

THE OMNIBUS HEARING—AN EXPERIMENT IN FEDERAL CRIMINAL DISCOVERY

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I. INTRODUCTION

In September, 1966, a judicial reorganization of the federal judicial districts in California resulted in the creation of the new Southern District of California, encompassing San Diego and Imperial Counties.¹ Within six months an experimental program called the "Omnibus Hearing" was initiated. Its chief proponent was and is the Honorable James M. Carter, then Chief Judge of the Southern District, and now Circuit Court Judge with the Ninth Circuit Court of Appeals. Under Judge Carter's urging and direction, and with the cooperation of the United States Attorney's Office, the omnibus hearing, a criminal pretrial discovery experiment, began.

The two events mentioned above are not interdependent occurrences. With the creation of a new judicial district, what had long been known to be true became provable by statistics. The Southern District of California handles the largest number of criminal matters of any judicial district in the United States.² The caseload per Assistant United States Attorney far outstrips that of any other United States Attorney's Office in the country.³ Furthermore, a large proportion of defendants are indigent and accept the appointment of counsel to represent them. The sheer volume of cases made the omnibus hearing imperative.

The omnibus hearing date is set after arraignment and plea, and prior to trial. Under the omnibus, defense counsel is expected to contact the Assistant United States Attorney to whom the case is assigned, and request discovery of the nature of the Government's case. Usually, this discovery is accomplished by permitting defense counsel to examine the contents of the Government's file, which primarily includes the report of the investigating agency. This report will normally reflect ninety-five percent of the evidence that the

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¹ 28 U.S.C. § 84(d) (Supp. II, 1967).

² 1967 ADMIN. OFF. OF THE U.S. COURTS, ANN. REP. OF THE DIR. (Table D 3).

³ 1967 ATT'Y GEN. ANN. REP. U.S. ATTORNEYS (Table 6).

Government will introduce at trial. Once defense counsel is apprised of the Government's case, he is in a better position to assist his client in making an intelligent decision whether to take the case to trial or dispose of it in another manner. This decision can be announced at the omnibus hearing.

It will be the purpose of this article to discuss the effect of the omnibus hearing, after one year's experience, at its birthplace. Comparison with existing federal law on specific matters will reveal the scope of the omnibus hearing. However, the practical aspects in connection with the omnibus will be the subject of major significance.

II. THE OMNIBUS HEARING

A. *In General*

The effect of the omnibus hearing, and its method of operation, can best be studied through examination of the "action taken" form⁴ developed and revised primarily by Judge Carter. This form is designed to be completed by defense counsel at the time of the omnibus hearing, forwarded to the Assistant United States Attorney, and then filed with the clerk of the court as part of the official record. From this form, the omnibus hearing can be analyzed and its legal effects examined.

The "action taken" form is divided into six topical areas: (A) Discovery by defendant, (B) Motions requiring separate Hearing, (C) Miscellaneous Motions, (D) Discovery by the government, (E) Stipulations, and (F) Conclusion-Defense Counsel States. However, for purposes of discussion it is more convenient to view the omnibus as covering these five areas of interest: (1) procedural simplification, (2) declarations, (3) stipulations, (4) disclosures by the Government, and (5) disclosures by the defense.

B. *Procedural Simplification*

1. *Intervening Court Appearance*

The mandatory omnibus hearing requires a court appearance by defendant and his counsel between the date of the arraignment and

⁴ The Omnibus Hearing Action Taken Form (Form OH-3, Revised 1/2/68) is appended to this article commencing at p. 323. All subsequent mention to the form in the text will be by footnote. The form will hereinafter be cited as OHAT. Attention is called to the fact that since the omnibus hearing is a mandatory proceeding (by agreement between the United States Attorney and the United States District Court, Southern District of California) when its provisions conflict or deviate from the present *Federal Rules of Criminal Procedure* and case law, the omnibus provisions prevail.

plea and the date of trial. Although this has nothing directly to do with the "action taken" form, it is the omnibus' most important function. Previously, *all* cases that came up for arraignment would be set on the trial calendar. Unless there was some communication between the United States Attorney's Office and the defense counsel before arraignment an unwieldy number of cases would be set on the trial calendar. When forty or more cases are set for trial on a particular date, it becomes exceedingly difficult to communicate with defense counsel so as to determine which cases are capable of disposition without trial, which must be continued for various reasons, and which should be tried as set. Furthermore, it is impracticable to prepare forty or more cases as though each would be tried on the same day.

The problem that exists without the omnibus hearing can be described as one of communication. Twin lines of communication must remain open to determine the direction that a particular case will take. There must be effective communication, first, between defense counsel and his client and, second, between defense counsel and the prosecutor. Too often, counsel may speak once with his client after being appointed and prior to arraignment, and then not have any contact with him prior to trial. This failure of communication is attributable in large part to the fact that indigent defendants are often transient and do not provide their counsel with current addresses and telephone numbers. Finally, the volume of cases lends itself to moderate delays between the time of the alleged offense and the time that the formal grand jury indictment is returned. It would appear that these delays hinder defendant and his counsel in keeping the case current in their minds, further accentuating the problems of the transient indigent.

What has been mentioned with regard to appointed counsel is also true of retained counsel. A conclusion can be drawn that the attentiveness of counsel to his client's case is not significantly affected by whether counsel is retained or appointed, but by the innate quality of the lawyer himself. The omnibus hearing, however, impels communication between counsel and defendant, as well as between counsel and prosecutor, prior to the time of setting a case for trial.

The defendant's presence is required at the time of the omnibus hearing.⁵ It may be waived only in rare circumstances and these are

⁵ Defendant must appear at all court hearings except when a waiver of appearance is on file. This waiver of appearance is only effective to excuse defendant's presence when a continuance is granted.

mainly occasions where a tremendous financial hardship and burden will result from a required appearance at the omnibus. When defendant must appear, there will undoubtedly be contact between defendant and his attorney, even if for only a few minutes before the omnibus.

Assuming that defense counsel has taken the opportunity to see the Government's file in the case, and possibly has discussed a proposed disposition of the case without trial, he will have the opportunity to discuss any developments with his client. Then an intelligent determination can be made. If defendant is not prepared to formalize a disposition on the date of the omnibus hearing, the case can be set on the disposition calendar and will not become a false and deceptive item on the trial calendar.

The case will be continued if defense counsel has not taken advantage of pretrial discovery prior to the omnibus hearing. Although defendant might be inconvenienced by having to make another court appearance, this failure to communicate with the prosecutor does have the beneficial effect of giving defendant and his counsel further opportunity to consult one another. In any event, the omnibus eventually provides a confrontation between defense counsel and the prosecutor to determine whether the case will go to trial.

At the conclusion of the omnibus hearing, the court inquires as to a date for further proceedings. If the matter appears to be heading toward trial, it will be placed on the trial calendar; otherwise, it should be continued the appropriate length of time and given a disposition date. As a result of the omnibus, there will be fewer cases on the trial docket, and confusion will be lessened as to which cases will be tried, and when.

If developments occur so that disposal without trial appears likely, an inquiry by the prosecutor shortly before the trial date should disclose that fact. The disposition can occur on the trial date, or the matter can be continued to a disposition date. Likewise, if a matter is set for disposition, but this does not materialize, the case can then be replaced on the trial calendar.

Therefore an intervening court appearance, between arraignment and before the setting of any trial date, is extremely useful and valuable in solving the problems created by an overwhelmingly large number of criminal cases in a district.

2. *Simplification of Motions*

In addition to any simplification resulting from the very existence of the omnibus hearing, its internal mechanics are designed to afford opportunities for simplification of motions. Under the omnibus rules, motions that should otherwise be made prior to trial can be made at the omnibus hearing. Moreover, motions usually required to be written can effectively be made orally at the time of the omnibus hearing.

Specifically, the omnibus incorporates five motions: suppression of physical evidence; suppression of admissions or confession; disclosure by the Government of the proceedings before the grand jury; disclosure of the existence of an informer and his identity; and disclosure of the existence of electronic surveillance. If defense counsel intends to make any of these motions, he does so at the omnibus. The court then inquires whether a hearing is needed on such a motion before trial. Quite frequently, the motion to suppress an admission or confession made by defendant⁶ can easily be handled at the trial. No independent hearing is needed, if the hearing, which must be held outside the presence of the jury, will probably not require an undue length of time.⁷ However, the other four motions may require a separate pretrial hearing.⁸

With regard to these motions, the question arises as to whether the omnibus actually results in simplification of the case. First, it should be noted that the omnibus provides that the motions can be made orally at the hearing. The simplicity of presenting an oral motion has resulted in more motions. It is relatively easy to circle a motion on the "action taken" form with little consideration of the actual merits. Many defense counsel feel compelled to make such motions, not only because it is easy to do, but also because they impress clients with the intensity of the lawyers' efforts—ultimately, however, many of the motions are proven frivolous.

