UNITED STATES of America,
Plaintiff-Appellee,

v.

Justo Fernan MARTINEZ et al.,
Defendants-Appellants.

No. 72-3133.

United States Court of Appeals,
Fifth Circuit.

Oct. 12, 1973.

Defendants were convicted before the United States District Court for the Southern District of Florida, William O. Mehrtens, J., of conspiracy to import marijuana, one of such three defendants was also convicted of actual importation, possession with intent to distribute and with distribution of marijuana and another one of such defendants was convicted of actual importation, possession with intent to distribute and with assaulting a federal officer, and they appealed. The Court of Appeals, Simpson, Circuit Judge, held that rejection of guilty plea of one of defendants on ground that postarrest statement might have been coerced was not for "good reason" and was reversible error, that refusal to grant severance to another defendant was prejudicial error and that evidence that third defendant had knowledge of existence of conspiracy was not sufficient to make out a submissible case.

Vacated and set aside in part and remanded with directions; reversed for new trial in part; and reversed with directions to dismiss in part.

1. Criminal Law ⇐662(8)
Jury ⇐29(4)

Entry of plea of guilty does not waive right to trial by jury and right to confront one's accusers in open court.

2. Criminal Law ⇐273(2)

Accused has no absolute right to have his guilty plea accepted by court. Fed.Rules Crim.Proc. rule 11, 18 U.S.C.A.

3. Criminal Law ⇐273(4)

Federal judge must refuse to accept guilty plea where requirements of rule setting forth prerequisites for acceptance of guilty plea cannot be met. Fed.Rules Crim.Proc. rule 11, 18 U.S.C.A.

4. Criminal Law ⇐273(4)

Decision to accept or reject guilty plea, once requirements of rules setting forth prerequisites for acceptance of plea have been satisfied, is committed to sound judicial discretion of trial judge. Fed.Rules Crim.Proc. rule 11, 18 U.S.C.A.

5. Criminal Law ⇐273(4)

Purposes of rule setting forth prerequisites for acceptance of guilty plea are to enable trial judge to determine whether such a plea is voluntary and to expedite disposition of postconviction attacks on judgments based on guilty pleas by providing complete record of basis on which plea was accepted. Fed.Rules Crim.Proc. rule 11, 18 U.S.C.A.

6. Criminal Law ⇐273(4)

Rule setting forth prerequisites for acceptance of guilty plea was not designed to discourage acceptance of guilty pleas merely because trial judge is uneasy or apprehensive over possibility of a subsequent collateral attack. Fed.Rules Crim.Proc. rule 11, 18 U.S.C.A.

7. Criminal Law ⇐273.1(1)

It is not erroneous to find that guilty plea is knowingly and voluntarily entered even in face of accused's unwillingness or inability to admit guilt where compelling reasons are present for entering guilty plea, as long as there exists substantial evidence of accused's guilt. Fed.Rules Crim.Proc. rule 11, 18 U.S.C.A.

8. Criminal Law ⇐273.1(1)

Voluntariness requirement as prerequisite for acceptance of guilty plea applies to both state and federal prosecution. Fed.Rules Crim.Proc. rule 11, 18 U.S.C.A.

9. Criminal Law ⇐273.1(1)

Requirements for voluntariness of guilty plea in federal proceedings cannot

be less strict than federal habeas corpus standards applied to state prosecutions. Fed.Rules Crim.Proc. rule 11, 18 U.S.C.A.

10. Criminal Law ⇐273.1(1)

Question whether guilty plea is voluntarily entered is determined, not by whether there are external forces inducing a defendant to plead guilty, but instead by a determination as to whether such forces are constitutionally acceptable. Fed.Rules Crim.Proc. rule 11, 18 U.S.C.A.

11. Criminal Law ⇐273(4)

If trial judge is convinced by record before him that a guilty plea is not coerced, a further showing that plea is knowingly entered and that there exists sufficient evidence of guilt will satisfy requirements of rule setting forth prerequisites for acceptance of guilty plea. Fed.Rules Crim.Proc. rule 11, 18 U.S.C.A.

12. Criminal Law ⇐273.1(1), 1166(3)

Where accused freely admitted his guilt of charges of importing marijuana and government had ample evidence, independent of accused's postarrest statement, to convict accused, rejection of accused's guilty plea on ground that statement might have been coerced was not for "good reason" and was reversible error. Fed.Rules Crim.Proc. rule 11, 18 U.S.C.A.; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1002(a), 21 U.S.C.A. § 952(a).

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

13. Criminal Law ⇐622(1)

Granting of motion for severance is matter within discretion of trial judge. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

14. Criminal Law ⇐1163(2)

When accused challenges refusal to grant motion to sever, he shoulders burden of making clear showing that prejudice resulting in the denial of a fair trial flowed from such refusal. Fed. Rules Crim.Proc. rule 14, 18 U.S.C.A.

15. Criminal Law ⇐622(3), 1166(6)

In criminal prosecution in which crucial question as to certain defendant was whether he had knowledge of plan to import marijuana or that package taken by him from vessel and placed on dock contained marijuana, refusal to grant severance whereupon defendant assertedly would have been able to obtain exculpatory testimony of codefendant, who was only person, other than defendant, to rebut government's circumstantial evidence of defendant's knowledge of such acts was prejudicial error. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.; 18 U.S.C.A. §§ 2, 371; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a), (a)(1), 1002(a), 21 U.S.C.A. §§ 841(a), (a)(1), 952(a).

16. Criminal Law ⇐339

Counsel for accused was entitled prior to retrial on charges of conspiracy to import, importation of, possession with intent to distribute and distribution of marijuana, to present evidence in regard to whether customs agents' identification of accused was made as fruit of suppressed postarrest statement by accused or had an independent basis. 18 U.S.C.A. §§ 2, 371; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a), (a)(1), 1002(a), 21 U.S.C.A. §§ 841(a), (a)(1), 952(a).

17. Criminal Law ⇐753.2(1, 4)

In considering motion for judgment of acquittal, evidence must be considered in light most favorable to government, together with all inferences which may reasonably be drawn from the facts; determining inquiry being whether there is substantial evidence on which jury might reasonably base finding that accused is guilty beyond reasonable doubt.

18. Criminal Law ⇐1144.13(3), 1159.6

Court of Appeals function on appeal is to consider evidence in light most favorable to government and to decide, in circumstantial evidence cases, whether reasonable minds could conclude that evidence was inconsistent with hypothesis of accused's innocence.

19. Conspiracy ⇐47(1)

Mere association, without more, does not suffice to demonstrate knowledge of conspiracy.

20. Conspiracy ⇐48.1(4)

Evidence that accused had knowledge of existence of conspiracy to import marijuana was not sufficient to make out a submissible case on such charge. 18 U.S.C.A. § 371.

Jack V. Eskenazi, Federal Public Defender, court-appointed, T. Sakowitz, Asst. Federal Public Defender, Miami, Fla., for Martinez and Huila.

Max P. Engel, David B. Javits, Miami, Fla., for Soris.

Robert W. Rust, U. S. Atty., J. Daniel Ennis, Bruce E. Wagner, Asst. U. S. Attys., Miami, Fla. for plaintiff-appellee.

Before BELL, GOLDBERG and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge:

We review on this appeal the judgments of conviction and sentence following jury verdicts of guilty of Justo Fernan Martinez, Oswaldo Huila, and Lorenzo Padilla-Soris. The charges arose from the importation into the United States of approximately 28 pounds of marijuana. We vacate or reverse the convictions of all three appellants, and remand for further proceedings in the district court.

The Facts

On August 16, 1972, agents of the United States Customs Service began surveillance of the normal docking berth on the Miami River of the M/V MONTEGO, which was due to arrive that evening from Turbo, Colombia. From vantage points approximately 100 yards away from the dock the agents observed the MONTEGO dock at approximately 9:00 P.M. that evening. The surveillance continued into the early morning hours of August 17th. Shortly after 1:00 A.M. the agents using binoculars observed someone leave the ship with a package under his arm. This person, identified later as the defendant-appellant Huila, walked alongside the ship toward the bow, where he placed the package on the wharf and returned to the ship. A short time later Huila came back and moved the package to a new location a few feet away and once more returned to the ship.

Two of the customs agents at this time moved to within a few yards of the position of the package and resumed their surveillance. About 25 minutes later the agents noticed the brakelights of an automobile near a warehouse immediately adjacent to the wharf. They saw a person who was identified later as the defendant-appellant Martinez, walk from the direction of the warehouse toward the place where Huila had last left the package. Martinez picked up the package and started back toward the parked automobile near the warehouse. The two customs agents watching from near the package then emerged and attempted to arrest Martinez, after identifying themselves by stating in English that they were United States Customs agents.

Martinez reacted by swinging the package in a wide arc in the direction of the agents. He either released the package or lost his grip on it and it sailed into the Miami River. Martinez was subdued after a short scuffle, whereupon one of the agents dove into the river and retrieved the package which Martinez had thrown.[1]

While these events were taking place, another customs agent approached the car in which Martinez had ridden to the vicinity of the warehouse. A third man, later identified as the defendant-appel-

1. The testimony was to the effect that the customs agent took four separate packages from the river, the implication being that the original package, possibly no more than a cardboard box, disintegrated in the water leaving the four individual packages retrieved by the agent from the water.

lant Padilla-Soris, had remained in the automobile behind the wheel. The customs agent attempted to identify himself in English to Padilla-Soris.[2] Padilla-Soris started the car at once and drove away. Still another agent, waiting in a government vehicle at the entrance to the dock area pursued Padilla. Speaking Spanish and using a loud speaker he identified himself as a customs agent. Padilla-Soris then stopped his vehicle at the side of the road and surrendered to the agent.

Martinez and Padilla-Soris were taken to customs headquarters for interrogation. At the same time the substance contained in the packages retrieved from the water was tested. It was determined that the substance was marijuana.

At the outset of the questioning, Martinez signed a waiver of his *Miranda* rights[3] and proceeded to give a statement to the customs officials. In the course of his statement Martinez furnished the name of the man who had off-loaded the marijuana from the MONTEGO as Huila.

For reasons not entirely clear from the testimony Huila was not arrested at the same time that Martinez and Padilla-Soris were taken into custody, but some time later was arrested and taken to customs headquarters for interrogation. Whether Huila was arrested before or after he had been identified by Martinez as the person depositing the marijuana on the dock is not clear from the testimony.

The grand jury indicted Martinez, Huila, and Padilla-Soris charging: (i) Count I: conspiracy to import, (ii) Count II, actual importation of, and Count IV, possession with intent to distribute a Schedule I controlled substance, to wit the 28 pounds of marijuana.[4] Additionally Count III charged Huila with distribution of marijuana[5] and Count V charged Martinez with assaulting a federal officer.[6]

The Trial

[1] The trial occurred on September 21 and 22, 1972. Prior to the commencement of the trial, Martinez, through his attorney, tendered a plea of guilty to Count II of the indictment, which charged importation of the marijuana. The prosecution apparently had agreed in exchange to dismiss the remaining charges against Martinez. The trial judge, in compliance with Rule 11, F.R.Crim.P., questioned Martinez to determine whether his plea was knowingly and voluntarily entered. In the course of this inquiry, Martinez asserted that his waiver of his *Miranda* rights during post-arrest interrogation had been obtained in exchange for a promise by customs agents that "nothing would happen to [him]." This prompted the trial judge to refuse to accept Martinez' plea of guilty, on the apparent ground that the plea might not have been voluntarily entered.[7] Counsel for Martinez attempt-

2. It was later ascertained that Padilla spoke only Spanish.

3. Miranda v. Arizona, 1966, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

4. In violation of: (i) Title 18 U.S.C. Sec. 371, (ii) Title 21 U.S.C. Sec. 952(a) and Title 18 U.S.C. Sec. 2, and (iii) Title 21 U.S.C. Sec. 841(a) and Title 18 U.S.C. Sec. 2.

5. In violation of Title 21 U.S.C. Sec. 841 (a)(1).

6. In violation of Title 18 U.S.C. Sec. 111.

7. In discussing his refusal to accept the guilty plea the trial judge stated:

"I could not, based on what Martinez has told me make a finding which I have to find that he freely and voluntarily, without the waiver of any constitutional rights, pled guilty. That is a finding I have to make and I can't do it on the basis of what he has told me."

Counsel for Martinez correctly points out to us that this is not a precise statement of the requirements under Rule 11, F.R.Crim.P., for acceptance of a guilty plea. The entry of a plea of guilty does indeed waive a number of constitutional rights, among them the right to trial by jury and the right to confront one's accusers in open court. McCarthy v. United States, 1969, 394 U.S. 459, 466, 89 S.Ct. 1166, 1171, 22 L.Ed.2d 418, 425. Examination of the entire colloquy between Martinez' counsel and the judge indicates, how-

ed to persuade the district judge that, independently of the coerced statement, the government possessed sufficient evidence upon which to convict him. Further, Martinez had admitted his guilt of the charge of importation. The judge however, persisted in refusing to accept Martinez' plea under the circumstances.

In view of this ruling, counsel for Padilla-Soris at this juncture renewed his motion for severance, earlier denied with other pre-trial motions. He was anxious to have Martinez available to testify for Padilla-Soris, supporting his defense as Martinez had offered to do earlier. The availability of this testimony for Padilla-Soris depended upon Martinez' pleading guilty and not being on trial when called to the stand. It appeared certain that Martinez would refuse to take the stand at a joint trial with Padilla-Soris and Huila. The court once more denied the motion for severance.

Martinez' counsel, a member of the Public Defender's staff, was court-appointed for both Martinez and Huila. He now moved for severance as to Huila, protesting that failure to accept Martinez' tendered guilty plea would prejudice either Huila's or Martinez' rights to a fair trial if his clients were tried jointly.[8] The court denied this motion and the trial proceeded against all three defendants.

As the government approached the close of its case, it became apparent that Martinez was given an incomplete and unacceptable statement of his Miranda rights by the Spanish speaking agent who interrogated him after arrest. It developed that this customs agent had told Martinez that the trial judge would be informed as to whether he waived his right to counsel at the interrogation. This left an obvious implication that his failure to waive right to counsel would be construed as unwillingness to cooperate to his detriment at trial. It was also shown that Martinez was told that the charge against him was smuggling marijuana, without mention of a possible charge of assaulting a federal officer. On the basis of these disclosures the trial judge ruled that the statement was inadmissible as coerced.

With the resolution of the problem of the coerced statement, Martinez' counsel once more tendered Martinez' plea of guilty to Count II of the indictment. The judge at this point appeared more favorably disposed toward acceptance of the plea and questioned the government as to its position. Government counsel stated that the offer to drop all charges against Martinez other than Count II in exchange for a plea of guilty to that count was rescinded, since the government had by then undertaken the burden of proving all of the counts. With the matter of the guilty plea thus disposed of, the court-appointed counsel for Martinez and Huila again moved that Huila's trial be severed so Martinez' exculpatory testimony could be available to Huila. Again the severance motion was denied and the government rested its case in chief.

ever, that the judge was fully aware of the requirements for acceptance of Martinez' guilty plea and some of the problems posed by the existence of a possibly coerced statement. Later in the colloquy he stated:

"That [the possibly coerced statement] would be a fine ground for a [collateral attack on the judgment under 28 U.S.C. Sec.] 2255 where he would say, 'Because of that confession I went ahead and admitted I was guilty, because they could introduce it against me, and I was induced, by virtue of a confession which was wrongfully extracted from me.'"

8. Counsel asserted that as Huila's attorney he would expect to call Martinez as a witness for Huila. But Martinez' interests would best be served by staying off the witness stand. While the joint counsel for Martinez and Huila did not move for a severance in specific terms, we so treat it and think the trial judge should have done likewise on the basis of the language employed: "I feel that for the two of them to go to trial together, I would be in a possible position of conflict." As an alternative, the attorney urged the court to appoint another counsel to represent one of the two defendants. This latter request was denied by the court.

At this time, the court granted counsel's motion on behalf of Padilla-Soris for judgment of acquittal as to Counts II and IV of the indictment. The court refused, however, to direct acquittal of Padilla of the conspiracy charge. The trial then proceeded with the presentation of evidence by the defendants.

The case was submitted to the jury and all defendants were found guilty as charged of the counts remaining for trial. Judgments of conviction and sentence ensued, followed by appeals by each defendant, asserting various grounds of error in the trial below, which we now consider.

Acceptance of Martinez' Guilty Plea

[2, 3] Martinez raises a single point by his appeal: that error was committed by the trial judge when he refused to accept his tendered plea of guilty to Count II of the indictment against him. Consideration of this question must start with the well-established proposition that a "criminal defendant has [no] absolute right to have his guilty plea accepted by the court." Lynch v. Overholser, 1962, 369 U.S. 705, 719, 82 S.Ct. 1063, 1072, 8 L.Ed.2d 211, 220. For example, a federal judge must refuse to accept a guilty plea where the requirements of Rule 11, F.R.Crim.P., cannot be met.[9] It was for the very reason that the trial judge felt that the voluntariness standard of Rule 11 was not met that he refused to accept Martinez' plea. But by a brief hearing outside the presence of the jury, the trial judge could have removed the barriers in the way of his finding that Martinez' plea was voluntarily entered. Instead those barriers remained until the government had all but finished its presentation, and their eventual removal came too late for Martinez to enter his plea to Count II.

[4] The decision to accept or reject a tendered guilty plea, once the requirements of Rule 11 have been satisfied, is committed to the "sound judicial discretion" of the trial judge, Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 498, 30 L.Ed.2d 427, 433. But the First Circuit requires that a trial judge "must seriously consider accepting a tendered plea [of guilty] . . . ." United States v. Bednarski, 1 Cir. 1971, 445 F.2d 364, 366. The District of Columbia Circuit goes a step further, and holds that a trial judge should not refuse to accept a guilty plea without "good reason." McCoy v. United States, 1966, 124 U.S.App.D.C. 177, 363 F.2d 306, 307. Since we lack precedent within our own circuit, we will weigh our problem in the light of these standards. The question before us is whether, once the requirements of Rule 11 have been met, "good reason" for rejecting a guilty plea exists because of the possibility of later collateral attack on the judgment to be entered upon the plea.

[5, 6] One of the purposes underlying Rule 11 is to enable a trial judge to determine whether a defendant's guilty plea is voluntary. McCarthy v. United States, 394 U.S. at 465, 89 S.Ct. at 1170, 22 L.Ed.2d at 424–425. A second function of Rule 11 is to expedite the disposition of post-conviction attacks upon judgments based on guilty pleas by providing a complete record of the basis upon which the plea was accepted. Id. But the rule is not designed to discourage the acceptance of guilty pleas merely because the trial judge is uneasy or apprehensive over possibility of a subsequent collateral attack. Indeed, Rule 11 recognizes the possibility of such attacks and as just pointed out is designed to facilitate their disposition by requiring the trial judge to make a complete

9. Rule 11 requires as a prerequisite to acceptance of a guilty plea that the trial judge "first address . . . the defendant personally and determine . . . that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea." A further requirement for entering judgment based on a plea of guilty is that the trial judge determine to his satisfaction "that there is a factual basis for the plea." See McCarthy v. United States, 1969, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418.

record showing the knowing and voluntary nature of the plea and the factual basis for it.

[7-11] The question of voluntariness under Rule 11 depends also upon inquiries to determine whether the plea is knowingly entered and whether there exists a factual basis for the plea. For example, it is not erroneous for a trial judge to find that a plea is knowingly and voluntarily entered even in the face of a defendant's unwillingness or inability to admit guilt, where compelling reasons are present for the entering of a guilty plea, as long as there exists substantial evidence of the defendant's guilt.[10] At all events, the question whether a guilty plea is voluntarily entered is determined, not by whether there are external forces inducing a defendant to plead guilty—for such forces will invariably exist—but instead by a determination as to whether these forces are constitutionally acceptable. So long as the trial judge is convinced by the record before him that a guilty plea is not coerced, a further showing that the plea is knowingly entered and that there exists sufficient evidence of guilt will satisfy the requirements of Rule 11.

[12] Against this background we view the action of the district court as contrary to both the spirit and the purpose of Rule 11. In the first place, it cannot be said that Martinez' guilty plea was involuntary in the sense of Rule 11. As we have indicated, Martinez freely admitted his guilt of the charges of importing marijuana. Also as Martinez' attorney repeatedly urged, the government had ample evidence, independent of the coerced confession, to convict Martinez of the importation charge. It cannot be said in the circumstances present that the existence of a possibly coerced, post-arrest statement rendered Martinez' tendered guilty plea involuntary under Rule 11. We hold that the rejection of Martinez' plea was not for "good reason," and was reversible error. McCoy v. United States, supra.

We iterate that it would have been simple for the judge to remove the cloud resting, in his judgment, over the voluntariness issue. A short hearing out of the presence of the jury and before trial was underway would have demonstrated that Martinez' post-arrest statement was inadmissible, exactly as was later determined. With this determination made, the acceptance of the guilty plea, if persisted in, could have followed. This procedure would have constituted "serious consideration" of acceptance of the guilty plea. United States v. Bednarski, supra.

Since we find that Martinez' guilty plea should have been accepted we vacate the convictions as to him under the remaining counts, Counts I, IV and V, and remand for resentence under Count II only. The trial court should correct the record by setting aside the jury verdict as to Martinez and the judgment and sentences thereunder, followed by an adjudication of guilt under Count II upon

10. North Carolina v. Alford, 1970, 400 U.S. 25, 37-38, 91 S.Ct. 160, 167, 27 L.Ed.2d 162, 169. In McCarthy v. United States, supra, as already noted in the text, the Supreme Court held that guilty pleas were required under the Due Process clause of the Constitution to be knowing and voluntary. The Court in its discussion made it clear that the voluntariness requirement of F.R.Crim.P. 11, is constitutional in origin and nature. As such, there can be no doubt that the voluntariness requirement applies alike to state and federal prosecutions. Oaks v. Wainwright, 5 Cir. 1971, 445 F.2d 1062, 1063; Wade v. Wainwright, 5 Cir. 1969, 420 F.2d 898, 900; Busby v. Holman, 5 Cir. 1966, 356 F.2d 75, 78. Since the voluntariness standard is constitutional in nature and origin, it is patent that a plea, constitutional if tendered in state court proceedings, would not be ruled unconstitutional in federal criminal prosecutions. Otherwise stated, the requirements for voluntariness in federal proceedings cannot be less strict than federal habeas corpus standards applied to state prosecutions. We therefore have no hesitancy in citing, in the context of a federal prosecution, the rule for voluntariness laid down in the review of state court proceedings. North Carolina v. Alford, supra. Cf. Boykin v. Alabama, 1969, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274.

the basis of the tendered plea of guilty, and not by reason of the jury's verdict.

Severance

The district judge's failure to accept Martinez' guilty plea raised problems for his co-defendant, Huila. Martinez had told his attorney, who also represented Huila, that he was willing to testify as a witness for Huila if the court accepted his guilty plea to Count II of the indictment. The government was agreeable at that time to that disposition of the charges against Martinez. When the court refused to accept Martinez' plea, motions for severance on behalf of Huila and Padilla-Soris were summarily denied by the court. Counsel for Huila now urges on appeal that the denial of severance as to him was an abuse of discretion by the trial court.

[13, 14] Under Rule 14 of the Federal Rules of Criminal Procedure, it is established that the granting of a motion for a severance is a matter within the discretion of the trial judge. Opper v. United States, 1954, 348 U.S. 84, 75 S. Ct. 158, 99 L.Ed. 101; Smith v. United States, 5 Cir. 1967, 385 F.2d 34, 37. When an appellant challenges the refusal of a trial judge to grant a motion to sever, he shoulders the burden of making a clear showing that "prejudice resulting in the denial of a fair trial" flowed from the failure to grant the motion. United States v. Nakaladski, 5 Cir. 1973, 481 F.2d 289; United States v. Iacoretti, 5 Cir. 1972, 466 F.2d 1147, 1153; Smith v. United States, supra.

[15] The question then is whether depriving one defendant of the opportunity to use the exculpatory testimony of a co-defendant amounts to "prejudice resulting in the denial of a fair trial." Byrd v. Wainwright, 5 Cir. 1970, 428 F. 2d 1017, was a state habeas corpus case, governed by 14th Amendment Due Process considerations rather than by the corresponding relief from prejudicial joinder provisions of Rule 14, F.R.Crim. P. But the criteria are similar, and in *Byrd* this circuit was presented with the opportunity to consolidate and catalogue our prior rulings for the guidance of trial judges confronted with motions for severance based on a desire to offer exculpatory testimony of a co-defendant. *Byrd* set forth the following guidelines: (i) the movant should "show that the testimony would be exculpatory in effect"; we cautioned that such a showing would not require the equivalent of a statement under oath by the co-defendant whose testimony was sought, op. cit. at 1020; Smith v. United States, supra, at 38; (ii) the movant should show to the court's satisfaction that the co-defendant will in fact testify; in this respect we cautioned that "the inquiry is not as to certainty whether the co-defendant will or will not testify but the likelihood;" op. cit. at 1022; *Smith*, supra, at 38; and (iii) we indicated that the trial judge might properly consider the exculpatory nature and the significance of the desired testimony to the movant's defense, which "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 co-defendant's testimony," op. cit. at 1020; United States v. Echeles, 7 Cir. 1965, 352 F.2d 892, 897–898.

There appears to be little doubt that conditions (i) and (ii) above were satisfied in the present case. Counsel for Martinez and Huila made the following statement to the court as to Martinez' planned testimony when he renewed the severance motion during the trial at the close of the government's case in chief:

> ". . . the defendant Martinez, if he were severed from this trial, would testify on behalf of the defendant Huila and exculpate him from any involvement in the matters which Huila is charged with. But, under the circumstances, he cannot take the stand because he is a defendant and will only inculpate himself."

The importance of Martinez' exculpatory testimony to Huila's defense is apparent. The crucial question as to Huila was whether he had knowledge, either of

the plan to import the marijuana, or that the package which he took from the M/V MONTEGO and placed on the dock actually contained marijuana. Martinez was the only individual other than Huila himself in a position directly to rebut the government's circumstantial evidence of Huila's knowledge of these facts.

The Court of Appeals for the Fourth Circuit has held in a similar situation that the failure to sever was reversible error. See United States v. Shuford, 4 Cir. 1971, 454 F.2d 772, where two defendants were charged with conspiring to knowingly submit and knowingly submitting false documents to the government, in violation of Title 18 U.S.C. Sec. 371 and Sec. 1001. The defendant Shuford, before the trial began and again after the prosecution rested, moved that his co-defendant Jordan's case be served so that he might have the benefit of Jordan's testimony, which was expected to contradict the government's evidence. In reversing the trial court's refusal to grant a severance in this situation, the Fourth Circuit said:

> "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." Id. at 776.

