judicial determination.[6]

[12] Congress' choice of the Attorney General or his designee to make the certification may have been to insure political accountability, *see* United States v. Robinson (5 Cir. Jan. 12, 1972) (No. 71-1058), or to centralize decision making, *cf.* United States v. St. Regis Paper Co., 355 F.2d 688, 693 (2 Cir. 1966), or because the Attorney General is in the best position to know, but for whatever reason, the trial court is not to make a *de novo* determination of whether or not the proceeding is against a person believed to have participated in an organized criminal activity. Unless the defendant shows bad faith on the part of the Government, the court is only to ascertain whether or not there has been a proper certification as required by statute.

[13] In the present case, the certification conformed with the statute in that it was given by Henry Petersen, Deputy Assistant Attorney General, as designated by the Attorney General, see Order Number 452-71, 36 Fed.Reg. 2601

4. H.R.Rep. No. 91-1549, U.S.Code Cong. & Admin.News, pp. 4007, 4025 (1970).

5. House Committee Report, *supra*, note 4.

6. A better analogy would be to various statutes, e. g. 18 U.S.C. §§ 2514, 3486(c), 6003, which require the approval of the Attorney General of a United States Attorney's decision that it is in the public interest to grant immunity to a witness in order to compel his testimony. The courts have accepted such approval as they have construed it as beyond their jurisdiction to make their own determination of whether or not the grant of immunity is justified in the public interest, Ullmann v. United States, 350 U.S. 422, 432-434, 76 S.Ct. 497, 100 L.Ed. 511 (1956). *Cf.*, In re Russo, 448 F.2d 369 (9 Cir. 1971); and Licata v. United States, 429 F.2d 1177 (9 Cir.), vac. as moot, 400 U.S. 938, 91 S.Ct. 239, 27 L.Ed.2d 243 (1970), with In re Vericker, 446 F.2d 244, 247 (2 Cir. 1971).

(Feb. 9, 1971).[7] The certification need be in no specific technical form, although it should preferably be in writing, *cf.* Licata v. United States, 429 F.2d 1177, 1180 (9 Cir.), vacated as moot, 400 U.S. 938, 91 S.Ct. 239, 27 L.Ed.2d 243 (1970).

Furthermore, there was no showing of bad faith on the part of the Government; in fact, trafficking in narcotics was one of the specific evils engaged in by organized crime which Congress sought to attack through the Organized Crime Control Act of 1970.[8]

Singleton's final challenge on appeal is to the mandatory five year minimum sentence imposed under 26 U.S.C. §§ 7237(b) and (d) (repealed effective May 1, 1971), claiming that he should have been sentenced under the more liberal provisions of 21 U.S.C. § 841(b) (1) (A), which replaced § 7237. This issue was, however, foreclosed adversely to him in this Circuit by United States v. Fiotto, 454 F.2d 252 (2 Cir. Jan 4, 1972), petition for cert. pending, 40 U.S.L.W. 3434 (March 14, 1972).

Judgment of conviction and sentence affirmed.

OAKES, Circuit Judge (dissenting):

I respectfully dissent, agreeing with the majority on the speedy trial claims but disagreeing in respect to the use of Morris's deposition. We are talking here about the use of a deposition given before trial, not about the use of testimony given at a previous trial. There are at last two substantial differences between the two. First, at the time a deposition of a prosecution witness is taken the defense may not be prepared adequately to cross-examine, while prior trial testimony is used only at a time when the defendant is presumably ready for trial. This was apparently the basis for the objection by the Association of the Bar of the City of New York to the deposition procedure here established. See 1970 U.S.Code Cong. & Admin.News p. 4090. The second difference is that the testimony of a witness at a prior trial has been subjected at least once to the crucible of in-court scrutiny by judge and jury. This is, perhaps, another way of saying that testimony in the solemn, impressive atmosphere of a federal courtroom, before the eyes of a keen judge and an observant jury, may be given with a litle more care, deliberation and accuracy on the part of the witness than it might be given in some office or room before a notary public.[1]

These differences have been deemed insufficient to warrant different consti-

7. The certification letter reads as follows:

May 11, 1971

Mr. Whitney North Seymour, Jr.
United States Attorney
New York, New York
Dear Mr. Seymour:

Pursuant to your request to obtain an order granting the taking of a deposition from Samuel Morris, I hereby certify, pursuant to authority conferred by Attorney General Order No. 452-71, dated January 30, 1971, that the case of United States v. James Bernard Singleton, is a legal proceeding against a person who is believed to have participated in organized criminal activity.

Sincerely,
/s/ Henry E. Petersen
HENRY E. PETERSEN
Deputy Assistant Attorney General

8. See Statement of Findings and Purpose, Pub.L. No. 91-452, 84 Stat. 922, U.S. Code Cong. & Admin.News p. 1073 (1970). *Cf.* 18 U.S.C. § 1961(1) (A).

1. *See* Ryland, J., in State v. McO'Blenis, 24 Mo. 402, 421 (1857) ("There are many things, aside from the literal import of the words uttered by the witness while testifying, on which the value of his evidence depends. These it is impossible to transfer to paper. Taken in the aggregate, they constitute a vast moral power in eliciting the truth, all of which is lost when the examination is had out of court and the mere words of the witness are reproduced in the form of a deposition."); *and see* Lord Strafford's plea in his November, 1640, impeachment: "I beg your lordships that he [the witness Duglisk] may look me in the face, and give his evidence, as the law is . . . . I desire the letter of the law, which says, my accuser shall come face to face." 7 Howell's State Trials 1293, 1341 (Cobbett's ed. 1810). *See also* the trial of Sir Walter Raleigh for treason in 1603, referred to in California v. Green, 399 U.S. 149, 157 n. 10,

tutional treatment of pretrial depositions and prior trial testimony in civil cases as a matter of due process of law. In criminal cases, however, it seems to me that these differences are critical, for we have the explicit precept of the sixth amendment that an accused has the right "to be confronted with the witnesses against him." Thus my dissent rests on two premises, the first of which is that the majority's supporting cases, which permit the use of testimony given at a prior trial,[2] are wholly inapposite to the controversy we are here called upon to decide; and the second is that the introduction at trial of pretrial depositions against an accused is—at the very least—of extremely doubtful constitutional validity. *See* Barber v. Page, 390 U.S. 719, 725, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968); 8 J. Moore, Federal Practice ¶ 15.02, at 15–5 (2d ed. 1970).

Concerning that constitutional issue, I think what the Supreme Court said in Mattox v. United States, 156 U.S. 237, 242–243, 15 S.Ct. 337, 339, 39 L.Ed. 409 (1895), provides the appropriate guideline by which we should measure appellant's confrontation clause claim:

> The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

It is true that the Advisory Committee, in support of its proposed Rule 15 which would permit the use of depositions taken at the behest of the Government and which previously had been rejected by the Supreme Court, has stated, "To the extent that the rejection was based upon doubts as to the constitutionality of such a proposal, those doubts now seem re-

90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). While Singleton was ready for trial at the time of taking Morris's deposition, and was there to confront him face to face, no trier of fact has had the opportunity at any time to observe the prosecution's chief witness at the time of that confrontation.

2. *E. g.*, Motes v. United States, 178 U.S. 458, 20 S.Ct. 993, 44 L.Ed. 1150 (1900) (preliminary trial testimony inadmissible where absence of deponent is due to negligence of prosecution); Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895) (prior trial testimony of deceased witness admissible); Mattox v. United States, 146 U.S. 140, 152, 13 S.Ct. 50, 36 L.Ed. 917 (1892) (dying declarations admissible); United States v. Hughes, 411 F.2d 461 (2 Cir.), cert. denied, 396 U.S. 867, 90 S.Ct. 145, 24 L.Ed.2d 120 (1969); United States v. Bentvena, 319 F.2d 916, 941 (2d Cir.), cert. denied [Ormento v. U. S., Di Pietro v. U. S., Fernandez v. U. S., Panico v. U. S., Galante v. U. S., Loicano v. U. S., Mancino v. U. S., Sciremammano v. U. S., Mirra v. U. S.], 375 U.S. 940, 84 S.Ct. 345, 346, 353, 354, 355, 360, 11 L.Ed.2d 271, 272 (1963). California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), does not go to our problem at all. There the witness whose prior statements were permitted to be used as substantive evidence was *in fact in court*, present to testify and subject to cross-examination, albeit uncooperative and evasive. Thus *Green* goes no further than to say that "the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, *as long as the declarant is testifying as a witness and subject to full and effective cross-examination.*" 399 U.S. at 158, 90 S.Ct. at 1935 (emphasis supplied). Moreover, *Green* was not in a jury trial context and the witness's testimony was given at a preliminary hearing. See Report of the Committee on Trial Practice and Technique for the Second Circuit of the United States Court of Appeals Relating to the Advisory Committee's Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal and Appellate Procedure 17–20 (mimeographed) (Jan. 6, 1972) (concluding that Proposed Rule 15 "should be rejected").

solved by California v. Green . . ." Committee Note to proposed amendment to Rule 15, April 1971 Preliminary Draft, at 31, quoted in 8 J. Moore, Federal Practice ¶ 15.02, at 150 (Supp. 1971). To author Cipes, and to me, however, they seem nothing of the sort, for the reasons stated in note 2 *supra*. See 8 J. Moore, Federal Practice ¶ 15.02, at 150-53 (Supp.1971).