The facility of making the oral motion raises more than the spectre of doubt as to the seriousness of the motion itself. It becomes evident

⁶ The grounds for this motion are: delay in arraignment, coercion or unlawful inducement, violation of *Miranda*, unlawful arrest, or improper use of a lineup. OHAT ¶ 6(c).

⁷ *Jackson v. Denno*, 378 U.S. 368 (1963). See also OHAT ¶ 6(d).

⁸ In addition to these motions, defense counsel has the opportunity to move for a dismissal on the grounds that the indictment or information fails to state an offense or on the ground of duplicity. These may also require a separate hearing. See OHAT ¶ 7(a), (b).

that the written motion practice is not eliminated if a motion has any legal substance. Defense counsel must be prepared, during argument, to elicit the facts that might support such a motion. This effort cannot be made in an intellectual vacuum or spontaneously in the courtroom. In order to make an adequate presentation, defense counsel *must* research the pertinent law on the issue. When he has done so, it is a simple task to submit a written motion with cited authority. Additionally, the written motion makes a much more complete record. The failure of the oral motion to appear in the record is often due to defense counsel's leaving the courtroom without having completed the "action taken" form. Such an omission does not occur when defense counsel drafts a written motion and serves it upon the Government.

Therefore, the alleged benefit of the omnibus insofar as eliminating the written motion simply does not materialize. Furthermore, thorough attorneys will be in a better position to examine witnesses after having made a written motion than the unprepared attorneys who made an oral one. Also, oral motions, many of which are made without proper basis, must be calendared and prepared. Consequently, from the Government's viewpoint, more time is spent than saved as a result of the oral practice.

It might be argued, on the other hand, that the omnibus alerts the Government to motions that the defense might make, motions of which the prosecutor might not otherwise be aware. This argument is without merit. The Government will always receive timely notice of any motion according to the rules of the written motion practice.⁹

The omnibus also provides that the Government can make certain motions, *e.g.*, to have defendant appear in a lineup.¹⁰ It must be noted that the defendant is directed by the court to appear, but only upon "timely notice to defense counsel." Thus, any procedural simplification for the benefit of the Government upon such motions is nonexistent because of the timely written¹¹ notice requirement.

3. *Timeliness of Motions*

The legal significance of the omnibus, as well as its binding effect on the timeliness of motions is at this time uncertain. Since there are

⁹ FED. R. CRIM. P. 47. Additionally, the facts as outlined in the report of the investigating agency will forewarn the Government of the bases for possible defense motions.

¹⁰ OHAT ¶ 12(a). See OHAT ¶ 12(b)-(i).

¹¹ Although the wording is "upon timely notice to defense counsel," this usually requires written notice

two types of motions, one of which must be made prior to plea, and one which may be made at any time before trial, the omnibus, by coming between plea and trial, may extend the timeliness of the former motions and limit that of the latter. For example, a motion challenging the method of impanelling a grand jury must be made prior to the entering of the accused's plea, or the right to object is waived¹² and failure by the court to consider the motion later will not be considered error in the absence of a clear abuse of discretion.¹³ However, the omnibus permits this motion to be made *after* arraignment and plea.¹⁴ Presumably, failure to make the motion at the omnibus will have the same effect—waiver—as failing to make it at arraignment and plea under Rule 12(b)(3).

The effect of the omnibus on the second type of motion, which must be made prior to trial, is subject to a similar inquiry: Does the failure to make such a motion at the omnibus preclude the timely raising of it later? Although it might appear that the answer would be in the negative because the motion would be timely raised pursuant to the present rules,¹⁵ the issue is not easily resolved. For example, a motion to suppress physical evidence must be made prior to trial.¹⁶ This rule derives from a system where the motion cannot be made pursuant to an earlier court opportunity. But as the omnibus provides the opportunity, the issue is thus reduced to: Does the failure to check that item of the "action taken" form preclude defendant from making such a motion later, as he would be precluded by not making a timely motion under Rule 41(e) of the Federal Rules of Criminal Procedure?

The answer cannot be quickly tendered because the situation is complicated by another item of the "action taken" form. In the "Conclusion," defense counsel states that he "knows of no problems involving delay in arraignment, the Miranda Rule or illegal seizure or arrest, or any other constitutional problem, except as set forth above."¹⁷ Immediately after that declaration is another which states that "defense counsel has inspected the check list on this OH-3 Action Taken form, and knows of no other motion, proceeding or

¹² *Poliafico v. United States*, 237 F.2d 97 (6th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957).

¹³ *See, e.g., United States v. Tane*, 329 F.2d 848 (2d Cir. 1964).

¹⁴ OHAT ¶ 14(a), (b).

¹⁵ FED. R. CRIM. P. 41(e) provides, in part, "[t]he motion shall be made before trial or hearing unless opportunity therefore did not exist"

¹⁶ *See Jones v. United States*, 362 U.S. 257 (1959).

¹⁷ OHAT ¶ 14(a).

request which he decides to press, other than those checked thereon.”¹⁸ These declarations clearly contemplate an intelligent analysis of the possible constitutional issues, and a rejection of those not checked. In view of the rule of law that the failure to raise an issue in a timely fashion precludes consideration of that issue unless plain error exists, and since appellate courts are unconcerned with the reasons for this failure, whether it be a considered rejection or negligence, the significance of such declarations becomes exceedingly important.¹⁹

Thus, do these declarations, combined with the failure to mark the appropriate motion to suppress, constitute an “intelligent waiver” of a known constitutional right, which is required pursuant to *Johnson v. Zerbst*?²⁰ And, if a waiver is not found, is the issue precluded on an estoppel theory from being raised later?

The answers to such questions relating to the legal effect of the omnibus hearing are unclear. Obviously, no precedent exists; only analogies are available, and they seem to suggest that a waiver might be found. However, with the ever-growing interest in seeing that defendant receives his day in court, it is doubtful that lower courts would support the Government's position in such matters. At this writing, appeals are being taken to the Ninth Circuit Court of Appeals which could resolve the legal significance of the omnibus hearing.

C. Declarations

1. Discovery Completed

The “action taken” form consists of certain declarations which reflect *fait accompli*. The first paragraph on the form is a statement that defense counsel has obtained full discovery and has inspected the Government's file except for certain materials specifically enumerated as having been withheld by it.²¹ In practice, the failure to check this declaration requires a continuance of the omnibus hearing. The fact that the hearing proceeds at the time of its setting means that discovery and inspection have occurred. Thus, its presence in the form is questionable, except as it informs the court of the accomplished fact. This aspect of the omnibus is also subject to abuse, for some defense counsel announce in open court that they have had full dis-

¹⁸ *Id.* ¶ 14(b).

¹⁹ *United States v. Laverick*, 348 F.2d 708 (3rd Cir.), *cert. denied*, 382 U.S. 940 (1965); *FED. R. CRIM. P.* 52(b); *9TH. CIR. R.* (18)(2)(d).

²⁰ 304 U.S. 458 (1938).

²¹ OHAT ¶ 1.

covery, and check the form, when actually they have not participated in any such discovery. In effect, their check expresses only what they *hope* to accomplish in the near future. For the most part, Government counsel does not embarrass defense counsel by disclosing otherwise, but merely accedes to the fiction.

2. *Future Discovery*

The next item on the form that amounts to a declaration provides: "Defendant, having had discovery of Items #2 and #3, [which deal with discovery of the Government's case], requests and moves for discovery and inspection of all further or additional information coming into the government's possession as to Items #2 and #3."²² Although this motion appears to be one compelling disclosure by the Government, in practice it usually amounts to nothing more than a declaration. This conclusion follows if defense counsel fails to pursue disclosure after the hearing. The prosecutor is in no position to contact defense counsel if any additional information comes into his possession. The burden is, therefore, on defense counsel to make appropriate and timely inquiry. This is made quite clear at the omnibus hearing. However, it is rare for defense counsel to make such an inquiry. This is particularly lamentable because case investigation often continues after the omnibus, and much of the investigation may have been specifically directed by the Assistant United States Attorney to whom the case is assigned. Thus, this portion of the "action taken" form is merely a statement of future intention, which is usually abandoned.

3. *Possible Disposition of the Case and Waiver of Jury*

The omnibus "action taken" form also contains a provision for defendant to indicate if the case can be disposed of without trial.²³ Here defense counsel indicates the direction that he believes the case will take. A related provision requests defendant to state whether or not a jury will be waived in the case.²⁴ If both sides consent to a jury waiver, it will be executed and accepted by the court at the omnibus. If either does not consent, the case will be set for a jury trial. Failure to waive a jury at the omnibus is of no consequence since the time-saving features of a jury waiver mean that the Government and the

²² *Id.* ¶ 4.

²³ *Id.* ¶ 11(b).

²⁴ *Id.* ¶ 11(c).

court will always consent to a waiver at any time prior to trial, regardless of what happens at the omnibus.