We think the conclusion reached by the Fourth Circuit was sound, and conclude that failure to grant the motion for severance resulted in prejudice to Huila's rights. Rule 14, F.R.Crim.P. Further, the severance sought in this case would not have been overly burdensome from the standpoint of judicial economy, as the result at most would have been two relatively short, uncomplicated trials. The judgment against Huila is vacated with directions that he be afforded another trial where he will have the opportunity to call Martinez as a witness in his behalf.

[16] We find it unnecessary to discuss at length an additional ground for reversal raised by Huila. Briefly, he contends that error was committed by the trial judge in denying him the right to call the customs agents as witnesses to elicit testimony regarding the basis of their identification of him as (i) independently made or (ii) made as a fruit of the suppressed post-arrest statement of Martinez. Counsel for Huila should be afforded an opportunity to present evidence in this regard to the court prior to his retrial.

Sufficiency of the Evidence as to Padilla-Soris

[17] Appellant Padilla-Soris assigns as error the district court's refusal to grant him a judgment of acquittal on the conspiracy charge, Count I, at the close of the government's evidence. This was by then the only remaining charge against this defendant, the motion for judgment of acquittal being granted as to Counts II and IV. As this Court stated:

> "In considering the motion for judgment of acquittal, F.R.Crim.P. 29(a), the District Judge must consider the evidence in the light most favorable to the Government, McFarland v. United States, 5 Cir. 1960, 273 F.2d 417; United States v. Carter, 6 Cir. 1963, 311 F.2d 934, together with all inferences which may reasonably be drawn from the facts, Cartwright v. United States, 10 Cir. 1964, 335 F.2d 919. The determining inquiry is whether there is substantial evidence upon which a jury might reasonably base a finding that the accused is guilty beyond a reasonable doubt."

Blachly v. United States, 5 Cir. 1967, 380 F.2d 665, 675.

[18] Our function on appeal is to consider the evidence in the light most favorable to the government, Glasser v. United States, 1942, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680, 704, and to decide in circumstantial evidence cases, as here, "whether reasonable minds could conclude that the evidence is inconsistent with the hypothesis of the ac-

cused's innocence." United States v. Warner, 5 Cir. 1971, 441 F.2d 821, 825.

[19] The critical issue as to Padilla-Soris' appeal is whether sufficient evidence was introduced to permit the jury to determine that Padilla-Soris had knowledge of the existence of a conspiracy. Knowledge of the existence of a conspiracy must usually appear from surrounding circumstances; it is seldom capable of direct proof. Proof of knowledge often rests upon "inferences drawn from relevant and competent circumstantial evidence . . . ." United States v. Warner, supra, at 830. Mere association, without more, however, does not suffice to demonstrate knowledge. Panci v. United States, 5 Cir. 1958, 256 F.2d 308, 312. These principles point the way to decision as we review the evidence produced by the government to show Padilla's participation in a conspiracy to import marijuana into the United States.

[20] It was shown first that Padilla-Soris drove Martinez to the dock area on the evening that the package of marijuana, off-loaded by Huila from the M/V MONTEGO, was retrieved by Martinez from its position of rest on the dock. Padilla-Soris immediately left the dockside area when he was approached and hailed by a customs agent. But the agent spoke a language unintelligible to the appellant. When Padilla-Soris was accosted a few moments later by a Spanish speaking agent he stopped the car he was driving and surrendered.

We do not discount the possibility that Padilla in fact knew of existence of a conspiracy to import marijuana, and that he drove Martinez to the dockside area in the early morning hours of August 17th in an effort to advance the objects of that conspiracy. Padilla-Soris may have met Martinez on a prior occasion, either independently or through a common acquaintance. It is also possible that Padilla-Soris became a member of the conspiracy earlier on the evening of August 16th, before driving Martinez to the dockside where Martinez took possession of the contraband. Any one of these possibilities may account for Padilla-Soris' knowledge of and participation in a conspiracy to import marijuana into the United States. But possibilities, however numerous, do not supply proof. The circumstances proved must be susceptible of inferences upon which a jury may reasonably find guilt beyond a reasonable doubt. The government was unable in this case to show that Padilla ever knew or met Martinez or Huila prior to the trip to the docks, or that he agreed with them or either of them to import marijuana into the United States. All we have is the evidence that Padilla drove Martinez to the docks, that he left the docks when approached by one customs agent, and that soon afterward he surrendered without resistance to another customs agent. No evidence of an incriminating nature was found on his person or in the car. Padilla-Soris' explanation of the trip to the dock was that he first met Martinez that evening at the home of a woman acquaintance, and that at her request he drove Martinez to the docks in her automobile. This was not disproved. Martinez when called as a witness by Padilla-Soris, presumably as a corroborating witness, refused to testify on grounds of self-incrimination.

When Padilla-Soris' participation in the conspiracy was allowed to go to the jury on the meager and insubstantial proof introduced in this case, it was an invitation to return a conviction based entirely on association. Mere association, standing alone, will not suffice to support a conviction for conspiracy. Panci v. United States, supra. The jury in this case was not presented with evidence from which reasonable minds could find guilt beyond a reasonable doubt. The question of Padilla-Soris' guilt should not have been submitted to the jury. Rather, his motion for judgment of acquittal should have been granted. His judgment of conviction and resultant confinement sentence under Count I of the indictment are reversed, with directions to dismiss the in-

dictment as to the defendant-appellant, Lorenzo A. Padilla-Soris.[11]

Conclusion

As to the appeal of Martinez, his convictions under Counts I, IV and V are vacated and set aside; upon remand his guilty plea to Count II is directed to be accepted and sentence imposed thereunder. As to the appeal of Huila, his convictions under Counts I, II, III, and IV are reversed and remanded for a new trial. Padilla-Soris' conviction under Count I is reversed with directions to dismiss the indictment as to him.

Vacated and set aside in part and remanded with directions; reversed for new trial in part; and reversed with directions to dismiss in part.

David Pope HOOD, Plaintiff-Appellant,

v.

DUN & BRADSTREET, INC., Defendant-Appellee.

No. 72-1233.

United States Court of Appeals, Fifth Circuit.

Sept. 14, 1973.

Rehearing and Rehearing En Banc Denied Oct. 31, 1973.

Action for libel predicated on statements published in credit report. The United States District Court for the Northern District of Georgia, Richard C. Freeman, J., 335 F.Supp. 170, granted credit reporting agency summary judgment, and plaintiff appealed. The Court of Appeals, Ingraham, Circuit Judge, held that certain statements did not constitute libel under Georgia law, that other statements were capable of being libelous by innuendo, that credit report was not a "matter of general or public interest" so as to be afforded a conditional privilege under First Amendment, that agency was not afforded conditional privilege under Georgia law, that complaint sufficiently alleged special damages and that genuine issues of fact precluded summary judgment.

Reversed and remanded.

Ainsworth, Circuit Judge, dissented and filed opinion and also dissented from denial of petition for rehearing.

1. Libel and Slander ⇐16

Under Georgia law, action for libel lies where published statement is false and defamatory, tending to injure reputation of an individual and exposing him to public hatred, contempt or ridicule. Code Ga. § 105-701.

2. Libel and Slander ⇐18

False and defamatory statements made in regard to another in his trade, office, or profession and calculated to injure therein constitute libel under Georgia law. Code Ga. § 105-702.

3. Libel and Slander ⇐19

Under Georgia law, while plain and unambiguous words must be construed in the normal and ordinary meaning, ambiguous words may be clarified in meaning by "reference to the circumstances" and thereby constitute libel by innuendo.

11. In view of our setting aside Padilla-Soris' conviction because of the insufficiency of the evidence as to him, it is not necessary to deal with his additional contention, that denial of his motion for severance was prejudicial to his defense, Rule 14, F.R.Crim.P., and hence an abuse of discretion on the part of the trial judge. His argument as to this question parallels that of Huila (except that he did have separate counsel) and the point was preserved for appellate review in a similar manner. Since this contention if we sustained it, as we doubtless would if necessary, would entitle him only to reversal for a new trial, the disposition of his conviction by reversing and directing dismissal of the indictment as to him renders discussion of his second point superfluous.

they were "at perfect liberty to disregard anything of the sort".

With all of this, there could be left no possible basis for a general claim of prejudicial error—much less any substance for a claim of "plain error", noticeable under Rule 52(b) Fed.Rules of Crim.Procedure, 18 U.S.C.A., (on which any contentiion here would have had to be predicated in view of the lack of challenge made to either the court's cautionary instruction or its general charge).

We should perhaps add that we intend no implication on whether the court's voicing of belief that the Government had produced all the witnesses it had on the question of appellant's presence at the assault would have constituted prejudicial error if it had not made clear by its cautionary instruction or its charge that the expression was without intended significance or effect. For there to be prejudice, it would seem that the situation would in any event have had to be one in which there was such basis to view a failure to produce witnesses as having existed that appellant would upon request have been legally entitled to an instruction on the presumption which could be engaged in in this regard. Whether the situation here was sufficiently of that character the court was not called upon to determine, nor is it before us, for no request for such a presumption instruction was made.

[3] We have in other cases said that the rule of presumption from failure to produce witnesses is one which is to be applied with caution, Shoenberg v. Commissioner of Internal Revenue, 8 Cir., 302 F.2d 416, 420; that it is not one which is abstractly entitled to be given application; but that it is to be accorded opportunity for significance and effect only when there has been shown a factual area in which it can logically operate, Jenkins v. Bierschenk, 8 Cir., 333 F.2d 421, 425.

These cautions have application to requests made for an instruction. They do not, of course, prevent the court from allowing free scope for mere traditional general argument by counsel as to why some witness or witnesses have not been called to the stand. But these are matters which are not directly before us and therefore require no further discussion.

No error is shown to have been involved in appellant's trial, and the judgment of conviction is accordingly not entitled to reversal.

Affirmed.

UNITED STATES of America, Plaintiff-Appellee,

v.

Julius L. ECHELES, Defendant-Appellant.

No. 14774.

United States Court of Appeals
Seventh Circuit.

Sept. 2, 1965.

Rehearing Denied Dec. 1, 1965.

Rehearing Denied Dec. 1, 1965. (En Banc).

Attorney was convicted in the United States District Court for the Northern District of Illinois, Eastern Division, Edwin A. Robson, J., of suborning perjury, impeding administration of justice and conspiracy, and he appealed. The Court of Appeals, Grant, District Judge, held that where it appeared in trial of attorney that he would be unable to call his client who was a codefendant to witness stand for purpose of getting into evidence client's prior statements holding attorney blameless, court's denial of attorney's motion for separate trial was erroneous.

Reversed and remanded.

1. Criminal Law ⇐622(1), 1152(1)

Motion for separate trial is addressed to sound discretion of trial court, which is subject to review and correction only if abused.

2. Criminal Law ⇐622(1)

Generally, persons jointly indicted should be tried together, particularly where indictment charges conspiracy or crime which may be proved against all defendants by same evidence and which results from same or a series of acts.

3. Criminal Law ⇐622(1)

Single joint trial of several defendants may not be had at expense of defendant's right to fundamentally fair trial.

4. Criminal Law ⇐1152(1)

Facts of each particular case determine whether court abused its discretion in not granting separate trial to one of several defendants.

5. Criminal Law ⇐622(2)

Fact that admissions of one of several defendants might be introduced at their trial which would prejudice defense of movant seeking separate trial would not be sufficient to enable movant to gain separate trial as a matter of right, even where admissions incriminated other defendants.

6. Criminal Law ⇐622(2)

Where it appeared in trial of attorney for suborning perjury, impeding administration of justice and conspiracy, that attorney would be unable to call his client who was a codefendant to witness stand for purpose of getting into evidence client's prior statements holding attorney blameless, court's denial of attorney's motion for separate trial was erroneous. 18 U.S.C.A. §§ 371, 1503, 1622.

7. Witnesses ⇐297(1), 300

Constitutional prohibitions against self-incrimination give any person the right to refuse to answer questions which might tend to incriminate him, and also prohibit any person on trial from being called to witness stand, and latter protection applies without regard to nature of intended inquiry. U.S.C.A.Const. Amend. 5.

8. Criminal Law ⇐622(2)

If attorney's duty to his client should require him to draw jury's attention to possible inference of guilt from a codefendant's silence, trial judge's duty is to order that defendants be tried separately.

Albert E. Jenner, Jr., Thomas P. Sullivan, John C. Tucker, Kenneth S. Broun, Chicago, Ill., Raymond, Mayer, Jenner & Block, Chicago, Ill., of counsel for appellant.

Edward V. Hanrahan, U. S. Atty., John Peter Lulinski, John Powers Crossby, Raymond F. Zvetina, Asst. U. S. Attys., for appellee.

Before CASTLE and KILEY, Circuit Judges, and GRANT, District Judge.

GRANT, District Judge.

This is an appeal by Julius L. Echeles, a member of the bar of Illinois and of this Court, from a verdict and a judgment thereon finding him guilty of suborning perjury, impeding administration of justice and conspiracy in violation of Sections 1622, 1503 and 371, Title 18, of the United States Code.[1] The respective

1. The pertinent part of the statutes involved are as follows:

§ 1622. *Subornation of perjury.* Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both.

§ 1503. *Influencing or injuring officer, juror or witness generally.* Whoever corruptly, or by threats or force * * * endeavors to influence, intimidate, or impede any witness, in any court of the United States * * * or corruptly or by threats or force * * * endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

§ 371. *Conspiracy to commit offense or to defraud United States.* If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or im-

violations allegedly occurred during the trial of United States v. Isaac Hill and Broadway Arrington,[2] a narcotics case, in which appellant Echeles served as attorney for one of the defendants, Broadway Arrington. In this appeal, appellant asserts three general assignments of error and places principal reliance on the contention that the Government did not establish a *prima facie* case against him for the reason that there was no evidence introduced at the trial from which it could reasonably be inferred that appellant knew of the perjury, or knew the witnesses involved intended to commit perjury or had falsified the record, such knowledge constituting an essential ingredient of the offense charged. Our review of the record, however indicates that the evidence on this issue was of such substance to warrant its submission to the jury and that the inferences drawn therefrom by the jury cannot be said to be unreasonable. Yet, we do find error in the denial by the trial court of appellant's motion for separate trial to be of sufficient gravity to compel reversal of appellant's conviction and remandment to the court below for new trial on all the issues.

The facts most relevant to disposition of this case on the ground stated are as follows: Broadway Arrington was indicted with others for conspiracy to violate the federal narcotics laws, it being alleged that in late April, 1961, Arrington sold narcotics to Marvin Moses at Chicago, Illinois. Moses was the only government witness to the alleged sale. As already noted, Julius Echeles was counsel for defendant Arrington.

Broadway Arrington's defense was an alibi. He asserted that he was in Hot Springs, Arkansas, at the time of the alleged transaction with Moses; specifically, that he was a guest in Pat Carr's Motel in Hot Springs from April 6 to April 29, 1961.

Two witnesses, Pat Carr, the owner of the motel in Hot Springs, and Lucille Smith, a former clerk at the motel, testified, in support of Arrington's defense, that Arrington was in fact a guest at Carr's Motel from April 6 to 29, 1961. They identified a corroborating motel registration card as the one that had been prepared by Mrs. Smith in the regular course of business during Arrington's stay. Arrington took the stand in his own defense and testified that he had signed the motel registration card on April 6, 1961, and that he stayed at the motel until April 29. Both Carr and Arrington testified that they had an independent recollection that Arrington and a man named Holmes had been in Hot Springs at the end of March, 1961, at which time they signed a contract to purchase a parcel of realty from a man named Cain, and that Carr had acted as broker in the transaction. Carr testified that Arrington had returned to Hot Springs in April to make arrangements with regard to the property which Arrington and Holmes had contracted to buy.

Three days after Carr and Smith had testified in support of Arrington's alibi, they were recalled to testify as Government rebuttal witnesses. They confessed that their prior testimony relating to Arrington's stay at Carr's Motel in Hot Springs in April, 1961, was false, and that the registration card was spurious, it having been prepared at Arrington's home in Chicago on May 24, 1963, the day they testified on Arrington's behalf. The card was filled out by Mrs. Smith in the presence of Carr, Arrington and Arrington's daughter Barbara O'Neil, before Arrington took them to Echeles' office, where they reviewed their testimony before they went to court. When asked, "Who told you to identify that card there as being a record of your motel?", Carr answered, "The lawyer."

prisoned not more than five years, or both. * * *

trict Court for the Northern District of Illinois, Eastern Division, the Honorable Julius J. Hoffman, United States District

Arrington then took the stand again in surrebuttal. He admitted that the registration card was not authentic, that he had not signed it in April, 1961, as he had testified, and that it had been prepared at his home, as Carr and Smith testified. He persisted, however, in his testimony that he had been in Hot Springs from April 6 to 29, 1961. Arrington also testified at that time that Echeles had nothing to do with falsifying the motel record. The colloquy in this respect was as follows:

Question: Showing you Defendant's Exhibit 4, Defendant Arrington's Exhibit 4, did your lawyer, Mr. Echeles have anything to do with the preparation of that card?

Answer: No, sir, he didn't.

The day after giving the foregoing testimony, May 29, 1963, and before the case went to the jury, Arrington entered a plea of guilty. At the time he entered the plea, Arrington again stated that Echeles had nothing to do with the preparation of the false registration card or with the perjured testimony:

The Court: Mr. Arrington, the law gives you the right to speak in your own behalf. I give you the privilege of saying anything you would like to say.

* * * * * *

Defendant Arrington: I have never been in prison before and I am ashamed. I would appreciate if you would do the best you can for me. I want to say one other thing, Judge, Mr. Carr didn't tell the truth on Mr. Echeles when he testified from the stand. Mr. Echeles didn't tell him to say anything. He asked him a few questions, how long he had been in Hot Springs, things like that. That didn't tell him no testimony in this trial. That's all I have to say.

Thereafter, on June 27, 1963, upon his plea of guilty Arrington was sentenced to 12 years imprisonment. At the time of his sentencing, Arrington made the following statements in open court:

The Court: And you—I want to test your intelligence here. When you took the witness stand in the case where you were tried and in which you pleaded guilty after the trial had progressed, you took the witness stand and said that you—you admitted that the testimony you had given in respect to your Hot Springs visit was not true, didn't you?

Defendant Arrington: Yes, but I mean about the card—

The Court: And you said then that Mr. Echeles did not tell you to do that, isn't that right?

Defendant Arrington: He didn't tell the clients what to do.

The Court: He didn't tell you what to do about that, did he? You said that from the witness stand and you said it right at the same lectern at which you stand now, isn't that right?

Defendant Arrington: Yes, sir.

The Court: That is right, isn't it?

Defendant Arrington: Yes, sir.

The Government submitted this matter to the September, 1963 federal grand jury in Chicago. The grand jury eventually returned an indictment against Echeles, Arrington and Mrs. O'Neil in five counts. Count One involved Arrington only. It charged a violation of Title 18, Section 1621, in that Arrington committed perjury on May 27, 1963, during his narcotics trial, by testifying that on April 6, 1961, he signed a registration card of Carr's Motel, Hot Springs, Arkansas, and that he had not signed the card on or about May 24, 1963.

Count Two charged that on or about May 24, 1963, Julius L. Echeles and Broadway Arrington knowingly procured Pat Carr to testify falsely at the Arrington trial that (a) Arrington was in Hot Springs from April 6, 1961, to April 29, 1961, to purchase some property from Pat Carr; (b) on April 6, 1961, Arrington signed a registration card of Carr's Motel; (c) the registration card had been in the care and control of Carr's

Motel from April 6, 1961, until produced on the trial in the Arrington narcotics case; and (d) the card was an authentic record of the motel—all in violation of Title 18, Section 1622 of the United States Code.

Count Three charged that on or about May 24, 1963, Echeles and Arrington knowingly procured Lucille Smith to give the same false testimony at the Arrington narcotics trial as specified in Count Two, with the exception of (a). Such also constituted a violation of Title 18, Section 1622.

Count Four, charging a violation of Title 18, Section 1503, alleged that on or about May 24, 1963, Echeles and Arrington knowingly endeavored to induce Pat Carr and Lucille Smith to testify falsely at the Arrington trial.

Count Five charged that from on or about May 13, 1963, to on or about May 29, 1963, Echeles, Arrington and Barbara O'Neil knowingly conspired to commit the crimes alleged in Counts Two, Three and Four.

The only overt act charged to have been committed by Echeles was a conversation on or about May 24, 1963, among Echeles, Arrington, O'Neil, Carr and Smith (in Echeles' office), at Chicago, Illinois. Such act was alleged to have constituted a violation of Section 371 of Title 18, prohibiting conspiracy to commit an offense against the United States.

All three defendants named in the indictment thereafter entered pleas of not guilty. Then, on November 15, 1963, appellant individually filed a motion for separate trial, basing said motion on three grounds: (1) that he, Echeles, would be prejudiced by the admission in evidence of statements of co-defendant Arrington which may constitute admissions under Count One of the indictment; (2) that a joint trial would deprive him of his right to call his co-defendants as witnesses; and (3) that the Government may have coerced co-defendants into making statements inculpatory of him, which though not admissible against him would be admissible against the declarant, to defendant Echeles' prejudice. The motion for severance was denied by the trial judge from the bench on January 29, 1964.

[1-4] It is to the sound discretion of the trial court that a motion for separate trial is addressed. Opper v. United States, 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed. 101 (1954); United States v. Shotwell Mfg. Co., 287 F.2d 667 (7th Cir. 1961), aff'd 371 U.S. 341, 83 S.Ct. 448, 9 L.Ed. 2d 357 (1963); United States v. Kramer, 236 F.2d 656 (7th Cir. 1956). It is also quite clear that this discretion is subject to review and correction only if abused. Olmstead v. United States, 19 F.2d 842, 53 A.L.R. 1472 (9th Cir. 1827), aff'd 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928); Gorin v. United States, 313 F.2d 641 (1st Cir. 1963); United States v. Haupt, 136 F.2d 661 (7th Cir. 1943). The problems arising out of such motions for separate trial frequently confront the courts in conspiracy cases, where 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, 163, 4 A.L.R.2d 1193 (1948), cert. den. 334 U.S. 853, 68 S.Ct. 1509, 92 L.Ed. 1775 (1948), particularly so where the indictment charges a conspiracy or a crime which may be proved against all the defendants by the same evidence and which results from the same or a similar series of acts. United States v. Lebron, 222 F.2d 531, 535 (2d Cir. 1955), cert. den. 350 U.S. 876, 76 S.Ct. 121, 100 L.Ed. 774 (1950); United States v. Cohen, 124 F.2d 164, 165-166 (2d Cir. 1941), cert. den. sub nom. Bernstein v. United States, 315 U.S. 811, 62 S.Ct. 796, 86 L.Ed. 1210 (1942). Nevertheless, a single joint trial, however desirable from the point of view of efficient and expeditious criminal adjudication, may not be had at the expense of a defendant's right to a fundamentally fair trial. Barton v. United States, 263 F.2d 894, 898 (5th Cir. 1959); United States v. Kahaner, 203 F.Supp. 78, 80-81 (S.D. N.Y.1962); Schaffer v. United States, 221 F.2d 17, 19, 54 A.L.R.2d 820 (5th

Cir. 1955); United States v. Haupt, supra, 136 F.2d at 671; Hale v. United States, 25 F.2d 430, 438–439 (8th Cir. 1928). What constitutes abuse of discretion in terms of safeguarding each defendant's rights in such cases necessarily depends upon the facts in each particular case. Schaffer v. United States, supra, 221 F.2d at 19; United States v. Kahaner, supra, 203 F.Supp. at 81; Brady v. United States, 39 F.2d 312, 313 (8th Cir. 1930).

[5] In the proceedings below, defendant Echeles was the occupant of what has been termed the "uneasy chair" generally reserved for co-defendants in a conspiracy trial. Krulewitch v. United States, 336 U.S. 440, 454, 69 S.Ct. 716, 93 L.Ed. 790 (1949) (concurring opinion of Mr. Justice Jackson). That is, Echeles, as he stated in the first of the three grounds tendered in support of his motion for severance, faced the prospect of defending himself in a trial in which admissions would be introduced into evidence against his co-defendant, Arrington, which, Echeles feared, would prejudice his own defense. However, it has repeatedly been held that this alone, even where the admissions incriminate other defendants, is not sufficient to enable movant to gain a separate trial as a matter of right. United States v. Caron, 266 F.2d 49, 51 (2d Cir. 1959); Hall v. United States, supra, 168 F.2d at 163; Cataneo v. United States, 167 F.2d 820, 823 (4th Cir. 1948).

[6] Yet, the incriminatory nature of the admissions against his co-defendants was not the whole of Echeles' problem in defending himself in the joint trial. For it appeared that, in a trial with Arrington as a co-defendant, Arrington having made statements in open court exculpatory of Echeles, Echeles would be unable to call this co-defendant to the stand for the purpose of getting the same or similar statements holding Echeles blameless into evidence. It is this circumstance, which constituted the second of the three grounds upon which Echeles based his motion for severance, together with the otherwise inconclusive nature of the first such ground, that compels this Court to find error in the trial court's denial of said motion for a separate trial.

[7] The Government contends that Echeles' failure to call or attempt to call Arrington as a witness precludes any claim of error in this Court, citing United States v. Vasen, 222 F.2d 3 (7th Cir. 1955). The Vasen case, however, has nothing to do with severance or with the problem presented in this case, and we do not find it controlling. Moreover, this contention misconceives one of the two fundamental protections afforded by the Fifth Amendment right against self-incrimination. By its first and most familiar protection, this Fifth Amendment provision gives any person the right to refuse to answer questions which might tend to incriminate him. But equally important is the "universally held" interpretation of this right prohibiting any person who is on trial for a crime *from being called to the witness stand.* 8 Wigmore on Evidence 406 (Claim of Privilege, § 2268); McCormick on Evidence 257–259 (Self-Incrimination, § 124) (1954). The second protection applies without regard to the nature of the intended inquiry; that is, a defendant on trial cannot be required to take the stand to answer even the most innocuous, non-incriminating inquiries. Nor does it make a difference whether the defendant is called to the stand by the prosecution or a co-defendant. 8 Wigmore on Evidence 410 (Claim of Privilege, § 2268).

This distinction was discussed in United States v. Housing Foundation of America, Inc., 176 F.2d 665, 666 (3rd Cir. 1949), wherein the court reversed because, over objection, one defendant had been permitted to call the other to the stand. Holding that such constituted "so fundamental an error that the judgment must be reversed and a new trial ordered", the court said:

> * * * The error made arises from confusing the privilege of any witness not to give incriminating answers with the right of the accused not to take the stand in a criminal

> prosecution against him. Both come within the protection of the clause of the 5th Amendment which provides: "No person * * * shall be compelled in any criminal case to be a witness against himself." The plain difference between the privilege of witness and accused is that the latter may not be required to take the stand at all. * * *

See also, to the same effect: United States v. Keenan, 267 F.2d 118, 126 (7th Cir. 1959), cert. den. 361 U.S. 863, 80 S.Ct. 121, 4 L.Ed.2d 104 (1959); United States v. Benjamin, 120 F.2d 521, 522 (2d Cir. 1941); Poretto v. United States, 196 F.2d 392, 394 (5th Cir. 1952).