Perhaps it would be sufficient to stop at this point, and meet head on the issue whether the Organized Crime Control Act of 1970, in permitting the use of pretrial depositions at trial, is constitutional.[3] The proper exercise of judicial restraint, however, requires that the constitutional issue be avoided if the statute does not apply in any event. Does that Act apply to Singleton's case so as to permit the use of a pretrial deposition against him?

I leave aside the issue whether the certification by a Deputy Assistant Attorney General was sufficient under the wording of the statute, as to which there may be doubt. *Compare* United States v. Pisacano, 459 F.2d 259 (2d Cir., filed April 7, 1972), with United States v. Robinson, No. 71-1058 (5th Cir., filed Jan. 12, 1972). For purposes hereof it is enough to assume its sufficiency. Is Singleton's trafficking in narcotics (in this case allegedly selling $1,800 worth of cocaine) an "organized criminal activity" within 18 U.S.C. § 3503? Moreover, are we conclusively bound by the Attorney General's certification, as the majority here suggests,[4] so that as a court we cannot even look into the propriety of its issuance?

I do not think we may abdicate the judicial function quite so completely to the prosecution. The determination of what is "organized criminal activity" may affect the whole course of the trial. I agree with Professor Kenneth Culp Davis, speaking with reference to delegated powers, that "[s]afeguards are usually more important than standards, although both may be important." Administrative Law § 2.00-5(b), at 54 (Supp.1970). I cannot join my brethren in so readily discarding all the safeguards in a situation in which there are no standards.[5]

What is an "organized criminal activity"? The Organized Crime Control Act of 1970 itself does not purport to tell us. Although there are a number of rather precise definitions in other parts of the Act,[6] "organized crime" is not defined, much less "organized criminal activity."[7] Even the House Judiciary

3. R. Cipes, writing the criminal volumes of Moore's Federal Practice, calls the deposition feature of the Act "simply a trial balloon for the government," and goes on to say: "Civil libertarians who have long been sensitive to governmental abuse of process and procedure in 'organized crime' prosecutions—seeing this as an 'early warning signal'—have now, at least in this writer's opinion, gained great credibility with the issuance of the 1971 proposed amendment to Rule 15 [permitting the use of depositions generally]." 8 J. Moore, Federal Practice ¶ 15.02, at 149 (Supp.1971).

4. The majority writes, at p. 1154 *supra*, ". . . the decision whether or not a proceeding is against a person believed to have participated in organized criminal activity is to be made by the Attorney General or his designee and not by the court."

5. Here there is not the slightest suggestion that the Department of Justice has set up its own standards as to what is an "organized criminal activity." *Cf.* K. Davis, Administrative Law § 2.00-5(b), at 54 (Supp.1970).

6. *See, e. g.*, 18 U.S.C. § 1511(b), defining an "illegal gambling business" as one remaining in substantially continuous operation for 30 days or grossing $2,000 in any one day.

7. "While this imprecise standard is enough to raise the hackles of any constitutional lawyer—at least one of whom will hopefully have an opportunity to take on the Attorney General in the appellate courts—that is hardly the only vice in the new deposition procedure." 8 J. Moore, Federal Practice ¶ 15.02, at 149 (Supp. 1971). And see the dissent to the House Judiciary Report by Representatives John Conyers, Abner Mikva and William Ryan, printed in 1970 U.S.Code Cong. &

Committee's report will be searched in vain for a definition, although it does contain chapters relating to "syndicated gambling" and to "racketeer influenced and corrupt organizations." H.R.Rep. No.91-1549, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S.Code Cong. & Admin.News, pp. 4007, 4009, 4010. The closest anything in the legislative history comes to giving us any indication of what Congress was talking about is Representative Poff's reference on the House floor to "access to collective criminal power."[8] 116 Cong.Rec. 9710 (daily ed. Oct. 7, 1970). If to be an "organized criminal activity" the activity must be one which would be shielded by "access to collective criminal power" —as good a definition as any, I suspect—there is nothing in this record to show that Singleton had any such "access" or was himself a part of or minion to or distributor for or agent of or buyer from "collective criminal power." The majority seems to imply that because organized crime does traffic in narcotics anyone who traffics in narcotics is engaged in an organized criminal activity. If so there are doubtless thousands of youths on high school and college campuses today who unknowingly participate in "organized crime." All that appears in this record, and this in a telegram from the United States Attorney in New York to the Department of Justice, is that "Singleton has been dealing in narcotics for at least 12 years with four prior drug arrests dating back to 1959."[9]

A case for the use of pretrial depositions in situations in which "collective criminal power" is involved could be made, I suppose, on the basis that the life of the deponent might be endangered by the defendant's access to criminal power. *Cf.* Note, Prosecutorial Discovery Under Proposed Rule 16, 85 Harv. L.Rev. 994, 1014-16 (1972). The government might further, either by legislation or administrative standards, seek to establish a presumption that any sale of a given significant amount of a given narcotic is an organized criminal activity since to acquire possession of such an amount would require some "access to collective criminal power." But until this has been done, we cannot willy-nilly permit such a loosely drawn statute, adopted without safeguards or standards or definitions, to apply to anyone the government seeks to have it apply to—much less when the validity of the underlying statute would thereby be cast into the gravest doubt.

It is possible that this case goes further than any other in the history of federal jurisprudence to make the sixth amendment and its confrontation clause a nullity.[10] *Compare* Pointer v. Texas,

Admin.News, pp. 4076, 4091: "Even in its draftsmanship it would rather equivocate than fight. Thus one searches the bill in vain for a definition of 'organized crime.' In a criminal statute where the term 'organized crime' is an operative device, it is not defined. When asked about the omission, the drafters explained that it was impossible to define, but everybody knew what it was."

8. We must, of course, bear in mind Mr. Justice Jackson's admonitions about probing too casually into what is called legislative history. See Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-396, 71 S.Ct. 745, 95 L.Ed. 1035 (1951) (concurring opinion).

9. Appellant's counsel tells us the telegram is factually incorrect. Apparently appellant, a black, was convicted of robbery when he was 16 and of marijuana possession in 1963 at age 20 and has had two other arrests, one resulting in a refusal to indict and one in dismissal by the court. The reference to his "dealing in narcotics" is, of course, hearsay. But even if all of the allegations of the government's telegram were true, there is no indication that he is in an "organized criminal activity" in the sense I believe Congress intended the phrase.

10. *See*, in American Bar Foundation, Sources of Our Liberties (R. Perry ed. 1959), the following: Va.Const. § 8 (June 12, 1776), at 312; Pa.Const. art. IX (Aug. 16, 1776), at 330; Del. Declaration of Rights § 14 (Sept. 11, 1776), at 339; Md.Const. art. XIX (Nov. 3, 1776), at 348; N.C.Const. art. VII (Dec. 14, 1776), at 355; Vt.Const. art. X

380 U.S. 400, 405, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965) ("There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."), *with* West v. Louisiana, 194 U.S. 258, 24 S.Ct. 650, 48 L.Ed. 965 (1904) (deposition permissible in state case). Proper procedural protection is the keystone of the structure of American civil liberties. Today's decision, I fear, weakens that structure.

I would reverse and remand.

UNITED STATES of America,
Appellant,
v.
HASTINGS MOTOR TRUCK CO. et al.,
Appellees.
No. 71-1646.

United States Court of Appeals,
Eighth Circuit.

Submitted April 13, 1972.

Decided June 1, 1972.

Action wherein government sought a deficiency judgment against all defendants for the unpaid balance of four loans secured by a mortgage obligation obtained from Small Business Administration. The United States District Court for the District of Nebraska, Richard E. Robinson, Senior District Judge, entered judgment dismissing complaint, and government appealed. The Court of Appeals, Van Oosterhout, Circuit Judge, held that evidence that, with respect to four loans secured by mortgage obligation obtained from Small Business Administration, defendants were persons who obligated themselves on mortgage note and indebtedness as makers, guarantors or assumers of mortgage indebtedness, and that, subsequent to making of loans and agreements, holder of legal title to mortgaged property, by warranty deed, conveyed property to a grantee with knowledge and consent of Small Business Administration, with sole consideration for conveyance being grantee's agreement to assume and pay all mortgages against property, supported finding that, under law of Nebraska, a novation occurred which released defendants from liability when grantee delivered assumption agreement to Small Business Administration.

Affirmed.

1. Evidence ⇐101, 384

Parol evidence rule is one of substantive law, and law of state where transaction took place is controlling.

2. Evidence ⇐465

In action wherein government sought a deficiency judgment against all defendants for the unpaid balance of four loans secured by a mortgage obtained from Small Business Administration, evidence, which was not offered for purpose of varying terms of original contractual obligation assumed by defendants, but for purpose of showing a new subsequent contract terminating defendants' liability on earlier contracts (novation), was not violative of Nebraska parol evidence rule and was admissible.

3. Courts ⇐406.5(6)

On appeal from judgment dismissing complaint by government for a deficiency judgment against all defendants

(July 8, 1777), at 366. The inclusion of a confrontation clause in the constitutions adopted in the early revolutionary era suggests that the right is pretty fundamental. *Id.* at 429.