D. *Stipulations*

1. *Stipulation to Chain of Custody and Chemist's Report*

This area of stipulations under the omnibus hearing experiment has been one of the most beneficial. Because the majority of cases involve contraband seized at the United States-Mexican border, the court asks defense counsel to stipulate to a continuous chain of custody by government agents from the time of seizure until the contraband is brought into court as evidence. In addition, the court asks counsel to stipulate that the report of the chemist may be introduced into evidence instead of his actual testimony. These proposed stipulations save considerable trial time and government expense.

2. *Stipulation to Theft of Vehicle*

The next most important area of stipulation relates to those cases which involve the transportation of a stolen motor vehicle in interstate or foreign commerce. Often there is no question as to the facts regarding the theft of the vehicle. By the very nature of these cases, the victim of the theft may reside far from the district in which the criminal action is brought. Therefore, the court inquires whether there can be a stipulation to the ownership of the vehicle, the theft, and that neither defendant nor any other person associated with him had permission to take it.²⁵ Naturally, if the defense is based on any of these points, the stipulation will be refused.

3. *Stipulation to Prior Conviction*

To facilitate introducing into evidence a prior felony conviction for impeachment purposes, defense counsel is asked to stipulate to admissibility without production of a witness or a certified copy of the conviction.²⁶ It takes little effort for the Government to obtain a certified copy of a federal conviction, or a certified and exemplified copy of a state conviction, for use in a trial. However, a stipulation that saves even this time can be a benefit to the Government.

4. *Conclusion Re Omnibus Stipulations*

There is no question that stipulations by defendants are valuable for saving time and money. It is equally true that the substance of the

²⁵ *Id.* ¶ 13(a).

²⁶ *Id.* ¶ 5(g)(2).

stipulations does not in any manner jeopardize the defense in a case. Chain of custody and chemists' reports are matters which are usually beyond dispute and can be proven by the Government if necessary.

The formalizing of stipulations is unquestionably a positive aspect of the omnibus. Nonetheless, a stipulation may not foreclose the issue. Even if defense counsel stipulates in open court, he may fail to make the "action taken" form part of the record. Then, at the trial, he will not recognize the stipulation out of innocent misrecollection, and only the notes of government counsel, taken at the omnibus hearing, are readily available to force the stipulation. On occasion, trial proceedings have been interrupted to consult the reporter who took notes at the omnibus.

A further difficulty with stipulations may be the reluctance of defendant to be bound by his counsel's actions. Consequently, the trial judge may inquire whether defendant agrees to the stipulation. If defendant was not consulted at the omnibus, he might now object to the stipulation. This is not uncommon among defendants of Latin extraction who may not have understood what transpired at the omnibus. Defense counsel may be able to explain the stipulation to his client's satisfaction. Otherwise, the Government will have to suspend the trial until witnesses or documents can be brought forward. In spite of the difficulties that might arise, *e.g.*, whether such a disputed stipulation is sufficient to support a conviction, few problems have actually been encountered.

Finally, stipulations can be extremely advantageous in complicated cases. For instance, a trial for tax evasion can be shortened considerably if counsel can stipulate as to the documentary evidence. Virtually any stipulation can be incorporated into the omnibus by including it under the "miscellaneous stipulations" provision.²⁷

E. *Disclosures by the Government*

1. *Background*

Prior to the omnibus it was the practice of the United States Attorney's Office to keep a tight grasp on the contents of government files. Their unavailability had the dual effect of arousing defense counsel's curiosity, while making the files' contents almost sacred to prosecutors. Thus, when the omnibus hearing was implemented, defense counsels' elation paralleled government counsels' disappoint-

²⁷ *Id.* ¶ 13(e).

ment. A lingering result of these changing attitudes manifests itself when defense counsel appear to be overbearing in their demands for voluntary disclosure and government counsel appear to react negatively. However, these aspects do not hamper the omnibus experiment. Suffice it to say that the omnibus hearing goes far beyond the areas of discovery otherwise available to defense counsel.

2. *Evidence Favorable on Issue of Guilt*

The first item on the "action taken" form which requires disclosure by the Government instructs the prosecution to reveal all evidence in its possession favorable to defendant on the issue of guilt.²⁸ This provision, technically, does not go beyond the landmark decision of *Brady v. Maryland*.²⁹ However, it does make one important procedural change in criminal discovery. Without an omnibus hearing, the proper time for moving for disclosure of such evidence is during trial, after the Government has closed its case in chief.³⁰ Requiring the Government to make disclosure at the omnibus hearing, which is normally three to four weeks prior to trial, permits defense counsel to mitigate the force of known prospective testimony more effectively than would a spontaneous reaction to the testimony. The defendant can also develop other evidence more fully if he knows the Government's case. In any event, the possibility exists that the thrust of the prosecution's presentation will be distorted.

The omnibus encompasses only evidence favorable to defendant *on the issue of guilt*. Unfortunately, many defense counsel think that this provision entitles them to more. For example, it would be advantageous for defendant to know that a government witness testifies poorly and is not a good witness. However, this information does not go to the issue of guilt, and defense counsel have no right to it under the omnibus. Another example would be the known absence of certain witnesses. The knowledge that a witness will not testify aids defendant when the case against him is built on such testimony. Nevertheless, this is not evidence going to the issue of guilt, and it can be withheld under both present law³¹ and the omnibus. Yet, defense counsel normally demand this information.

²⁸ *Id.* ¶ 2.

²⁹ 373 U.S. 83 (1963).

³⁰ This determination is based on 18 U.S.C. § 3500 which states that there is no requirement that the Government make any such disclosures before the start of trial. See *United States v. Leighton*, 265 F. Supp. 27, 35 (S.D.N.Y. 1967); *United States v. Westmoreland*, 41 F.R.D. 419 (S.D. Ind. 1967).

³¹ *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, *rehearing denied*, 372 U.S. 950 (1963); *United States v. Chase*, 372 F.2d 453 (4th Cir.), *cert. denied*, 387 U.S. 907 (1967).

Again the dilemma arises whether the failure to make a *Brady* motion at the omnibus precludes later discovery, particularly in light of the additional declaration that no problems exist other than those checked, and the doctrine of "plain error."³² The probable answer is that defendant can fail to make the *Brady* motion at the omnibus and yet not waive the right to make it during the trial. Accordingly, defendant loses nothing by withholding the motion at the omnibus, and the Government gains no advance warning of such an issue. In fact, the compulsion to make these disclosures prior to the "right" time only results in a possible detrimental effect upon the jury's quest for an accurate reflection of the facts.

3. *Statements by Defendant*

Without doubt, one of the most significant aspects of the omnibus is the requirement that the Government disclose "all oral, written or recorded statements made by defendant to investigating officers or to third parties and in the possession of the plaintiff."³³ This provision greatly exceeds the requirements of Rule 16(a) of the Federal Rules of Criminal Procedure.³⁴ Obviously, there is a certain overlap between Rule 16(a) and the omnibus. The *written* or *recorded* statements made by the defendant would be discoverable under this rule as well as under the omnibus. However, the major departure comes when the Government is ordered to disclose *oral* statements by defendant, not recorded or reduced to writing and signed by him. Moreover, Rule 16(a) is discretionary in that the court *may* order disclosure, whereas the omnibus *compels* disclosure.

The policy against disclosure of defendant's oral statements is approved by the present rules of criminal discovery. There is strong justification for this policy. First, defendant participated in the events and, presumably, has firsthand knowledge of what he said. Indeed he may have a better recollection of what was said since the event is so significant an occurrence in his life, while it may be routine for the investigating officers. The oral declarations are available to both sides

³² United States v. Laverick, 348 F.2d 708 (3rd Cir.), *cert. denied*, 382 U.S. 940 (1965); FED. R. CRIM. P. 52(b); 9TH. CIR. R. (18)(2)(d).

³³ OHAT ¶ 3(a).

³⁴ FED. R. CRIM. P. 16(a).

DEFENDANT'S STATEMENTS; REPORTS OF EXAMINATIONS AND TESTS; DEFENDANT'S GRAND JURY TESTIMONY. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government

from their respective participants in the event. Therefore, why must the Government disclose matters already in possession of defendant? Second, the only way that defendant could possibly make use of his oral statements, it is submitted, is to tailor his testimony. If he told the truth originally, his statements at trial will conform to his prior declarations. If the oral statements were untrue, disclosure affords the opportunity to shape defendant's trial testimony to eliminate inconsistencies with prior oral statements. It is this reasoning which has been advanced in support of the Government's refusal to reveal defendant's oral statements.³⁵

Assume that defendant is apprehended while crossing the border into the United States from Mexico with a quantity of marihuana concealed in his automobile. He informs investigating Customs agents that he was loaned the vehicle by a Mexican, in Mexico, identified only as *Pancho*. If there is any semblance of truth to the statement, it is difficult to imagine defendant's failure to recall the name of the individual from whom he borrowed the vehicle. However, if the statement is untrue, as it frequently is, defendant may not be able later to remember the name that he falsified as being the owner of the automobile. Thus, without prior discovery, defendant often would testify at trial that a man named *Juan* had loaned him the car. The prior oral statement could be effectively used to impeach the defendant's credibility. However, if defense counsel knows that his client mentioned the name *Pancho* when previously asked the identity of the owner of the vehicle, he could bring this fact to defendant's attention prior to trial. This conduct of defense counsel is in no way reprehensible. Defendant, on the other hand, could be expected to "refresh" his recollections that it was *Pancho* who loaned him the automobile, and not *Juan* as he had indicated to his attorney. Before the omnibus disclosure it was not uncommon for defendants suffering from "names confusion" to be cured by such a confrontation with their prior inconsistent statements.