[8] Thus, Echeles could not properly call Arrington as a witness during Echeles' case in chief. For if Arrington declined to take the stand, as was his right, Echeles' action in calling him and causing him to decline to do so in front of the jury would have injected prejudicial error into the record as to Arrington. In De Luna v. United States, 308 F.2d 140, 141, 1 A.L.R.2d 969 (5th Cir. 1962), wherein it was held that the defendant had the constitutionally guaranteed right of silence free from prejudicial comments, even when they came only from co-defendant's attorney, the court said in language applicable here:

> * * * If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's duty is to order that the defendants be tried separately.

The Government further contends that Echeles' position in support of his motion for severance necessarily involved indulgence in two speculative assumptions: first, that Arrington would be tried prior to Echeles, and secondly, that Arrington would not claim his Fifth Amendment privilege against self-incrimination if called as a witness in the trial of Echeles. As for the first such "assumption", we do not feel it would have been egregious had the trial judge, after granting the motion for separate trial, also directed the Government to proceed first with the case against Arrington.

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. See People v. McCullough, 31 Mich. 25, 45 N.W. 515, 518 (1890); People v. Wells, 272 N.Y. 215, 5 N.E.2d 206 (1936). 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.

Speculation as to whether or not Arrington would claim the privilege at a later Echeles trial has spawned other collateral issues, namely, whether the questions asked at such a later trial would not be within the scope of Arrington's privilege, and whether Arrington had not waived his privilege as a witness by testifying fully about the circumstances on surrebuttal during the narcotics trial. Such questions, speculative as they are, we do not now reach; they can properly be decided if and when they arise in a future proceeding against Echeles. 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.

This is particularly true where, as here, the opportunity was so readily available —as the court said in Schaffer v. United States, supra, 221 F.2d at 19, reversing because a severance was denied: "There being only two defendants, it would not be very time consuming but entirely practicable to accord them separate trials. * * *"

In reaching this conclusion, we take special note of the fact that during the joint trial of Echeles and Arrington, the Government was permitted to introduce into evidence the incriminatory admissions of Arrington taken from the transcript of the prior narcotics trial, while an objection was sustained precluding Echeles from reading into evidence Arrington's statements protesting the innocence of Echeles contained in the same transcript. While the ruling of the court below as to these evidentiary matters was perhaps the only one possible under the circumstances, it really served to compound the error previously committed and to emphasize that the scales of justice had already been tipped to favor the Government.

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

Reversed and remanded.

NICHIMEN CO., Inc., Plaintiff-Appellee,

v.

Leonard ASHBACH, Defendant-Appellant.

No. 15141.

United States Court of Appeals
Seventh Circuit.

Nov. 12, 1965.

Action to recover damages because of fraudulent conversion. From a judgment of the United States District Court for the Northern District of Illinois, Eastern Division, Joseph Samuel Perry, J., the defendant appealed. The Court of Appeals, Hastings, Chief Judge, held, inter alia, that where under agreement title to radios sold was to remain in seller and accounts receivable were to be delivered to seller, acts of buyer, or those acting under his direction and control, in pledging radios as collateral for a loan, assigning accounts receivable to lender and failing to remit proceeds of accounts, which acts were done without knowledge, consent or acquiescence of seller, to its resulting damage constituted fraudulent acts of conversion under Illinois law.

Affirmed.

1. Sales ⇐218

Where subsequent to buyer's default in payment for transistor radios the parties agreed that all merchandise theretofore purchased and all radios thereafter delivered should be delivered in bonded warehouse, title to remain in seller, and there were no intervening rights of third parties involved in transaction, the contract reinvested seller with title to radios and accounts receivable and provisions for obtaining possession and control were merely to further secure and protect title of seller.

2. Sales ⇐197

In a sales contract of personalty, title is transferred from seller to buyer when parties to contract intend it to be transferred; physical transfer is not essential to passage of title.

3. Trover and Conversion ⇐10

Where under agreement title to radios sold was to remain in seller and accounts receivable were to be delivered to seller, acts of buyer, or those acting under his direction and control, in pledging radios as collateral for a loan, assigning accounts receivable to lender and failing to remit proceeds of accounts, which acts were done without knowledge, consent or acquiescence of seller, to its resulting damage constituted fraudulent acts of conversion under Illinois law.

4. Execution ⇐423, 451

The term "malice" as used in Illinois Insolvent Debtors Act applies to that class of wrongs which are inflicted

cates other persons,[74] and they may be held not to provide sufficient protection.[75] As a last resort, if nothing else will prevent the prejudice, a severance must be ordered.[76]

§ 225. —— Testimony of a Codefendant

Three kinds of problems with regard to the testimony of a codefendant may arise on a request for relief from prejudicial join-

74. May call attention

Rezneck, The New Federal Rules of Criminal Procedure, 1966, 54 Geo. L.J. 1276, 1310.

75. Not sufficient protection

Reversible error to refuse severance where confession of one codefendant admitted in evidence implicated other defendants, even though names of other defendants were blanked out before confession was read to jury. U. S. v. Bozza, C.A.2d, 1966, 365 F.2d 206, 214–218, noted 1967, 28 Ohio St.L. J. 356.

"To be sure, the trial court devised a procedure under which the confessions were introduced without mention of the names of the other persons implicated. But their names were in fact revealed in the course of the cross-examination of the confessing petitioners." Anderson v. U. S., 1943, 63 S.Ct. 599, 602, 318 U.S. 350, 356, 87 L.Ed. 829.

Defendant's illegally obtained confessions were inadmissible hearsay as to codefendants, notwithstanding that codefendants' names were omitted from confessions, where other testimony about codefendants made it obvious that the omitted names were theirs. Jones v. U. S., C.A.1964, 342 F.2d 863, 119 U.S.App.D.C. 284.

"In the case at bar it appears to us plain that the expedient suggested by the appellant: i. e. to black out the names of Delli Paoli and Margiasso would have been futile. * * * Read upon the other evidence of the prosecution's witnesses that had connected Delli Paoli with Margiasso and Pierro at the 'service station' and elsewhere, there could not have been the slightest doubt as to whose names had been blacked out; and, even if there had been, the blacking out itself would have not only laid the doubt, but underscored the answer." U. S. v. Delli Paoli, C.A. 2d, 1956, 229 F.2d 319, 321, affirmed 1957, 77 S.Ct. 294, 352 U.S. 232, 1 L.Ed.2d 278.

See note 69 above.

76. Severance required

U. S. v. Bozza, C.A.2d, 1966, 365 F. 2d 206, 214–218, described note 75 above.

When government insisted upon the introduction, against co-defendant and to the surprise of defendant, of federal agent's testimony that co-defendant had stated that defendant had brought treasury check to him, had told him that check was not his check and had asked his aid in cashing it, defendant was entitled to a mistrial in view of the potentially great prejudicial effect of the testimony in relation to its small importance to government's case and in view of fact that situation was not susceptible of correction by instruction. Flores v. U. S., C.A.5th, 1967, 379 F.2d 905.

Abuse of discretion not to order severance where co-defendant had made an incriminating admission. Barton v. U. S., C.A.5th, 1959, 263 F.2d 894.

Schaffer v. U. S., C.A.5th, 1955, 221 F.2d 17, 54 A.L.R.2d 820.

See Belvin v. U. S., C.A.5th, 1960, 273 F.2d 583, 587.

der. First is the case in which one defendant takes the stand and puts the blame on the other defendant. Such testimony is not hearsay, since it is given in open court, and it is admissible against the second defendant. Where this is in prospect a severance may be ordered,[77] but it is not required.[78]

A second problem arises if one defendant wishes to use the testimony of a codefendant in his own behalf. One defendant may not require another to take the stand at a trial in which both are charged, since this would be inconsistent with the privilege of a criminal defendant not to be called to the stand at all.[79] If a defendant does take the stand and testify at all he waives his privilege not to answer questions about the crime charged.[80] Thus at a joint trial a defendant who does not wish to testify on his own behalf is hardly likely to take the stand on behalf of a codefendant.

77. Severance ordered

"As counsel for defendant Luis Valdes pointedly remarks, Valdes, if compelled to go to trial together with defendant Vega, would have to prepare his defense against two adversaries, the United States and codefendant Vega. They would be united in their effort to convict Valdes. We must agree that under these conditions, a joint trial would be the equivalent of a denial of a fair and impartial trial." U. S. v. Valdes, D.C.Puerto Rico, 1967, 262 F.Supp. 474.

78. Joint trial not improper

Conviction of defendant in narcotics prosecution was not plain error because of failure to sever where codefendant who testified made no attempt to incriminate defendant who did not testify, other than to confirm latter's presence when alleged illegal action was formulated and carried out. Fields v. U. S., C.A.4th, 1967, 370 F.2d 836.

Severance was not required, even if testimony of one defendant on her own behalf tended to establish a link between her and her codefendants that had been supplied only inferentially in the government's case. U. S. v. Kahn, C.A.2d, 1966, 366 F.2d 259, 263, certiorari denied 87 S.Ct. 321, 385 U.S. 948, 17 L.Ed.2d 226.

In prosecutions for narcotics violations, even though when one of the defendants voluntarily took the witness stand he verified some critical portions of the evidence given by government agents, nevertheless, it was within trial judge's discretion to order such defendant to be tried along with two other defendants, and record did not establish abuse of such discretion. U. S. v. Soto, C.A.7th, 1958, 256 F.2d 729.

79. Codefendant cannot require testimony

U. S. v. Housing Foundation of America, Inc., C.A.3d, 1949, 176 F.2d 665, 666.

See U. S. v. Echeles, C.A.7th, 1965, 352 F.2d 892, 897–898.

80. Waiver of privilege

Johnson v. U. S., 1943, 63 S.Ct. 549, 552, 318 U.S. 189, 195, 87 L.Ed. 704.

McCormick, Evidence, 1954, § 131.

Motions for a severance so that a defendant may be able to call a codefendant to the stand are usually denied.[81] The courts show a healthy, and quite justified, skepticism whether the defendant would call his codefendant if he could,[82] and whether the codefendant would not claim his constitutional privilege even in a separate trial.[83] There are a few cases, however, in which it is

81. Severance refused

Where defendant and codefendant were charged as members of conspiracy under one count of indictment as to violation of Hobbs Act refusal to grant defendant a severance from codefendant on ground that defendant was unable in joint trial to compel effective testimony from codefendant was not an abuse of discretion. U. S. v. Sopher, C.A.7th, 1966, 362 F.2d 523, 526–527, certiorari denied 87 S.Ct. 286, 385 U.S. 928, 17 L.Ed.2d 210.

The granting of a severance is largely a matter of discretion; and in prosecution for mail fraud in sale of securities, court exercised its discretion to deny application for severance, notwithstanding applicant's contention that his only connection with transaction had been as a "finder" of stock for firm with which other defendants were associated and that since other defendants might fail to take stand at joint trial, and they were only ones who could testify that he was wholly disassociated with selling efforts of their firm, he would be deprived of his constitutional rights to have compulsory process for obtaining witnesses in his favor unless he was granted a separate trial. U. S. v. Berman, D.C.N.Y.1959, 24 F.R.D. 26.

82. Skeptical whether codefendant would be called

Bare assertion that without severance defendant could not call his codefendants as witnesses does not warrant reversal on the theory that if he could he would have done so. Brown v. U. S., C.A.1967, 375 F.2d 310, 316–317, 126 U.S. App.D.C. 134, certiorari denied 87 S.Ct. 2133, 388 U.S. 915, 18 L.Ed. 2d 1359.

Motion by certain defendants to sever their cases for trial on ground that at least one of the other defendants had made exonerative statements and would be a necessary witness in their behalf at trial but that he might deny movants the benefit of his favorable testimony by asserting his privilege was denied where nothing substantial was offered in support of motion and movants merely made bald assertion that someone had made or might make exonerative statement in their behalf. U. S. v. Tanner, D.C.Ill.1967, 279 F.Supp. 457, 468.

Defendants joined in same indictment were not entitled to separate trial on ground that testimony of codefendant could exculpate them but that codefendant would refuse to take stand in joint trial, where no facts were furnished as to nature, extent and importance of the exculpatory testimony that would be offered in separate trials. U. S. v. Crisona, D.C.N.Y.1967, 271 F.Supp. 150, 154–155.

83. Skepticism whether codefendant would testify

Denial of one codefendant's motion for separate trial made on ground that it would afford moving codefendant opportunity to call other codefendant as witness for purpose of explaining his possession of narcotics was not abuse of discretion, where moving codefendant did not show or assert that other codefendant's version of facts would have any exculpatory effect or that other codefendant would more likely testify were he tried separately. Smith v. U. S., C.A. 5th, 1967, 385 F.2d 34, 38.

There is no absolute requirement for severance when defendants sug-

held that a severance is necessary on this ground. In one the second defendant had three times, in open court in a prior proceeding, exonerated the defendant now seeking a severance. Thus the probability seemed strong that he would give helpful testimony at a separate trial, particularly if the second defendant were tried first.[84] In another case severance was ordered even though an affidavit for the government quoted the second defendant's lawyer as saying he would advise his client to claim the

gest that testimony of codefendant is not available to them unless they are tried separately, and the unsupported possibility that such testimony might be forthcoming does not make denial of motion for severance erroneous. U. S. v. Kahn, C.A.7th, 1967, 381 F.2d 824, 841, certiorari denied 88 S.Ct. 591, 389 U.S. 1015, 19 L.Ed.2d 661.

Denial of severance, in conspiracy prosecution, as to codefendant who allegedly conveyed to victim threats from defendants, was not abuse of discretion although codefendant stated that he would not testify in behalf of defendants in any trial in which he was also defendant, where codefendant's affidavit indicated that he intended to invoke privilege against self-incrimination whether he testified as codefendant or as severed defense witness, motion was not made until after defendants had testified in their own behalf, and all defendants put forth single defense, without attempting to shift blame among themselves, although defendants claimed that codefendant's refusal to testify was not brought to their attention until immediately before their motion. Kolod v. U. S., C.A.10th, 1967, 371 F.2d 983, 990–992.

Even if joint trial of two defendants made it less likely that one would give exculpatory evidence for the other, that did not make denial of motion for severance erroneous, at least in absence of anything indicating that codefendant would have given exculpatory evidence. U. S. v. Kahn, C.A.2d, 1966, 366 F.2d 259, 263–264, certiorari denied 87 S.Ct. 321, 385 U.S. 948, 17 L.Ed.2d 226.

Two of defendants who were charged with conspiring to bribe were not entitled to a severance on ground that testimony of co-defendants was essential to their defense and that such testimony would not be available to them unless each defendant was tried separately so that co-defendants could be put on the stand. Gorin v. U. S., C.A.1st, 1963, 313 F.2d 641. The court said, at 645–646, that the argument was unrealistic and that there was no reason to think a codefendant would be more willing to waive his privilege in a separate trial than in a joint trial.

U. S. v. Pilnick, D.C.N.Y.1967, 267 F.Supp. 791, 800.

U. S. v. Leighton, D.C.N.Y.1967, 265 F.Supp. 27, 31.

U. S. v. Van Allen, D.C.N.Y.1961, 28 F.R.D. 329, 338–339.

84. Probability of testimony strong

U. S. v. Echeles, C.A.7th, 1965, 352 F.2d 892. In that case the court said, at 898: "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."

privilege even in a second trial. The court pointed out that the second defendant might be tried first, and that the privilege might no longer be available to him when called as a witness, and that even if the moving defendant were tried first, the second defendant might ignore his lawyer's advice and waive the privilege.[85]

The final problem is well illustrated by the decision of the Fifth Circuit in De Luna v. United States.[86] It is of course the rule that the Constitution prohibits any comment on the failure of a criminal defendant to take the stand.[87] The De Luna case considered the application of this rule where one defendant, who has testified, wishes to comment on the failure of a codefendant to take the stand.

De Luna and Gomez were tried together on narcotics charges. Gomez testified in his own defense and put all the blame on De Luna. De Luna did not testify, but his attorney argued that Gomez was the sole culprit. The attorney for Gomez in his closing argument referred forcefully to the fact that his client was honest enough and had courage enough to take the stand and tell the whole story but that the jury had not heard a word from De Luna. The jury acquitted Gomez but convicted De Luna.

On appeal De Luna's conviction was reversed. The majority, speaking through Judge John Minor Wisdom, said that the comments of the attorney for Gomez were proper from his point of view, since "his attorneys should be free to draw all rational inferences from the failure of a codefendant to testify, just as an attorney is free to comment on the effect of any interested party's failure to produce material evidence in his possession or to call witnesses who have knowledge of pertinent facts."[88] The comments, however, while proper from Gomez's point of view, were

85. Privilege might be unavailable or waived

U. S. v. Gleason, D.C.N.Y.1966, 259 F.Supp. 282. The court said, at 284–285, that it was enough for severance that "Karp has shown persuasive ground for the claim that she needs Pitkin's evidence; that the need must almost certainly go unsatisfied in a joint trial; and that there is substantially greater likelihood or her using him if they are tried separately."

See U. S. v. Gleason, D.C.N.Y.1967, 265 F.Supp. 880, 881–882, for later developments in this case.

86. De Luna case

C.A.5th, 1962, 308 F.2d 140, 1 A.L.R. 3d 969, rehearing denied C.A.5th, 1963, 324 F.2d 375, noted 1963, 31 Geo.Wash.L.Rev. 1044, 15 Stan.L.Rev. 690, 16 Vand.L.Rev. 1243, 49 Va.L.Rev. 356.

87. Constitution prohibits comment

Griffin v. State of California, 1965, 85 S.Ct. 1229, 380 U.S. 609, 14 L.Ed.2d 106.

88. Attorneys free to draw all rational inferences

308 F.2d at 143.

prejudicial to De Luna and inconsistent with his right not to have comment made about his decision to exercise his constitutional privilege.[89] The conflicting interests of Gomez and De Luna created a dilemma that could have been resolved only by trying them separately.[90] Judge Griffin Bell concurred in the result, agreeing that De Luna had been prejudiced, but thought Gomez's attorney did not have the right to comment on De Luna's failure to testify.[91]

Although other courts in subsequent cases similar to De Luna have recognized the problem to be "substantial and troublesome," [92] no court has felt obliged to reverse on that ground. In the later cases, unlike De Luna, the defendants have presented unified, rather that conflicting defenses, and one defendant would have no motive to seek to discredit another,[93] nor could he claim

89. Prejudicial to codefendant
308 F.2d at 150–155.

90. Separate trials required
"Thus, the joint trial of the two defendants put Justice to the task of simultaneously facing in opposite directions. And Justice is not Janus-faced. * * *

"In short, for each of the defendants to see the face of Justice they must be tried separately." 308 F. 2d at 143, 155.

91. View of concurring judge
"It was proper in the defense of Gomez for his counsel to comment upon the fact that he had taken the stand, but it was improper for him to comment upon the fact that de Luna had not taken the stand. The inference which plainly would arise against de Luna by comments to the effect that Gomez testified, like the inference that arises in any event from the failure to testify, is one that must be checkmated by admonition of the court in charge." 308 F.2d at 155 (concurring opinion).

92. Problem troublesome
Hayes v. U. S., C.A.8th, 1964, 329 F. 2d 209, 221, certiorari denied 84 S.Ct. 1883, 377 U.S. 980, 12 L.Ed. 2d 748.

93. Defenses not conflicting
"The important factual distinction between De Luna and the instant case, however, is that in the former, one co-defendant successfully shifted all of the blame to the other co-defendant, whereas here, all co-defendants put forth a single, unified defense based on the theory that the prosecution witnesses had fabricated a preposterous story against them." Kolod v. U. S., C.A.10th, 1967, 371 F.2d 983, 991.

"The degree of antagonism, however, is not as great as that in De Luna where the defenses were mutually exclusive. There, if one defense were believed, the other could not be. In the instant case, it is not clear that Kahn could not have been found innocent if Sachs and Curran were so found." U. S. v. Kahn, C.A.7th, 1967, 381 F.2d 824, 841, certiorari denied 88 S.Ct. 591, 389 U.S. 1015, 19 L.Ed.2d 661.

"The situation here is markedly different. The position of both Snell and the defendant (through his attorney), far from being antagonistic, was that they did not even know each other prior to the trial." U. S. v. Barney, C.A.7th, 1966, 371 F.2d 166, 171.

De Luna rule applies only "where the defendants present conflicting and irreconcilable defenses * * *."

§ 226. —— Conspiracy Cases

Many of the cases discussed in the three sections immediately preceding are conspiracy cases, but the problems of joinder in a conspiracy prosecution are so critical that separate treatment of that subject is required.

To the prosecutor a conspiracy prosecution offers many advantages, but such a prosecution also creates "a serious danger of unfairness to the defendant." [97] Justice Jackson, speaking for himself and Justices Frankfurter and Murphy, has commented:

> The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests loose practice as to this offense constitutes a serious threat to fairness in our administration of justice.[98]

A conspiracy count in an indictment provides a sufficient connecting link to join many defendants charged with many different substantive offenses,[99] and even failure of proof on the conspiracy count will not work retroactively to make the joinder improper so long as the charge of conspiracy was put forth in good faith.[1]

A conspiracy prosecution greatly lessens the right, twice protected in the Constitution, to trial in the vicinage, since venue in a conspiracy prosecution can be laid in any district in which any conspirator did any of the acts, however innocent, intended

97. Serious danger of unfairness

Developments in the Law—Criminal Conspiracy, 1959, 72 Harv.L.Rev. 920, 922.

"It can be readily seen, therefore, that a conspiracy trial creates real and serious possibilities of confusion in the jury, which may indulge in unwarranted imputations of guilt, particularly where the evidence is complex or circumstantial and where there are many defendants." U. S. v. Kahn, C.A.7th, 1967, 381 F.2d 824, 839, certiorari denied 88 S.Ct. 591, 389 U.S. 1015, 19 L.Ed.2d 661. In this case denial of a severance was upheld.

98. Unavailing protest of courts

Krulewitch v. U. S., 1949, 69 S.Ct. 716, 719–720, 336 U.S. 440, 445–446, 93 L.Ed. 790 (concurring opinion).

99. Connecting link for joinder

See § 144 above at notes 58 and 76–85.

1. Failure of proof

Schaefer v. U. S., 1960, 80 S.Ct. 946, 362 U.S. 511, 4 L.Ed.2d 921, noted 1961, 45 Minn.L.Rev. 1066.

See § 144 above at notes 86–92.

But see

Reversal was held required, however, because of the complexity of the case, with regard to defendants who played only a minor role, after the conspiracy charges had been dismissed. U. S. v. Branker, C.A.2d, 1968, 395 F.2d 881.

prejudice if his attorney were not allowed to comment on the failure of another to testify.[94] In addition it has been held that the benefits of the De Luna rule do not apply to a defendant if no severance has been sought[95] and no mistrial asked during the jury argument.[96] Both of those requests had been made in De Luna.

Rhone v. U. S., C.A.1966, 365 F.2d 980, 981, 125 U.S.App.D.C. 47.

"Here, unlike the situation in De Luna, Bennett did not place the sole blame for the wrongful acts charged upon a co-defendant." Hayes v. U. S., C.A.8th, 1964, 329 F.2d 209, 222, certiorari denied 84 S.Ct. 1883, 377 U.S. 980, 12 L.Ed. 2d 748.

94. Comment by attorney forbidden

Mere fact that defendant is unable to comment on refusal of codefendant to testify will not justify severance of trial in which there is cohesion of crime alleged, defendants charged and proof adduced, and there must be showing that real prejudice will result from defendant's inability to comment. U. S. v. Kahn, C.A.7th, 1967, 381 F.2d 824, 839-841, certiorari denied 88 S.Ct. 591, 389 U.S. 1015, 19 L.Ed.2d 661.

Where before the defendants presented their witnesses the district court instructed their counsel not to refer to failure of any of defendants to take the stand and this instruction was to protect rights under U.S.C.A.Const. Amend. 5 of the two silent defendants, and the defenses of the three defendants were not mutually exclusive, and third defendant's counsel's closing argument took advantage of such defendant having taken the stand, there was no showing that prejudice would result from such defendant's inability to comment, and severance was not necessitated. U. S. v. Battaglia, C.A.7th, 1968, 394 F.2d 304, motion denied C.A., 394 F.2d 327.

"We agree with the concurring opinion in De Luna, however, to the effect that such comment by the attorney would not be permissible." U. S. v. McKinney, C.A.6th, 1967, 379 F.2d 259, 265.

U. S. v. Turner, D.C.Tenn.1967, 274 F.Supp. 412, 420.

Court's order to counsel not to comment in his argument "upon the failure of co-defendants to testify" did not prejudice testifying defendant "upon the peculiar facts of this case." Hayes v. U. S., C.A.8th, 1964, 329 F.2d 209, 222, certiorari denied 84 S.Ct. 1883, 377 U.S. 980, 12 L.Ed.2d 748.

Note, Joinder of Defendants in Criminal Prosecutions, 1967, 42 N.Y.U. L.Rev. 513, 526.

95. No severance sought

Defendant could not assert that he was prejudiced by joinder of his case with that of codefendant in that his codefendant testified while defendant did not, thereby emphasizing to jury his failure to take the stand on self-incrimination grounds beyond the repair of any instruction, where at no time before or during the trial did the defendant argue to the court that severance should be granted because codefendant's testimony would present defendant with trilemma of adopting it, disputing it, or remaining silent rather than make the choice, and in that defendant explicitly adopted codefendant's testimony, thereby obtaining benefit of it without subjecting himself to cross-examination. Rhone v. U. S., C.A.1966, 365 F.2d 980, 981, 125 U.S.App.D.C. 47.

96. No mistrial asked

U. S. v. Barney, C.A.7th, 1966, 371 F.2d 166, 170-171.

RULE 15. DEPOSITIONS

Analysis

Sec.
241. When Authorized.
242. Motion for Order.
243. How Taken.
244. Defendant's Counsel and Payment of Expenses.
245. Use of Depositions; Objections.

Text of Rule 15

(a) **When Taken.** If 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, the court at any time after the filing of an indictment or information may upon motion of a defendant and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, 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.

(b) **Notice of Taking.** The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time.

(c) **Defendant's Counsel and Payment of Expenses.** If a defendant is without counsel the court shall advise him of his right and assign counsel to represent him unless the defendant elects to proceed without counsel or is able to obtain counsel. If it appears that a defendant at whose instance a deposition is to be taken cannot bear the expense thereof, the court may direct that the expenses of travel and subsistence of the defendant's attorney for attendance at the examination shall be paid by the government. In that event the marshal shall make payment accordingly.

(d) **How Taken.** A deposition shall be taken in the manner provided in civil actions. The court at the request of a defendant may direct that a deposition be taken on written interrogatories in the manner provided in civil actions.

(e) **Use.** At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evi-

dence, may be used if it appears: That the witness is dead; or that the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena. 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.