ADVOCATE

ous event than armed piracy of a passenger aircraft in flight. The extreme penalty [1] reflects the concern of the Congress and at the same time enhances the probability that a desperate man will destroy the aircraft and the lives of all aboard rather than fail in his attempt. It is clear to us that to innocent passengers the use of a magnetometer to detect metal on those boarding an aircraft is not a resented intrusion on privacy, but, instead, a welcome reassurance of safety. Such a search is more than reasonable; it is a compelling necessity to protect essential air commerce and the lives of passengers. The rationale of *Terry* is not limited to protection of the investigating officer, but extends to "others . . . in danger." *Terry, supra*, 392 U.S. at 30, 88 S.Ct. 1868, 20 L.Ed.2d 889. That all passengers are endangered by the presence of weapons on aircraft needs no exposition.

[3] When the high metal indication of the magnetometer was not satisfactorily explained by Epperson, the subsequent physical "frisk" of his jacket was entirely justifiable and reasonable under *Terry*. At this stage of the encounter the reasonable fear of the marshal for the safety of airline passengers increased and he was entitled, for their protection, to conduct a carefully limited search of the clothing of Epperson in an attempt to discover weapons which might be used for air piracy. Since the use of the magnetometer was justified at its inception, and since the subsequent physical frisk was justified by the information developed by the magnetometer, and since the search was limited in scope to the circumstances which justified the interference in the first place, we hold the search and seizure not unreasonable under the Fourth Amendment.

Affirmed.

1. "[D]eath if the verdict of the jury shall so recommend . . . ." 49 U.S.C.A. § 1472(i)(1)(A).

UNITED STATES of America, Appellee,

v.

E. Graydon SHUFORD, Appellant.

United States of America, Appellee,

v.

Herman S. JORDAN, Jr., Appellant.

Nos. 71-1424, 71-1425.

United States Court of Appeals, Fourth Circuit.

Argued Aug. 23, 1971.

Decided Dec. 23, 1971.

Defendants were convicted in the United States District Court for the District of South Carolina, at Charleston, J. Robert Martin, Jr., Chief Judge, of knowing submission of false documents with reference to matter within jurisdiction of Department of Justice and conspiracy and they appealed. The Court of Appeals, Sobeloff, Senior Circuit Judge, held that where severance was only way of affording defendant any possibility of persuading codefendant to testify and codefendant had indicated quite clearly to trial judge that he would testify if granted a severance and had indicated the precise contents of the expected testimony and its importance, it was reversible error to deny defendant's motion for severance. The Court further held that vacation of convictions of defendant required vacation of codefendant's convictions also.

Reversed and remanded as to one case and vacated and remanded with instructions as to the other.

Haynsworth, Chief Judge, dissented and filed an opinion.

1. Criminal Law ⇐618

Generally persons jointly indicted should be tried together, especially where one crime may be proved against

two or more defendants on a single set of facts or from the same evidence.

2. Criminal Law ⇐618

Joint trial is inappropriate if it sacrifices a defendant's right to a fundamentally fair trial.

3. Criminal Law ⇐622(1)

Grant or denial of severance is in sound discretion of trial judge. Fed. Rules Crim.Proc. rule 14, 18 U.S.C.A.

4. Criminal Law ⇐622(1)

If substantial degree of prejudice springs from a joint trial, a severance is mandated. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

5. Criminal Law ⇐622(1)

Severance is obligatory where one defendant's case rests heavily on exculpatory testimony of his codefendant who is willing to give such testimony but for the fear that by taking the stand in joint trial he would jeopardize his own defense. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

6. Witnesses ⇐5

Fifth Amendment gave defendant right not even to be called to stand and that right extended so far as to forbid not only Government, but even codefendant from calling defendant to the stand. U.S.C.A.Const. Amend. 5.

7. Witnesses ⇐5

If a defendant's case is severed from that against codefendant, although codefendant retains privilege against self-incrimination, as a witness, he no longer has right not to be called to stand. U.S.C.A.Const. Amend. 5; Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

8. Criminal Law ⇐622(2), 1166(6)

Where severance was only way of affording defendant, charged with submission of false document with reference to matter within jurisdiction of Department of Justice, any possibility of persuading codefendant to testify, defendant had indicated quite clearly to trial judge that he would testify if granted a severance and had indicated the precise contents of the expected testimony and its importance, defendant should not have been foreclosed from benefits of codefendant's pivotal testimony because there was not an absolute certainty that codefendant would testify and it was reversible error to deny defendant's motion for severance. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.; U.S.C.A.Const. Amend. 5; 18 U.S.C.A. § 1001.

9. Criminal Law ⇐622(3)

Where severance would necessitate a great number of otherwise unnecessary trials or duplication of unusually complex trial, district court, in exercise of its discretion, could well consider those factors as possible counterweights to benefits from severance accruing to moving defendant, but paramount question is always whether refusal of severance impairs fairness of the trial. Fed. Rules Crim.Proc. rule 14, 18 U.S.C.A.; U.S.C.A.Const. Amend. 5.

10. Criminal Law ⇐1144(9)

Where, for first time on appeal, party raises unsupported argument that, if severance had been ordered, codefendant would thereafter have waived his Fifth Amendment privileges and testified as promised, appellate court has right to refuse to indulge in pure supposition as to what behavior of codefendant would have been if requested severance had been granted. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.; U.S.C.A.Const. Amend. 5.

11. Criminal Law ⇐1171(5)

Argument of codefendant's attorney that codefendant answered questions in a direct, forthright manner without evasion was not prejudicial to defendant on theory that it was an oblique reference to defendant's failure to take the stand.

12. Criminal Law ⇐80

Where the only potential principal has been acquitted, no crime has been established and conviction of aider and abettor cannot be sustained.

13. Criminal Law ⇐80

Aider and abettor may be tried before principal and, where commission of

crime is proved, aider and abettor may be tried even if principal is unknown.

14. Criminal Law ⇐80

Where principal was granted a new trial, defendant convicted as aider and abettor was entitled to vacation of his conviction of substantive offense, contingent upon principal's conviction, at his retrial, of the substantive offense charged.

15. Conspiracy ⇐23

Conviction of one conspirator cannot stand upon acquittal of his only co-conspirator. 18 U.S.C.A. § 371.

16. Conspiracy ⇐23

Where indictment names additional, untried co-conspirators, conviction may be affirmed notwithstanding acquittal of codefendant conspirator. 18 U.S.C.A. § 371.

17. Criminal Law ⇐1186(1)

Where trial court charged that, to convict on conspiracy count, it would be sufficient if jury found agreement between defendants and named, but unindicted, co-conspirators, or at least two of the number, so that it was impossible to know whether jury found that defendant conspired with codefendant alone or with others, it would be improper to speculate in that regard when codefendant's conviction was vacated and defendant's conviction must also be vacated. 18 U.S.C.A. § 371.

F. Lee Bailey, Boston, Mass. (N. Welch Morrisette, Jr., Columbia, S. C., Gerald Alch, Boston, Mass., Ralph C. Robinson, Jr., Columbia, S. C., on brief), for E. Graydon Shuford.

C. D. Hopkins, Jr., Hanahan, S. C. (Malcolm M. Crosland, Charleston, S. C., on brief), for Herman S. Jordan, Jr.

Marvin L. Smith and Robert G. Clawson, Jr., Asst. U. S. Attys. (John K. Grisso, U. S. Atty., on brief), for United States.

Before HAYNSWORTH, Chief Judge, SOBELOFF, Senior Circuit Judge, and WINTER, Circuit Judge.

SOBELOFF, Senior Circuit Judge:

This case raises one of the problems sometimes encountered when two criminal defendants, each surrounded by a multitude of procedural protections, are tried jointly and the effectuation of one defendant's rights necessarily works an infringement of the rights of the other.

E. Graydon Shuford and Herman S. Jordan, Jr., appeal from their convictions under 18 U.S.C. §§ 371 and 1001, for (1) the knowing submission of a false document with reference to a matter within the jurisdiction of the Department of Justice and (2) conspiracy. Each defendant was sentenced to 18 months imprisonment on each count, sentences to run concurrently.

I

The events leading to these convictions began in the fall of 1969 when Shuford, an attorney specializing in personal injury cases, helped establish the West Ashley Physical Therapy Laboratory ("Laboratory") in conjunction with one Gene H. Long. The latter, named in the indictment as a co-conspirator but never brought to trial, was an experienced physical therapist who ran the Laboratory and was responsible for billing patients and general record keeping. The Laboratory was formed in order to provide physical therapy for those of Shuford's clients who required such treatment.

Two weeks after the Laboratory opened, Long approached Shuford and told him that some of the physical therapy patients were not keeping their appointments. Shuford instructed Long to bill these patients for their unkept appointments anyway. Several days later, Long had occasion to speak with Jordan, a legal investigator employed in Shuford's office, about the unkept appointments. Jordan, when informed by Long of Shuford's earlier instructions, told Long to do as he had previously been directed.

Meanwhile, on November 17, 1969, Mack C. Wheat was involved in an automobile accident with an agent of the Federal Bureau of Investigation. Wheat retained Shuford as his attorney and was ultimately referred to the Laboratory for physical therapy. In January of 1970, Shuford filed on behalf of Wheat an administrative claim for settlement under the Federal Tort Claims Act. Appended to the claim was a bill for Wheat's physical therapy treatments at the Laboratory—a bill which included $45 in charges for three unkept appointments. No indication appeared on the face of the bill that these appointments were not kept. However, a hospital bill, also submitted with the claim, indicated that Wheat was in the hospital on the dates of the three appointments in question. The claim was therefore rejected and a criminal investigation was begun, resulting in the instant prosecution.