The end result of this omnibus disclosure is that impeachment by prior inconsistent oral statements is precluded, to the detriment of the Government's case. It has been the experience of the United States Attorney's Office for the Southern District of California that compulsory disclosure of defendant's prior oral statements makes prosecutions more difficult.

³⁵ *United States v. Louis Carreau, Inc.*, 42 F.R.D. 408 (S.D.N.Y. 1967).

In seeking discovery of defendant's prior oral statements, some defense counsel request any or all written memoranda that agents might have taken during the course of their interview with defendant. Quite often, it is from these notes that a report of defendant's oral statement is made. This report is commonly made available for the omnibus, and it is "camp" among defense counsel to demand to see the hand-written notes. Although this might seem reasonable, the law is clearly to the contrary. In *United States v. Federman*,³⁶ the court declared that discovery of internal government memoranda was exempt from Rule 16(a) and not within the rule's definitions of "statements of confession." In addition to case law supporting non-disclosure of such items, the Public Information section of the Administrative Procedure Act of 1967 exempts "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party."³⁷ Thus, the omnibus hearing deviates from present case and statutory law in this area.

The administrative difficulties in producing these notes are so great that they raise a serious question as to the propriety of granting such requests by defense counsel. The investigating agents maintain these notes in their files. Requiring them to bring the files to the United States Attorney's Office obviously imposes a burden on their time. It requires a coordination of government counsel, defense counsel, and the agent. Furthermore, the agent may have to exercise great diligence to insure that matters which cannot be disclosed and which might be a part of his file (such as information concerning an informer, or continuing investigation relating to the culpability of others) are not revealed unconsciously to a zealous defense counsel.

Only when defendant has made what amounts to a confession does the Government benefit by revealing his oral statements. While defense counsel is rarely ignorant of his client's confession, if he is unaware of it this revelation could have the beneficial effect of inducing a guilty plea, thereby avoiding a trial.

The omnibus changes the time requirement for filing defense motions for discovery. Under Rule 16(f), any such motion for discovery must be made "within 10 days after arraignment, or at such reasonable time as the court may permit."³⁸ The omnibus extends this time to at least the omnibus hearing, which in most cases is more than 10

³⁶ 41 F.R.D. 339 (S.D.N.Y. 1967).

³⁷ 5 U.S.C.A. § 552(4)(b)(7) (1967).

³⁸ FED. R. CRIM. P. 16(f).

days after arraignment. In practice, it makes a discovery motion available to defense at any time prior to trial. Under 16(f) failure to make a timely motion results in its denial, unless good cause can be shown why such motion would be "in the interests of justice." However, the open end order by the court at the omnibus for discovery of all further information coming into the Government's possession³⁹ would appear to make a discovery motion always timely.

4. *Government Witnesses*

The omnibus permits defense counsel to secure the names of plaintiff's witnesses as well as their statements.⁴⁰ This discovery extends beyond the present limits of case law.⁴¹ *United States v. Westmoreland*⁴² held that in noncapital cases the court is without authority to order the Government to procure a list of its witnesses, regardless of whether the Government plans to call such witnesses at the trial, or whether such witnesses have knowledge of the events on which the prosecution is based.

For the most part, the Government has few inhibitions about revealing the names and prospective statements of government agents and employees. Disclosure of the case in chief could improve the prospects for a disposition other than by trial. However, when the prospective witnesses are not in the Government's employ additional considerations must be weighed.⁴³ The most important reason for refusing to disclose the name of a "lay" witness prior to trial is the consideration for his personal health and safety. One cannot lightly dismiss the Government's hesitation in this matter since it is common for criminal defendants to threaten government witnesses. When violence is feared, the courts usually acquiesce in nondisclosure.

5. *Physical and Documentary Evidence*

Defense is also permitted inspection of "all physical or documentary evidence in plaintiff's possession."⁴⁴ Rule 16(b) of the Federal Rules

³⁹ See discussion under section C.2 in the text, *supra*.

⁴⁰ OHAT ¶ 3(b).

⁴¹ *United States v. Chase*, 372 F.2d 453 (4th Cir.), *cert. denied*, 387 U.S. 907 (1967); *United States v. Elliott*, 266 F. Supp. 318 (S.D.N.Y. 1967).

⁴² 41 F.R.D. 419, 427 (S.D. Ind. 1967).

⁴³ One of those considerations is *not* the delight that a prosecutor might experience by dramatically producing a witness at trial whose testimony is highly damaging to, and unexpected by, defendant. Any benefit of such a surprise should be balanced against the benefits of disclosure.

⁴⁴ OHAT ¶ 3(c) (emphasis added).

of Criminal Procedure provides that the court may order the Government to permit inspection and copying of books, papers, documents, tangible objects, buildings or places, which are in its possession,⁴⁵ "upon a showing of materiality" to the preparation of the defense and "that the request is reasonable." On the surface, it would seem that the omnibus eliminates the need to show materiality and reasonableness of the request for discovery of such items. This is not the case. However, in the absence of a strenuous objection by government counsel, any tenuous claim by defense counsel will be honored at the omnibus. In view of the volume of cases, the court does not have the time for any protracted hearing on the matter, and it is more expeditious to grant the request. Governmental refusal to permit any such inspection would, of course, bring the matter into focus on the issues of materiality and reasonableness, and would force the court's more detailed examination of the merits of defendant's request.

Thus, this provision of the omnibus "action taken" form generally conforms to the present rules which require a showing of materiality and reasonableness. In practice, the Government does not insist on a showing, and the discovery permitted exceeds that to which defendant is entitled.

6. *Prior Acts or Convictions*

The Government is instructed to indicate whether it intends to rely on prior acts or convictions of a similar nature for proof of knowledge or intent.⁴⁶ This provision compels disclosure of more information than is required under present rules. There is virtually no law on this specific issue, but refusal to disclose would seem to be protected by cases upholding the Government's right not to reveal its evidence or the names of its witnesses.⁴⁷

As a practical matter, the prosecution will *always* rely on prior acts and prior convictions of a similar nature to prove knowledge and intent. Likewise, prior *felony* convictions of the defendant will be relied on for impeachment purposes if he testifies.⁴⁸ It is equally true that the Government will diligently seek to discover whether such

⁴⁵ FED. R. CRIM. P. 16(b) proceeds to except from discovery "reports, memoranda, or other internal governmental documents made by government agents in connection with the investigation or prosecution of the case . . ."

⁴⁶ OHAT ¶ 5(a).

⁴⁷ See *United States v. Diliberto*, 264 F. Supp. 181 (S.D.N.Y. 1967); *United States v. Federman*, 41 F.R.D. 339 (S.D.N.Y. 1967); *United States v. Westmoreland*, 41 F.R.D. 419 (S.D. Ind. 1967). See also cases cited note 52 *infra*.

⁴⁸ See OHAT ¶ 5(g).

acts or convictions exist—each defendant's prior criminal record is solicited as a matter of course from the Federal Bureau of Investigation.

Another provision under the impeachment item of the "action taken" form provides for a court ruling as to whether the defendant's prior felony conviction may be used.⁴⁹ As far as is known, this provision has never been checked. The presiding judge at an omnibus hearing might predict the probable consequences of a Government attempt to impeach in such a manner, but he will rarely foreclose the trial judge from exercising his own discretion in the matter.⁵⁰ Upon an affirmative response acknowledging a prior felony conviction some trial judges close the matter; others permit the nature of the prior felony as well as the date and place of conviction to be disclosed.

Although defense counsel could normally be expected to know of his client's prior acts or convictions, if he lacks this information the omnibus would serve to alert him to an item which defendant may have withheld from him. Such a discovery would assist defense counsel in eliminating surprise and in clarifying his relationship with his client.

7. *Expert Witnesses*

If the Government intends to call expert witnesses, it must disclose the name of the witness, his qualifications, and the subject of his testimony, including reports he has rendered.⁵¹ This item substantially deviates from present case law and the general rule that the *nature* of the case is not subject to discovery.⁵² Notwithstanding the law favorable to its position, the Government usually discloses such information because it enhances the likelihood of disposition without trial.

⁴⁹ *Id.* ¶ 5(g)(1).

⁵⁰ It is within the trial judge's discretion whether to permit such an inquiry and the extent to which the matter will be discussed. *See, e.g., United States v. Stirone*, 262 F.2d 571 (3d Cir. 1958).

⁵¹ OHAT ¶ 5(b).