(f) **Objections to Admissibility.** Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

§ 241. When Authorized

There are important differences between the rules for depositions in civil cases and Rule 15, authorizing depositions in criminal cases. In civil litigation depositions may be taken as a matter of right at the instance of any party and may be for discovery or to obtain evidence. Under Rule 15, however, depositions may be taken in a criminal case only upon court order, at the instance of a defendant or a material witness. Criminal depositions are not for discovery of information but only to preserve evidence.[1] Indeed the scope of discovery in a related civil action may be circumscribed in order to prevent a party from obtaining information that he could not obtain directly under the deposition and discovery procedures of the Criminal Rules.[2] A request

1. Not for discovery

U. S. v. Steffes, D.C.Mont.1964, 35 F.R.D. 24.

State practice

A Vermont statute, 13 Vt.S.A. § 6721, enacted in 1961, has been construed as allowing defendant in a criminal case to have "unlimited discovery" by means of depositions. State v. Mahoney, 1961, 176 A.2d 747, 122 Vt. 456.

For an account of the favorable experience under the statute, see Langrock, Vermont's Experiment in Criminal Discovery, 1967, 53 A.B.A.J. 732.

2. Related civil case

In handling motions for stay of civil suit until disposition of criminal prosecution on related matters, and in ruling on motions under civil discovery procedures, judge should be sensitive to difference in rules of discovery in civil and criminal cases. Campbell v. Eastland, C.A.5th, 1962, 307 F.2d 478, certiorari denied 83 S.Ct. 502, 371 U.S. 955, 9 L.Ed.2d 502.

If related civil litigation is pending at the same time as a civil proceeding, the taking of depositions in the civil action may, in the discretion of the court in which the civil action is pending, be stayed

to take a deposition in a criminal case, it is said, is to be granted only in "exceptional situations." [3]

In order to obtain a court order for the taking of a deposition in a criminal case, the moving party must establish (1) that the prospective witness may be unable to attend or prevent from attending a trial or hearing, (2) that the testimony of the witness is material, and (3) that it is necessary to take the deposition of the witness in order to prevent a failure of justice. All three conditions must be met.[4] If they are the motion to take the deposition will be granted.[5] If one or more condition is not satisfied the motion will be denied.[6]

pending disposition of the criminal charges. See the discussion of this matter in connection with Civil Rule 30.

3. Exceptional situations only

U. S. v. Whiting, C.A.2d, 1962, 308 F.2d 537, 541, certiorari denied Crowe v. U. S., 83 S.Ct. 722, 372 U.S. 909, 9 L.Ed.2d 718.

U. S. v. Birrell, D.C.N.Y.1967, 276 F. Supp. 798, 822.

U. S. v. Glessing, D.C.Minn.1951, 11 F.R.D. 501, 502.

Advisory Committee Note

The Advisory Committee Note to Rule 15(a) is as follows: "1. This rule continues the existing law permitting defendants to take depositions in certain limited classes of cases under dedimus potestatem and in perpetuam rei memoriam, 28 U.S.C. § 644, [now repealed]. This statute has been generally held applicable to criminal cases, Clymer v. United States, 38 F.2d 581, C.C.A.10th; Wong Yim v. United States, 118 F.2d 667, C.C.A.9th, certiorari denied 313 U.S. 589, 61 S.Ct. 1112, 85 L.Ed. 1544; United States v. Cameron, 15 Fed. 794, C.C.E.D.Mo.; United States v. Hofmann, 24 F.Supp. 847, S.D.N.Y. Contra, Luxenberg v. United States, 45 F.2d 497, C.C.A.4th, certiorari denied 283 U.S. 820, 51 S. Ct. 345, 75 L.Ed. 1436. The rule continues the limitation of the statute that the taking of depositions is to be restricted to cases in which they are necessary 'in order to prevent a failure of justice.'

"2. Unlike the practice in civil cases in which depositions may be taken as a matter of right by notice without permission of the court (Rules 26(a) and 30, Federal Rules of Civil Procedure), this rule permits depositions to be taken only by order of the court, made in the exercise of discretion and on notice to all parties. It was contemplated that in criminal cases depositions would be used only in exceptional situations, as has been the practice heretofore."

4. All conditions must be met

In re United States, C.A.1st, 1965, 348 F.2d 624.

5. Motion granted

That government would be ready for trial of tax evasion case in near future and that witness of whom taxpayer sought to take deposition went to work daily and appeared healthy were pertinent facts but were not enough to prevent taking of the deposition, considering facts that indictment was scarcely a month old, that other motions by taxpayer were set for hearing, that calendar was not light, and that witness was 77 to 80 years old. U. S. v. Hagedorn, D.C.N.Y. 1966, 253 F.Supp. 969.

Defendants charged with conspiring to transmit to foreign government

6. See note 6 on page 475.

Rule 14

McGee v. U. S., C.A.10th, 1968, 402 F.2d 434, certiorari denied 89 S.Ct. 1020, 394 U.S. 908, 22 L.Ed.2d 220.

14. Defendant must make affirmative demonstration

U. S. v. Kershner, C.A.5th, 1970, 432 F.2d 1066.

Posey v. U. S., C.A.5th, 1969, 416 F.2d 545, certiorari denied 90 S.Ct. 965, 397 U.S. 946, 25 L.Ed.2d 127.

U. S. v. Jackson, C.A.6th, 1969, 409 F.2d 8.

In order to demonstrate abuse of discretion by trial judge in denying severance, one must show more than mere fact that codefendants whose strategies were generally antagonistic were tried together; at the very least, it must be demonstrated that a conflict was so prejudicial that differences were irreconcilable, and that the jury would unjustifiably infer that this conflict alone demonstrated that both were guilty. U. S. v. Robinson, C.A.1970, 432 F.2d 1348, 139 U.S.App.D.C. 286.

16. Selective verdicts

U. S. v. Hutul, C.A.7th, 1969, 416 F.2d 607.

18. Overwhelming evidence of guilt

Harrington v. California, 1969, 89 S.Ct. 1726, 395 U.S. 250, 23 L.Ed.2d 284.

22. Conviction reversed

U. S. v. Varelli, C.A.7th, 1969, 407 F.2d 735, certiorari denied 92 S.Ct. 1311, 405 U.S. 1040, 31 L.Ed.2d 581.

23. But see

In a case in which the confession of one defendant incriminated a codefendant, the confession was properly admissible against the first defendant and his conviction was affirmed although the conviction of the codefendant was reversed. U. S. v. Lyon, C.A.7th, 1968, 397 F.2d 505, certiorari denied 89 S.Ct. 131, 393 U.S. 846, 21 L.Ed.2d 117.

RULE 15. DEPOSITIONS

§ 241. When Authorized

The subject of depositions in criminal cases was taken in hand by Congress, as a part of the Organized Crime Control Act of 1970, and is now governed by 18 U.S.C.A. § 3503.[16.1] This statute covers the entire ground—and more—previously covered by Rule 15 and large portions of its language are taken without change from Rule 15. Thus the rule must now be regarded as wholly superseded by the statute.

The most important change made by the statute is that depositions at the instance of the government are now authorized for the first time. If the government moves for an order allowing a deposition, it must include in its motion a 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."[16.2] This was explained by Representative Poff, when the bill was before the House of Representatives, as follows:

> The concept of organized criminal activity is broader in scope than the concept of organized crime; it is meant to include any criminal activity

16.1 1970 statute

18 U.S.C.A. § 3503, added by Act of Oct. 15, 1970, Pub.L. 91-452, § 601.

16.2 Certification by Attorney General

18 U.S.C.A. § 3503(a).

After Attorney General or his designee has made the required certification, the trial court 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. U. S. v. Singleton, C.A.2d, 1972, 460 F.2d 1148 (noted 1972, 4 Rut.-Cam.L.Rev. 148) certiorari denied 93 S.Ct. 1506, 410 U.S. 984, 36 L.Ed.2d 180.

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16.3 "Organized crimin

116 Cong.Rec. H9710 (d
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16.3a Exceptional circu

If the three specified cor
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met. U. S. v. Singleto
460 F.2d 1148 (noted 19
L.Rev. 148.) certiorari
Ct. 1506, 410 U.S. 984,

16.4 Refuses to testify

18 U.S.C.A. § 3503(f).

16.5 Change the place

18 U.S.C.A. § 3503(b).

16.6 Presence of defendar

18 U.S.C.A. § 3503(b).

collectively undertaken since in all such instances there is an increased potential for intimidation of Government witnesses. In addition, there is no requirement that the trial at hand be of that sort. It is access to collective criminal power that endangers the witness—whether of the Mafia, the Communist Party, the Black Panther Party, or the KKK. Such a defendant, no matter what he is being tried for—a violation of the Migratory Bird Act, for instance—can bring this power to bear to avoid criminal liability, and that is what this provision is designed to protect against.[16.3]

The statute also differs from the rule in that under the statute a deposition may be taken only of a prospective witness of the party who moves for the order. The rule had not been so limited in terms. Further, the statute changes the standard for granting an order for the taking of a deposition. As set out in the text in the main volume, the rule had allowed a deposition only on a showing of three specified conditions. The statute speaks more generally and allows the court to order the taking of a deposition "whenever due to exceptional circumstances it is in the interest of justice that the testimony of a prospective witness of a party be taken or preserved." [16.3a]

A final major change made by the statute is that a deposition may be used in a criminal case if "the witness refuses in the trial or hearing to testify concerning the subject of the deposition or part offered."[16.4]

Other differences between the statute and the prior practice under the rule may be briefly noted: (1) the court is now authorized to change the place for taking the deposition;[16.5] (2) the right of the defendant to be present at the examination, and the consequence of his failure to exercise that right, are spelled out more clearly than in the past;[16.6] (3) the court may now require the government to pay the expenses of both the defendant and his attorney and may do so whenever the deposition is taken at the instance of the government as well as when the defendant is unable to bear these expenses;[16.7] (4) it is specified that a

16.3 "Organized criminal activity"

116 Cong.Rec. H9710 (daily ed. Oct. 7, 1970).

16.3a Exceptional circumstances

If the three specified conditions of Rule 15(a) are met, then the "exceptional circumstances" test of the statute is met. U. S. v. Singleton, C.A.2d, 1972, 460 F.2d 1148 (noted 1972, 4 Rut.-Cam. L.Rev. 148.) certiorari denied 93 S. Ct. 1506, 410 U.S. 984, 36 L.Ed.2d 180.

16.4 Refuses to testify

18 U.S.C.A. § 3503(f).

16.5 Change the place

18 U.S.C.A. § 3503(b).

16.6 Presence of defendant

18 U.S.C.A. § 3503(b).

16.7 Payment of expenses

18 U.S.C.A. § 3503(c).

Compare

Defendant who allegedly committed perjury during bankruptcy proceeding involving defendant's corporation, in relation to questions asked as to defendant's interest in a certain motion picture film, would be allowed to take depositions in Spain to give defendant an opportunity to show what his dealings with Spanish Government had been regarding this and other films, but court would require defendant to pay travel expenses of government attorney plus a per diem rate of $17 per day for period of time spent in Spain where there was no evidence that defendant did not have the ability to meet such conditions and where defendant had failed to arrange depo-

deposition of a party defendant cannot be taken without his consent; [16.8] (5) it is specified that the scope of examination and cross-examination at a deposition shall be such as would be allowed in the trial itself; [16.9] (6) the government is required to make available to the defendant any statement of a witness that the government would be required to make available if the witness were testifying at the trial.[16.10]

16.8 Deposition of a defendant
18 U.S.C.A. § 3503(d).

16.9 Scope of examination
18 U.S.C.A. § 3503(d).

16.10 Produce statements
18 U.S.C.A. § 3503(e).

Supplement to Notes in Main Volume

sitions when government counsel was previously in Spain interviewing witnesses. U. S. v. Bronstor, D.C.N.Y. 1971, 321 F.Supp. 1269.

3. Exceptional situations only

Wright cited by the court in McCormick v. Swenson, D.C.Mo.1971, 328 F.Supp. 646, 648.

U. S. v. Rosenstein, D.C.N.Y.1969, 303 F.Supp. 210, 212.

As discussed in the new text above, the 1970 statute that has replaced Rule 15 now permits depositions only in "exceptional circumstances." 18 U.S.C.A. § 3503(a).

See U. S. v. Singleton, C.A.2d, 1972, 460 F.2d 1148, certiorari denied 93 S.Ct. 1508, 410 U.S. 984, 36 L.Ed.2d 180, holding that if the three specified conditions of Rule 15(a) are met, then the "exceptional circumstances" test of the statute is met.

4. All conditions must be met

The fact that a witness was unwilling to attend was not tantamount to being unable to attend. U. S. v. Hayutin, C.A.2d, 1968, 398 F.2d 944, certiorari denied 89 S.Ct. 400, 393 U.S. 961, 21 L.Ed.2d 374.

Burden of proof is on defendant seeking to take deposition of witness who may be unable to attend trial to show that the witness is unavailable, that deposition is necessary to prevent a failure of justice, and that the testimony is material to his defense. U. S. v. Bronston, D.C.N.Y. 1971, 321 F.Supp. 1269.

5. Motion granted

Defendant would be permitted to take deposition of person whose testimony would be relevant to determination of issues at trial and who had enclosed in letter to defense counsel medical certificate confirming arteriosclerosis and chronic bronchitis condition preventing any travel to United States and who had informed defense counsel that he would be willing to submit to deposition in England. U. S. v. Rosenstein, D.C.N.Y.1969, 303 F.Supp. 210.

6. Motion refused

Where no adequate showing was made for taking of deposition of prospective witness outside United States since his only refusal to attend trial was his fear of arrest and prosecution if he returned to United States and during trial judge granted such witness safe passage from Mexico to United States and back for purpose of testifying but such witness refused to attend trial, denial of motion to take deposition of witness outside United States was not an abuse of discretion. U. S. v. Puchi, C.A.9th, 1971, 441 F.2d 697, certiorari denied 92 S.Ct. 92, 404 U.S. 853, 30 L.Ed.2d 92.

Defendant would not be permitted to take deposition of person who was presently fugitive from justice subject to arrest pursuant to outstanding order of contempt issued by district court. U. S. v. Rosenstein, D.C. N.Y.1969, 303 F.Supp. 210.

Where codefendant was fugitive from justice who had wilfully absented himself to a country with which United States did not have diplomatic relations and thus was afforded protection against sanctions that might be sought for perjurious testimony, there was no showing that codefendant was willing to testify and government could not prepare cross inter-

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298 F.Supp. 1215.

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9. Discretion of court

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374.

§ 242. Motion for Or

31. Burden on moving par

See U. S. v. Hayutin, C.A.
F.2d 944, 954, certiorari de
400, 393 U.S. 961, 21 L.E

U. S. v. Valentine, D.C.Puer
238 F.Supp. 957, 983 n. 26.

Defendant seeking to have
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S. v. Bronston, D.C.N.Y.19
Supp. 1269.

§ 243. How Taken

43. Civil Rules applicable

The Civil Rules are now made
ble by 18 U.S.C.A. § 3503(d),
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§ 244. Defendant's Couns

Rule 15(c) has now been
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rogatories without disclosure in advance of defendant's trial of substance of its case, defendant would not be permitted to take deposition by written interrogatories of codefendant. U. S. v. Figueroa, D.C.N.Y.1969, 298 F.Supp. 1215.

8. Convincing showing of materiality

It is not necessary that defendant, who seeks to take deposition of a prospective witness who may be unable to attend trial show that the testimony will surely acquit him. U. S. v. Bronston, D.C.N.Y.1971, 321 F. Supp. 1269.

9. Discretion of court

The taking of deposition of citizen of foreign country and the setting of conditions for it was within judge's discretion. U. S. v. Hayutin, C.A.2d, 1968, 398 F.2d 944, certiorari denied 89 S.Ct. 400, 393 U.S. 961, 21 L.Ed.2d 374.

Taking of deposition of a prospective witness who may be unable to attend trial, especially on the eve of trial, and the setting of conditions for such taking, are clearly within trial court's discretion. U. S. v. Bronston, D.C.N.Y.1971, 321 F.Supp. 1269.

21. Limits to constitutional rule

See California v. Green, 1970, 90 S.Ct. 1930, 399 U.S. 149, 26 L.Ed.2d 489, on remand 92 Cal.Rptr. 494, 479 P.2d 988, 3 Cal.3d 981. Although the Court had a different problem before it in that case, its analysis certainly would seem to permit use by the prosecution in a criminal case of the deposition of an unavailable witness.

It was so held in U. S. v. Singleton, C.A. 2d, 1972, 460 F.2d 1148, certiorari denied 93 S.Ct. 1506, 410 U.S. 984, 36 L. Ed.2d 180.

§ 242. Motion for Order

31. Burden on moving party

See U. S. v. Hayutin, C.A.2d, 1968, 398 F.2d 944, 954, certiorari denied 89 S.Ct. 400, 393 U.S. 961, 21 L.Ed.2d 374.

U. S. v. Valentine, D.C.Puerto Rico 1968, 288 F.Supp. 957, 983 n. 26.

Defendant seeking to have deposition taken of prospective witness who may be unable to attend trial must show that it is practicable to obtain the testimony and that the proposed witness is, although unavailable for trial, willing to testify by deposition. U. S. v. Bronston, D.C.N.Y.1971, 321 F. Supp. 1269.

Bare recital in affidavit submitted by defense counsel that deponent had reason to believe that person would not attend any trial conducted in United States, absent any factual elaboration showing that witness could not be present, was insufficient to permit deposition of person. U. S. v. Rosenstein, D.C.N.Y.1969, 303 F. Supp. 210.

35. Reviewable on appeal from final judgment

U. S. v. Hayutin, C.A.2d, 1968, 398 F.2d 944, certiorari denied 89 S.Ct. 400, 393 U.S. 961, 21 L.Ed.2d 374.

§ 243. How Taken

43. Civil Rules applicable

The Civil Rules are now made applicable by 18 U.S.C.A. § 3503(d), but it is there specified that the scope of examination and cross-examination is limited to that which would be allowed at the trial itself.

§ 244. Defendant's Counsel and Payment of Expenses

Rule 15(c) has now been superseded by 18 U.S.C.A. § 3503(d). The statute gives the court power to require the government to pay the expenses of travel and subsistence of the defendant and his attorney for attendance at the examination whenever the deposition is taken at the instance of the government or whenever it is taken at the instance of a defendant who appears to be unable to bear the expense.

§ 245. Use of Depositions; Objections

Rule 15(e) has now been superseded by 18 U.S.C.A. § 3503(f). The statute is the same as the former rule, except that an additional ground on which a deposition may be used under the statute is that the witness refuses in the trial or hearing to testify concerning the subject of the deposition or part offered."

Supplement to Notes in Main Volume

58. Use of deposition

Since all parties in prosecution for smuggling aliens into United States complied with the statutory procedure with respect to taking of depositions of aliens against whom material witness complaints had been filed to insure their presence at trial and defendant knowingly waived right to confront such witnesses in person, court did not err in admitting such deposition testimony after ordering aliens returned to Mexico. U. S. v. Lewis, C.A.9th, 1972, 460 F.2d 257.

RULE 16. DISCOVERY AND INSPECTION

§ 251. History

More recently, speaking in the context of criminal discovery, the Court has said:

> The adversary system of trial is hardly an end to itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played.[14.1]

Further liberalization of criminal discovery in the federal courts appears to be only a matter of time.[14.2]

14.1 Not a poker game

Williams v. Florida, 1970, 90 S.Ct. 1893, 1896, 399 U.S. 78, 82, 26 L.Ed.2d 446.

14.2 Further liberalization

The American Bar Association Project on Standards for Criminal Justice has recommended "more permissive discovery practices for criminal cases than is provided by applicable law in any jurisdiction in the United States."

ABA Project on Standards for Criminal Justice, Discovery and Procedure Before Trial, Tent.Dr.1969, p. 1.

The ABA recommendations strongly influenced the Advisory Committee on Criminal Rules in its January 1970 proposals for extensive amendment of Rule 16. 48 F.R.D. 537.

See U. S. v. Ahmad, D.C.Pa.1971, 53 F.R.D. 186, 190, citing Wright (Wright & Elliott Supp.).

§ 252. Policy Considerations

15. Favorable to broad discovery

ABA Project on Standards for Criminal Justice, Discovery and Procedure Before Trial, Tent.Dr.1969.

Comment, Toward Effective Criminal Discovery: A Proposed Revision of Federal Rule 16, 1970, 15 Vill.L.Rev. 655.

25. But see

"Certainly Judge Hand overstated the case. The accused is a long way from having 'every advantage,' although he has a good many. Juries doubtless tend to believe that most indicted persons are guilty, no matter how strongly they are warned otherwise; and the state has far greater resources for investigation and, at least until recently, better lawyers." Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 1968, 37 U.Cinc.L.Rev. 671, 694.

"It is clear, however, that, even with the expansion of the rights of accused, the defendant in a criminal case does not enjoy every advantage or more advantages than the state." ABA Project on Standards for Criminal Justice, Discovery and Procedure Before Trial, Tent.Dr.1969, p. 43.

information relating to national defense of the United States and to acting as agents of foreign government in United States without prior notification to Secretary of State were entitled to order to take depositions of foreign nationals alleged to be co-conspirators, even though defendants did not know whereabouts of prospective witnesses and could not ascertain whether they would consent to be permitted to be examined, and, if so, nature and extent of their testimony. U. S. v. Egorov, D.C.N.Y.1963, 34 F.R.D. 130.

6. Motion refused

Trial court properly denied motion to take deposition of certain foreign nationals where there was no showing that their testimony might have been material. U. S. v. Steel, C.A.2d, 1966, 359 F.2d 381.

It is not enough under Rule 15(a) that the testimony of a witness is material and that his deposition is needed in order to prevent a failure of justice. The deposition cannot be ordered unless it also appears that he will be unable to attend the trial. A bare assertion that the witness might not be able to appear is not enough. In re United States, C.A.1st, 1965, 348 F.2d 624.

Court denied application to take deposition of witness who was in the United States and subject to subpoena despite claim of defendant that witness could not take time from a busy medical practice to come to trial and that it would be expensive to bring him from Philadelphia, Pa., to Hot Springs, Ark. U. S. v. Massi, D.C.Ark.1968, 277 F.Supp. 371.

The naked fact that witnesses were outside of the United States does not, of itself, constitute an adequate basis for an inference that they may be "unable to attend" within the meaning of Rule 15(a). U. S. v. Birrell, D.C.N.Y.1967, 276 F.Supp. 798, 822–824.

Court would not authorize deposition of witness abroad sought because witness, who was otherwise able and willing to testify, declined to come to United States solely for asserted reason that he desired assurance of immunity against arrest should authorities conclude that his testimony was perjurious. U. S. v. Soblen, D.C.N.Y.1961, 203 F.Supp. 542, affirmed C.A.2d, 1962, 301 F.2d 236, certiorari denied 82 S.Ct. 1585, 370 U.S. 944, 8 L.Ed.2d 810.

Defendant, who had been indicted for failure to answer questionnaire propounded to him in connection with census, was not entitled to take deposition of Director of Bureau of Census pursuant to this rule, though he was allegedly a hostile witness, in absence of showing that he was unable to attend or might be prevented from attending trial. U. S. v. Rickenbacker, D.C.N.Y.1961, 27 F.R.D. 485.

Motion to take deposition was denied where it was sought thereby to permit witness to testify and still remain fugitive. U. S. v. Van Allen, D.C.N.Y.1961, 28 F.R.D. 329, affirmed C.A.2d, 1965, 349 F.2d 720, 769–770.

Though testimony of witness would clearly be material, deposition would not be ordered of person expected to be government's chief witness since there was no suggestion that she would be unable to attend the trial. U. S. v. Grado, D.C.Mo.1957, 154 F.Supp. 873.

Where there was no proof or even indication that petitioner's accountant was a prospective witness in future prosecution of petitioner for income tax evasion and for making fraudulent returns, and it was not established that it was necessary to take the deposition of the accountant to prevent a failure of justice, petitioner was not entitled to take the deposition of the petitioner. Application of Russo, D.C.N.Y.1956, 19 F.R.D. 278, affirmed C.A.2d, 1957, 241 F.2d 285, certiorari denied 78 S.Ct. 18, 355

There is language in some cases indicating that defendant is entitled to take a deposition under Rule 15 only on a showing that the testimony would tend to exonerate him.[7] It has been correctly observed, however, that read in context these cases mean only that there must be a convincing showing that the anticipated testimony would be material to some defense.[8] Of course the defendant would not seek to take a deposition unless he hoped it would tend to exonerate him, but the government cannot defeat his motion by even a highly plausible forecast that the defendant will be disappointed in this hope.

Although the decisions recognize a considerable discretion in courts passing on motions to take a deposition,[9] the rule does not permit a judge to condition authorization of a deposition upon the witness consenting in writing to open its files to investigation by the United States.[10]

The rule does not permit authorization of a deposition on motion of the government, though there have been proposals for many years that this should be permitted. William Howard Taft, later to be Chief Justice, urged this as long ago as 1905.[11] The original advisory committee that drafted the Criminal Rules would have allowed this,[12] but the Supreme Court, which had

U.S. 816, 2 L.Ed.2d 33. The appellate court held that the Civil Rules, rather than the Criminal Rules, were applicable to this motion to suppress made prior to indictment, but agreed with the result.

In prosecution for failure to submit for induction into armed forces, defendant was not entitled to take depositions of members of presidential appeal board, since their testimony would not be material. U. S. v. Glessing, D.C.Minn.1951, 11 F.R.D. 501.

7. Would tend to exonerate

See U. S. v. Broker, C.A.2d, 1957, 246 F.2d 328, 329, certiorari denied 78 S.Ct. 63, 355 U.S. 837, 2 L.Ed.2d 49.

U. S. v. Whiting, C.A.2d, 1962, 308 F.2d 537, 541, certiorari denied 83 S.Ct. 722, 734, 372 U.S. 909, 919, 9 L.Ed.2d 718, 725.

8. Convincing showing of materiality

U. S. v. Hagedorn, D.C.N.Y.1966, 253 F.Supp. 969, 971.

9. Discretion of court

In re United States, C.A.1st, 1965, 348 F.2d 624, 626.

U. S. v. Whiting, C.A.2d, 1964, 308 F.2d 537, 541, certiorari denied 83 S.Ct. 722, 372 U.S. 909, 9 L.Ed. 2d 718.

U. S. v. Broker, C.A.2d, 1957, 246 F. 2d 328, 329, certiorari denied 78 S.Ct. 63, 355 U.S. 837, 2 L.Ed.2d 49.

Heflin v. U. S., C.A.5th, 1955, 223 F. 2d 371, 375.

10. Condition improper

Madison-Lewis, Inc. v. MacMahon, C.A.2d, 1962, 299 F.2d 256.

11. Urged long ago

Taft, The Administration of the Criminal Law, 1905, 15 Yale L.J. 1, 10.