Before the trial began and again after the prosecution submitted its evidence, Shuford moved that Jordan's case be severed from his own so that he might have the benefit of Jordan's testimony.[1] Jordan likewise moved to have his case severed and joined in Shuford's motion. Although Shuford testified in his own behalf, Jordan ultimately decided not to take the stand. According to Jordan's statement to the court in support of Shuford's second motion for severance, two considerations prompted his decision not to testify: First, he wanted to avoid cross-examination that would bring to light certain prior convictions of his, and second, he planned to stand on the insufficiency of the Government's evidence and feared that if he took the stand in his own trial, he might strengthen the case against him by placing his credibility and demeanor before the jury. Shuford's attorney, arguing the motion for severance, further asserted, apparently without dissent by Jordan, that Jordan was not averse to testifying in Shuford's behalf at a separate trial, since his own defense would not thereby be jeopardized.

Before ruling on the motions for severance, the trial judge, in an endeavor to meet Jordan's objections to taking the stand in the joint trial, offered to forbid the Government from raising Jordan's prior criminal record on cross-examination. Jordan, however, still remained unwilling to testify, preferring to challenge the sufficiency of the Government's case without exposing himself as a witness in his own behalf. The trial judge denied the severance motions.

Shuford argues that only if severance were granted and Jordan were not before the court as a defendant could he have called Jordan to testify in his behalf. Since Jordan was the only witness Shuford could present to controvert the testimony of Long, the Government's chief witness, Shuford contends that denial of the severance so prejudiced his defense as to destroy the fairness of his trial.

II

[1, 2] Primarily for reasons of economy of time in judicial administration, the general rule has evolved that persons jointly indicted should be tried together. Hall v. United States, 83 U.S.App.D.C. 166, 168 F.2d 161 (1948); Dykes v. United States, 114 U.S.App.D.C. 189, 313 F.2d 580 (1962). This rule has particular strength where, as here, one crime may be proved against two

1. When Shuford's attorney first moved for severance, he stated to the trial judge, "I know what [Jordan's] testimony would be, and it directly contradicts the indictment."

At the conclusion of the Government's case, in arguing Shuford's second motion for severance, made with leave of court, Shuford's attorney was even more explicit. He asserted, "Jordan would testify if he could be produced that there was no instruction to his knowledge as the witness Long has testified to falsify or build up any therapy lab reports"; that he had no knowledge that the Mack C. Wheat bill was false or erroneous in any respect until the criminal investigation began; and that he conspired with no one to create any false or fraudulent reports as to anyone involved.

or more defendants on a single set of facts or from the same evidence. United States v. Lebron, 222 F.2d 531 (2d Cir. 1955), cert. denied, 350 U.S. 876, 76 S.Ct. 121, 100 L.Ed. 774 (1955). Notwithstanding the need for efficiency in judicial administration, a joint trial is inappropriate if it sacrifices a defendant's right to a fundamentally fair trial. Baker v. United States, 329 F.2d 786 (10th Cir. 1964), cert. dismissed, 379 U.S. 853, 85 S.Ct. 101, 13 L.Ed.2d 56 (1964); Barton v. United States, 263 F.2d 894 (5th Cir. 1959).

[3, 4] For these reasons, although Rule 14 of the Federal Rules of Criminal Procedure places the grant or denial of a severance in the sound discretion of the trial judge, Opper v. United States, 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed. 101 (1954); United States v. Frazier, 394 F.2d 258 (4th Cir. 1968), if a "substantial degree of prejudice" springs from a joint trial, a severance is mandated. United States v. Morgan, 394 F.2d 973 (6th Cir. 1968); United States v. Burgio, 279 F.Supp. 843 (S.D.N.Y.1968). Not surprisingly, the facts peculiar to each case will determine whether sufficient prejudice exists to make the denial of a severance reversible error. Schaffer v. United States, 221 F.2d 17, 19 (5th Cir. 1955).

[5] The reported decisions support the proposition that a severance is obligatory where one defendant's case rests heavily on the exculpatory testimony of his co-defendant, willing to give such testimony but for the fear that by taking the stand in the joint trial he would jeopardize his own defense.

The leading exposition of this proposition is United States v. Echeles, 352 F.2d 892 (7th Cir. 1965). Echeles, a member of the Illinois bar, was charged, together with two others, with suborning perjury, impeding the administration of justice and conspiracy. During the joint trial, it appeared that admissions previously made by Echeles' co-defendants would be introduced into evidence against them. Echeles contended that these admissions reflected unfairly on the question of his own guilt. Moreover, he asserted, other statements previously made by his co-defendants—absolving him from any part in the wrongdoing—would be admissible only if the co-defendants repeated them on the witness stand. Echeles moved for a severance on the ground that, since the Fifth Amendment prohibited him from calling his co-defendants to testify in his behalf, his only possible protection was through the grant of a severance. The trial court denied the motion. The Seventh Circuit reversed, holding on these facts that denial of the severance so prejudiced Echeles' defense that a new trial was required.[2]

The denial of a severance prejudiced Echeles by preventing him from effectively countering one important element of the prosecution's case. Similarly, in the instant case, rejection of the severance motion prejudicially denied Shuford the opportunity to present testimony highly relevant in the resolution of the issue of guilt or innocence.

III

At the trial, Jordan's testimony was sought by Shuford in regard to a crucial fact on which the Government and Shuford were in sharp disagreement, namely the precise nature of Shuford's instructions to Long regarding billing practices. Shuford testified that he advised Long that the Laboratory could bill patients for missed appointments, but he added the admonition that these items should be handled in a manner as not to appear in later litigation or settle-

2. Other courts likewise have recognized that a severance is due where the moving defendant needs the evidence of a co-defendant; this need is unlikely to be met in a joint trial; and "there is a substantially greater likelihood" that the evidence would be forthcoming if severance were granted. United States v. Gleason, 259 F.Supp. 282 (S.D.N.Y. 1966). *See also* United States v. Addonizio, 313 F.Supp. 486 (D.C.N.J.1970).

ment negotiations.[3] Long, in contrast, testified to a version that was significantly different. He strongly suggested that Shuford was intending to use the misleading bills to enhance his clients' recoveries.[4]

Thus the situation presented to the jury was that if they credited Long, then they could find that Shuford intended to falsify the therapy bill submitted to the Government. On the other hand, if they believed Shuford, they could see him as the innocent victim of Long's failure to follow instructions. Plainly, the guilt or innocence of Shuford hinged, in large measure, on the outcome of this credibility dispute.

[6, 7] No other witness testified regarding Shuford's instructions to Long. Indeed the only other potential witness with direct knowledge of this phase of the case was Jordan who, in the absence of a severance, declined to take the stand. And the Fifth Amendment gave Jordan the right not even to be called to the stand so long as he was a defendant. United States v. Keenan, 267 F.2d 118, 126 (7th Cir. 1959), cert. denied, 361 U.S. 836, 80 S.Ct. 121, 4 L.Ed.2d 104 (1959); Poretto v. United States, 196 F.2d 392, 394 (5th Cir. 1952). This right extends so far as to forbid not only the Government, but even Shuford from calling Jordan to the stand. DeLuna v. United States, 308 F.2d 140 (5th Cir. 1952); United States v. Housing Foundation, 176 F.2d 665, 666 (3d Cir. 1949). However, if Jordan's case were severed, while he would retain the privilege against self-incrimination, as a witness, he would no longer have the right not to be *called* to the stand. Landy v. United States, 283 F.2d 303 (5th Cir. 1960). Thus, absent Jordan's willingness to waive his Fifth Amendment rights while joined as a defendant with Shuford, severance was the only way of affording Shuford any possibility of persuading Jordan to testify.

[8, 9] In a situation where the elusive quality of credibility is of such importance, the jury should have the benefit of all relevant testimony likely to shed light on the situation. We think that the denial of the severance, resulting in withholding this witness' testimony on such a critical point, so tipped the scales against Shuford that he failed to receive a fair trial. A verdict based so heavily on less than the full available testimony, where the missing testimony could, with relative ease, have been procured, should not stand.[5]

3. Shuford testified in part that:
> I told [Long] at that time that I thought it would be legally proper to bill [patients] for appointments made but not kept. However, to indicate this on any bills that he sent to me.
> * * * * *
> Of course, in presenting a claim, the only certain items that are legally recoverable, for instance, a bill for broken appointment would not be an item for damages that would be recoverable.
> * * * * *
> I told [Long] that I would not protect the payment of the bill for his broken appointments, that he would have to collect that from the patient himself.

4. Long testified in part that:
> [Shuford] told me that if the patients kept their appointments, or if they did not, that they were to be marked as if they had * * *. He said that if his clients did not keep their appointments and I did not mark them down for treatment anyway, when he went to court or to an insurance company with the claim, that the insurance company or the court or whatever would say well, if you had really been hurt, injured, or such, then you would have kept your appointments. This was his reason that he gave me * * *. Mr. Shuford told me that the larger the medical expense as a general rule the larger the settlement.