⁵² *See, e.g., United States v. Chase*, 372 F.2d 453 (4th Cir.), *cert. denied*, 387 U.S. 907 (1967) (transcribed jury proceedings not discoverable unless reasonable need is shown); *United States v. Cobb*, 271 F. Supp. 159 (S.D.N.Y. 1967) (Government not required to disclose list of witnesses before trial); *United States v. Diliberto*, 264 F. Supp. 181 (S.D.N.Y. 1967) (defendant's motion for pretrial discovery worded too broadly and failed to show requirement of need to inspect); *United States v. Gleason*, 265 F. Supp. 880 (S.D.N.Y. 1967) (adversary character of criminal proceedings has not been revised to justify or require sweeping disclosure without particularized need); *United States v. Federman*, 41 F.R.D. 339 (S.D.N.Y. 1967) (defendant is not entitled to *all* written or recorded statements).

8. *Physical and Mental Examinations*

Reports of physical or mental examinations in the control of the prosecution must be supplied to defense counsel.⁵³ These items were obtainable under the preexisting rules,⁵⁴ and the omnibus represents no extension except as to the time for making the motion. The same is true with respect to the reports of scientific tests, experiments or comparisons, and other expert reports in the prosecution's possession.⁵⁵ This part of the omnibus is virtually identical to Rule 16 (a) (2).⁵⁶

In *United States v. Acarino*,⁵⁷ the court allowed defendant's inspection of heroin by an expert of his choosing. However, a motion to inspect the summarization report of the Federal Bureau of Investigation was denied on the ground that it was internal government memoranda and therefore exempt. If some of the items discoverable under the omnibus would ordinarily be "internal government memoranda," then the omnibus exceeds present law.

9. *Inspection and Copying*

The omnibus "action taken" form includes a provision which allows defense counsel to inspect and/or copy any books, papers, documents, photographs, or tangible objects which the prosecution obtained from, or which belong to defendant, or which will be used against him in a court proceeding.⁵⁸ This provision corresponds to Rule 16(b),⁵⁹ except as the rule requires a showing of materiality and reasonableness. If the United States Attorney's Office chose not to participate in the omnibus, it could protect all such items from

⁵³ OHAT ¶ 5(c).

⁵⁴ FED. R. CRIM. P. 16(a) (2).

⁵⁵ OHAT ¶ 5(d).

⁵⁶ FED. R. CRIM. P. 16(a) (2) provides for disclosure to defendant of:

[R]esults or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government

⁵⁷ 270 F. Supp. 526 (E.D.N.Y. 1967).

⁵⁸ OHAT ¶ 5(e).

⁵⁹ FED. R. CRIM. P. 16(b):

OTHER BOOKS, PAPERS, DOCUMENTS, TANGIBLE OBJECTS OR PLACES.

Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a) (2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with

discovery, absent a showing of materiality and reasonableness.⁶⁰ The only advantage accruing to the Government from disclosing these items is the chance to avoid trial. The defendant, on the other hand, gains access to information otherwise not discoverable.

10. *Prior Convictions of Government Witnesses*

The "action taken" form contains a provision requiring the disclosure of information concerning a prior conviction of persons whom the prosecution intends to call as witnesses.⁶¹ Although this information would not be discoverable without the omnibus hearing,⁶² it is a valuable impeachment tool for defense counsel, who might otherwise prejudice his case with the jury if he were forced to ask each government witness, individually, whether he had a previous conviction.

Otherwise, it is difficult to see what is accomplished by requiring such a disclosure. The prosecutor presents few witnesses in any but the most complex cases and thus, defense counsel would be examining mostly government agents. However, if a witness does not reveal a prior conviction, a matter of which the prosecution would undoubtedly be aware, it would seem that a duty would arise on the part of the prosecutor to remedy the perjury.⁶³

11. *Entrapment*

The *Brady*⁶⁴ decision requires the Government to disclose all evidence in its possession favorable to defendant on the issue of guilt when it closes its case in chief. Under the "action taken" form, the Government is ordered to disclose at the omnibus hearing any information indicating entrapment of defendant.⁶⁵ Disclosure at this time would seem to be an acceleration of the duty which would normally fall within the scope of *Brady*. This benefits defense counsel by allowing him to better prepare the defense of entrapment before trial.

the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500.

(Emphasis added).

⁶⁰ See text under section E.5. Although both OHAT ¶ 3(c) and ¶ 5(e) are derived from FED. R. CRIM. P. 16(b), they apparently differ over the requirements of materiality and reasonableness.

⁶¹ OHAT ¶ 5(f).

⁶² *United States v. Cobb*, 271 F. Supp. 159 (S.D.N.Y. 1967).

⁶³ ABA CANONS OF PROFESSIONAL ETHICS NO. 41.

⁶⁴ 373 U.S. 83 (1963).

⁶⁵ OHAT ¶ 5(h) and discussion in text under section E.2.

12. *Grand Jury Transcripts*

The general rule regarding traditionally secret grand jury testimony is that it should rarely be disclosed and only under circumstances showing particularized and compelling need.⁶⁶ There is no absolute prohibition against disclosure—the matter is left to the discretion of the court.⁶⁷

The omnibus requires the Government to disclose whether proceedings before the grand jury were recorded.⁶⁸ If transcripts exist does defendant have a right to examine them? This determination requires a separate hearing in which need for discovery must be shown,⁶⁹ but defendant has already advanced beyond existing law in that he was not compelled to show need in order to ascertain the *existence* of the transcripts.⁷⁰

When cases heard by the grand jury have not been recorded defense counsel often demand the identity of the party that presented the case. In the majority of proceedings, a law enforcement agent makes the presentation and his identity is meaningless. Nevertheless, occasions have arisen where this information has been ordered to be disclosed. However, where the personal safety of the grand jury witness is at stake the Government will refuse to disclose his testimony until defense counsel make the appropriate showing of need.

Even where the personal safety of the witness is not in question, there is still reason to keep his identity secret. By way of example, one of the offices of the grand jury is to determine the effectiveness of a witness. If this is contained in the transcript, its divulgence is similar to disclosure of an attorney's work product.

13. *Informers*

The disclosure or nondisclosure of informers has been the area of the omnibus most vexatious to the Government. This is due, in part at least, to the divergence from the preexisting case law. In *United States v. Chandler*,⁷¹ defendant could not compel a govern-

⁶⁶ See *United States v. Proctor & Gamble Co.*, 356 U.S. 677 (1958); *Costello v. United States*, 350 U.S. 359 (1956); *Washington v. American Pipe & Constr. Co.*, 41 F.R.D. 59 (S.D. Cal. 1966); *United States v. Kahaner*, 203 F. Supp. 78 (S.D.N.Y. 1962); *United States v. Wortman*, 26 F.R.D. 183 (E.D. Ill. 1960).

⁶⁷ FED. R. CRIM. P. 6(e).

⁶⁸ OHAT ¶ 6(e).

⁶⁹ *Id.* ¶ 6(g).

⁷⁰ *United States v. Rosenberg*, 39 F.R.D. 301 (S.D.N.Y. 1966).

⁷¹ 368 F.2d 152 (5th Cir. 1966).

ment witness to state whether a party, predominantly identified in reported activities of defendants, but not called as a witness in the case, was a government informer. Case law also requires defendant to make some showing of need before the Government will be compelled to disclose if an informer existed.⁷² The accused is not entitled to the identity of the informer unless he can show that the informant could be of assistance to his defense; it is not enough to merely speculate that the identity of the informer is necessary.⁷³ However, if defendant can make the appropriate showing, the Government is put to the choice of identifying the informer or relying on the privilege of nondisclosure. If the privilege is elected, the court may dismiss the indictment.⁷⁴ In deciding whether to dismiss, the court must balance the Government's interest in maintaining the informer's anonymity against the right of the accused to prepare an adequate defense or to be apprised of matters favorable to him on the issue of guilt, *e.g.*, if the informer was a participant in the event.⁷⁵

The "action taken" form, on the other hand, compels the government to state whether an informer or "lookout" is involved in the case,⁷⁶ and whether the Government will rely on its privilege of nondisclosure and not call the informer as a witness nor divulge his identity.⁷⁷ Although the election to disclose or withhold the identity of an informer is still available to the Government, the omnibus requires disclosure of the *existence* of an informer as an affirmative matter. The results have been disastrous to the informer system—the risk that an informer's cover will be "blown off" has been significantly increased. This is particularly true with respect to informers in cases arising out of arrests at the United States-Mexican border. In these cases, it is submitted, defense counsel could not begin to show need, especially in view of the absolute right to search a vehicle or person entering the United States from a foreign country.⁷⁸

When the informant issue is aired, disclosure of the informer's existence and the information received from him negate his future value to the Government by warning smugglers which methods of

⁷² *Id.* See also *Lannom v. United States*, 381 F.2d 858 (9th Cir. 1967).

⁷³ *Lannom v. United States*, 381 F.2d 858 (9th Cir. 1967); *King v. United States*, 348 F.2d 814 (9th Cir. 1965).