12. Proposed by original committee

Second Preliminary Draft of Federal Rules of Criminal Procedure, February 1944, pp. 90–94.

earlier thought such a procedure "questionable," [13] inserted the words "upon motion of a defendant" in what is now Rule 15(a), and made certain other changes in the rule in order to make it clear that depositions may not be taken at the instance of the government.[14] When a new committee was formed years later to propose amendments to the rules, it recommended again that government depositions be permitted,[15] but this recommendation was rejected by the Standing Committee on Rules of Practice and Procedure and was not included in the changes recommended by the Judicial Conference to the Supreme Court.[16]

The gingerly treatment of these proposals is in large part because it is unclear whether taking depositions at the instance of the government would be consistent with the Confrontation

Criticisms of proposal

The proposed rule is of doubtful wisdom. There is much that a jury may learn in weighing the credibility of a witness by seeing him on the witness stand that is not present from reading the cold words of a deposition. Maguire, Proposed New Federal Rules of Criminal Procedure, 1943, 23 Or. L.Rev. 56, 63.

For other criticisms of this rule while in the Preliminary Draft, see Stewart, Comments on Federal Rules of Criminal Procedure, 1943, 8 John Marshall L.Q. 200, 269; Phillips, Suggestions and Comments on the Proposed Federal Rules of Criminal Procedure, 1943, 17 Fla.L.J. 230, 234.

13. Questioned by Supreme Court

This statement was made in unpublished comments by the Court on an earlier draft of the proposed rules. See Orfield, Depositions in Federal Criminal Procedure, 1957, 9 S.C.L.Q. 376, 381.

14. Government depositions not permitted

See the remarks of the Hon. G. Aaron Youngquist in N.Y.U. Institute on Federal Rules of Criminal Procedure, 1946, p. 165.

Orfield, Depositions in Federal Criminal Procedure, 1957, 9 S.C.L.Q. 376, 383–384.

15. Recommended again by new committee

Second Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure, March 1964, pp. 8–11.

16. Not recommended by Judicial Conference

The recommendations of the Judicial Conference are set out at 39 F.R.D. 69, 172–173.

Regret that the amendments to Rule 15 were not adopted is voiced in Orfield, The Federal Rules of Criminal Procedure, 1966, 10 St. Louis U.L.J. 445, 449.

The proposal had been criticized, however, in Note, 1933, 33 Notre Dame Law. 35, 41.

The Special Committee on Federal Rules of Procedure of the American Bar Association also opposed adoption of the proposed changes in Rule 15. In a report of August 1965 it said, in part: "If the testimony of such an absent witness is of such great importance that 'a failure of justice' might result in the absence of his testimony, it should be apparent that the witness is important enough so that the jury should have a chance to see and observe his demeanor." 38 F.R.D. 95, 108.

Clause of the Sixth Amendment. In a famous case, the Supreme Court said:

> 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 the 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.[17]

This would seem to prohibit the use of depositions except where the right of confrontation has been waived. But in the very same passage the Court went on to say that general rules of law must occasionally give way to considerations of public policy and the necessities of the case.[18] Were it otherwise there could be no exceptions to the hearsay rule in a criminal prosecution, at least if the evidence is offered against the accused,[19] and it is entirely clear that this is not the law.[20] Indeed very re-

17. Right of confrontation

Mattox v. U. S., 1895, 15 S.Ct. 337, 339, 156 U.S. 237, 242–243, 39 L.Ed. 409.

This is quoted with approval by the Court in Barber v. Page, 1968, 88 S.Ct. 1318, 1320, 390 U.S. 719, 721, 20 L.Ed.2d 255. In that case the Court also said that "a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." 88 S.Ct. at 1322, 390 U.S. at 724–725.

18. General rules must give way

Mattox v. U. S., 1895, 15 S.Ct. 337, 340, 156 U.S. 237, 243, 39 L.Ed. 409.

19. Offered against the accused

Out-of-court statements offered against a criminal defendant must survive the hurdles of both the hearsay rule and the Confrontation Clause. If the accused offers such statements in his own behalf, there is no problem with the Confrontation Clause, while the Due Process Clauses of the Fifth and Fourteenth Amendments are limitations—as yet little discussed in the cases—to any exclusion of evidence offered by an accused. See Ferguson v. State of Georgia, 1961, 81 S.Ct. 756, 773, 365 U.S. 570, 602, 5 L.Ed.2d 783 (concurring opinion).

20. Exceptions to hearsay rule recognized

If the witness is absent by the connivance or procurement of the accused, his testimony at a preliminary examination may be received at the trial. Reynolds v. U. S., 1874, 98 U.S. 145, 148, 25 L.Ed. 244.

Dying declarations and testimony at a former trial are admissible. Mattox v. U. S., 1895, 15 S.Ct. 337, 156 U.S. 237, 39 L.Ed. 409.

McCormick, Evidence, 1954, pp. 483–487.

Case no longer authoritative

West v. State of Louisiana, 1903, 24 S.Ct. 650, 194 U.S. 258, 48 L.Ed.

cently the Court, in holding the Confrontation Clause binding on the states, said:

> The case before us would be quite a different one had Phillips' statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine. * * * There are other analogous situations which might not fall within the scope of the constitutional rule requiring confrontation of witnesses.[21]

This could reasonably be read as permitting the use of depositions against a defendant if he and his counsel were present and had an adequate opportunity to cross-examine. It is just as well, however, that not all constitutional questions need be decided, and that rules do not press to, or beyond, constitutional limits. As a member of the original Advisory Committee observed when the Supreme Court refused to adopt that committee's proposal for government depositions: "The Court's action in eliminating depositions on behalf of the government may have been prompted by a feeling that the government could better afford to lose a few cases than make even a gesture which might be interpreted as favoring trial on a paper record." [22]

Even under Rule 15 as it stands hard problems of the applicability of the Confrontation Clause are possible, though so far as can be told from the reported cases, they have never arisen.[23] There is no problem if a deposition is taken at the instance of the defendant and offered in evidence by him. His right under the Confrontation Clause can be waived,[24] and surely there is a waiver

965, says that a deposition is admissible against the accused in a state prosecution. It is no longer authoritative since it rests on the premise that the Sixth Amendment is not applicable against the states, and this is clearly not now the law. See Pointer v. State of Texas, 1965, 85 S.Ct. 1065, 380 U. S. 400, 13 L.Ed.2d 923.

21. Limits to constitutional rule

Pointer v. State of Texas, 1965, 85 S.Ct. 1065, 1069–1070, 380 U.S. 400, 407, 13 L.Ed.2d 923.

22. Comment of committee member

Dession, The New Federal Rules of Criminal Procedure: II, 1947, 56 Yale L.J. 197, 218.

23. Possible problems under existing rule

These problems are discussed with great foresight in N.Y.U. Institute on Federal Rules of Criminal Procedure, 1946, pp. 191–196.

24. Right waivable

Diaz v. U. S., 1912, 32 S.Ct. 250, 223 U.S. 442, 56 L.Ed. 500.

Kemp v. Government of Canal Zone, C.C.A.5th, 1948, 167 F.2d 938, 940.

Burns ex rel. Burns v. Sanford, D.C. Ga.1948, 77 F.Supp. 464, 465.

under the circumstances described. The problems arise in three situations. First, a deposition is taken on motion of the defendant but the witness gives answers unfavorable to the defendant. The defendant naturally does not offer the deposition but the prosecution does. Is the deposition admissible? This is the easiest of the three situations since the motion by the defendant for taking of the deposition can be viewed as a waiver of his right of confrontation.[25] Second, the deposition exculpates the defendant at whose instance it was taken but incriminates a codefendant. The deposition is clearly not admissible against the codefendant if he was not present and represented by counsel when it was taken.[26] Cautionary instructions are plainly inadequate as a remedy and a severance should be granted.[27] If the codefendant was present and represented by counsel, present law simply gives no answer to the question whether the deposition is usable against him. It would be hard to find a waiver by the codefendant who has neither sought to have the deposition taken nor offered it in evidence. If the case ever arises the court that has it will have to make new law on the application of the Confrontation Clause in this situation.

Finally the rule provides that if a material witness is committed for failure to give bail or otherwise meet conditions of release, the court on the written motion of the witness and upon notice to the parties may direct that his testimony be taken by deposition and may then order the witness released from custody.[28] As

25. **But see**

There is state court authority to the contrary. E.g., State v. Tomblin, 1897, 48 Pac. 144, 57 Kan. 841; State v. McCall, 1944, 149 P.2d 580, 158 Kan. 652. In the latter case the court said: "The fact that defendant had taken the deposition as he was entitled to under the constitution did not constitute a waiver of his right to be confronted with the witness before the jury." 149 P.2d at 581.

26. **Not admissible**

This seems to follow a fortiori from Pointer v. State of Texas, 1965, 85 S.Ct. 1065, 380 U.S. 490, 13 L.Ed. 2d 923.

27. **Cautionary instructions inadequate**

See § 224 above.

28. **Material witness**

See also Rule 46(b), § 766 below.

And see 18 U.S.C.A. § 3149, adopted in 1966: "If it appears by affidavit that the testimony of a person is material in any criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpena, a judicial officer shall impose conditions of release pursuant to section 3146. No material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to

was predicted when the rules were adopted,[29] this procedure is rarely, if ever, used, and so is not of practical importance. If it were used the deposition could clearly not be admitted against a defendant not present and represented by counsel at the hearing, for reasons similar to those stated in connection with the use of a deposition adverse to a codefendant. Use of the deposition against a defendant present and represented by counsel at the taking of the deposition would raise the same hard question discussed above about the limits of the Confrontation Clause.

§ 242. Motion for Order

A deposition may be taken only by leave of court granted on motion. Provisions of other rules about motions apply to such a motion.[30] Rule 15(a) requires that notice of the motion be given to all parties. The burden is on the moving party to demonstrate the availability of the proposed witnesses and their willingness to appear, the materiality of the testimony they are expected to give, and that injustice will result if the motion is denied.[31] This showing may appropriately be made in an affidavit in support of the motion.[32]

The rule permits the motion to be made "at any time after the filing of an indictment or information," but it has been said that it should be made promptly,[33] and motions that would delay the trial have been rejected as untimely.[34]

the Federal Rules of Criminal Procedure."

29. Predicted when rules adopted

See the comments of Judge Alexander Holtzoff in N.Y.U. Institute on Federal Rules of Criminal Procedure, 1946, p. 196.

30. Other rules about motions

The subject of motions generally is covered by Rule 47, §§ 801–802 below. Time for motions is regulated by subdivisions (d) and (e) of Rule 45, §§ 754–755 below, and service and filing of motions by Rule 49, §§ 821–822 below.

31. Burden on moving party

U. S. v. Whiting, C.A.2d, 1962, 308 F.2d 537, certiorari denied 83 S.Ct. 722, 372 U.S. 909, 9 L.Ed.2d 718.

U. S. v. Grado, D.C.Mo.1957, 154 F. Supp. 878.

U. S. v. Ausmeier, D.C.N.Y.1946, 5 F.R.D. 395.

32. Showing made by affidavit

Rule 47, § 802 below.

U. S. v. Hagedorn, D.C.N.Y.1966, 253 F.Supp. 969, 970.

U. S. v. Egorov, D.C.N.Y.1963, 34 F. R.D. 130, 131.

See U. S. v. Ausmeier, D.C.N.Y.1946, 5 F.R.D. 395, 396–397.

33. Should be made promptly

U. S. v. Foster, D.C.N.Y.1948, 81 F. Supp. 281, 284.

Motion not untimely

Government objection that motion for depositions of persons who had been deported was untimely because not made until after they

34. See note 34 on page 482.

Denial of a motion to take a deposition is an interlocutory order and is not appealable. It is reviewable on appeal from a judgment of conviction,[35] but defendant has a heavy burden to show an abuse of discretion by the trial court, and no defendant thus far has prevailed on such an appeal. In one case defendant did obtain mandamus when the trial court attached a condition, not authorized by the rules, to the order for taking the deposition,[36] and another case held that mandamus was available to the government when the district court's order permitting taking the deposition was the result of a misconstruction of the rule.[37]

§ 243. How Taken

If the court grants a motion for the taking of a deposition, the moving party must give to every other party reasonable written

were deported was rejected, because prior to their deportation it could not have been shown that they would be unable to attend the trial. U. S. v. Egorov, D.C.N.Y. 1963, 34 F.R.D. 130.

34. Motion untimely

Motion to take deposition, made after considerable delay and on opening day of trial, was properly denied. U. S. v. Whiting, C.A.2d, 1962, 308 F.2d 537, certiorari denied 83 S.Ct. 722, 372 U.S. 909, 9 L.Ed.2d 725.

See U. S. v. Birrell, D.C.N.Y.1967, 276 F.Supp. 798, 823.

In prosecution for smuggling merchandise into United States, where three months before trial government had named person in Germany as a coconspirator and more than two months before trial had apprised defendant that it would offer a witness who would testify that such person had made statements incriminating defendant, there was no abuse of discretion in denying defendant's motion, made on eve of trial, to take in Germany, by written interrogatories, the deposition of such person. U. S. v. Broker, C.A.2d, 1957, 246 F.2d 328, certiorari denied 78 S.Ct. 63, 355 U.S. 837, 2 L.Ed.2d 49.

"Appellant's motion was filed at 4:00 p. m. on a Friday, only five days prior to the trial. The prosecuting attorney was engaged in trying cases and was unable to go to Florida to take the deposition. The motion gave no reason for the lapse of 15 days between appointment of defense counsel and the filing of this motion, and we cannot now consider in determining the propriety of the order, counsel's afterthought in his appellate brief that he had meanwhile been ill." Heflin v. U. S., C.A.5th, 1955, 223 F.2d 371, 375.

35. Reviewable on appeal from final judgment

U. S. v. Steel, C.A.2d, 1966, 359 F.2d 381, 382.

U. S. v. Kelly, C.A.2d, 1965, 349 F.2d 720, 769, certiorari denied 86 S.Ct. 1467, 384 U.S. 947, 16 L.Ed.2d 544.

U. S. v. Whiting, C.A.2d, 1962, 308 F.2d 537, 541, certiorari denied 83 S.Ct. 722, 372 U.S. 909, 9 L.Ed. 2d 718.

Heflin v. U. S., C.A.5th, 1955, 223 F. 2d 371, 375.

36. Mandamus granted defendant

Madison-Lewis, Inc. v. MacMahon, C.A.2d, 1962, 299 F.2d 256.

37. Mandamus granted government

In re United States, C.A.1st, 1965, 348 F.2d 624.

notice of the time and place for taking the deposition and the name of the person to be examined.[38] A subpoena may be issued to be served on the person whose deposition is to be taken,[39] although in many cases this will be either unavailing or unnecessary or both. If the deponent resides in the district in which the deposition is to be taken he may be required by subpoena to attend an examination only in the county in which he resides or is employed or transacts his business in person. If he is not a resident of the district, he may be required to attend only in the county where he is served with a subpoena or within 40 miles from the place of service or at such other place as is fixed by the court.[40]

The notice of taking the deposition need not state the name of the person before whom it is to be taken. Although in civil cases it has been said that it is "better practice" to include that information,[41] it is hard to see why this is so, and decisions in civil cases are clear that it is not required.[42]

Rule 15(d) incorporates by reference the provisions of the Civil Rules on the manner of taking depositions in criminal cases, and the discussion of the relevant Civil Rules is applicable to these details in taking a criminal deposition.[43] It is specifically pro-

38. Notice of taking

Rule 15(b).

An earlier draft would have provided that "if the name is not known, a description sufficient to identify him." Orfield, Depositions in Federal Criminal Procedure, 1957, 9 S.C.L.Q. 376, 383. That language does appear in Civil Rule 30(a), and the deletion of it in the corresponding Criminal Rule would seem deliberately intended to produce a different result. Yet Criminal Rule 17(f), somewhat inconsistently, provides that an order permitting a deposition authorizes the clerk to issue subpoenas for "the persons named or described therein."

39. Subpoena authorized

Rule 17(f) (1). On subpoenas generally, see §§ 271–279, below.

40. Place of examination

Rule 17(f) (2). See § 278 below.

41. Better practice

Norton v. Cooper-Jarrett, Inc., D.C. N.Y.1940, 1 F.R.D. 92, 94.

42. Name of officer not required

Yonkers Raceway, Inc. v. Standardbred Owners Ass'n, D.C.N.Y. 1957, 21 F.R.D. 3.

Zweifler v. Sleco Laces, Inc., D.C.N. Y.1950, 11 F.R.D. 202.

Norton v. Cooper-Jarrett, Inc., D.C. N.Y.1940, 1 F.R.D. 92.

43. Civil Rules applicable

The following provisions of the Civil Rules appear to be relevant, and the discussion of them in the appropriate volume of this Treatise should be consulted: Civil Rules 26(c) (examination and cross-examination); 28 (persons before whom depositions may be taken); 29 (stipulations regarding the taking of depositions); 30(c) (record of examination; oath; objections); 30(d) (motion to terminate or limit examination); 30(e) (submission to

vided in Criminal Rule 17(b), however, that on motion of a party upon whom the notice of taking the deposition is served, the court for cause shown may extend or shorten the time. The protective orders authorized by Civil Rule 30(b) should be unnecessary in a criminal deposition since the court can take such matters into account in passing on the motion for taking the deposition. Civil Rule 26(b), on the scope of the examination, can have at best limited application to criminal depositions, since Rule 15(a) limits such depositions to material testimony and the Civil Rule allows testimony inadmissible at the trial so long as it is relevant to the subject matter involved in the action.

Rule 15(d) provides that the court at the request of a defendant may direct that a deposition be taken on written interrogatories in the manner provided in civil actions.[44] This incorporates the procedure set out in Civil Rule 31.[45] It does not authorize interrogatories to an adverse party,[46] a very different procedure provided for in Civil Rule 33. Rule 17(a) also provides that if a court grants a motion for the taking of a deposition it may also order that any designated books, papers, documents or tangible objects, not privileged be produced at the same time and place.[47]

§ 244. Defendant's Counsel and Payment of Expenses

Rule 15(c) of this rule introduces a new feature for the purpose of protecting the rights of an indigent defendant. If a defendant is without counsel the court must advise him of his rights and assign counsel unless the defendant elects to proceed without counsel or is able to retain counsel. If it appears that a defendant at

witness, changes; signing); 30(f) (certification and filing by officer; copies; notice of filing); 30(g) (failure to attend or to serve subpoena; expenses); 32 (effect of errors and irregularities in depositions. Whether Civil Rule 37(a) (refusal to answer) is applicable is unclear. For reasons stated in the text, Civil Rule 26(b) has at best a limited application to a criminal deposition.

44. **Deposition on written interrogatories**

Even before the rules, it was said that the court had inherent power to authorize this, though it refused to do so in the case before it. U. S. v. Dockery, D.C.N.Y.1943, 50 F. Supp. 410.

45. **Civil Rule 31**

See the discussion of that rule in the civil volumes of this Treatise.

46. **Interrogatories to adverse party not authorized**

U. S. v. Schluter, D.C.N.Y.1956, 19 F.R.D. 415.

47. **Production of documents**

No reported case has been found in which this power has been exercised.

whose instance a deposition is to be taken cannot bear the expense thereof,[48] the court may direct that the expenses of travel and subsistence of the defendant's attorney for the attendance at the examination must be paid by the government.[49] In that event the marshal must make payment accordingly.[50] The Criminal Justice Act of 1964 makes provision, for cases falling within it, for reimbursement to counsel of "expenses reasonably incurred." [51]

§ 245. Use of Depositions; Objections

Rule 15(e) in providing when and for what purpose a deposition may be used at the trial generally follows the corresponding provisions of Civil Rule 26(d) (3).[52] A subpoena in a civil case runs only within the district where issued or 100 miles from the place of trial, while a subpoena in a criminal case runs throughout the United States[53] and, if the witness is a national or resident of the United States, even into a foreign country.[54] Ac-

48. Showing not made

Defendants' motion for order to take depositions at expense of government of witnesses alleged to be in Germany was denied, where it was not shown to what the witnesses would testify, or that witnesses were available, or that if available the witnesses would voluntarily present themselves to give the depositions, or before whom the depositions could be taken in Germany, or that defendants were unable to bear the expense. U. S. v. Ausmeier, D.C.N.Y.1946, 5 F.R.D. 395.

49. Expenses paid

Accused was entitled to have his court-appointed counsel reimbursed for expenses necessarily and reasonably incurred for traveling and subsistence in interviewing informer at informer's residence, for, if necessary, expenses reasonably incurred in taking informer's deposition, and for expenses necessarily incurred for travel and subsistence in viewing scene of alleged crime. U. S. v. Germany, D.C.Ala.1963, 32 F.R.D. 343.

50. But see

Although in U. S. v. Germany, D.C.Ala.1963, 32 F.R.D. 343, 345, the court could see no difference "between taking a deposition (for which the rule provides payment) and the oral interview of a witness (for the United States says there shall be no payment)," the Administrative Office of the United States Courts ruled that there were no appropriated funds for the latter kind of expenses, and the court held that the defendant must be discharged for failure to pay these expenses. U. S. v. Germany, D.C.Ala.1963, 32 F.R.D. 421.

51. Criminal Justice Act

18 U.S.C.A. § 3006A(d).

See U. S. v. Boyden, D.C.Cal.1965, 248 F.Supp. 291.

52. Civil Rule 26(d)(3)

See the discussion of that rule in the civil volumes of this Treatise.

53. Throughout United States

Rule 17(e)(1). See § 276 below.

54. Into a foreign country

28 U.S.C.A. §§ 1783, 1784; Rule 17(e)(2). See § 277 below.

cordingly the principal difference between the provisions for civil and criminal cases is that in civil cases a deposition may be used is at a greater distance than 100 miles from the place of trial, while this portion of the criminal provision requires that the witness be out of the United States.[55]

Although this is said by the Advisory Committee to be "the only difference" between the rules for civil and criminal cases,[56] this is not accurate. A deposition may be used in a civil case if the witness is unable to attend or testify because of age or imprisonment. These are not grounds for use of the deposition in a criminal case. Presumably the witness who is in prison can be required to attend by a writ of habeas corpus ad testificandum.[57] Perhaps the committee thought that age alone does not prevent a witness from attending a trial unless it is associated with sickness or infirmity, grounds for use of a deposition recognized for both criminal and civil cases. Further there is nothing in Criminal Rule 15(e) corresponding to clause 5 of Civil Rule 26(d) (3), which authorizes the court to allow use of depositions in "exceptional circumstances" other than those mentioned in the balance of that rule.

The grounds on which a deposition may be used in a criminal case are (1) that the witness is dead, or (2) that the witness is out of the United States, unless it appears that his absence was procured by the party offering the deposition, or (3) that the witness is unable to attend or testify because of sickness or infirmity, or (4) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena. In addition it is provided that if the deponent does appear as a witness and testify his deposition may be used to contradict or impeach his testimony.[58] In addition Rule 15(e) has a provision to Civil Rule

55. Witness out of the United States

It is nowhere explained why the deposition of a witness out of the United States may be used if his attendance can be compelled by subpoena under the statutes and rule cited in note 54 above.

56. Advisory Committee Note

See the Advisory Committee Note to Rule 15(e), set out in the Appendix in volume 3.

57. Habeas corpus ad testificandum

28 U.S.C.A. § 2241(c)(5).

U. S. v. McGaha, D.C.Tenn.1962, 205 F.Supp. 949.

58. Use of deposition

Rule 15(e).

Because these are generally similar to the provisions of Civil Rule 26(d)(3), and there are many more civil than criminal cases involving this question, the discussion of that rule in the civil volumes of this Treatise should be consulted.

Richard M Nixon

WATERGATE SPECIAL PROSECUTION FORCE DEPARTMENT OF JUSTICE

Memorandum

TO : The File DATE: Oct. 3, 1974

(Dictated but not read)

FROM : James F. Neal

SUBJECT: Motion to Quash Nixon subpoena.

This memorandum is being written in anticipation of a motion to quash the subpoenas issued to Nixon and anticipation that the motion will be accompanied by a report concluding that Mr. Nixon is not now and will not be in the foreseeable future physically able to travel to this city and testify in person.

The subpoena and motion raise two questions: First, what position should be taken with respect to its own subpoena, and second, the position the Government should take with respect to the subpoena issued by defendant Ehrlichman. Mr. Nixon is not an essential witness for the Government. While his testimony would be important to help establish a complete chain of custody of certain White House recordings, the Government is satisfied it will be able to prove the integrity of the recordings it seeks to have admitted in evidence without his testimony. Thus, the position we should take with respect to our own subpoena is that being satisfied of Mr. Nixon's unavailability to testify in person we would not press the issue were this the only question. (It should be noted that establishing Mr. Nixon's unavailability is an important element of our ability to prove the integrity of the tapes without his testimony.)

The Government has a duty, however, to insure, to the extent possible a fair trial for every defendant. Consequently, we cannot wash our hands of the matter if a defendant pushes his subpoena to Mr. Nixon. We must take a position that is supportable in the law. I believe we should suggest that the Court promptly determine if Mr. Nixon "may be unavail-

able" to appear in the foreseeable future as a witness in this cause. If the answer is affirmative, the Court should determine if Mr. Nixon is physically able to be deposed and his testimony preserved. If the answer is negative, the matter is resolved, at least for the present. If, on the other hand, the answer is that Mr. Nixon is, or in the near future will be, able to submit to a deposition, the Court should order him to appear at a prescribed time and place for the purpose of giving such deposition. In the event this takes place, the Government should be allowed to propound its questions to Mr. Nixon and the defendants should be allowed to cross-examine him on this testimony. Then the defendants should propound their questions with Mr. Nixon as their witness and the Government should be allowed to cross-examine.

The remaining question, and perhaps the most sensitive one, is the procedure for determining Mr. Nixon's ability to appear in person as a witness or to give a deposition. I suggest the Court appoint a panel of distinguished physicians of this area to make an investigation and to report to the Court the answer to the following questions:

1. Is Mr. Nixon presently able to travel to this city and testify?

2. Will Mr. Nixon be available to testify in person in this city in the foreseeable future?

3. If Mr. Nixon is not able to travel to this city to testify in person and with the physicians concluding he will not be able to do so in the foreseeable future or conclude they cannot make such a finding at the present time to a reasonable degree of medical certainty, then they should determine if Mr. Nixon is presently able to be deposed at an appropriate time and place in California. The report on this question should specify the circumstances and precautions that should be taken in respect to such a deposition. If Mr. Nixon is unable to give a deposition at the present time, physicians should report whether he will be able to be deposed in the foreseeable future, again specifying the conditions and precautions surrounding such a deposition. Finally, if

the doctors can come to no conclusion on any of the above questions, they should report to the Court their opinion whether and when it would be appropriate for them to conduct a further investigation in an attempt to answer these questions.