5. It is significant that, in this case, severance would only have required two relatively uncomplicated trials in place of one—not an undue burden from the viewpoint of judicial administration. Where severance would necessitate a great number of otherwise unnecessary trials or the duplication of an unusually complex trial, a district court, in the exercise of its discretion, could well consider these factors as possible counterweights to the benefits accruing to the moving defendant from severance in the particular circumstances. *See* United States v. Turner, 274 F.Supp.

IV

In its brief on appeal, the Government argues that, even if severance were granted, there is no assurance that Jordan "would be any more willing to waive his Fifth Amendment privilege in a separate trial as opposed to a joint trial." In support of this contention, we are cited to a number of cases which have, out of a similar scepticism, upheld the denial of a severance in circumstances arguably analogous to those present here: *e. g.*, United States v. Frazier, 394 F.2d 258 (4th Cir. 1968); United States v. Kilgore, 403 F.2d 627 (4th Cir. 1968), cert. denied, 394 U.S. 932, 89 S.Ct. 1204, 22 L.Ed.2d 462 (1969); United States v. Kahn, 381 F.2d 824 (7th Cir. 1967), cert. denied, 389 U.S. 1015, 88 S.Ct. 591, 19 L.Ed.2d 661 (1967); Kolod v. United States, 371 F.2d 983 (10th Cir. 1967).

[10] However, none of the cases relied upon by the Government is apposite here. In those cases, the courts simply refused to accept an appellant's unsupported assertion that, if severance had been ordered, a co-defendant would thereafter have waived his Fifth Amendment privileges and testified as promised.[6] Where, for the first time on appeal, a party raises such an argument without support in the record, an appellate court rightfully refuses to indulge in pure supposition as to what the behavior of a co-defendant would have been if the requested severance had been granted.

In the present instance, however, we are not called upon to engage in an exercise of clairvoyance. Both Shuford and Jordan indicated quite clearly to the trial judge not only that Jordan would testify if granted a severance, but also the precise content of the expected testimony and its importance.[7] This is not to say that it is beyond question that Jordan's testimony would be forthcoming after severance. The movant is not put to such stringent proof. A reasonable probability appearing that the proffered testimony would, in fact, materialize, Shuford should not have been foreclosed from the benefits of Jordan's pivotal testimony simply because that probability was not an absolute certainty. United States v. Echeles, 352 F.2d 892 (7th Cir. 1965); United States v. Gleason, 259 F.Supp. 282 (S.D.N.Y. 1966).[8]

412 (D.C.Tenn.1967); United States v. Crisona, 271 F.Supp. 150 (S.D.N.Y.1967) (Mansfield, J.). The paramount question, however, is always whether refusal of the severance impairs the fairness of the trial.

6. *See, e. g.*, United States v. Kilgore, 403 F.2d 627, 628 (4th Cir. 1968), cert. denied, 394 U.S. 932, 89 S.Ct. 1204, 22 L.Ed. 2d 462 (1969):

> It does not appear, however, that an adequate record was made below to sustain such a contention. It was nowhere demonstrated that the codefendant was willing, at a separate trial, to corroborate Morris' story * * *. We cannot simply assume that the corroborative testimony would have been forthcoming * * *.

To the same effect, *see*, United States v. Kahn, 366 F.2d 259, 263-264 (2d Cir.), cert. denied, 385 U.S. 948, 87 S.Ct. 321, 17 L.Ed.2d 226 (1966); United States v. Kahn, 381 F.2d 824 (7th Cir.), cert. denied, 389 U.S. 1015, 88 S.Ct. 591, 19 L.Ed.2d 661 (1967).

7. *See* note 1, *supra*; part III, *supra*.

8. In his dissent, Judge Haynsworth would uphold the denial of the severance because in his view the record does not reflect a sufficient likelihood that Jordan would testify at Shuford's separate trial and that, in fact, it would be against Jordan's interest so to testify.

It is true that fine judgments as to Jordan's state of mind in the event of severance are not easily made. While it would overstate the matter to say that beyond any possibility of doubt Jordan would testify as promised, it is as certain as may reasonably be expected. We differ with our dissenting brother in the interpretation of the record in this regard. Jordan's failure to repeat in detail the arguments and conclusions of Shuford's attorney, recited in the presence of Jordan and his attorney, concerning Jordan's testimony is, to our minds, highly indicative of their agreement with Shuford's analysis and that if severance were granted Jordan would in fact testify. Significant is the fact that the trial court

We reach this conclusion, aware of the vital importance of Jordan's testimony to Shuford's defense, and in light of the substantial expectation that Jordan, if severance were granted, would indeed testify as indicated. We emphasize that our approach in this case does not mandate a severance in every situation where one defendant desires the testimony of another. We hold only, on the specific facts of this case, that Jordan's testimony took on unusual importance for Shuford's defense; that this testimony could become available only by severance; and that in these circumstances it was reversible error to deny Shuford's motion.[9]

V

[11] We perceive no error in the court's overruling Jordan's motion for severance. Unlike Shuford, Jordan was not confronted with an inability to produce testimony vital to his defense. Jordan, in addition, complained that he was prejudiced by the jury argument of Shuford's attorney who said, "Mr. Shuford answered questions in a direct, forthright manner without evasion." Jordan maintains that this was an oblique reference to his failure to take the stand. We find no substance in this argument. It is true that there are decisions holding that a defendant may be entitled to a new trial because comment prejudicial to him was made in the jury's presence by a co-defendant's attorney. But these are cases in which the co-defendants were attempting to cast guilt upon each other. *See* DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962). This is not the case here; in the existing situation counsel's remark lacked the sinister implication attributed to it by Jordan.

[12-14] The other assignments of error made in Jordan's appeal are equally unsupportable. However, the peculiar circumstances of the case prevent us from affirming Jordan's conviction at this time. As the indictment and the evidence at trial show, Jordan's involvement with the substantive crime charged was that of an aider and abettor of Shuford as principal. It is an accepted rule that where the only potential principal has been acquitted, no crime has been established and the conviction of an aider and abettor cannot be sustained.[10] Shuttlesworth v. City of Birmingham, 373 U.S. 262, 83 S.Ct. 1130, 10 L.Ed. 2d 335 (1963). This rule, undeviatingly followed for generations, would be offended if, on retrial, Shuford, the principal, should be acquitted and the conviction were allowed to stand as to Jordan, the aider and abettor. We therefore vacate Jordan's conviction on the substantive count, under 18 U.S.C. §§ 2 and 1001, contingent upon Shuford's conviction, at his retrial, of the substantive offense charged.

[15, 16] The remaining count on which Jordan stands convicted charges a conspiracy between Jordan, Shuford and other unindicted individuals. It is well recognized that a conviction of one conspirator cannot stand beside the acquittal of his *only* co-conspirator, Romontio v. United States, 400 F.2d 618 (10th Cir. 1968); Lubin v. United States, 313 F.2d 419 (9th Cir. 1963). Where, however, the indictment names additional, untried co-conspirators, conviction will be affirmed notwithstanding the acquit-

was effectively apprised by both counsel of the problem presented. Severance was the obviously available solution.

9. Shuford also raises a number of alleged errors in the trial court's evidentiary rulings and challenges the sufficiency of the evidence to convict him. In view of our present holding reversing Shuford's conviction, which will require a retrial, it is unnecessary to decide these issues at the present time. They may not arise in the new trial, or if they do, the context may be different.

10. Lest we be misunderstood, we emphasize that an aider and abettor may be tried before the principal and where the commission of a crime is proved, an aider and abettor may be tried even if the principal is unknown. Feldstein v. United States, 429 F.2d 1092 (9 Cir.), cert. denied, 400 U.S. 920, 91 S.Ct. 174, 27 L.Ed. 2d 159 (1970).

tal of the co-defendant. Cross v. United States, 392 F.2d 360 (8th Cir. 1968); United States v. Gordon, 242 F.2d 122 (3rd Cir. 1957).

[17] Nevertheless, this rule cannot be invoked to affirm Jordan's conspiracy conviction. The trial court charged the jury that in order to convict on the conspiracy count it would be sufficient if they found an agreement between "the defendants and named [but unindicted] co-conspirators, or at least two of the number." It is impossible to know whether the jury found that Jordan conspired with Shuford alone or with others and it would be improper to speculate in this regard. We therefore vacate Jordan's conviction as to the conspiracy count also and grant him a new trial on that charge.

Reversed and remanded as to No. 71–1424; vacated and remanded with instructions as to No. 71–1425.

HAYNSWORTH, Chief Judge (dissenting):

There is no disagreement between my brothers and me over the general principles of law which should govern our decision. We all agree that a motion to sever is addressed to the sound discretion of the District Judge, though its denial is reviewable by the Court of Appeals, if denial deprives a trial of essential fairness. We do differ in our appraisal of the practical situation which confronted the District Judge. In my view of the record and the practical problem presented, the District Court's denial of Shuford's motion for a severance was in no sense an abuse of the sound discretion lodged in it. I must conclude, therefore, that we overreach our authority in granting a new trial and in directing a severance.

Before the commencement of the trial, Shuford made a motion for a severance. Through counsel, he stated that he intended to take the witness stand, that his testimony would be favorable to Jordan, as well as to himself, that he had expected Jordan to testify in his own defense, and that such testimony would also be favorable to Shuford. He learned, however, from Jordan's attorneys that Jordan might not testify for fear that the Government would use a prior conviction to impeach him as a witness. At that time he represented that Jordan would be willing to testify as a witness for Shuford if Jordan was not then on trial, but he anticipated some problem if the trial proceeded without a severance.