⁷⁴ *Roviaro v. United States*, 353 U.S. 53 (1957).

⁷⁵ *Id.* *Cochran v. United States*, 291 F.2d 633 (8th Cir. 1961).

⁷⁶ OHAT ¶ 6(h)(1).

⁷⁷ *Id.* ¶ 6(h)(2)-(4).

⁷⁸ 19 U.S.C. §§ 482, 1581, 1582 (1964). See *Cervantes v. United States*, 263 F.2d 800 (9th Cir. 1959).

their operations have been exposed. This word has filtered back to dealers in Mexico and many have changed their methods of operation. Before the omnibus experiment a marihuana dealer may have parked a loaded vehicle in a certain location prior to its being driven into the United States. The government informant would see the vehicle and report the location and the vehicle's license number to the Customs Agency. The dealer would apparently not think of the location as being connected with the stopping of the vehicle at the border. Because of the omnibus disclosures this fact is widely known, and as a result, information now being received indicates that the dealer is taking elaborate steps to change the load of marihuana from one vehicle to as many as two or three. When the vehicle with the awaited license number crosses the border, it is stopped, but there is no marihuana.

This aspect of the omnibus sometimes forces the agent to take affirmative action to contact his informer instead of waiting for the informer to contact him at an appropriate time. This undoubtedly increases the risk of the informer being discovered, particularly since the dealer is now looking for the leak in his operation.

The above problems are inherent in government disclosure of the existence of an informer, and the omnibus hearing "action taken" is a simple method for defense counsel to secure such disclosure. The matter is not so simple, however, when the Government invokes its privilege of nondisclosure and a separate hearing on the privilege must be held. It is not unusual for some defense counsel to be unacquainted with the law on the subject and thus not know how to proceed. Some counsel have appeared at the hearing with the expectation that the informer will be present for examination. The use of written rather than oral motions might rectify this problem.

14. *Electronic Surveillance*

The preceding discussion relating to informers is also applicable to the issue of electronic surveillance of defendant or his premises. There is no affirmative duty, as a matter of law, on the part of the prosecution to disclose if surveillance took place; the burden of proof rests with defendant.⁷⁹ While the omnibus compels the Government to disclose the existence of electronic surveillance,⁸⁰ this adds little since

⁷⁹ *United States v. Leighton*, 265 F. Supp. 27 (S.D.N.Y. 1967); *United States v. Baker*, 262 F. Supp. 657 (D.D.C. 1966).

⁸⁰ OHAT ¶ 6(j).

directives from the Department of Justice order United States Attorneys to reveal the fact.⁸¹

15. *Miscellaneous Motions*

The "action taken" form also provides for a number of miscellaneous motions by defense counsel.⁸² If a motion would otherwise have to be made prior to the omnibus, *e.g.*, before or at the arraignment, the omnibus *extends* the time for making the motion. For example, under the Federal Rules of Criminal Procedure, motions to dismiss the indictment of information for failure to state an offense, or on the ground of duplicity, must be made prior to trial, and "shall be made before the plea is entered," but "the court may permit it to be made within a reasonable time thereafter."⁸³ And under Rule 12 (a) (2) failure to make the motion constitutes a waiver, unless the court grants relief for cause shown. The omnibus would, at the very least, extend the time for presenting the motion until the omnibus date. However, failure to make the motion at the omnibus should have the same effect as the failure to make a timely motion in the absence of the omnibus.

On the other hand, the omnibus *decreases* the time for motions which ordinarily could be made at any time prior to trial. Included here are motions to sever defendants and to sever counts of the criminal charge.⁸⁴ The question with respect to these motions is whether the failure to make the motion at the omnibus constitutes a waiver. There is much to be said for an affirmative answer. However, the court would probably declare the motion timely if made prior to trial.

Under present law a motion for a bill of particulars must be made before arraignment or within ten days thereafter.⁸⁵ The omnibus extends this time, but failure to make the motion at the omnibus, or within ten days, should be treated the same as a failure under the present rules. Relief would then be discretionary with the court.

The motion to take a deposition of a witness for testimonial purposes can be made at any time after the filing of an indictment or

⁸¹ Memorandum from the Attorney General to Executive Department Heads. Re: Wiretapping and Electronic Surveillance, June 16, 1967.

⁸² OHAT ¶ 7(a)-(h).

⁸³ FED. R. CRIM. P. 12(a)(3).

⁸⁴ *Id.* 12(b)(2).

⁸⁵ *Id.* 7(f).

information.⁸⁶ The omnibus fixes a certain date for the making of that motion. Failure to make the motion at the omnibus could be viewed with some disdain by the court, but it would probably not preclude the making of the motion at a later time.

A motion to require the Government to secure the appearance of a specific witness can also be made at the omnibus.⁸⁷ Since the present rules specify no time for such a subpoena,⁸⁸ the only effect of the omnibus is to alert the prosecutor at an earlier date that such a request might be made. Failure to make the request at this time would never constitute a bar to a later request in view of defendant's constitutional right to have compulsory process for obtaining witnesses in his favor.⁸⁹

The last motion by defendant inquires into the reasonableness of bail. Counsel's failure to move for inquiry presents no problem, because the matter of bail is always subject to judicial review upon his request.⁹⁰ Bail is expressly covered by the Constitution,⁹¹ thus the omnibus has little effect on defendant's rights other than to set a hearing date.

F. *Disclosures by the Defense*

This area provides the third realm in which the Government would benefit from the omnibus hearing. The first, as will be recalled, is the stipulations regarding admission of the Government's evidence;⁹² the second is specific information from defendant about the case.

1. *Mental State of Defendant*

The first item to be disclosed by defendant is whether his mental state will be put in issue. Any claim of *incompetency* of defendant to stand trial is supposed to be made at the omnibus hearing.⁹³ If the defense of *insanity* is to be tendered by defendant, this should be made known at the omnibus,⁹⁴ together with the names of his witnesses and any reports.⁹⁵ These reports are covered under the present

⁸⁶ *Id.* 15(a).

⁸⁷ OHAT ¶ 7(g).

⁸⁸ FED. R. CRIM. P. 17.

⁸⁹ U.S. CONST. amend. VI, § 3; *United States v. Seeger*, 180 F. Supp. 467 (S.D.N.Y. 1960).

⁹⁰ FED. R. CRIM. P. 46.

⁹¹ U.S. CONST. amend. VIII, § 1.

⁹² See discussion under sections D.1 and D.2 in the text *supra*.

⁹³ See OHAT ¶ 8(a).

⁹⁴ *Id.* ¶ 8(b).

⁹⁵ *Id.* ¶ 8(c), (d).

rules and, thus, omnibus does not afford the Government more than it could obtain under rule 16(c);⁹⁶ it only changes the time of disclosure. Defendant must also indicate whether he will submit to a psychiatric examination.⁹⁷

Failure to raise the issue of insanity at the omnibus would not prevent its later consideration.⁹⁸ The sole function of the omnibus, therefore, is to alert the Government to a possible defense based upon defendant's mental state. However, the likelihood that such a defense would come as a surprise is minuscular. First, the investigating agent usually has sufficient contact with defendant to gain some insight into his present mental condition. If there appears to be any abnormality, he will report this to the United States Attorney. Second, defendant makes general court appearances, and his conduct or demeanor on these occasions may manifest some mental instability. Finally, since defense counsel would undoubtedly be aware of any such condition, if he planned to rely on the insanity defense, he would raise the issue of competency at the omnibus. Yet, once competency is brought into issue, the United States Attorney would be seasonally advised that insanity would probably be the defense, and there would thus be little possibility of surprise.

If there is any indication or suspicion that defendant's mental state is abnormal, the United States Attorney is under an obligation to file a motion for a judicial determination of his mental competency.⁹⁹ The defense, or the court on its own motion may also file such a motion.¹⁰⁰

2. *Alibi*

If defendant intends to offer an alibi defense, the Government can request defense counsel to so state at the time of the omnibus hearing.¹⁰¹ Moreover, it can request the names of the witnesses who will

⁹⁶ FED. R. CRIM. P. 16(c) provides that if the defendant has been permitted discovery under Rule 16(b), the court may order that the defendant permit the Government to inspect and copy medical reports. Rule 16(f) states that this motion should be made within ten days after arraignment but may be permitted later if shown to be in the interest of justice.

⁹⁷ OHAT ¶ 8(e).

⁹⁸ See, e.g., *Long v. United States*, 360 F.2d 829 (D.C. Cir. 1966) (no definite time period established for mental examination); *Mitchell v. United States*, 316 F.2d 354 (D.C. Cir. 1963) (motion for mental examination granted on day of trial). See also 18 U.S.C. § 4245 (1964) (Director of the Bureau of Prisons can certify inmate for hearing on issue of mental competency at the time of trial).

⁹⁹ 18 U.S.C. § 4244 (1964).