It is my suggestion the Court leave to the panel of physicians, at least in the first instance, the type of investigation they conclude necessary and appropriate. Thus, if these physicians determine it is sufficient simply to review and analyze the medical reports and records on Mr. Nixon's present physicians, we should accept such a view. If, on the other hand, the physicians determine they should conduct their own examination and testing of Mr. Nixon they should be authorized and empowered by the Court to do this.

See Gov't's opp to motions to quash on VDE's &

GOVERNMENT'S MEMORANDUM IN OPPOSITION
TO [redacted] MOTIONS TO QUASH SUBPOENAS
TO RICHARD M. NIXON

The United States submits this memorandum of points and authorities in opposition to the motions of Richard Nixon to quash the subpoenas served upon him by the United States and by Defendants ~~Haldeman~~ and Ehrlichman.

STATEMENT OF FACTS

Mr. Nixon has asked the Court to employ its discretionary power, under Rule 17(c) of the Federal Rules of Criminal Procedure which permits the court to quash or modify a subpoena that is "unreasonable or oppressive," in order to quash the subpoena of the United States commanding him to appear as a witness in the present case. He has made similar motions as regards (a) subpoenas served upon him by Defendants [redacted] Ehrlichman. The sole reason offered to justify quashing the subpoena of the United States[1/] is the witness' assertion that his physicial condition "is such that compliance with the

1. The other grounds on which the witness resists defendants' subpoenas are not asserted, and, in any event, would have no bearing, with respect to the government's subpoena. In addition, the witness' admittedly premature attempt to invoke "executive privilege" in response to defendants' subpoenas is manifestly inapt, since this privilege inheres in the government, for the benefit of the government, and may not be asserted on the basis of a decision of a private citizen acting in his private capacity. Moreover, the opinion of the Supreme Court in United States v. Nixon, ___ U.S. ___ (1974), makes it plain that the privilege is not available to a co-conspirator who would use it to conceal evidence of a criminal conspiracy in the face of a demonstrated need for such evidence at trial.

subpoena would be detrimental to his health and would pose a serious risk to his life." From an examination of his supporting papers, it appears that the witness does not object to testifying as such,[2] but only to traveling to the District of Columbia in the immediate future.

While the United States is willing to withdraw its subpoena if compliance with the subpoena would impose an undue hardship on Mr. Nixon, in view of the importance of a fair and full adjudication of the present case and the apparent insubstantiality of the witness' supporting affidavit, we submit that the Court should not quash the subpoenas at this time. Instead, we would suggest that the Court follow the accepted procedure of appointing impartial experts to advise it as to whether the witness' physical condition makes it unreasonable to compel him to travel to the District of Columbia.

ARGUMENT

We wish it to be understood that the United States has no desire to compel any witness to travel or testify

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2. There is no suggestion that the witness is presently so debilitated that he is unable to respond to questions. Cf. United States v. Carter, 493 F.2d 704, 707 (2d Cir. 1974); Burton v. United States, 175 F.2d 960, 963 (5th Cir. 1949); United States v. Sweig, 316 F.Supp. 1148, 1165-68 (S.D.N.Y. 1970), aff'd, 441 F.2d 114 (2d Cir.), cert. denied, U.S. (1971). On the contrary, Mr. Nixon himself points to the possibility that "the testimony be taken out of court in such a way as not to risk the impairment of his health." Witness' Motion to Quash Subpoena of Defendant Ehrlichman, at 5.

3. In so stating, we do not, of course, wish to waive the opportunity to question the witness, in the presence of the jury, as to the authenticity of the tape recordings that will be offered into evidence.

at the cost of his life or health. As the cases cited by Mr. Nixon show, it has been held that even a defendant may not be compelled to appear if he is mentally or physically incompetent. See United States v. Doran, 328 F.Supp. 1261, 1262 (S.D.N.Y. 1971); United States v. Keegan, 331 F.2d 257, 263-64 (7th Cir.) cert. denied, 379 U.S. 828 (1964).

At the same time, it is central to our system of justice that parties be given the opportunity, not only of testing the recollection and sifting the conscience of a 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." Barber v. Page, 390 U.S. 719, 721 (1968), quoting Mattox v. United States, 156 U.S. 237, 242-43 (1895). Consequently, the public duty of giving material testimony in a criminal case before the body that must decide the guilt or innocence of the accused is one "which every person within the jurisdiction of the Government is bound to perform when properly summoned." See United States v. Bryan, 339 U.S. 323, 331 (1950). The importance of this duty -- a matter that repeatedly has been emphasized by the Supreme Court[3] -- demands the most careful scrutiny of each and every application for

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3. See, e.g., Branzburg v. United States, 408 U.S. 665, 688 (1973); United States v. Bryan, 339 U.S. 323, 331 (1950); Blackmer v. United States, 284 U.S. 421, 438 (1932); Blair v. United States, 250 U.S. 273, 281 (1919).

relief from its requirements. Thus, in every case in which accomodations have been made for the sake a witness' or a defendant's health, the necessity of deviating from normal trial procedures or schedules has been uncontested or overwhelmingly documented. See, e.g., United States v. Singleton, 460 F.2d 1148, 1150 (2d Cir. 1972); Burton v. United States, 175 F.2d 960, 963 (5th Cir. 1949); United States v. Podell, 369 F.Supp. 151, 153 (S.D.N.Y.), writ of mandamus granted on other grounds sub nom. United States v. Carter, 493 F.2d 704 (2d Cir. 1974); United States v. Doran, supra, 328 F.Supp. at 1263-64.

cert. denied, 410 U.S. 984 (1973)

The record made by the witness here, however, does not constitute such a compelling showing of physical incapacity to attend trial. ~~The affidavit of the witness~~ Except for the unsubstantiated assertions of counsel, the witness' motions to quash ~~rest on~~ rest entirely on the single affidavit of the witness' personal physician.[4] Significantly, ~~this affidavit~~ this physician does not ~~state~~ conclude that carefully supervised travel to Washington is at all incompatible with the ~~the~~ therapy he has prescribed. The affidavit simply states that Mr. Nixon should: (1) wear an elastic stocking; (2) take oral medication; (3) avoid "prolonged"

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4. In his motion to quash Defendant Ehrlichman's subpoena, Mr. Nixon alludes to "the ~~affirm~~ affidavits of the examining physicians." Witness' Motion to Quash Subpoena of Defendant Ehrlichman, at 5. However, the only affidavit of a physician that has been served on the government is that of John C. Lungren, M.D., ~~Dr. Lungren~~ who ~~does~~ states that he "advised" that other physicians concur in his recommended therapy.

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periods of sitting, standing or walking which could result in increased veinous congestion; (4) avoid "extended" trips which require such sitting or create a risk of traumatic hemorraging; and (5) remain in a "controlled environment" where periodic blood tests and examinations may be performed. Nowhere does the witness or the affiant indicate that these conditions cannot be met if the witness complies with the subpoenas.[5/]

Furthermore, even if the witness' showing in this case were less equivocal, the Court would be well advised to seek independant expert guidance concerning the witness' condition. We say this for two reasons. First,

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5. We do not wish to suggest what precautions the witness should take in order to minimize any risk to his health while discharging his duty of giving material testimony before the jury. But we do think the following common sense observations are relevant to ascertaining whether, in light of the affiant's allegations, it is reasonable to insist on compliance with the subpoenas. Certainly, Mr. Nixon can continue to wear an elastic stocking and take oral medication while in transit and in Washington. By having the affected leg elevated, or by reclining as necessary, he can avoid prolonged periods of sitting, standing or walking, as prescribed. And, by utilizing any of the large number of ample medical facilities in the metropolitan area, his condition may be monitored in accordance with his physician's recommendations. Beyond this, the Court may provide appropriate facilities and supervise the questioning of the witness in a manner consonant with his medical needs. See, e.g., United States v. Doran, 328 F.Supp. 1261, 1263 (S.D.N.Y. 1971); United States v. Sweig, 316 F.Supp. 1148, 1167-68 (S.D.N.Y. 1970), aff'd, 441 F.2d 114 (2d Cir.), cert. denied, 403 U.S. 932 (1971) (defendant with severe cardiac condition brought to trial with "extensive precautions," including frequent and lengthy recesses, facilities for the defendant to lie down and rest, trained nurse on call outside courtroom).

the unprecedented nature of this case -- its "magnitude and seriousness" -- make it especially important that the Court take every reasonable step to assure itself that it is, in fact, truly imperative that a propsective witness be excused from his obligation to give material testimony at trial. Cf. United States v. Doran, supra, 328 F.Supp. at 1263. Second, the fact that the witness here is not a neutral or detached witness disinterested in the case, but has himself been formally accused of participating in the conspiracy for which defendants are standing trial should make the Court still more hesitant to accept the witness' protestations of inability to testify without some independant verification.

That the Court has the power to appoint medical experts to assist it in matters within its jurisdiction is hardly open to debate. See, e.g., Advisory Committee Note to Rule 706, Proposed Rules of Evidence for United States Courts and Magistrates 99 (1972) (the "inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned"). Rule 28(a) of the Federal Rules of Criminal Procedure explicitly empowers the court to appoint its own expert witnesses. Accordingly, the Court of Appeals for this Circuit has held that where the competency of a witness is in question, the trial judge may appoint a physician to examine the witness to obtain expert testimony concerning the degree and effect of the witness' disability. United States v. Benn, 476

F.2d 1127 (D.C. Cir. 1973).[6] In fact, for particular instances in which the courts have ordered appointed physicians to examine a defendant or witness who pleads he is physically unable to appear at trial, one need only look to the very cases relied on by Mr. Nixon. See, e.g., United States v. Keegan, supra, 331 F.2d at 263-64 (court ordered examination and inspection of medical record by Public Health Service physicians). See also Natvig v. United States, 236 F.2d 694, 698 (D.C. Cir. 1956), cert. denied, 352 U.S. 1014 (1957) (court appointed physician to examine witness who had heart attack on eve of trial); United States v. Bernstein, 417 F.2d 641 (2d Cir. 1969) (affirming denial of continuance where district court relied on opinion of court appointed physician instead of accepting conclusion of defendants' physicians that appearance at trial would pose "risk to their health and lives").

Finally, the claim advanced by Defendants Haldeman and Ehrlichman that they are "now entitled to take Mr. Nixon's deposition"[7] does not make independent verification by court appointed physicians of Mr.

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6. Benn was concerned with the appointment of a psychiatrist to aid the trial court in ruling on the competency of a mentally retarded complaining witness. The Court of Appeals noted that the basis for ordering a medical examination of a witness "stems from the trial court's inherent power to conduct those inquiries necessary to a full and fair adjudication." 476 F.2d at 1130 n.12 (citations omitted).

7. See Defendant Ehrlichman's Motion for Continuance and Severance, at 11; Defendant Haldeman's Motion for Suspending of Trial and Continuance, at 8-9. Of course, no party is entitled to depose a witness without first securing leave of the court on motion. See, e.g., 1 C. Wright, Federal Practice and Procedure § 242, at 481 (1969).

any the less imperative or desirable. To begin with, since Mr. Nixon has not made a sufficient showing that he is physically unfit to testify at trial, it follows that defendants, who rely completely on the witness' papers to demonstrate unavailability, are not presently entitled to depose the witness. A defendant's motion to depose a witness must be denied in the absence of a compelling showing of the witness' (probable) unavailability. See, e.g., In re United States, 348 F.2d 624 (1st Cir. 1965); United States v. Whiting, 308 F.2d 537, 541 (2d Cir. 1962), cert. denied, 372 U.S. 909 (1963). Even proof that a prospective witness is outside the jurisdiction and declines to appear to testify at trial does not necessarily establish the required unavailability. United States v. Kelly, 349 F.2d 720, 769 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966). In short, before countenancing a deposition and dispensing with the fundamental requirement that a witness "stand face to face with the jury," Barber v. Page, supra, 390 U.S. at 721, the Court should have before it more than the ambiguous asservations of a single physician and the bald assertions of two defendants that the witness must "convalesce in his home."[8/]

Moreover, even if it were possible for defendants to make an adequate showing of unavailability without

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8. Defendant Haldeman's Motion for Suspending of Trial and for Continuance, at 1; Defendant Ehrlichman's Motion for Continuance and Severance, at 1.

recourse to ~~the~~ inspection of the witness' medical records or actual examination of the witness by an independant panel of ~~physi~~ physicians, defendants, on the record as it now stands, would still not be entitled to a deposition. In addition to proving unavailability, defendants must demonstrate that, in the language of Rule 15(a), F.R.Crim.P., ~~their witness~~ the deposition is "necessary" "to prevent a failure of justice." Defendants speculate that such a "failure of justice" would ensue were the witness not to testify ~~because~~ because "Richard M. Nixon is an indispensable witness . . . whose testimony will be highly exculpatory ~~to~~ for the defense." Haldeman ~~Memo~~ Memorandum at 1; cf. Ehrlichman Memorandum at 2.[9] Yet, there is reason to doubt that the witness' failure to appear would deprive the defense of such critical evidence as to constitute a "failure of justice."[10] Much of what the witness could testify to is ~~already~~ available in the form of tape recorded conversations that have been supplied to the defense. As for the specific ~~areas that~~ matters about which defendants

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9. If this is so, we would think it all the more important that the Court avoid ordering depositions if at all possible and that the witness appear before the jury so that the jurors may judge by "the manner in which he gives his testimony whether he is worthy of belief." Barber v. Page, supra, 390 U.S. at 721. This consideration thus militates in favor of the appointment of independant medical experts as a mechansim for securing a satisfactory determination of whether resort to deposition is truly necessary.

10. The government does not consider Mr. Nixon's testimony indispensable to its case. If the witness is available, either for deposition or ~~at~~ for trial testimony, the government would conduct limited examination relating to the authenticity of the tape recordings ~~in this~~ that will be offered as evidence.

state they would elicit tetsimony from the witness, much of the testimony would merely be cumulative, and almost all of it is available from other sources.[11] Nor does the proposition that, as an unindicted co-conspirator, Mr. Nixon is in a position to give testimony "as vital and indispensable as that of any party," Ehrlichman Memorandum at 8, fortify defendants' conclusory allegation that the expected testimony is actually "highly exculpatory." Whether any defendant has information that might tend to exculpate his co-defendants is not a matter of a priori knowledge.[12] Indeed, Defendant Ehrlichman's observation that "fine distinctions" should not be drawn "bewteen situations where a party is involved and where a material witness who is alleged to be a co-conspirator is involved," id., helps place the matter in proper perspective. Were Mr. Nixon a co-defendant and were he to refuse to take the stand, defendants could hardly complain of a "failure of justice."[13] In sum, in the absence of a firmer basis for concluding that

Defendant Ehrlichman's Motion for Continuance and Severance, at 12

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11. Most of the specific items of which the witness is said to have "sole" and "exclusive" knowledge turn out, upon inspection, to be conversations with and communications to other persons, such as Richard Kleindeinst, Henry Peterson, and defendants themselves -- all of whom are available to testify at defendants' bidding.

12. In fact, in considering defendants motions for severance in this case, the Court found that defendants "failed to indicate the exculpatory importance of the particular testimony they desire to elicit from their co-defendants." United States v. Mitchell, Crim. No. 74-110 (D.D.C. July 9, 1974) (Memorandum Order). The showing of the exculpatory importance of the particular testimony defendants Haldeman and Ehrlichman indicate they would obtain from the witness is no more convincing.

the witness' testimony is "necessary" to avoid a "failure of justice," the suggested alternative of deposing the witness is not viable. In any event, even a film of the deposition of a witness is not a ~~complete~~ substitute for his personal appearance, and ~~does not suppose a~~ the Court should not permit a deposition or excuse the witness from testifying at trial before ~~would not diminish the importance of~~ obtaining an impartial and independant expert evaluation of the witness' ~~prospective witness~~ physical capacity to comply with the outstanding subpoenas.

CONCLUSION

For the foregoing reasons, the motions to quash the subpoenas to Richard M. Nixon should be denied.

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13. A far more careful and convincing showing ~~of~~ that particular, highly exculpatory ~~missing~~ testimony has been withheld from a defendant than has been made here would be ~~required to support~~ required to support a claim of injustice in that situation. See cases cited, Government's Memorandum in Opposition to Defendants' Motions for Severance; note 12 supra.

IN THE UNITED STATES

MEMORANDUM IN OPPOSITION TO MOTIONS TO QUASH SUBPOENAS TO RICHARD M. NIXON

The United States submits this memorandum in opposition to the motions of Richard M. Nixon to quash the subpoenas served upon him by the United States and by Defendants Haldeman and Ehrlichman. 1/

STATEMENT OF FACTS

Mr. Nixon has asked this Court to quash the subpoena issued to him on behalf of the United States on the grounds that the physical condition of the witness is such that compliance with the subpoena would be detrimental to his health and would pose a serious risk to his life. He has made similar motions with respect to the subpoenas served upon him by Defendants Haldeman and Ehrlichman. 2/

1/ In his Motion for Suspending of Trial and for Continuance, defendant Haldeman states that he is "causing to be issued a subpoena requiring Richard M. Nixon to appear and to testify as a witness for the defense."

2/ With respect to the Ehrlichman subpoena, Mr. Nixon asserts the additional ground of "executive privilege." It is highly problematical that a former President, in his private capacity, can assert this which redounds the government, for the benefit of the government. See, e.g., Kansas Nuclear Chemical Corp. v. United States, 157 F. Supp. 939, 944 (Ct. Cl. 1958). The Court does not have to reach these issues, however, because it is clear that testimony of Mr. Nixon relating to the issues before this Court (the only testimony that can be elicited), must yield. See United States v. Nixon, — U.S. —, 94 S. Ct. 3090, 3110 (1974).

subpoena ~~would~~ would be detrimental to his health and would pose a serious risk to his life." From an examination of his supporting papers, it appears that the witness does not object to testifying as such,[3] but only to traveling to the District of Columbia in the immediate future.

While the United States is willing to withdraw its subpoena if compliance with the subpoena would impose an undue hardship on ~~the witness~~ Mr. Nixon, in view of the importance of a fair and full adjudication of the present case and the apparent insubstantiality of the witness' supporting affidavit, we submit that the Court ~~should not quash the subpoenas at this time. Instead, we~~ would suggest that the Court follow the accepted procedure of appointing impartial experts to advise ~~it and be~~ whether the witness' physical condition makes it unreasonable to compel him to travel to ~~the~~ the District of Columbia at this time."

~~ARGUMENT~~

~~We wish it to be understood that the United States has no desire to compel any witness to travel or testify~~

3/ There is no suggestion that the witness is presently so debilitated that he is unable to respond to questions. Cf. United States v. Carter, 493 F.2d 704, 707 (2d Cir. 1974); Burton v. United States, 175 F.2d 960, 963 (5th Cir. 1949); United States v. Sweig, 316 F.Supp. 1148, 1165-68 (S.D.N.Y. 1970), aff'd, 441 F.2d 114 (2d Cir.), cert. denied, 403 U.S. 932 (1971). On the contrary, Mr. Nixon himself points to the possibility that "the testimony be taken out of court in such a way as not to risk the impairment of his health." Witness' Motion to Quash Subpoena of Defendant Ehrlichman, at 5.

~~5. In so stating, we do not, of course, wish to waive the opportunity to question the witness, in the presence of the jury, as to the authenticity of the tape recordings that will be offered in evidence.~~

(13) Although we agree the Court has discretion in appropriate cases to quash subpoenas under Rule 17(c) of the Federal Rules of Criminal Procedure on the grounds that compliance would be "unreasonable or oppressive" because of the illness of the witness, we submit that the showing of Mr. Nixon does not warrant such relief at this time. Rather, we

If such experts were to determine that ~~it would~~ travel at this time would create an unreasonable risk to Mr. Nixon's health, the Court should require the experts to report whether Mr. Nixon will be able to comply with the subpoena without undue risk in the foreseeable future. Only if it appears to the Court, upon clear and convincing evidence, that Mr. Nixon will be unable to testify at any time during this protracted trial would the Court be justified in quashing the subpoena.

In this regard, the Special Prosecutor wishes to inform the Court that the government will not insist upon Mr. Nixon's testimony as part of its direct case. If ~~the~~ Mr. Nixon does appear ~~in~~ at the request of any of the

defendants, the government ~~Special Prosecutor~~ would like to reserve at that time as part of its case, the right to ask Mr. Nixon limited questions regarding the authenticity of tape recordings the government will offer into evidence. 4/ This procedure will eliminate the need for Mr. Nixon to appear on two separate occasions and will reduce substantially the risk, if any, to his health.

4/ The government intends to establish the authenticity of the tape recordings without the testimony of Mr. Nixon and will submit to the Court a memorandum supporting the government's theory. Thus, Mr. Nixon's testimony on this issue would support an alternative theory of admissibility.

ARGUMENT

~~I.~~

It is true, of course, that the courts have refused to compel testimony by a witness where there is a substantial ~~at the cost of his life or health. As the cases cited~~ danger risk of serious impairment of the witness' ~~by Mr. Nixon show, it has been held that even a defendant may not be compelled to appear if he is mentally~~ health ~~or physically incompetent. See United States v. Doran, 328 F.Supp. 1261, 1262 (S.D.N.Y. 1971); United States v. Keegan, 331 F.2d 257, 263-64 (7th Cir.) 1964), cert.~~ 379 U.S. 828 (1964).

At the same time, it is central to our system of justice that parties be given the "opportunity, not only of testing the recollection and sifting the conscience of a 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." Barber v. Page, 390 U.S. 719, 721 (1968), quoting Mattox v. United States, 156 U.S. 237, 242-43 (1895). Consequently, the public duty of giving ~~material~~ testimony in a criminal case before the body that must decide the guilt or innocence of the ~~accused~~ accused is one "which every person within the jurisdiction of the Government is bound to perform when properly summoned." See United States v. Bryan, 339 U.S. 323, 331 (1950). The importance of this duty -- ~~a matter that~~ repeatedly ~~has been~~ emphasized by the Supreme Court[5] -- demands the most careful scrutiny of each and every application for

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5. See, e.g., Branzburg v. United States, 408 U.S. 665, 688 (1973); United States v. Bryan, 339 U.S. 323, 331 (1950); Blackmer v. United States, 284 U.S. 421, 438 (1932); Blair v. United States, 250 U.S. 273, 281 (1919).

In addition, courts will deviate from normal trial procedures only when it is shown that special arrangements cannot be instituted which will afford sufficient protection for the witness' health

Courts must insure that there is no unwarranted intrusion on the public's right to a full and impartial trial or on the defendant's constitutional right of confrontation. This can only be done if courts insist on a clear and convincing showing before granting a subpoena ad testificandum relief from its requirements. ~~Thus, in every case in which accomodations have been made for the sole~~ a witness' or a defendant's health, ~~the necessity of deviating from normal trial procedures or schedules has been uncontested or overwhelmingly documented.~~ See, e.g., United States v. Singleton, 460 F.2d 1148, 1150 (2d Cir. 1972); Burton v. United States, 175 F.2d 960, 963 (5th Cir. 1949); United States v. Podell, 369 F.Supp. 151, 153 (S.D.N.Y.), writ of mandamus granted on other grounds sub nom. United States v. Carter, 493 F.2d 704 (2d Cir. 1974); United States v. Doran, ~~supra~~, 328 F.Supp. 1261, 1263-64 (SDNY. 1971).

Cert. denied, 410 U.S. 984 (1973)

The ~~record made by the witness here, however, does not constitute such a compelling showing of physical incapacity to attend trial.~~ showing submitted by Mr. Nixon, based solely on the affidavit of his personal physician, does constitute the compelling showing that is required for the relief sought. ~~The affidavit of the witness~~ Except for the unsubstantiated assertions of counsel, the witness' motions to quash ~~rest on~~ rest entirely on ~~the single affidavit of the witness' personal physician.~~ Significantly, this physician ~~his affidavit~~ does not conclude ~~state~~ that carefully supervised travel to Washington would be ~~is at all~~ incompatible or would endanger his client's health, with the ~~his~~ therapy he has prescribed. The affidavit simply states that Mr. Nixon should: (1) wear an elastic stocking; (2) take oral medication; (3) avoid "prolonged"

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6. In his motion to quash Defendant Ehrlichman's subpoena, Mr. Nixon alludes to "the ~~affirm~~ affidavits of the examining physicians." Witness' Motion to Quash Subpoena of Defendant Ehrlichman, at 5. However, the only affidavit of a physician that has been served on the government is that of John C. Lungren, M.D., ~~Dr. Lungren~~ who ~~does~~ states that he "advised" that other physicians concur in his recommended therapy.

More importantly, public reports as early as this morning indicate that Mr. Nixon's condition has improved considerably as a result of the in-patient treatment he has received. Dr. Lungren's affidavit thus cannot be used as a basis for concluding that Mr. Nixon will not be able to testify at any time within the next three months.

periods of sitting, standing or walking which could result in increased veinous congestion; (4) avoid "extended" trips which require such sitting or create a risk of traumatic ~~hemmorr~~ hemorraging; and (5) remain in a "controlled environment" where periodic blood tests and examinations may be performed. Neither the memorandum in support of the motion to quash nor the affidavit indicate ~~Nowhere does the witness or the affiant indicate~~ that these conditions cannot be met if the witness complies with the subpoenas. 7/

Furthermore, even if the ~~witness'~~ showing in support of the motion to quash ~~case~~ were less equivocal, ~~the Court would be well advised to seek independent expert adv~~ guidance concerning the witness' condition. We say this for two reasons. First, under the circumstances of this case the Court should appoint an independent panel of doctors, with expertise in the area of cardio-vascular disorders, to conduct whatever examinations they believe is appropriate and to report to the Court on Mr. Nixon's health and his physical ability to testify, both now and in the foreseeable future. 8/

7. We do not wish to suggest what precautions the witness should take in order to minimize any risk to his health while ~~giving~~ discharging his duty of giving material testimony before the jury. But we do think the following ~~common sense~~ observations are relevant to ascertaining whether, in light of the affiant's allegations, it is reasonable to insist on compliance with the subpoenas. Certainly, Mr. Nixon can continue to wear an elastic stocking and take oral medication while in transit and in Washington. By having the affected leg elevated, or by reclining as necessary, he can avoid prolonged periods of sitting, standing or walking, as prescribed. And, by utilizing any of the large number of ample medical facilities in the metropolitan area, his condition may be monitored in accordance with his physician's recommendations. Beyond this, the Court may provide appropriate facilities and supervise the questioning of the witness in a manner consonant with his medical needs. See, e.g., United States v. Doran, 328 F.Supp. 1261, 1263 (S.D.N.Y. 1971); United States v. Sweig, 316 F.Supp. 1148, 1167-68 (S.D.N.Y. 1970), aff'd, 441 F.2d 114 (2d Cir.), cert. denied, 403 U.S. 932 (1971) (defendant with severe cardiac ~~problems~~ condition brought to trial with "extensive precautions," including frequent and lengthy recesses, facilities for the defendant to lie down and rest, and trained nurse on call outside courtroom).