The motion was denied at that time with leave to renew it later. It was renewed later, after the close of the Government's case, at which time Shuford's attorneys had been informed that the decision had been made to withhold Jordan from the witness stand. Shuford's lawyer then represented to the court that if Jordan were severed from the trial, a mistrial being declared as to him, so that Shuford could call him as a witness in the continuation of the trial as to Shuford, Jordan would testify that he knew of no instructions to Long to falsify reports, that Jordan knew of no error or falsity in the Wheat bill until he learned of it as a result of the F.B.I.'s investigation, that he had conspired with no one to falsify reports or claims, and that when he learned that discrepancies existed he had told Mr. Long to correct them all.

There was no representation that Jordan could testify to anything providing direct corroboration for Shuford's testimony about his conversations with Long. The only representation was that Jordan would offer testimonial exculpation of himself. Such testimony from Jordan might well have provided tangential support for Shuford, but the proffer does not suggest the direct and immediate relevance indicated by the majority opinion.

Jordan and his attorneys participated in this discussion only to the extent of a statement that it was not then anticipated that Jordan would testify for the reasons previously suggested by Shuford's attorney, fear that the Government would use the earlier conviction to

impeach him and fear that his appearance as a witness might somehow bolster the Government's case against Jordan.

The District Court thereupon denied Shuford's motion, but it did so with an extension of substantial protection to Jordan should he decide to testify. The Court stated that if Jordan should testify in the joint trial it would not permit the Government to use his prior conviction as a basis for impeachment of him as a witness.

Thereafter, Jordan made a motion for a directed verdict which was denied. He then moved for a severance on the ground that a joint trial with Shuford was unfair to Jordan. He had not joined in Shuford's earlier motion to sever, however, and at no time did he indicate a willingness to have a mistrial declared as to him and to testify, without a claim of his Fifth Amendment privilege, as a witness for Shuford in a continuation of the trial as to Shuford. The record contains no disclaimer by Jordan of Shuford's lawyer's pretrial representation that Jordan would be willing to testify as a witness for Shuford if Jordan were not then on trial, but there is no affirmative representation by Jordan, or his lawyer, with respect to any phase of the matter, and, with respect to him, the situation had materially changed after the joint trial had proceeded to the close of the Government's case.

At the close of the Government's case, the only practical course open to the Court, if a severance was to be granted, was the one suggested by Shuford's counsel—that a mistrial be declared as to Jordan and the trial proceed as to Shuford.[1]

If Jordan had then been eliminated from the case on Shuford's motion under circumstances which would permit his subsequent separate trial, it seems to me highly speculative that Jordan would have been available as a witness in Shuford's defense in any meaningful sense. No longer on trial himself, Jordan would then have been without the protection of the Court's order preventing the Government's impeachment use of his prior criminal record. At that time his counsel would have been compelled to advise him that whatever he said as a witness in Shuford's defense might be used in whole or in part in his subsequent trial. If he had any concern that his testimony as a witness might bolster the Government's case against him, as was represented in Shuford's second motion for a severance, the inhibiting weight of that concern would be as heavy upon Jordan whether or not he remained jointly on trial with Shuford.

Under all these circumstances, therefore, it seems to me that the District Judge's assurance that Jordan would not be subject to impeachment by the Government on the basis of his prior record if he testified at the joint trial was the fairest and most practical protection available, and it was equally so in the interest of both Shuford and Jordan. A severance would have given neither one more protection on that score and would not tend to alleviate in any way Jordan's concern about filling in some gap in the Government's case against him.

Far from abusing his discretion, therefore, it seems to me the District Judge offered a reasonable solution to the dilemna of the defendants. Rather than depriving the trial of essential fairness, it seems markedly fair. Now we give assurance that Jordan will testify in Shuford's defense since we leave standing his conviction as an aider and abettor, conditioned upon Shuford's subsequent conviction, but neither Shuford nor Jordan had any rightful claim to that kind of advantage.[2] The District

1. It is possible that Jordan and his lawyer would have consented to this since he later sought a severance as to himself, but the record contains no affirmative evidence of it. He might well have withheld his consent in the hope of erecting a bar against his subsequent retrial.

2. Since the developments have left Jordan with no hope of avoidance of his conviction except by Shuford's acquittal, he

Court's very practical resolution of the matter was more in the interest of justice and without the taint of basic unfairness which, alone, would warrant our awarding a new trial because of a denial of a motion for severance.

The situation in *Echeles*[3] was far different from the one which confronted the District Judge here. Echeles had represented Arrington, a defendant in a narcotics case who claimed an alibi. Arrington procured the falsification of a motel registration card and supporting testimony of the motel operator and clerk in aid of the alibi defense. The falsity of this evidence was discovered before the conclusion of the narcotics case. Thereupon, Arrington admitted his participation in the perjury, but twice in open court informed the judge that Echeles, his lawyer, had had nothing to do with it.

When Echeles, Arrington and others, were being tried on the perjury charges, Arrington's admissions of perjury, made in the narcotics trial, were received in evidence, but his statements exonerating Echeles were excluded. Unlike this case, Arrington was the principal who had full knowledge of the extent, if any, to which Echeles had participated in the perjurious scheme. Twice in the narcotics case, while confessing his own participation, he had stated that Echeles had nothing to do with it, and there was no reason to suppose he would not repeat such statements if, in a severed trial, Echeles did call him as a witness in his defense. Moreover, the introduction of Arrington's admissions and the exclusion of his accompanying exoneration of Echeles inevitably had a prejudicial effect on Echeles, the lawyer representing Arrington when the perjured testimony and false registration card were introduced.

Here the situation was quite different. Shuford stood in no comparable need of Jordan's testimony, for Jordan could offer no direct contradiction of Long's testimony about the instructions he had received from Shuford. Nor did any extrajudicial admissions of Jordan come into the case which adversely affected Shuford's interest.

And, finally, the Court here, by denying the Government the right to use Jordan's prior criminal record in his cross examination, freed Jordan from all substantial reason for not taking the witness stand in the joint trial which would not be present in an equal way had Shuford's severance motion been granted. In *Echeles*, nothing was done to relieve Arrington's very understandable disinclination to testify in a joint trial; probably nothing of that sort could have been done.

This case simply cannot be blown up into the extraordinary kind of situation presented in *Echeles*. It is a frequently encountered situation routinely left to the discretion of the trial judge. The manner in which the trial judge exercised his discretion here deserves our commendation rather than our criticism.

I would affirm the convictions.

has every incentive for active cooperation to procure that acquittal, even to the point of grave incrimination of himself in the process.

3. United States v. Echeles, 7 Cir., 352 F.2d 892.

will develop a record upon which his determination will rest, with Bradley's conviction to stand or fall in accordance with his conclusions.[10]

Remanded.

James L. BYRD, Petitioner-Appellee,

v.

Louie L. WAINWRIGHT, Director, Florida Division of Corrections, Respondent-Appellant.

No. 28245.

United States Court of Appeals, Fifth Circuit.

June 24, 1970.

Proceeding of state prisoner's petition for writ of habeas corpus. The United States District Court for the Southern District of Florida at Miami, C. Clyde Atkins, J., granted the writ and appeal was taken. The Court of Appeals, Godbold, Circuit Judge, held that where petitioner, indicted for rape with six other defendants, moved before trial for severance on ground that he would require testimony of certain of the codefendants whose confessions raised strong doubts as to his guilt, and other defense counsel and prosecutor had made known strong likelihood that at least some of the codefendants would plead guilty, denial of severance denied due process.

Affirmed.

1. Habeas Corpus ⇐92(1)

Federal habeas corpus court, in determining whether denial of severance constituted violation of due process, will examine matters known to the trial judge at the time he ruled on motion to sever.

2. Criminal Law ⇐622(1), 1148

Motion for separate trial is addressed to discretion of trial court, reviewable for abuse of discretion.

3. Criminal Law ⇐622(1)

Trial court is not to be found in error for denial of motion for separate trial on basis of matters that became known to him later or because of events occurring at trial.

4. Criminal Law ⇐622(1)

There is no duty to sever trials merely because potentially exculpatory testimony of a codefendant exists; the defendant-movant must desire to use it.

5. Criminal Law ⇐622(3)

Movant seeking severance in order to have opportunity to elicit codefendant's testimony must make clear showing of what codefendant would testify to and that testimony would be exculpatory in effect. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

6. Criminal Law ⇐528

Use of confessions of defendants whose trials have been concluded, at subsequent trial for exculpatory purposes, would not violate Miranda principles.

7. Criminal Law ⇐412.1(1)

Under Florida law, declaration against penal interest by the accused is admissible if made voluntarily.

8. Criminal Law ⇐622(1)

In opposition to defendant's motion for severance, government may inquire into likelihood of codefendant's testifying and court is not required to sever where possibility of codefendant's testifying is merely colorable or there is no showing that it is anything more than a gleam of possibility in the defendant's eye.

9. Constitutional Law ⇐268(2)

Where petitioner, indicted for rape with six other defendants, moved before trial for severance on ground that he would require testimony of certain of the codefendants whose confessions raised strong doubts as to petitioner's guilt, and other defense counsel and prosecutor had made known strong likelihood that at least some of the codefendants would plead guilty, denial of severance denied due process.