¹⁰⁰ *Id.*

¹⁰¹ OHAT ¶ 9(a).

provide the alibi.¹⁰² There is no procedure under the present federal rules whereby the prosecution could make this discovery. However, the actual benefit of the omnibus to the Government on this matter may be illusory. First, alibi defenses are rare, and there has yet to be an instance where an omnibus hearing has resulted in the disclosure of a previously unknown alibi defense. In fact, there is no statistical data indicating that an alibi defense has been tendered since the initiation of the experiment. Second, it is submitted that the Government is usually in a position to know if an alibi defense will be offered. Investigative analysis should equip government counsel with the knowledge from which a possible alibi defense could be deduced. Thus, although the Government could profit from this provision of the omnibus hearing, it has not been of value to date.

3. *Scientific Tests*

If scientific tests, experiments or comparisons have been conducted for defendant, the omnibus provides for government access to their results and the names of the persons who conducted them.¹⁰³ This discovery parallels that permitted by Rule 16(c),¹⁰⁴ and is conditioned upon the court's having granted some discovery to defendant under Rule 16(b).¹⁰⁵ Here again, the omnibus affects merely the timing of the motion and does not differ substantively from the present rules.

4. *Nature of Defense*

The "action taken" form also permits government discovery of the nature of the defense. The form lists five possibilities: (1) lack of knowledge of contraband [which is generally the subject of smuggling cases], (2) lack of specific intent, (3) diminished mental responsibility, (4) entrapment, and (5) general denial, putting the Government to proof.¹⁰⁶

However, the expectations of this provision far exceed its demonstrated worth. In the first place, the entry of a not guilty plea informs government counsel of the nature of the defense, namely:

¹⁰² *Id.* ¶ 9(b).

¹⁰³ *Id.* ¶ 10.

¹⁰⁴ FED. R. CRIM. P. 16(c) provides that the court may order defendant to permit the government to inspect and copy scientific reports "which the defendant intends to produce at the trial and which are in his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable."

¹⁰⁵ See statute cited note 96 *supra*.

¹⁰⁶ OHAT ¶ 11(a).

lack of specific intent and general denial. Any possibility of entrapment undoubtedly will already be known to the Government and the previous discussion of mental responsibility¹⁰⁷ indicates that this defense would be known also. An announcement that the defense in a smuggling case will be lack of knowledge of the contraband could be anticipated by the prosecution much of the time. In general, the disclosure choices on the "action taken" form as to disclosure of the nature of the defense *never* come as a surprise and *never* provide any meaningful information.

It is possible that the omnibus could be modified to make available specific details of the defense, *e.g.*, defendants proposed explanation of the events, if any. However, the omnibus hearing does not presently require such a disclosure, and it is unlikely that this development will materialize.

5. *Defense Witnesses*

The Government is ostensibly granted three additional items of discovery. The "action taken" form allows the prosecution to request whether defendant will testify at the trial,¹⁰⁸ if additional witnesses will be called,¹⁰⁹ and whether these will include character witnesses.¹¹⁰ However, this "discovery" is not a black or white proposition. There are three responses available to defendant on these requests: (1) may, (2) will, and (3) will not. It has been the experience of the Government that "may" is most frequently checked by defense counsel. When that is the choice, the Government is in no better position than before; the prosecutor is always aware of the possibility that defendant *may* testify.

The problem goes further than failing to indicate a definite course of action by defendant in these areas. If defendant commits himself to a "will" or "will not" proposition, can he later change that decision? Quite obviously, if defendant indicates he will testify and later decides that he will not, the omnibus would not infringe upon his constitutional privilege against self-incrimination and his absolute right to refrain from taking the stand.¹¹¹ Conceivably, it could be argued that the omnibus amounts to an intelligent waiver of a known

¹⁰⁷ See discussion under section F.1 in the text *supra*.

¹⁰⁸ OHAT ¶ 11(d).

¹⁰⁹ *Id.* ¶ 11(e).

¹¹⁰ *Id.* ¶ 11(f).

¹¹¹ U.S. CONST. amend. V, § 4; see *Slochower v. Board of Educ.*, 350 U.S. 551 (1956).

right,¹¹² and defendant could be forced to testify. However, such a holding is not probable. Similar reasoning would apply to the calling of additional witnesses, including character witnesses, at trial. If the announced position is that such witnesses were not going to be called, and they are called, an estoppel could be argued, but probably unsuccessfully. If they are announced to be called, and are not, it seems that the Government could hardly insist upon their appearing.

Discovery of additional defense witnesses is to be given within a certain number of days before trial.¹¹³ If prospective defense witnesses appear at the trial and their names have not been previously disclosed, the prosecution would probably be entitled to a continuance. It is unlikely that the Government could prevent their testifying.

It should be noted that the omnibus does provide the Government with discovery, to which it would not be entitled under any present rule, insofar as additional witnesses are concerned. If such discovery is granted, the prosecutor would be in a better position to rebut, for example, character evidence. However, like the alibi defense, use of character witnesses does not seem to be prevalent. There are no instances in which the Government has had occasion to invoke this portion of the omnibus form.

6. *Physical Evidence Secured From Defendant*

The omnibus provides for Government discovery of evidence relating to defendant's physical person.¹¹⁴ Upon timely notice to defense counsel, defendant can be ordered to appear in a lineup, to speak for voice identification, to be fingerprinted, to pose for photographs, to try on articles of clothing, to permit the taking of specimens of material under defendant's fingernails, to permit the taking of samples of blood, hair and other material of his body, to provide samples of his handwriting, and to submit to an external physical inspection of his body. However, the omnibus does not exceed current federal law; all of these items are discoverable without violating defendant's constitutional rights.¹¹⁵ The law in this area has evolved case by case as

¹¹² *Johnson v. Zerbst*, 304 U.S. 458 (1938).

¹¹³ OHAT ¶ 11(g).

¹¹⁴ *Id.* ¶ 12(a)-(i).

¹¹⁵ See, e.g., *Schmerber v. California*, 384 U.S. 757 (1966) (fingernails by analogy, blood samples); *Holt v. United States*, 218 U.S. 245 (1910) (clothing); *Lewis v. United States*, 382 F.2d 817 (D.C. Cir. 1967) (handwriting and photographs); *Gilbert v. United States*, 366 F.2d 923, 936 (9th Cir. 1966) (voice identification); *United States v. Thompson*, 356 F.2d 216, 224 (2d Cir. 1965) (fingerprints); *Caldwell v. United States*, 338 F.2d 385 (8th Cir.), *cert. denied*, 380 U.S. 984 (1964) (lineup does

these items have been secured by the investigating officers, prior to defendant's appearance to answer the charge. In most cases these items would have been taken immediately following the arrest. Consequently, the omnibus is a *post facto* request by the Government, except for the previously undiscoverable handwriting exemplars. In the past, however, handwriting samples have been obtainable from defendant's counsel without the necessity for formal notice.

III. CONCLUSION

An experiment in discovery, the omnibus hearing was implemented to dispose of the large volume of criminal cases. Its purported virtue is that it furnishes full discovery to both the Government and the defense. Discovery is to be accomplished within two or three weeks after arraignment or immediately before the hearing. The omnibus purports to achieve its objective by: (1) maintaining communication between defendant and his counsel as well as between counsel and the prosecution, (2) eliminating the written motion practice, (3) encouraging stipulations to matters which are not disputable, and (4) informing the parties to enable them to intelligently and expeditiously dispose of the case by trial or a plea of guilty.

The hearing, itself, and the "action taken" form were established to assure that discovery has been made and that both sides view the case in its proper perspective. If one side has balked, the court may order disclosure at the hearing or affirm the party's privilege of non-disclosure.

In theory, the omnibus is to benefit both sides; in practice, it is defense oriented. Undoubtedly, the emphasis of the omnibus on voluntary government disclosure has tended to obscure the limits of what the prosecution may be compelled to divulge. The Government is frequently ordered to reveal item after item. In some circumstances, according to present case law or even under the omnibus, the Government has the right to withhold certain items. However, the court invariably inquires into the reasons behind any attempt by the prosecution to invoke its privilege.

Conversely, defendant is compelled to make no disclosures that have not been upheld in previous cases and, in addition, the omnibus

not violate fifth amendment); *McFarland v. United States*, 150 F.2d 593 (D.C. Cir. 1945) (external inspection of body); *Maxwell v. Stephens*, 229 F. Supp. 205 (E.D. Ark. 1964), *aff'd*, 348 F.2d 325 (8th Cir.), *cert. denied*, 383 U.S. 944 (1965) (hair samples).

entitles him to far more information than case decisions would allow, *e.g.*, admission of knowledge of the existence of an informer. Because the Government has yet to derive any significant benefit from disclosures made by the defense, the omnibus does not have any adverse effect on defendant's case.

It is submitted, therefore, that several procedural revisions are necessary to restore a more equitable balance between disclosures by the Government and the defense: (1) Government disclosure of such matters as the existence of an informer should be eliminated since it has an unfavorable effect on law enforcement, (2) the omnibus should be limited to disclosure of the basic nature of the Government's case in chief, and (3) the Government's privilege of nondisclosure should be honored as an intelligent appraisal of the reasons for and against disclosure.