8/ Although it may be suggested that this examination should be limited to a review of the physical tests already performed on Mr Nixon, we suggest that the scope of the examination must be left to the discretion of the panel of doctors. Only they are qualified to judge what type of examination will be required to permit them to give the Court as full and reliable report. Moreover, public reports by Mr Nixon's personal physician indicate that the past tests may no longer represent an accurate picture of his current condition.

power to compel attendance
Keeping
WATERGATE SPECIAL PROSECUTION FORCE witnesses for DEPARTMENT OF JUSTICE
deposition

Memorandum

TO : James F. Neal
Associate Special Prosecutor

DATE: October 9, 1974

PMK:sfk

FROM : Peter M. Kreindler PMK
Counsel to the Special Prosecutor

SUBJECT: The Court's power to order that a deposition be taken of Richard M. Nixon.

Attached are two memoranda prepared by David Kaye concerning the Court's power to order that a deposition be taken of Mr. Nixon pursuant to Rule 15 of the Federal Rules of Criminal Procedure. Rule 15, as you know, provides that the Court may order a deposition of a prospective witness upon the motion of a defendant if it appears "that a prospective witness may be unable to attend or prevented from attending a trial or hearing..." As David Kaye points out in his first memorandum, the Court has inherent power to appoint a team of impartial medical experts to determine whether a witness will be able to attend a trial. In view of the statements of Dr. Lungren, which were carefully tailored to save Mr. Nixon from any of the burdens that would attach to either an appearance at trial or an oral deposition with defendants and all counsel present, this seems a particularly appropriate case for the Court to exercise its discretion to name its own experts. Dr. Lungren's statements on their face indicate a clear possibility of prejudice.

Although David Kaye has not discovered any case law, it would seem that there must be a presumption in favor of a witness actually appearing at trial. Thus, even if defendants were to be satisfied with a deposition, the Government should have the right to insist upon live testimony unless it is clear that the prospective witness is unavailable. Accordingly, we should take the position that to protect the integrity of the Court's processes, and the public interest, Judge Sirica must exercise his discretion to appoint an independent team of experts to determine whether Mr. Nixon is, in fact, able to testify.

Additionally, you have asked whether a deposition can be ordered now, leaving open the possibility that Mr. Nixon may be able to appear at trial in the future. It is clear from the wording of Rule 15 that the Rule contemplates preserving a

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witness's testimony by deposition when it appears that the witness may be unable to attend, not just when it is clear that he will not be able to attend. Thus, if Judge Sirica appoints a team of medical experts, the experts should be required to state, if they conclude that Mr. Nixon in his current state is unable to attend, whether he may be able to attend in a month or two.

Attachments

Richard M. Nixon

WATERGATE SPECIAL PROSECUTION FORCE DEPARTMENT OF JUSTICE

Memorandum

TO : Peter Kreindler DATE: October 9, 1974

FROM : David Kaye DK

SUBJECT: Defendants' Request to Depose Mr. Nixon

I have located no cases dealing specifically with the question of the evidentiary showing of a witness' unavailability due to sickness that a defendant must make to obtain a court ordered deposition pursuant to Rule 15, F.R. Crim. P. or to 18 U.S.C. §3503. Therefore, I can only offer the following observations. As my memorandum of October 8 demonstrates, it is well within the discretion of the trial judge to appoint medical experts to examine Mr. Nixon to determine whether he will be available as a witness at trial and whether he is able to be deposed in California. Conversely, whether the judge may instead rely upon the materials furnished by Mr. Nixon in deciding whether to allow the defense or the prosecution to depose Mr. Nixon is equally within his discretion. In the present case, two facts militate in favor of appointing independent experts rather than permitting defendants to rely on the witness' experts. Where (1) the witness himself is implicated in criminal activity and has an interest in not testifying, and where (2) the witness' testimony may be of crucial importance to the defense or the prosecution, the court should be especially careful before allowing the witness to be examined outside the presence of the jury.

Richard M. Nixon

WATERGATE SPECIAL PROSECUTION FORCE

DEPARTMENT OF JUSTICE

Memorandum

TO : Peter Kreindler

DATE: October 7, 1974

FROM : David Kaye DK

SUBJECT: Court Appointment of Medical Experts to Examine Mr. Nixon

James Neal has proposed that the court in United States v. Mitchell, Crim. No. 74-110 (D.D.C.), should select a panel of distinguished physicians to determine whether Mr. Nixon's physical condition will make him unavailable as a witness at trial and whether he is or will be able to be deposed in California. See Neal, Memorandum on Motion to Quash Nixon Subpoena, Oct. 3, 1974. This memorandum examines some of the questions raised by this proposal, namely: (1) the power of the court to appoint such a panel; (2) the consequences of a refusal by Mr. Nixon to submit to physical examination by this panel; and (3) the type of finding by the panel that would enable Defendant Ehrlichman to depose Mr. Nixon pursuant to Rule 15, F.R. Crim. P., or that would permit the government to do the same under 18 U.S.C. §3503. 1/

I. The Power of the Court to Appoint a Panel of Physicians to Examine a Witness.

That a court may appoint experts to assist it in matters within its jurisdiction is all but irrefragable. As the Judicial Conference's advisory committee on the rules of evidence noted, "[t]he inherent power of a

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1/ This memorandum does not address the question of whether the "organized criminal activity" certification required of the government by §3503 can validly be made in this case. Two opinions of divided panels of the Second Circuit suggest that this requirement can properly be fulfilled here. See Rient, Memorandum on Deposing Mr. Nixon pursuant to 18 U.S.C. 3503, Sept. 18, 1974. These opinions also discuss the constitutionality of §3503.

trial judge to appoint an expert of his own choosing is virtually unquestioned." Advisory Committee Note to Rule 706, Proposed Rules of Evidence for United States Courts and Magistrates 99 (1972), citing Scott v. Spanjer Bros., Inc., 298 F.2d 928 (2d Cir. 1962); Danville Tobacco Ass'n. v. Bryant-Buckner Associates, Inc., 333 F.2d 202 (4th Cir. 1964); Sink, The Unused Power of a Federal Judge to Call His Own Expert Witnesses, 29 S. Cal. L. Rev. 195 (1956); 2 J. Wigmore, Evidence in Trials at Common Law §§ 663 & 2484 (3d ed. 1940). Indeed, Rule 28(a), F. R. Crim. P., explicitly empowers the court to appoint its own expert witnesses. Accordingly, the Court of Appeals for this circuit recently held, in United States v. Benn, 476 F.2d 1127 (D.C. Cir. 1973), that where the competency of a witness is in doubt, the trial judge may, on his own motion, appoint a psychiatrist to conduct an examination of the witness to obtain expert testimony concerning the degree and effect of the witness' disability. 2/ I therefore conclude that the court has the authority to appoint a panel of physicians to examine Mr. Nixon

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2/ 476 F.2d at 1130. Under the circumstances of the case, the court held that the trial judge did not err in not ordering an examination of the complaining witness, a mentally retared 18 year old girl, who testified that she had been raped.

Of course, here we would be seeking the appointment of court experts for an examination of the physicial ability of a witness to travel and testify rather than to aid the judge or jury in assessing the competency of the witness' proposed testimony. But the court noted in Benn that the basis for ordering a psychiatric examination of a witness "stems from the trial court's inherent power to conduct those inquiries necessary to a full and fair adjudication." 476 F.2d at 1130 n. 12 (citations omitted). See also Winn v. United States, 270 F.2d 326 (D.C. Cir. 1959) (court has inherent power to order thorough mental examination of defendant to determine sanity). Accord, United States v. Baird, 414 F.2d 700, 710 (2d Cir. 1969); Pope v. United States, 372 F.2d 710 (8th Cir. 1967), vacated and remanded on other grounds, 392 U.S. 651 (1968); United States v. Albright, 388 F.2d 719 (4th Cir. 1968). An impartial determination of whether a witness' health makes it impossible for him to give material testimony is as important to a full and fair adjudication as is an unbiased examination of a witness' competency to give evidence. In addition, Rule 28(a) contains no express limitation of the uses to which court appointed experts may be put.

or his medical records for the purpose of advising the court and the parties of Mr. Nixon's availability as a witness at trial and his capacity to give a deposition.

II. The Consequences of a Refusal by a Witness To Submit to Court Ordered Examination.

The power of the court to appoint a panel of physicians to examine Mr. Nixon does not ineluctably imply a concommitant power to compel him to submit to such an examination. 3/ The strongest argument against the court's authority to order a witness to undergo an examination (or face citation for contempt) comes from the realm of civil procedure. In two cases decided around the turn of the century, the Supreme Court held that a federal court could not order a physicial examination in the absence of a statute or rule providing for such examinations. See Camden & Suburban R. Co. v. Stetson, 177 U.S. 172 (1900); Union Pac. R. Co. v. Botsford, 141 U.S. 250 (1891). The Court emphasized the "inviolability of the person" and the fact that, with limited exceptions, "no order of process commanding such an exposure or submission was ever known to the common law in the administration of justice between individuals." 141 U.S. at 252. 4/ Even under today's civil practice, a district court can order a physical examination only of a party, and it cannot enforce its order by a contempt citation. See Rule 35, F. R. Civ. P., Sibbach v. Wilson & Co., Inc., 312 U.S. 1 (1941).

3/ Thus, the inherent power of the court to appoint a psychiatrist to examine a prosecutrix in a rape case (see United States v. Benn, 476 F.2d 1127 (D.C. Cir. 1973)) does not mean that the woman cannot refuse to be examined by the court's expert. Cf. United States v. Dildy, 39 F.R.D. 340 (D.D.C. 1966).

4/ More recently, Sibbach v. Wilson & Co., Inc., 312 U.S. 1 (1941), held that Congress had properly authorized the Supreme Court to prescribe a rule of civil procedure (Rule 35) giving the district courts power to order physical examinations of parties in civil cases. In Schlagenhauf v. Holder, 379 U.S. 104 (1964), this rule was upheld against constitutional attack.

There are two obvious differences between the civil practice and the situation in United States v. Mitchell, and each points in an opposite direction. For one, the proposed examination here is not of a party, but of a witness. Forcing one who is not a party to the litigation to submit to examination seems particularly odious. 5/ On the other hand, while it is clear that a witness could not be compelled to submit to examination in civil litigation, we are concerned here with a criminal case. This distinction was emphasized in United States v. Baird, 414 F.2d 700, 710 (2d Cir. 1969), and a number of cases have held it within the inherent power of a federal court to order a defendant in a criminal case who raises a defense of insanity to undergo a psychiatric examination by an expert chosen by the prosecution. See id.; United States v. Albright, 388 F.2d 719, 722 (4th Cir. 1968); Pope v. United States, 372 U.S. 710, 720-21 (8th Cir. 1967) (en banc), vacated and remanded on other grounds, 392 U.S. 651 (1968). Contra, State v. Olson, 274 Minn. 225, 143 N.W. 2d 169 (1966).

These cases also stress the notion that "[a]n accused who asserts lack of criminal guilt because of insanity and who fully cooperates with psychiatrists engaged by him for examination purposes . . . ought not to be allowed to frustrate a similar comprehensive examination by the State . . . ." Pope v. United States, supra, 372 F.2d at 720-21. To some degree, the same principle applies here. A witness who asks to be excused from his obligation to give evidence in a criminal trial on the basis of affidavits of physicians of his own selection should not be able to preclude the court from verifying the reasons the witness advances for releasing him from his duty.

In any event, whether or not a court may hold in contempt a witness who declines to cooperate with the court's experts, it would seen that a refusal by Mr. Nixon to undergo examination by impartial experts could be considered by the court to support an inference that the motion to quash is not well founded.

5/ To the extent that the court appointed panel would only examine existing medical records, the invasion of personal liberties is vastly reduced.

III. The Showing Required for Deposing a Witness

A. By the Defense Under Rule 15

Rule 15 permits the defense to obtain a court order for the deposition of a witness when (1) "it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing," (2) "his testimony is material," and (3) "it is necessary to take his deposition in order to prevent a failure of justice." Rule 15(a), F.R. Crim. P. See also 1 C. Wright, Federal Practice and Procedure §241, at 474 (1969). 6/ As for the first requirement, "[a] showing that a prospective witness may die before the trial, or may be unable to attend because of sickness or disability, should be sufficient to demonstrate unavailability." 8 Moore's Federal Practice Para. 1503 [1], at 15-9 (1974). Consequently, if the court appointed experts were to conclude that it is likely that Mr. Nixon will be unable to testify at trial but is or will be able to have his deposition taken in California, Defendant Ehrlichman would have little difficulty in making the necessary showing for him to secure a Rule 15 deposition from Mr. Nixon.

B. By the Government under §3503

Where Rule 15 allows a deposition only on a showing of the three conditions specified above, 18 U.S.C. §3503 speaks more broadly. It allows the court to order the taking of a deposition "whenever due to exceptional circumstances it is in the interest of justice that the

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6/ In addition, it may be necessary for the defense to show that the prospective witness is willing and able to testify at the taking of his deposition. See United States v. Bronston, 321 F. Supp. 1269 (S.D.N.Y. 1971).

The defense may also move to depose a prospective witness under 18 U.S.C. §3503. The showing statutorily required of the defense is the same as that demanded of the prosecution, described infra, except that defense depositions are not limited to organized crime cases.

testimony of a prospective witness of a party be taken or preserved." In United States v. Singleton, 460 F.2d 1148 (2d Cir. 1972), cert. denied, 410 U.S. 984 (1973), the Second Circuit held that the measure of the "exceptional circumstances" required in §3503 is the same showing demanded in Rule 15 motions. Thus, if it appears that Mr. Nixon may be took sick to testify at trial, the prosecution should be permitted to take his deposition in order to preserve his testimony. 7/

7/ Cf. United States v. Carter, 493 F.2d 704 (2d Cir. 1974) (doctor's affidavit established that critical government witness had suffered 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); United States v. Singleton, supra, 460 F.2d 1148 (government witness too ill with luekemia to leave his home in Alabama to attend scheduled trial in New York).

WATERGATE SPECIAL PROSECUTION FORCE DEPARTMENT OF JUSTICE

Memorandum

TO : Peter Kreindler DATE: October 15, 1974

FROM : John Barker J.B.

SUBJECT: Nixon Documents

Attached are the documents you requested.

The first indication that Mr. Nixon might be suffering a recurrence of phlebitis came in an A.P. dispatch the evening of September 11, widely reprinted in the September 12 editions of local papers. The "source" quoted in the dispatch, I was informed at the time by an A.P. reporter here in Washington, was Edward Cox. David Eisenhower appeared on the Today Show the morning of September 12 and also reported the recurrence of phlebitis. Dr. Tkach was interviewed on September 13, reported the presence of a second clot and told the press that Mr. Nixon was resisting efforts to get him to go to the hospital. Mr. Nixon entered hospital on September 23.

The Lundgren interview you requested took place on September 30 and was reported in October 1 editions.

The New York Times

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9/12/74
Date

Relative Describes Nixon As in Pain and Depressed

WASHINGTON, Sept. 11 (AP) —Former President Richard M. Nixon is in physical pain and remains "way down, very depressed" despite the pardon he received, a member of his family reports. The family member sought out a telephone interview last night, asking not to be identified but sayingK : "This is something someone should talk about." Mr. Nixon's condition is of concern to his wife and family, according to the caller.

Mr. Nixon has seen and spoken with this indivudual both before and since resigning Aug. 9. They had a telephone conversation as recently as Monday night. There have been conflicting reports about Mr. Nixon's health, which President Ford mentioned Sunday in announcing a pardon for his predessor, and about his state of mind.

The family member said that:

¶Mr. Nixon is suffering from a recurrence of phlebitis, which on July 5 had been publicly described as resolved.

¶The former President does not talk about his physical problems with his family members, who first learned of the phlebitis last summer, from his doctors, not from Mr. Nixon.

¶He has made no decisions about returning to the public arean.

¶He is reconsidering his announcement of last Dec. 10 that he would eventually give the San Clemente estate to the American people. This is part of his current preoccupation with getting his personal affairs in order.

'Very Depressed'

Referring to the pardon, the family member said, "He's still way down, very depressed. He is in a deep depression," the caller continued, "I would hope the pardon would eventually lift that but I just haven't noticed that. There was no sudden elation."

The depression is aggravating the physical problems, according to the family member. "It's not that he's not sharp. He grasps things as quickly as ever. But the mental letdown plays on the physical problems. Each plays on the other and that cycle makes both worse."

After the resignation, the family drove north to Ventura, Calif., one day and had a picnic on the beach. "We had planned to say overnight," this family member said. "But he couldn't continue because of the pain in ih his leg."

The phlebitis, a blood clot that developed in his left leg shortly before his June trip to the Middle East, has left the leg "swollen out of proportion to the other leg, the callersal.

Doubts on Health

The family member knew of no other specific medical problems but said, "From the way reports are coming back, I just feel there is something more.

"It is enough to worry Mrs. Nixon. The worse it would be, the less he would talk about it.

"In other words, he's obviously in pain. He's obviously concerned about his health, but he's not talking about it."

The family was described as being in this quandary: "He's always wanted us to talk it up, to say everything's fine no matter what the situation. It just isn't true."

Before President Ford granted the full pardon, Mr. Nixon was said to have been in a predicament over his personal affairs.

"He wanted to tie up his affairs and get them in a manageable may that only he could do. He wanted to do it for his family," the family member said.

"But he couldn't do that, because he had these other things hanging over him. If he had to prepare a legal defense, he would have been broke."

Pride in Foreign Policy

The caller said that Mr. Nixon worries about how history will judge his Administration, but draws strength from recalling his foreign policy accomplishments.

Recalling the former President's statement that resignation was "abhorrent to every instinct in my body," the family member, said: "He is a fighter and he wanted to stay there, but his mind overcame his emotions. His sense of realities won out in the end." The family member said that "his consolation is in saying it was the right thing for the country."

Asked about a published report that President Ford was concerned that Mr. Nixon might take his own life, this family member said:

"You have to understand that [Mr. Nixon] is a very strong, very religious man. He wouldn't consider suicide because of his religious convictions, but I guess you never know."

The Knight News Service distrihuted a report today saying that the family member was Edward F. Cox, Mr. Nixon's son-in-law. The Associated Press declined to comment on the report.

NEW YORK DAILY NEWS

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9/12/74 Date

The Pain, the Strain

Nixon Bears It: David

By PAUL HEALY

Washington, Sept. 11 (News Bureau)—Richard M. Nixon is in some pain from phlebitis but otherwise appears to be bearing up fairly well, his son-in-law, David Eisenhower, told The News today.

"The phlebitis is bad. It's a constant thing, swelling and some pain, and it's just there, whether (Nixon's situation) gets better or worse," Eisenhower said in a telephone interview.

He said that neither he nor his wife Julie, had seen the former President in recent days but that his impression from talking to aides at San Clements was that Nixon was "bearing up pretty well." He said that he and Julie planned to fly out to California this weekend to visit her parents.

David was asked about reports that Nixon was deeply depressed, but said he was unable to assess them. A member of the Nixon family—thought to be Tricia's husband, Edward Cox—called the Associated Press last night and said that Nixon was "in a deep depression" which was not lifted by the full pardon granted him by President Ford.

'Assumes' Spirits Were Lifted

David said that he "assumed" Nixon's spirits were lifted by the pardon announcement. He discounted the former President's solitary habits, saying that there was nothing unusual about Nixon taking long walks alone.

David denied reports that Julie might have interviewed with Ford on behalf of a pardon for her father. "It's completely ridiculous," he said. "There's nothing to that at all. We've seen the Fords three or four times since the resignation. It has always been a social occasion. The idea of Julie intervening is the stupidest thing I've ever heard of in my life."

He said that Nixon was deeply interested in setting down the historical record of his last days in office. "Every time we have talked, he has wanted some input from the family on the week before the resignation . . . something that could be preserved, possibly for a book," David said.

There have been reports that Nixon could receive as much as $2 million for his memoirs.

The family member who talked to the AP sought out the telephone interview, saying: "This is something someone should talk about" but asking not to be identified by name.

This person has seen and spoken with Nixon both before and since he resigned Aug. 9 and has talked with him by phone as recently as Monday night. He said he knew of no specific physical problems other than phlebitis, but "from the way reports are coming back, I just feel there is something more. It bothers me.

"Enough to Worry Mrs. Nixon

"It is enough to worry Mrs. Nixon. The worse it would be, the less he (Nixon) would talk about it. In other words, he's obviously in pain. He's obviously concerned about his health, but he's not talking about it," the person said.

He said that "emotionally, he (Nixon) is still way down and that's what bothers me even more. He is in a deep depression. I would hope the pardon would eventually lift that but I just haven't noticed that. There was no sudden elation."

Asked about reports that Ford granted the pardon because of fear that Nixon might take his own life, the family member responded: "You have to understand that the President (Nixon) is a very strong, very religious man. He prays every night. I have not seen that but, having talked to him about religious things and prayer, I know it's true.

"He wouldn't consider suicide because of his religious convictions, but I guess you never know."

The New York Times

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10/1/74 Date

Doctor Rules Out Nixon Testimony for 1 to 3 Months

Special to The New York Times

By LAWRENCE K. ALTMAN

LONG BEACH, Calif., Sept. 30—Former President Richard M. Nixon will not be medically fit to travel to Washington for one to three months to testify in the Watergate cover-up trial, Mr. Nixon's doctors said here today. Mr. Nixon is expected to be discharged from Memorial Hospital Medical Center next weekend.

Dr. John C. Lungren, Mr. Nixon's personal physician, said at a news conference that perhaps his patient could give a written deposition in about three weeks after a normal course of convalescence from his phlebitis and pulmonary embolus.

That course is not fully planned yet, Dr. Lungren said, because Mr. Nixon is scheduled to undergo a series of diagnostic tests this week. Dr. Lungren also said he needed time to evaluate how well Mr. Nixon responds to anticoagulant, or blood thinning, treatment.

"It's my feeling that he is improving," Dr. Laungren said.

Mr. Nixon has been subpoenaed by both the prosecution and the defense in the Watergate cover-up trial that is scheduled to begin tomorrow. But Mr. Nixon is not expected to be called as a witness for several weeks.

In answer to a question whether Mr. Nixon was in sufficiently good physical condition to withstand the strain of deposition in his hospital room, Dr. Lungren said, "At this time, I don't think he is."

Then, when asked how much longer he expected it would be before Mr. Nixon could provide such testimony, Dr. Lungren responded: "A written deposition—perhaps within a period of two to three weeks, certainly."

Dr. Lundgren said that Mr. Nixon would have to avoid protracted periods of sitting, standing or riding in a car, plane or bus for "at least a month—maybe three months."

When pressed for a more precise estimate, he said: "In all honesty, I don't know." He added, "I can't pinpoint the time. I can't do that."

Gain for the Doctor

Dr. Lungren went on that if Mr. Nixon chose to testify, "I can't stop him. That's his decision, not mine." But he continued: "I'd be derelict in my duty to him if I suggested that he not observe this restricted acivity for at least the nexxt three weeks and a lot longer."

Mr. Nixon's first bout of phlebitis occurred on a trip to Japan 10 years ago. Then, earlier this year, while in the Middle East, Mr. Nixon reported symptoms of swelling and leg pain to his doctors. The symptoms reportedly began before Mr. Nixon left Washington on the trip.

Mr. Nixon also went to the Soviet Union though the symptoms lingered. Mr. Nixon's doctors have said that he went on the trip against their advice. Doctors at the time said it was not a good idea for Mr. Nixxon to travel with a phlebitis condition because of the risk of developing a pulmonary embolus.

Mr. Nixon also declined hospitalization when Dr. Lungren said he first recommended it for a flare-up of the phlebitis earlier this month.

At the news conference, Dr. Lungren said: "I think he's finally adopted the decision that he'd follow everything I told him to do."

Earlier in the day, Dr. Lungran issued a medical bulletin stating that Mr. Nixon was out of his hospital bed and sitting in a reclining chair with his left lag elevated for portions of the day, though he "continues to have marked physical exhaustion."

Dr. Lungren sai dthat Mr. Nixon's "treatment is proceeding satisfactorily" and that he had stopped his intravenous heparin while continuing to prescribe Coumadin blood-thinning pills.

"He will continue to receive Coumadin for anticoagulation for a yet indeterminate period of time," Dr. Lungren said. He also said that Mr. Nixon was wearing a full-length support stocking on his left leg.

"He's mentally sharp but physically extremely fatigued," Dr. Lungren said. When asked to explain his definition of physical fatigue, Dr. Lungren said that Mr. Nixon had gone 27 years without a vacation, had spent the last five and a half years in the roughest job in the world, had recurrences of phlebitis since June and was undergoing his longest stay in a hospital.

Dr. Lungren has repeatedly stressed that his bulletins and the gist of his remarks were approved by Mr. Nixon in accordance with the principles of the confidentiality of the doctor-patient relationship.

The Long Beach specialist in internal medicine said that he was resuming the battery of diagnostic tests that had been suspended while Mr. Nixon was treated with heparin last week.

"I am hopeful that all the tests will be performed and that the preliminary findings will permit finalization of hi future treatment schedule by the first of next week," Dr. Lungren said.

He said that he planned to repeat ventilation-perfusion lung scans that discovered the embolus in Mr. Nixon's right lung. Dr. Lungren confirmed a report last week that pictures from the two tests combined to show "a small, definite defect in the right lung—the extent is approximately 5 per cent of the total lung tissue."

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 MOTIONS TO QUASH
SUBPOENAS TO RICHARD M. NIXON

The United States submits this memorandum in opposition to the motions of Richard M. Nixon to quash the subpoenas served upon him by the United States and by Defendant Ehrlichman.[1/]

Mr. Nixon asks this Court to quash the subpoenas issued to him on behalf of the United States and Defendant Ehrlichman on the grounds "that the physical condition of the witness is such that compliance with the subpoenas would be detrimental to his health and would pose a serious risk to his life."[2/]

1/ The motions to quash are the only matters before the Court at this time. Defendants Ehrlichman and Haldeman, in their motions for a continuance filed on September 27 and October 9, respectively, claim they are "now entitled to take Mr. Nixon's deposition." A deposition of a prospective witness in a criminal case pursuant to Rule 15 of the Federal Rules of Criminal Procedure or pursuant to 18 U.S.C. 3503 only may be taken with leave of the Court upon motion of a party. There is no such motion before the Court. Accordingly, the government at this time does not address the right of defendants to take Mr. Nixon's deposition, although it does not believe the defendants can make a sufficient showing to warrant this procedure.

2/ With respect to the Ehrlichman subpoena, Mr. Nixon asserts the additional ground of "executive privilege." It is highly doubtful that a former President, in his private capacity, can assert this privilege which inheres in the government, for the bene-

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As we demonstrate below, the showing in support of the motions falls far short of the clear and convincing evidence of substantial risk to Mr. Nixon's health that would warrant granting the relief sought. Accordingly, the Court would be fully justified in denying the motions to quash and requiring Mr. Nixon to comply with the subpoenas.