10. *See* House v. United States, 134 U.S.App.D.C. 10, 411 F.2d 725, 728 (1969).

10. Criminal Law ⇐621(2)

Sequence in which trials of coindictees are to be held is in the discretion of the court.

Earl Faircloth, Atty. Gen. of Florida, Tallahassee, Fla. Jesse J. McCrary, Jr., Asst. Atty. Gen., Miami, Fla., for respondent-appellant.

Gerald F. Richman, Miami Fla., for petitioner-appellee.

Before GODBOLD, DYER and MORGAN, Circuit Judges.

GODBOLD, Circuit Judge:

This is an appeal from an order of the District Court granting Byrd's petition for a writ of habeas corpus. We affirm.

On April 6, 1966 Byrd was indicted in Florida state court for rape, along with six other defendants. In May he moved for a severance, stating that his defense would vary from that of the codefendants, that he would require the testimony of certain of the codefendants and could not at any stage of the trial expect or compel any of them to be witnesses in his behalf, and that he could not resolve his dilemma unless the codefendants were tried separately from and earlier than he.

The motion was denied by an order entered immediately before trial in September. Byrd was convicted, along with three of the other defendants, and was given a life sentence. Two defendants pleaded guilty during the trial. One defendant was acquitted on a directed verdict. He exhausted his state remedies. Following an evidentiary hearing the federal District Court granted habeas on the ground that the denial of a severance was a violation of due process, relying upon United States v. Echeles, 352 F.2d 892 (7th Cir. 1965) and DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962).

[1, 2] We examine the matters known to the trial judge at the time he ruled on the motion to sever, recognizing that a motion for a separate trial is addressed to the discretion of the court, reviewable for abuse of discretion, Sosa v. State, 215 So.2d 736 (Fla. 1968), Smith v. United States, 385 F.2d 34 (5th Cir. 1967), and bearing in mind that in cases of this nature safeguarding the rights of defendants and the interests of the courts in efficient and expeditious administration of criminal justice is necessarily approached on a case by case basis. *Echeles, supra*, 352 F.2d at 897.

All seven defendants were charged with the mass rape of the same young woman on a single occasion. The other six defendants confessed, some only to presence at the scene, others to actual participation in the rape. Five confessions purported to name all persons present at the commission of the crime; only one of these five named Byrd. Another of the five affirmatively stated that Byrd was not present. The sixth confession implicated Byrd as an active participant in the crime.

Motions were filed to suppress the confessions for failure to give *Miranda* warnings, and on July 26 the court held a hearing on those and other pending motions. The confessions were before the court, and arguments were made concerning them by several of the counsel for various of the defendants. Byrd's counsel was present and argued his pending motion for severance. He pointed out that Byrd was the only nonconfessing defendant, and that his major defense would be alibi. He noted the possibility that the other defendants might not take the stand, and that he could not require them to testify or even call them to the stand as witnesses. *E. g.*, DeLuna v. United States, *supra*.

As to the one confession which incriminated Byrd (that of Parks), Byrd's counsel told the court that he had talked to Parks who had told him there had been confusion in the taking of his confession (arising from the fact that police were also investigating a different incident, near in time, at which some of the defendants had been present) and, in substance, that Byrd had not been present at the rape scene. Byrd's coun-

sel told the court that he had heard conversations among the other defendants to the effect Byrd was not present at the rape, and that the other defendants had told him their testimony would be that Byrd was not with them on the date of the crime.

The court set the motion to sever for further hearing. Subsequently he suppressed the six confessions. Although the order of suppression is not in the record, colloquy with counsel, which is in the record, indicates that it was based on lack of full compliance with *Miranda*.

On September 7 the court held the further hearing on the motions of Byrd (and others) for severance. Counsel for Byrd, and the prosecutor, pointed out the likelihood that some of the codefendants might plead guilty. Counsel for defendant Chisholm (who pleaded guilty at trial) reported he was considering the possibility of a guilty plea. All the motions to sever were denied.

[3] In the interest of full understanding we note events which took place at the trial. In so doing, we recognize that we are considering the judge's exercise of discretion at the pre-trial stage when he denied the motion, and that he is not to be found in error for that denial on the basis of matters that became known to him later or events occurring at the trial.[1] On conclusion of the state's case, a verdict of acquittal was directed as to defendant Marshall. Byrd was the only defendant who took the stand. He denied being present at the scene. After his testimony all defendants rested. Two more defendants, Davis and Chisholm, then changed their pleas to guilty. The four remaining defendants, including Byrd, were found guilty.

This case is similar to *Echeles, supra*, relied on by the court below. There, in the course of a criminal trial, defendant Arrington admitted on the stand that he had engaged in a scheme to present falsified documents and perjured testimony in his defense. In his testimony, and in subsequent statements in open court, he exculpated Echeles, his attorney, of participation. Arrington was indicted for perjury, and Arrington and Echeles (and others) for procuring the perjury, conspiracy, and like offenses.

Echeles faced a prospect, which Byrd did not face, of a trial in which Arrington's incriminating admissions could be introduced into evidence against Arrington and would in some degree prejudice Echeles. But his second problem was the same as Byrd's, inability to get into evidence statements tending to exculpate him made by his codefendant. The 7th Circuit held that the trial court erred in denying a severance, saying:

> At this juncture, we hold merely that, having knowledge of Arrington's record testimony protesting Echeles' innocence, and considering the obvious importance of such testimony to Echeles, it was error to deny the motion for a separate trial. It should have been clear at the outset that a fair trial for Echeles necessitated providing him the *opportunity* of getting the Arrington evidence before the jury, regardless of how we might regard the credibility of that witness or the weight of his testimony. (Emphasis in original.)

352 F.2d at 898.

When a trial court is presented with a motion to sever based on the desire to offer exculpatory testimony of a codefendant, there are several areas of inquiry, sometimes overlapping, which the court well may pursue for guidance in determining what it should do:

(1) Does the movant intend or desire to have the codefendant testify? How must his intent be made known to the court, and to what extent must the court be satisfied that it is bona fide?

1. This is not to say that there may not be error for denial of a motion made or renewed at trial, or, in a sufficiently extreme case of prejudice, for failure of the trial judge on his own motion to reopen the question of severance where, after denial, the circumstances have sufficiently changed. In this instance, the motion was not reviewed at trial.

(2) Will the projected testimony of the codefendant be exculpatory in nature, and how significant must the effect be? How does the defendant show the nature of the projected testimony and its significance?[2] Must he in some way validate the proposed testimony so as to give it some stamp of verity.

(3) To what extent, and in what manner, must it be shown that if severance is granted there is likelihood that the codefendant will testify?

(4) What are the demands of effective judicial administration and economy of judicial effort? Related to this is the matter of timeliness in raising the question of severance.[3]

(5) If a joint trial is held, how great is the probability that a codefendant will plead guilty at or immediately before trial and thereby prejudice the defendant, either by cross-defendant prejudice or by surprise as it relates to trial preparation?

[4] There is no duty to sever merely because potentially exculpatory testimony of a codefendant exists. The defendant-movant must desire to use it. Brown v. United States, 126 U.S.App.D.C. 134, 375 F.2d 310, 317, cert. denied, 388 U.S. 915, 87 S.Ct. 2133, 18 L.Ed.2d 1359 (1967). The desire of Byrd was plain and was asserted earnestly and repetitiously by his counsel, with full exploration of reasons. We reject the underlying implication of the state that as a matter of law there must be either formal testimony of defense counsel under oath, or an affidavit from him, stating his intent to use the codefendant's testimony. In this instance the transcripts of the July and September hearings reveal not merely argument but extensive dialogue and exchange between attorneys and the court on many aspects of the case, in an atmosphere of apparent candor and trust. It is clear that the court treated as trustworthy the statements of the numerous counsel, as officers of the court.[4]

We turn to the second area of inquiry, the exculpatory nature, and the significance, of the codefendant's testimony and the showing of those factors. This might be restated in terms of the extent of potential prejudice to the defendant if the defendant is tried without the opportunity to elicit the codefendant's testimony.[5]

[5] It must be shown that the testimony would be exculpatory in effect. Smith v. United States, *supra*, 385 F.2d at 38. The movant must make a clear showing of what the codefendant would testify to. United States v. Kaufman, 291 F.Supp. 451 (S.D.N.Y. 1968). Such a showing was made in this case. The confessions were before the court at the July hearing and their contents discussed. Again, we reject overly-formalistic rules. It is not necessary, as the state implies, that the potential testimony of the codefendant bear the imprimatur of having been given previously in a judicial proceeding under oath. In United States v. Gleason, 259 F.Supp. 282 (S.D.N.Y. 1966), severance was granted where "there was no dispute between the government and the moving defendant that a codefendant had in the

2. On the matter of effectual procedures for getting before the judge, at the pre-trial stage, the nature of the codefendant's testimony, in the federal system Rule 14 provides that the court may require the government to deliver for *in camera* inspection any statements or confessions which the government intends to introduce in evidence.

3. In Kolod v. United States, 371 F.2d 983 (10th Cir. 1967), the motion was made at mid-trial, and the principal ground for denial was failure to timely present before trial. Compare United States v. Leighton, 265 F.Supp. 27 (S.D.N.Y.1967) describing some of the frustrations of dealing with the motion before trial.