Since the omnibus hearing is still in the experimental stage, every effort should be made to vary the nature of the experiment in order to determine whether it can be improved. With this thought in mind, it is hoped that the above suggestions can be tried for a period of time. It is only through variation of omnibus procedures that an objective appraisal of the value of this unique innovation in the field of criminal discovery can be made.

APPENDIX

Chief Judge Fred Kunzel
and Judge James M. Carter
Form OH-3 5/22/67
Revised 6/20/67; Revised 1/2/68

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	No. _____ Crim.
Plaintiff,)	
V.)	ACTION TAKEN
)	(OMNIBUS HEARING)
Def. #1 _____)	(Form OH-2 MOTION FORM is elimi-
Def. #2 _____)	nated and Counsel may make copy of this
Def. #3 _____)	OH-3 for their files. See amended instruc-
)	tion form OH-1).
Defendants.	

(Number circled
shows action taken)

A. Discovery by defendant

1. The defense states it has obtained full discovery and (or) has inspected the government file, (except)

(If government has refused discovery of certain materials, defense counsel shall state nature of material. _____)

_____).

2. The government states it has disclosed all evidence in its possession, favorable to defendant on the issue of guilt.

3. The defendant requests and moves for -

3(a) Discovery of all oral, written or recorded statements made by defendant to investigating officers or to third parties and in the possession of the plaintiff. (Granted) (Denied)

3(b) Discovery of the names of plaintiff's witnesses and their statements. (Granted) (Denied)

3(c) Inspection of all physical or documentary evidence in plaintiff's possession. (Granted) (Denied)

4. Defendant, having had discovery of Item #2 and #3, requests and moves for discovery and inspection of all further or additional information coming into the government's possession as to Items #2 and #3. (Granted) (Denied)

5. The defense requests the following information and the government states -

5(a) The government (will) (will not) rely on prior acts or convictions of a similar nature for proof of knowledge or intent.

5(b) Expert witness (will) (will not) be called:

1. Name of witness, qualification and subject of testimony, and reports (have been) (will be) supplied to the defense.

5(c) Reports or tests of physical or mental examinations in the control of the prosecution (have been) (will be) supplied.

5(d) Reports of scientific tests, experiments or comparisons and other reports of experts in the control of the prosecution, pertaining to this case (have been) (will be) supplied.

5(e) Inspection and/or copying of any books, papers, documents photographs or tangible objects which the prosecution -

(1) obtained from or belonging to the defendant, or

(2) which will be used at the hearing or trial, (have been) (will be) supplied to defendant.

5(f) Information concerning a prior conviction of persons whom the prosecution intends to call as witnesses at the hearing or trial (has been) (will be) supplied to defendant.

5(g) Government to use prior felony conviction for impeachment of defendant if he testifies,

Date of conviction _____ Offense _____

(1) Court rules it (may) (may not) be used.

(2) Defendant stipulates to prior conviction without production of witnesses or certified copy. (Yes) (No)

5(h) Any information government has, indicating entrapment of the defendant (has been) (will be) supplied.

B. Motions requiring separate Hearing

The defense moves—

- 6(a) To suppress physical evidence in plaintiff's possession on the grounds of
- (1) Illegal search
 - (2) Illegal arrest

- 6(b) Hearing of motion to suppress physical evidence set for _____

- 6(c) To suppress admissions or confessions made by defendant on the grounds of
- (1) Delay in arraignment
 - (2) Coercion or unlawful inducement
 - (3) Violation of the Miranda Rule
 - (4) Unlawful arrest
 - (5) Improper use of Line-up (Wade v. Gilbert)

- 6(d) Hearing to suppress admissions or confessions set for _____

- (1) Date of trial. (or) (2) _____

Government to state:—

- 6(e) Proceedings before the grand jury (were) (were not) recorded;

6(f) Transcriptions of the grand jury testimony of the accused, and all persons whom the prosecution intends to call as witnesses at a hearing or trial (have been) (will be) supplied;

- 6(g) Hearing re supplying transcripts set for _____

- 6(h) The government to state:—

- (1) There (was) (was not) an informer (or lookout) involved;
- (2) The informer (will) (will not) be called as a witness at the trial;
- (3) It has supplied the identity of the informer; (or)
- (4) It will claim privilege of non-disclosure;

- 6(i) Hearing on privilege set for _____

- 6(j) The government to state:—

There (has) (has not) been any—

- (1) Electronic surveillance of the defendant or his premises;
- (2) Leads obtained by electronic surveillance of defendant's person or premises;
- (3) All material will be supplied, or

- 6(k) Hearing on disclosure set for _____

C. Miscellaneous Motions

The defense moves—

- 7(a) To dismiss for failure of the indictment (or information) to state an offense.
(Granted) (Denied)

7(b) To dismiss the indictment or information (or count _____ thereof) on the ground of duplicity. (Granted) (Denied)

7(c) To sever case of defendant _____ and for a separate trial. (Granted) (Denied)

7(d) To sever count _____ of the indictment or information and for a separate trial thereon. (Granted) (Denied)

7(e) For a Bill of Particulars. (Granted) (Denied)

7(f) To take a deposition of witness for testimonial purposes and not for discovery. (Granted) (Denied)

7(g) To require government to secure the appearance of witness _____ who is subject to government direction at the trial or hearing. (Granted) (Denied)

7(h) To inquire into the reasonableness of bail. Amt. fixed _____ (Affirmed) (Modified to _____).

D. Discovery by the government

D.1. Statements by the defense in response to government requests.

8. Competency, Insanity and Diminished Mental Responsibility

8(a) There (is) (is not) any claim of incompetency of defendant to stand trial.

8(b) Defendant (will) (will not) rely on a defense of insanity at the time of offense;

8(c) Defendant (will) (will not) supply the name of his witnesses, both lay and professional, on the above issue;

8(d) Defendant (will) (will not) permit the prosecution to inspect and copy all medical reports under his control or the control of his attorney;

8(e) Defendant (will) (will not) submit to a psychiatric examination by a court appointed doctor on the issue of his sanity at the time of the alleged offense;

9. Alibi

9(a) Defendant (will) (will not) rely on an alibi;

9(b) Defendant (will) (will not) furnish a list of his alibi witnesses;

10. Scientific Testing

Defendant (will) (will not) furnish results of scientific tests, experiments or comparisons and the names of persons who conducted the tests;

11(a) Nature of the Defense

Defense counsel state that the general nature of the defense is—

- (1) lack of knowledge of contraband
- (2) lack of specific intent
- (3) diminished mental responsibility
- (4) entrapment
- (5) general denial. Put government to proof.

11(b) Defense counsel states there (is) (is not) (may be) a probability of a disposition without trial;

11(c) Defendant (will) (will not) waive a jury and ask for a court trial;

- 11(d) Defendant (may) (will) (will not) testify;
- 11(e) Defendant (may) (will) (will not) call additional witnesses.
- 11(f) Character witnesses (may) (will) (will not) be called.
- 11(g) Defense counsel will supply government names of additional witnesses for defendant _____ days before trial.

D.2. Rulings on government request and motions

The defendant is directed by the court, upon timely notice to defense counsel,

- 12(a) to appear in a lineup
- 12(b) to speak for voice identification by witnesses
- 12(c) to be finger printed
- 12(d) to pose for photographs (not involving a re-enactment of the crime)
- 12(e) to try on articles of clothing
- 12(f) to permit taking of specimens of material under fingernails
- 12(g) to permit taking samples of blood, hair and other materials of his body which involve no unreasonable intrusion;
- 12(h) to provide samples of his handwriting
- 12(i) to submit to a physical external inspection of his body.

E. Stipulations

It is stipulated between the parties:

13(a) That if _____ was called as a witness and sworn he would testify he was the owner of the motor vehicle on the date referred to in the indictment (or information) and that on or about that date the motor vehicle disappeared or was stolen; that he never gave the defendant or any other person permission to take the motor vehicle.

13(b) That the official report of the chemist may be received in evidence as proof of the weight and nature of the substance referred to in the indictment (or information).

13(c) That if _____ the official government chemist were called, qualified as an expert and sworn as a witness he would testify that the substance referred to in the indictment (or information) has been chemically tested and is

_____ contains _____

and the weight is _____

13(d) That there has been a continuous chain of custody in government agents from the time of the seizure of the contraband to the time of the trial.

13(e) Miscellaneous stipulations:

F. Conclusion—Defense Counsel States

14(a) That defense counsel knows of no problems involving delay in arraignment, the Miranda Rule or illegal seizure or arrest, or any other constitutional problem, except as set forth above.

14(b) That defense counsel has inspected the check list on this OH-3 Action Taken form, and knows of no other motion, proceeding or request which he decides to press, other than those checked thereon.

Approved:

Dated: _____

Attorney for the United States

SO ORDERED:

Attorney for Defendant #1

Attorney for Defendant #2

JUDGE

Attorney for Defendant #3