Nevertheless, the government does not object to the Court, out of an abundance of caution, appointing a panel of three doctors, with expertise in the area of cardio-vascular disorders, to conduct an independent examination to determine whether Mr. Nixon in fact will be able to testify without seriously impairing his health. Clearly, this panel should be free to determine the scope of the examination necessary to permit it to give the Court a full and reliable report. In addition, as we discuss below in greater detail, the panel should be free to consult with other physicians to determine what precautions and arrangements, if any, the Court should adopt to insure that Mr. Nixon would not incur undue risk in testifying.

In this regard, the Special Prosecutor wishes to inform the Court that the government will not insist upon Mr. Nixon's testimony as part of its direct case. If Mr. Nixon does appear at the request of any of the defendants, the government wishes to reserve the right at that time to ask Mr. Nixon limited questions regarding the authenticity of tape recordings the government will offer into evidence. 3/

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fit of the government. See, e.g., Kaiser Aluminum & Chemical Corp. v. United States, 157 F.Supp. 939, 944 (Ct. Cl. 1958). The Court does not have to reach this issue, however, because any presumptive privilege for testimony of Mr. Nixon relating to the issues before this Court (the only testimony that can be elicited) must yield. See United States v. Nixon, ____ U.S. ____, 94 S.Ct. 3090, 3110 (1974).

3/ The government intends to establish the authenticity of the tape recordings without the testimony of Mr. Nixon and will submit to the Court a memorandum supporting the government's theory. Thus, Mr. Nixon's testimony on this issue would support an alternative theory of admissibility.

This procedure will eliminate the need for Mr. Nixon to appear on two separate occasions and will reduce substantially any risk to his health.

ARGUMENT

It is true, of course, that courts have discretion under Rule 17(c) of the Federal Rules of Criminal Procedure to quash a subpoena when there is a substantial risk of serious impairment of the witness' health. At the same time, however, it is central to our system of justice that parties be given the "opportunity, not only of testing the recollection and sifting the conscience of a 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." Barber v. Page, 390 U.S. 719, 721 (1968), quoting Mattox v. United States, 156 U.S. 237, 242-43 (1895). Consequently, the public duty of giving testimony in a criminal case before the body that must decide the guilt or innocence of the accused is one "which every person within the jurisdiction of the Government is bound to perform when properly summoned." United States v. Bryan, 339 U.S. 323, 331 (1950). See also Branzburg v. United States, 408 U.S. 665, 688 (1973); Blackmer v. United States, 284 U.S. 421, 438 (1932); Blair v. United States, 250 U.S. 273, 281 (1919).

Accordingly, courts must carefully scrutinize each and every motion to quash to insure that there is no unwarranted intrusion on the public's right to a full and impartial trial or on the defendant's constitutional right of confrontation. A motion to quash should not be granted unless the court has determined that there is a clear and convincing showing the

witness would seriously jeopardize his health by testifying and that the Court is incapable of instituting arrangements appropriate to protect that witness' health. See generally United States v. Singleton, 460 F.2d 1148, 1150 (2d Cir. 1972), cert. denied, 410 U.S. 984 (1973); Burton v. United States, 175 F.2d 960, 963 (5th Cir. 1949); United States v. Podell, 369 F. Supp. 151, 153 (S.D.N.Y.), writ of mandamus granted on other grounds sub nom. United States v. Carter, 493 F.2d 704 (2d Cir. 1974); United States v. Doran, 328 F. Supp. 1261, 1263-64 (S.D.N.Y. 1971).

The showing submitted by Mr. Nixon, based solely on the affidavit of his personal physician,[4/] does not constitute this compelling showing. Indeed, an examination of the papers indicates that Mr. Nixon objects not to testifying,[5/] but to traveling to the District of Columbia. Significantly, however, Dr. Lungren does not conclude that carefully supervised travel to Washington would endanger his patient's health or would be incompatible with the therapy he has prescribed. His affidavit simply states that Mr. Nixon should: (1) wear an elastic stocking; (2) take oral medication; (3) avoid "prolonged" periods of sitting, standing or walking which could

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4/ In his motion to quash Defendant Ehrlichman's subpoena, Mr. Nixon alludes to "the affidavits of the examining physicians." Witness' Motion to Quash Subpoena of Defendant Ehrlichman, at 5. However, the only affidavit of a physician that has been served on the government is that of John C. Lungren, M.D., who states that he is "advised" that other physicians concur in this recommended therapy.

5/ There is no suggestion that the witness is presently so debilitated that he is unable to respond to questions. Cf. United States v. Carter, 493 F.2d 704, 707 (2d Cir. 1974); Burton v. United States, 175 F.2d 960, 963 (5th Cir. 1949); United States v. Sweig, 316 F. Supp. 1148, 1165-68 (S.D.N.Y. 1970), aff'd., 441 F.2d 114 (2d Cir.), cert. denied, 403 U.S. 932 (1971). On the contrary, Mr. Nixon himself points to the possibility that "the testimony be taken out of court in such a way as not to risk the impairment of his health." Witness' Motion to Quash Subpoena of Defendant Ehrlichman, at 5.

result in increased veinous congestion; (4) avoid "extended" trips which require such sitting or create a risk of traumatic hemorrhaging; and (5) remain in a "controlled environment" where periodic blood tests and examinations may be performed. Neither the memorandum in support of the motions nor the affidavit indicates that these conditions cannot be met if the witness takes appropriate precautions in complying with the subpoenas.

The government, of course, is not qualified to determine what precautions would alleviate the concerns expressed by Dr. Lungren. But, it is clear that Mr. Nixon can continue to wear an elastic stocking and take oral medication while in transit and in Washington. By having the affected leg elevated, or by reclining as necessary, he can avoid prolonged periods of sitting, standing or walking, as prescribed. And, by utilizing any of the large number of ample medical facilities in the metropolitan Washington area, his condition may be monitored in accordance with his physician's recommendations. Beyond this, the Court may provide appropriate facilities and supervise the questioning of Mr. Nixon in a manner consonant with his medical needs. See, e.g., United States v. Doran, supra, 328 F. Supp. at 1263; United States v. Sweig, supra, 316 F. Supp. at 1167-68 (defendant with severe cardiac condition brought to trial with "extensive precautions," including frequent and lengthy recesses, facilities for the defendant to lie down and rest, and trained nurses on call outside courtroom).

Mr. Nixon's showing also is insufficient because it does not rule out the possibility that Mr. Nixon will be able to testify in the future. Indeed, a medical report released yesterday indicated that Mr. Nixon is responding well to treatment, that his condition has not flared up since he left

the hospital, and that there have been no complications. (Washington Star News, October 15, 1974, at A-2.) It may be that after an additional period of convalescence it will be possible to conclude with reasonable certainty that Mr. Nixon will be able to travel safely to Washington to testify before the end of the trial. As this Court well knows, the trial of this case will take at least two more months, and it would be improper to quash the subpoenas unless the Court concluded that Mr. Nixon could not testify at any time during the course of the trial.

Even if the showing in support of the motion to quash were considerably stronger, the proper course, under the circumstances of this case, would be to appoint an independent panel of doctors to conduct whatever examination they believe is appropriate and to report to the Court on Mr. Nixon's health and his physical ability to testify.

The Court, of course, has the power under Rule 28(a) of the Federal Rules of Criminal Procedure to appoint medical experts to assist it in matters within its jurisdiction. See Advisory Committee Note to Rule 706, Proposed Rules of Evidence for United States Courts and Magistrates 99 (1972) (the "inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned"). Accordingly, the Court of Appeals for this Circuit has held that where the competency of a witness is in question, the trial judge may appoint a physician to examine the witness to obtain expert testimony concerning the degree and effect of the witness' disability. This power "stems from the trial court's inherent power to conduct those inquiries necessary to a full and fair adjudication." United States v. Benn, 476 F.2d 1127, 1130 n.12

D.C. Cir. 1973). 6/ Indeed, the very authorities cited by Mr. Nixon support the Court's authority to appoint physicians to examine a defendant or witness who pleads he is physically unable to appear at trial. See United States v. Keegan, 331 F.2d 257, 263-64 (7th Cir. 1964) (court ordered examination and inspection of medical record by Public Health Service physicians); see also Natvig v. United States, 236 F.2d 694, 698 (D.C. Cir. 1956), cert. denied, 352 U.S. 1014 (1957) (court appointed physician to examine witness who had heart attack on eve of trial); United States v. Bernstein, 417 F.2d 641 (2d Cir. 1969) (affirming denial of continuance where district court relied on opinion of court appointed physician instead of accepting conclusion of defendants' physicians that appearance at trial would pose "risk to their health and lives").

There are three reasons that make it particularly appropriate for the Court to exercise its discretion in this case. First, the unprecedented nature of the trial -- its "magnitude and seriousness" -- make it essential for the Court to take every reasonable step to assure itself that Mr. Nixon in fact will be unable to testify before quashing subpoenas directed to him. Cf. United States v. Doran, supra, 328 F. Supp. at 1263.

Second, Mr. Nixon is not a neutral or detached witness. He has been formally accused of participating in the conspiracy for which defendants are standing trial, and it would be only natural for him to seek to avoid an obligation to testify. Thus, the Court should be hesitant to rely solely on Mr. Nixon's supporting papers.

6/ Benn was concerned with the appointment of a psychiatrist to aid the trial court in ruling on the competency of a mentally retarded complaining witness.

Although the government has no reason to question the integrity of Dr. Lungren, the Court cannot ignore the fact that he has attended Mr. Nixon as his physician since 1952. Any loyalties that have developed during this association of more than 20 years might unintentionally color Dr. Lungren's advice. Indeed, it is clear that Dr. Lungren was focusing on Mr. Nixon's exposure to subpoenas when he conducted his tests and acted as an advocate in public reports which were structured to be favorable to Mr. Nixon's legal position. 7/

Finally, in addition to providing an impartial, up-to-date evaluation of Mr. Nixon's medical condition, an independent panel of doctors would be able to consult with the Court on the appropriate safeguards and procedures for minimizing the risks, if any, that would be occasioned by Mr. Nixon traveling to Washington for the purpose of testifying. Only with this advice can the Court finally determine whether Mr. Nixon is in fact able to testify.

CONCLUSION

For the reasons stated above, the motions to quash should be denied without prejudice, and the Court should appoint an independent panel of doctors to examine Mr. Nixon to determine whether, under appropriate conditions, Mr. Nixon will be able to testify at any time during the trial of this case.

7/ In a news conference on September 30, 1974, he stated that Mr. Nixon would not be able to testify, but might be able to give a "written deposition." (New York Times, October 1, 1974, at 18.)

Respectfully submitted,

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Associate Special Prosecutor

PETER M. KREINDLER
Counsel to the Special Prosecutor

RICHARD BEN-VENISTE
Assistant Special Prosecutor

JILL WINE VOLNER
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Assistant Special Prosecutor

Attorneys for the United States

Watergate Special Prosecution Force
1425 K Street, N. W.
Washington, D. C. 20005

Dated: October 16, 1974.

Of Counsel:

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Peter F. Rient
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Peter K.

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CHARLES A. HUFNAGEL, M.D.
CHAIRMAN, DEPARTMENT OF SURGERY
SURGEON-IN-CHIEF

29 November 1974

The Honorable John J. Sirica
Judge, United States District Court
United States District Court
Washington, D.C.

Dear Judge Sirica:

The report of the medical panel is submitted with this letter. All members were in agreement with the opinions it contains. The dates stipulated are the expression of our judgement at the present time and are subject to modification by unknown future medical developments.

If required by the court the panel can submit the medical reasons and data upon which it based its report. This would involve specific information regarding his condition, which we have been instructed is confidential.

I would be pleased to meet with you to discuss the reasons for the opinions expressed by the panel, if you wish.

Sincerely yours,

Chas A. Hufnagel M.D.

Charles A. Hufnagel, M. D.
Chairman, Medical Panel

CAH/dg

TO: The Honorable John J. Sirica, U. S. District Judge

FROM: Medical Panel--Charles A. Hufnagel, M.D., Chairman;
Richard S. Ross, M.D. and John A. Spittell, Jr., M.D.

SUBJECT: The Physical Condition of Mr. Richard M. Nixon

On November 25, 1974, we visited the Long Beach Memorial Hospital where we interviewed Doctor Eldon Hickman and reviewed the medical records, x-rays, special studies and laboratory data of Mr. Richard M. Nixon. Subsequently, we examined Mr. Nixon at his home on the same date. The examination of Mr. Nixon was carried out with his consent and cooperation. On the basis of the above, we submit the following opinions in response to the questions posed in the court order filed on November 13, 1974:

(1) Mr. Nixon is not presently able to travel to Washington, D. C. to testify.

(2) It is difficult to predict with accuracy when such a trip to Washington, D. C. might be accomplished without excessive risk. If recovery proceeds at the anticipated rate, and there are no further complications, we would estimate that such a trip should be possible by February 16, 1975.

(3) Mr. Nixon is not presently able to appear and testify at a site near his home.

(4) If his recovery proceeds at the anticipated rate, and there are no further complications, we would estimate that he should be able

to testify at a court room near his home by February 2, 1975.

(5) Mr. Nixon is not presently able to be deposed by the parties in this case.

(6) If recovery proceeds at the anticipated rate, and there are no further complications, we would estimate that he should be able to give a deposition in his home by January 6, 1975.

(7) If a deposition is to be taken as described in response to (6) above, we suggest it be obtained in no more than two daily sessions of no longer than one hour each. There should be adequate opportunity for rest between sessions. A physician should be in attendance to monitor Mr. Nixon's condition during the taking of the deposition.

Respectfully submitted,

Chas A. Hufnagel

Charles A. Hufnagel, M. D.
Chairman of Medical Panel

26 November 1974

CAH/dg

(Handwritten copy signed by each member of medical panel attached)

Form DJ-150
(Ed. 4-26-63)

UNITED STATES GOVERNMENT

DEPARTMENT OF JUSTICE

Memorandum

TO : Peter M. Kreindler
Counsel to the Special Prosecutor

DATE: 30 Nov. 1974

FROM : David Kaye

SUBJECT: Continuance to Obtain Testimony of a Sick Witness

I have spent some hours locating cases discussing the showing a defendant must make to obtain a continuance because of the illness of a witness.[1/] I have concluded that although a lesser standard is usually employed, there is some support for the position that the defendant must submit an affidavit showing that the testimony would be favorable to the defense and that the witness will probably be available in a reasonable time.

Generally, if a continuance is sought for the purpose of securing the attendance of witnesses, "it must be shown who they are, what their testimony will be, that it will be relevant under the issues in the case and competent, that

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1. In none of these cases was the factor of a sequestered jury present.

the witness can probably be obtained if the continuance is granted, and that due diligence has been used to obtain their attendance for trial as set." Neufield v. United States, 118 F.2d 375, 380 (D.C.Cir. 1941), cert. denied, 315 U.S. 798.

Numerous cases emphasize the elements of probable availability and the expected nature of the testimony. Thus, in Eastman v. United States, 153 F.2d 80, 84-85 (8th Cir. 1946), cert. denied, 328 U.S. 852, the court of appeals saw no error in 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" and it was "difficult to discern what value the testimony of the absent witness could have been to defendants." See also Dearinger v. United States, 468 F.2d 1032 (9th Cir. 1972), where a similar result was reached, in part, due to the existence of "some doubt as the ultimate availability of [the] witnesses," id. at 1035.

In particular, the simple fact that the expected testimony would be highly material is not enought to compel a continuance. In United States v. Lustig, 163 F.2d 85, 89 (2d Cir.), cert. denied, 332 U.S. 775 (1947), the court of appeals held that the lower court correctly exercised its discretion in denying

a defense motion for a continuance made on the ground that a defense witness had suffered a coronary thrombosis in view of the fact that the testimony, "if ever obtainable, would only have been cumulative to that of [the defendants]." See also 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), cert. denied, 379 U.S. 821 (affirming denials of continuances to allow the defense to present cumulative testimony). Even if the sick witness is alleged by the government to have participated in the crime and is conceded to have "material information," a one-week continuance is not required if counsel only advises the court generally that the witness' testimony is important to "the whole truth" but does not specify the testimony to be elicited. Payton v. United States, 222 F.2d 794, 796 (D.C.Cir. 1955). See also Babb v. United States, 210 F.2d 473 (5th Cir. 1954) (defense must allege what the absent witness would testify to if present). The defense, in short, must do more than show materiality. It must identify "substantial favoring evidence," United States v. Harris, 436 F.2d 775, 777 (9th Cir. 1970), and it should make this showing by way of affidavit, United States v. Trenary, 473 F.2d 680, 682 (9th Cir. 1973).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES	)	
	)	
Plaintiff	)	
	)	
v.	)	Criminal No. 74-110
	)	
JOHN MITCHELL, et al.	)	
	)	
Defendant	)	
	)	

MOTION TO QUASH SUBPOENA

Richard M. Nixon, through his undersigned counsel, respectfully moves pursuant to Rule 17, Federal Rules of Criminal Procedure, to quash a certain subpoena to testify and produce documents or materials in this proceeding. The subpoena, issued upon the application of defendant John D. Ehrlichman on September 4, 1974, and served upon the witness on September 19, 1974, commands him to appear to testify and produce certain documents and materials in this case in Washington, D. C., on September 30, 1974. On September 20, 1974, the date for compliance with the subpoena as served was suspended by the Court pending the filing of these papers. A copy of the subpoena is attached hereto as Exhibit A.

The grounds for this motion, which are more fully discussed below, are as follows:

1. The physical condition of the witness at this time is such that compliance with the subpoena would be detrimental to his health and would seriously increase the risk of

permanent injury or incapacitation.

2. Both the documents and materials demanded, and the subject matter of the testimony sought, are privileged as confidential Presidential communications, and are subject to compelled disclosure under subpoena in a criminal case only upon a specific showing of necessity for the testimony or the materials. Such a showing has not been made.

3. The duces tecum portion of the subpoena is unreasonable and oppressive in that it lacks the specificity required to determine whether the materials sought are relevant and admissible as evidence.

ARGUMENT

A. Compliance With The Subpoena Would Pose A Serious Risk of Permanent Injury to The Health of the Witness.

Based on the affidavit of John C. Lungren, M. D. 1/ and on the information and belief of counsel, the facts as to Mr. Nixon's current physical condition and prognosis are as follows:

Mr. Nixon has suffered since the mid-1960's from recurrent phlebitis or inflammation of the blood veins. Phlebitis is often accompanied by blood clotting, a serious condition

1/ The Affidavit of Dr. Lungren has not yet been received by counsel. It has, however, been read over the telephone, and the Affidavit of Herbert J. Miller, Jr., attached hereto as Exhibit B, sets forth its contents. The Lungren Affidavit will be filed as soon as it is received by counsel.

which threatens the life of those if afflicts. Should emboli (clots) formed in the veins become detached and reach the lungs, permanent damage or death may result.

During the week ending September 13, 1974, Mr. Nixon was examined by Dr. John Lungren at Palm Springs, California and by Dr. Walter Tkach in San Clemente, California. Both found a worsening of the phlebitis condition, this time affecting the upper left leg, and recommended hospitalization for diagnostic tests and treatment. Mr. Nixon entered Long Beach Memorial Medical Center in Long Beach, California, on September 23, and has remained there through this date.

At the time of his admission to the hospital, it was believed that the diagnostic tests would be completed and available on September 30 or October 1, and counsel so reported to this Court at a conference on September 27. However, in tests performed after Mr. Nixon's admission to the hospital, an embolus was discovered in the right mid lung lateral surface, and further tests were discontinued to permit treatment of this potentially extremely dangerous condition. The embolus in the lung is responding to treatment, and the tests originally planned have been resumed. Counsel are now informed by the attending physician that the tests are expected to be completed on Friday, October 4, 1974, and the results and analysis will be available to counsel by approximately the middle of the week of October 7.

Assuming that further complications do not occur, Mr. Nixon will be released from the hospital on October 4 or 5, and will be placed on ambulatory prophylactic anticoagulant therapy for a period of approximately three to six months, depending on his response to such therapy. The therapy includes oral medication, frequent testing, and restricted physical activity, and requires that Mr. Nixon refrain from travel.

Counsel expect to have more complete information on Mr. Nixon's condition after the test results have been obtained and analyzed, and if requested, we will make a further report to the Court at that time. However, even on the basis of the information obtainable at this time, it is clear Mr. Nixon cannot comply with the subpoena in the immediate future without impairing his physical condition and creating a potentially very serious risk to his health.

In determining whether to require attendance of a witness pursuant to subpoena, "the Court must be assured that the physical and mental health of the witness will not be damaged, impaired or in any way harmed in any significant way." In re Loughran, 276 F. Supp. 393, 430 (C.D. Cal. 1967). The fact of a physical disorder "making trial excessively painful or risky" to the defendant's health, United States v. Doran, 328 F. Supp. 1261, 1262 (S.D. N.Y. 1971); see United States v. Keegan, 331 F.2d 257, 263-264 (7th Cir. 1964), constitutes

a ground for precluding trial altogether. Where merely foregoing the testimony of a witness is at stake, rather than foregoing trial altogether, the risk to the individual's health should be given the weightiest consideration by the trial court. At the very least, where the witness's testimony is shown to be necessary, courts have granted a continuance of trial to permit the witness to recover from his illness, or ordered that the testimony be taken out of court in such a way as not to risk impairment of his health. See Burton v. United States, 175 F.2d 960, 963-964 (5th Cir. 1949); Newton v. United States, 162 F.2d 795, 797 (4th Cir. 1947); United States v. Podell, 369 F. Supp. 151 (S.D. N.Y. 1974).

At the present time, based on the affidavits of the examining physicians, we submit it is clear that requiring Mr. Nixon's attendance pursuant to the subpoena would pose serious risks to his health. In addition, Mr. Nixon plainly is unable to perform the review of his Presidential materials -- which are presently and will for some time remain in Washington, D. C. -- necessary to comply with the duces tecum portion of the subpoena. For these reasons, the subpoena should be quashed.

B. The Materials and Testimony Sought Are Privileged Presidential Communications

The materials sought in the duces tecum portion of the subpoena, as well as the testimony presumably sought by

Mr. Nixon's appearance,[2/] relate exclusively to communications between the President and his aides. Such communications are "presumptively privileged," and their disclosure may be compelled only upon a "demonstrated, specific need for evidence in a pending criminal trial." United States v. Nixon, U.S. , 94 S. Ct. 3090, 3110 (1974). In that case, the Supreme Court held that once a claim of privilege had been made, it was the "duty of the District Court to treat the subpoenaed material as presumptively privileged and to require the Special Prosecutor to demonstrate that the presidential material was 'essential to the justice of the [pending criminal] case.'" Id.

In sharp contrast to the specific identification of conversations subpoenaed by the Special Prosecutor and the showing of relevance and admissibility made by him as to each, see id. at 3103-3104, the present subpoena is so broad and unspecific as to make impossible any intelligent judgment as to exactly what is desired, much less as to whether the need for any particular materials is sufficient to overcome the privilege. Mr. Nixon has no desire to withhold materials legitimately necessary to Mr. Ehrlichman's defense. But as the

2/ We recognize that until the subject matter of the anticipated questioning is known, it is impossible to judge whether the privilege is applicable. We suggest that it would be appropriate to require at least a proffer from Mr. Ehrlichman of the subjects upon which he would examine Mr. Nixon so that an informed decision on privilege may be made. Cf. Capitol Vending Co. v. Baker, 36 F.R.D. 45, 46 (D.D.C. 1964).

Supreme Court recognized, it is "necessary in the public interes to afford presidential confidentiality the greatest protection consistent with the fair administration of justice." Id. at 3111. To do so requires a continuing insistence that a preliminary showing of necessity be made in each case. Such a showing has not and cannot be made as to the present subpoena, and for that reason it should be quashed.

C. The Duces Tecum Portion of the Subpoena Is Unreasonable and Fails to Comply With Rule 17(c)

The duces tecum portion of the subpoena requires the witness to bring with him "all documents, books, records, tape recordings, writings, drawings, graphs, charts, photographs, phono records, and other intangible matters which refer to or relate to the concealment or cover-up of the break-in into Democratic National Headquarters and the involvement as to the same by agents or employees of The White House or the Committee for the Re-election of the President." This blanket description does not comply with the requirement of Rule 17(c) Federal Rules of Criminal Procedure, that the materials sought be "designated." The words "which refer to or relate to the concealment or coverup" are not sufficient "to apprise a man of ordinary intelligence what documents are required" or to enable the Court "to ascertain whether the requested documents have been produced." 8 Wright & Miller, Federal Practice and

Procedure §2211, p. 631 (1970); see Scuden v. Boston Insurance Co., 34 F.R.D. 463, 466 (D. Del. 1964). Read broadly, the demand would seem to require any document or tape in which any reference is made to the investigations of the Watergate affair from June 1972 to the present time; and while the documents conceivably relevant to the issues in this case are surely only a small fraction of such materials, the witness has no way of determining which are or are not demanded by the subpoena.

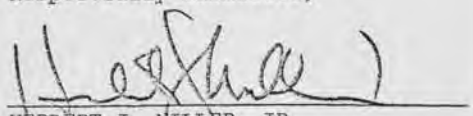
Furthermore, to require a search of all Presidential materials produced since the date of the Watergate break-in to select materials covered by the subpoena would impose an unreasonable burden on the witness. Without any specification of particular conversations or documents, a complete search of thousands of documents and hundreds of hours of tape recordings would be required, and such a burden will not be put on a witness where it is within the power of the demanding party to more particularly describe the materials felt to be relevant to the case. See Flichinger v. Aetna Casualty & Surety Co., 37 F.R.D. 533, 535 (W.D. Pa. 1965); Rosee v. Board of Trade of the City of Chicago, 36 F.R.D. 684, 691 (N.D. Ill. 1965). The overbreadth and lack of specificity in this subpoena is even more egregious than the one involved in Shelton v. United States 131 U.S. App. D.C. 315, 326, 404 F.2d 1292, 1303 (1968), cert. denied, 393 U.S. 1024 (1969), where the Court of Appeals

affirmed this Court's quashing of a criminal defendant's subpoena as "unreasonable and oppressive" when it demanded of a House subcommittee chairman "all information concerning the Klan in his possession, custody, control, or maintained by or available to him or obtained by him prior to or during" an investigation. See also, e.g., Margoles v. United States, 402 F.2d 450, 451-52 (7th Cir. 1968) (upholding quashing, on ground of excessive breadth, of criminal defendant's subpoena for all electronic eavesdropping equipment logs for city FBI office covering period of year and a half).

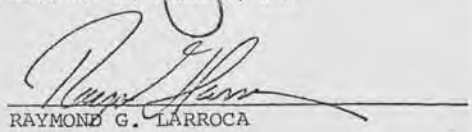
CONCLUSION

For the reasons stated herein, the subpoena should be quashed.

Respectfully submitted,



HERBERT J. MILLER, JR.



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