4. United States v. Gleason, 259 F.Supp. 282 (S.D.N.Y.1966) is an example of handling the motion, and the showings of underlying factors, by affidavits from both sides.

5. In the federal system, Rule 14 Fed.R. Crim.P. is expressly in terms of prejudice to the defendant.

past made written and oral exculpatory statements concerning the movant." 259 F.Supp. at 283.

In *Echeles* the court considered Arrington's testimony to be of "obvious importance." So it is in the instant case. Perhaps the most critical fact known to the trial judge when acting on Byrd's motion was the inconsistencies of the confessions, which raised strong doubts as to Byrd's guilt. One defendant exculpated him. One (Parks) named him as a participant, but counsel represented that Parks would testify that Byrd was shown as present through error. Four defendants named various persons as being present, but none included Byrd. The state urges that "no one has a constitutional right to be tried last." That is not the problem. Here the one person who had a unique interest in being tried separately and later was Byrd. Also, this was a shocking crime of violence, committed in the nighttime, with at the most two eye witnesses to attempt to identify seven Negro youths. (As it turned out, identification was by one witness, the victim's date—the young woman could identify no one.)

We do not consider the last sentence of the above-quoted language from *Echeles* to establish a principle that the judge presented with a motion to sever may not make inquiry into credibility or weight of the potential testimony of the codefendant but to only refer to the testimony of Arrington under the circumstances of that case. Credibility is for the jury, but the judge is not required to sever on patent fabrications. If the testimony is purely cumulative, or of negligible weight or probative value, the court is not required to sever. The requirement is not a trial which guarantees the defendant every item of evidence he would like to offer but one which meets constitutional standards of due process.

[6, 7] In addition to making the other defendants unavailable, the joint trial affected Byrd adversely in another respect. So long as he was tried with others he had no way to introduce the confessions they had given, since they were taken in violation of *Miranda* and were inadmissible against them. *Cf.* Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). But at a separate trial he would have at least a possibility of getting the confessions themselves into evidence and enjoying their exculpatory effect even though the codefendants claimed the privilege against self-incrimination. The confessions, since not being used to incriminate anyone on trial, would not violate *Miranda*. The record before us does not show that the statements were made involuntarily although preceded by an incomplete *Miranda* warning. Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966). A declaration against penal interest by the accused is admissible in Florida if made voluntarily. Williams v. State, 74 So.2d 797 (Fla. 1954). As to the possible admissibility, as an exception to the hearsay rule, of a statement against penal interest by one not a party, containing matter exculpatory of the accused, when the testimony of the declarant is unavailable, see V Wigmore on Evidence, §§ 1456–77 pp. 259–290. The parties have not briefed the Florida law on this point, and it is not necessary that we develop the matter further than to refer to a possibility of admissibility.

[8] A third inquiry may be into the likelihood that the codefendant will be willing to testify if the defendant is tried separately. *Echeles* said this:

> With regard to the question of whether or not Arrington would claim the privilege if he were called as a witness during a trial of Echeles alone —a trial held subsequent to his own —we can only say that such question was not properly the Government's to interpose. Speculation about what Arrington might do at a later Echeles trial undoubtedly would be a matter of some concern to Echeles, but he should not be foreclosed of the possibility that Arrington would testify in his behalf merely because that eventuality

was not a certainty. [Citations omitted.] Moreover, it would in fact seem more likely than not that Arrington would have testified for Echeles for the reason that three times previously, in open court, Arrington had voluntarily exculpated Echeles, apparently contrary to his own penal interest.

352 F.2d at 898. We do not agree that likelihood is an inquiry that the government may not even make. The court is not required to sever where the possibility of the codefendant's testifying is merely colorable or there is no showing that it is anything more than a gleam of possibility in the defendant's eye. "The unsupported possibility that such testimony [exculpatory testimony of a codefendant] might be forthcoming does not make the denial of a motion for severance erroneous." United States v. Kahn, 381 F.2d 824, 841 (7th Cir. 1967). *Accord*, Tillman v. United States, 406 F.2d 930, 936 (5th Cir. 1969)[6] In this circuit we have referred to the codefendant's being "more likely to testify were he [the movant] tried separately." Smith v. United States, *supra*, 385 F.2d at 38. In United States v. Gleason, 259 F.Supp. 282, 284 (S.D.N.Y. 1966) the court reached this conclusion:

> It is enough to say that Karp [the movant] has shown persuasive ground for the claim that she needs Pitkin's [the codefendant's] evidence; that the need must almost certainly go unsatisfied in a joint trial; and that there is substantially greater likelihood of her using him if they are tried separately.

[9, 10] Byrd asked not only a separate but a later trial, and, as pointed out previously, he was the one defendant with a unique interest in being tried later than the others. This is not a case like Gorin v. United States, 313 F.2d 641 (1st Cir. 1963) in which the court may indulge in an assumption that a codefendant would be no more willing to waive his privilege against self-incrimination when called as a witness in a separate trial than he would be willing to insist upon his privilege as a defendant not to take the stand. The sequence in which trials would be held is in the discretion of the court.[7] Other defense counsel, and the prosecutor, had made known the strong likelihood that at least some of the codefendants would plead guilty.[8]

Bearing on the likelihood issue is the question whether codefendants pleading guilty would lose their right to claim the privilege against self-incrimination at a later trial of the defendant. See Namet v. United States, 373 U.S. 179, 83 S.Ct. 1151, 10 L.Ed.2d 278 (1963); Coile v. United States, 100 F.2d 806 (5th Cir. 1939); Annot. 9 A.L.R.3d 990 (1966). In this instance the question is complicated by the other incident, known to the judge, at which some of the defendants appeared to have been present, and for which some of them had been charged, and the possibility that one testifying about the rape might tend to incriminate himself as to the other incident. These are questions we need not answer. The inquiry is not as to certainty whether the codefendants will or will not testify but the likelihood.

Our disposition of the case makes it unnecessary for us to consider whether the court, in its continuing duty at all stages of the trial to grant a severance

6. See also United States v. Kahn, 366 F.2d 259, 261 (2d Cir. 1966):
> "This possibility [of exculpatory testimony by the codefendant at a separate trial], standing by itself, did not make the denial of a motion for severance erroneous, (citations omitted), at least in the absence of anything in the record indicating that the codefendant would have given exculpatory evidence."

7. See United States v. Sanders, 266 F. Supp. 615 (W.D.La.1967), in which the court granted severances to two defendants and established an order of trial consisting of four separate trials, expressly reserving the right to change the sequence and to reconsolidate if appropriate.

8. In a case, such as the present one, where the exculpatory testimony is in such form that it may be independently admissible as an exception to the hearsay rule, inquiry into likelihood that the codefendant will testify may become academic.

if prejudice appears, Schaffer v. United States, 362 U.S. 511, 80 S.Ct. 945 4 L. Ed.2d 921 (1960), was required to declare a mistrial when a directed verdict was entered as to Marshall, or later, when guilty pleas were entered by Davis and Chisholm.

Affirmed.

William G. SULLIVAN, Petitioner, Appellant,

v.

Palmer C. SCAFATI, Respondent, Appellee.

No. 7563.

United States Court of Appeals, First Circuit.

Heard June 4, 1970.

Decided June 30, 1970.

Habeas corpus proceeding by state prisoner. The United States District Court for the District of Massachusetts, Francis J. W. Ford, J., denied the writ and petitioner appealed. The Court of Appeals, Coffin, Circuit Judge, held, inter alia, that where language of instruction did not impose burden of proof on defendant, cautionary instruction that alibi evidence was to be subjected to rigid scrutiny was not erroneous even though "rigid scrutiny" language was supplemented by reference to frequency with which alibi evidence was attended by contrivance, subornation and perjury.

Affirmed.

1. Habeas Corpus ⇐45.3(8)

Arguments which were not made to state court but which were merely supportive of claims put in issue did not present new issues precluding consideration by federal habeas court.

2. Criminal Law ⇐775(3)

Where language of instruction did not impose burden of proof on defendant, cautionary instruction that alibi evidence was to be subjected to rigid scrutiny was not erroneous even though "rigid scrutiny" language was supplemented by reference to frequency with which alibi evidence was attended by contrivance, subornation and perjury.

3. Criminal Law ⇐778(5)

Instruction to effect that alibi "attempts to prove affirmatively" was not a cloaked way of shifting prosecution's burden of proof to defendant.

4. Stipulations ⇐14(7)

Pretrial stipulation in joint trial that Commonwealth would not introduce confessions or admissions of either defendant and prosecutor's statement, in response to motion for copies of statements, that he had no statement of defendant did not preclude admission of police officers' testimony as to observations of defendant trying to avoid scrutiny by eyewitness and as to overhearing remarks made by defendant.

5. Indictment and Information ⇐88

Grand jury's failure to specify precise reason for its belief that accused possessed requisite state of mind was not error.

6. Criminal Law ⇐787(2)

Court's instruction that jury may not draw inference from failure of defendant, who did not object to instruction, to testify was not erroneous.

7. Witnesses ⇐266

Rulings foreclosing cross-examination of police officer who had not been shown to have testified before grand jury as to whether his trial testimony had been given to such jury, and preventing interrogation of homicide victim's daughter from hospital report did not constitute unconstitutional denial of cross-examination.

David Berman, Medford, Mass., with whom John F. Zamparelli, Victor J. Garo, Arthur E. Robbins, and Zamparelli