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OMNIBUS HEARINGS IN CRIMINAL CASES IN NORTH DAKOTA FEDERAL DISTRICT COURT

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Pre-trial discovery processes in criminal cases have, until very recent years, been virtually nonexistent. Some of the traditional reasons set forth in opposition to broad discovery in criminal cases were: that some defense counsel were untrustworthy; that there was a possibility of intimidating witnesses, if their identity was known; fear of prematurely disclosing the identity of informants; and the supposed advantage to the prosecution of surprise. However, in the 1960's there apparently arose a realization that some of the arguments against broad discovery procedures in criminal cases were not sound.

Countervailing considerations which are set forth by those desiring broader pre-trial discovery in criminal cases include the need for changes that will protect the defendant's procedural rights at every stage, thus lending more finality to criminal cases and alleviating many post conviction proceedings based on some procedural error in the pretrial and trial proceedings. Also recognized is the fact that the public interest is served by genuine plea discussions, which often result in pleas of guilty (accounting for a vast majority of criminal case dispositions). Furthermore, it is argued that the use of extensive pretrial discovery results in the identification and disposition of potentially significant constitutional issues early in the proceedings. Additionally, it is argued that if inexperienced counsel are appointed to defend an accused they will be better equipped to present a defense if they participate in pre-trial discovery.

During 1972 the federal courts in North Dakota have initiated a procedure in some criminal cases called an Omnibus Hearing. The Omnibus Hearing is so named because it is intended to serve

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The statements and opinions contained herein are those only of the author and do not necessarily reflect the position of the North Dakota United States Attorney's Office or the Department of Justice.

as an all-purpose hearing dealing with a wide variety of matters in a systematic and simplified way. The North Dakota Federal District Court uses an Order On Omnibus Pre-Trial Conference form which is attached to this article as Appendix "A."[1] Its practice is to notify the defense counsel of the Omnibus procedure. If counsel and the defendant agree to participate, they submit a signed form to the court.[2] Once the defendant agrees to participate the government may refuse to participate within three days. The court also suggests that counsel for the defendant and counsel for the government meet at their convenience and review the Omnibus form and agree on and disclose as many things as they can prior to appearing before the court. A date is then set at which time the defendant, his counsel, and the prosecution meet with the court. At this meeting, areas of disagreement are discussed and the parties make various motions pursuant to the order, which the court then grants or denies. Some motions require separate hearings such as a motion to suppress certain evidence and the court sets a date for a hearing on such a motion at some time in the future.

In 1944, the Advisory Committee of the Federal Rules of Criminal Procedure first recommended the language for the predecessor of the present Rule 16 of the Federal Rules of Criminal Procedure.[3] This language was adopted in 1946 and provided:

> Upon motion of a defendant at any time after the filing of the indictment or information, the Court *may* order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, *upon a showing that the items sought may be material* to the preparation of his defense *and that the request is reasonable.* The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just. (emphasis added)[4]

The defendant was forced to carry the burden and show the materiality of the items sought and further, he had to show that his request was reasonable.[5]

Continued study of discovery in criminal cases led to further revision of Rule 16 of the Federal Rules and a so-called "liberal

1. Hereinafter referred to as Order.
2. *See* Appendix B.
3. Hereinafter referred to as Fed. R. Crim. P.
4. 8 MOORES, FEDERAL PRACTICE, Section 16.02[2] (1972).
5. *See, e.g.,* United States v. Abrams, 29 F.R.D. 178 (S.D.N.Y. 1961).

rule" was adopted in 1966, which is the one under which the courts now operate. Further revision of Rule 16 is still being discussed.

The United States Supreme Court set the tone for broader criminal pre-trial discovery when it stated in 1966 that "the growing realization [is] that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice. . . ."[6]

The limited experience which this writer has had with the Omnibus Hearing procedure[7] now being used in the western half of the District of North Dakota clearly shows that if the United States Attorney's office is ordered by the court to disclose, or if he voluntarily discloses, everything which can be requested on the Omnibus form, the result is that the defendant will get far more information than he is allowed under current court rules, federal statutes and court decisions.

A. DISCOVERY BY THE DEFENDANT

Parts A (1 through 9) of the pre-trial order cover the discovery which is made possible for the defendant if he participates in the Omnibus Hearing. A(1) of the order basically asks if the defendant has had full discovery and if he has inspected the government file. In some of the cases which have been handled since the inception of the Omnibus Hearing, the United States Attorney's office has allowed the defendant to have full access to the file; in others, some portions of the investigative reports are withheld. In no case has the suggestion been made that the government inspect the defendant's files.

A(2) questions whether or not the government has disclosed all the evidence in its possession which is favorable to the accused. This relates to the disclosure first required by *Brady v. Maryland*.[8] It should be noted however, that the disclosure allowed by Rule 161 of the Federal Rules of Criminal Procedure is actually broader than that required by *Brady*.[9]

A(3) of the form has three parts. The first part relates to motions by the defendant for discovery of all oral, written or recorded statements or memoranda of them which was made by the defendant to the investigating officers. This falls directly under the provisions of Federal Rule 16(a), which has been held to give the defendant an "almost automatic right" to his written or recorded statements

6. Dennis v. United States, 384 U.S. 855, 870 (1966).
7. Hereinafter referred to as Omnibus.
8. Brady v. Maryland, 373 U.S. 83 (1963).
9. United States v. Condor, 423 F.2d 904 (6th Cir. 1970); Hemphill v. United States, 392 F.2d 45 (8th Cir. 1968); 1 WRIGHT, FEDERAL PRACTICE AND PROCEDURE, at 515, (1969).

or confessions.[10] Also, summary reports and interview memoranda that are made by government agents setting forth the substance of the defendant's remarks "in detail and in length" are discoverable.[11] At least one court has held that the statements need not even be given to a government agent.[12] Many courts also have held that the government must show "particular and substantial" reasons why motions for these statements should not be granted.[13]

The second part of A(3) relates to a motion for discovery of the names of the government's witnesses and their statements. The granting of this motion goes far beyond what is now the law relating to discovery pursuant to Federal Rule 16(b) and 18 U.S.C. § 3500 (1970). The law appears to be settled that the government does not have to disclose to the defendant the names of the government witnesses under the provisions of Rule 16.[14]

The clear language of Rule 16(b) and 18 U.S.C. § 3500(a) (1970) provide that the witnesses' statement is discoverable *after* the witness has testified, thus precluding pre-trial discovery of its contents.[15] Furthermore, 18 U.S.C. § 3500(b) (1970) provides that only the portion of the statement that relates to the witness' direct testimony is discoverable. In addition, the United States Supreme Court has held that 18 U.S.C. § 3500 (1970) is the exclusive means for obtaining any statements of government witnesses that were made before trial.[16] Additionally, statements made by co-defendants are generally not discoverable.[17]

One area of contention under this provision that has arisen several times is what portion, if any, of a government agent's investigative report is discoverable. It seems clear that the entirety of the agent's report is not discoverable at pre-trial proceedings. However, if the government does call the agent as a witness, then the provisions of 18 U.S.C. § 3500(3)(1) include the agent's reports as discoverable material.[18]

Even if the agent testifies, only that portion of his report that relates to his testimony on direct examination can be produced under

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10. United States v. Federman, 41 F.R.D. 339 (S.D. N.Y. 1967).
11. United States v. Morrison, 43 F.R.D. 516, 519 (N.D. Ill. 1967); United States v. Garret, 305 F. Supp. 267 (S.D. N.Y. 1969).
12. United States v. Crisona, 416 F.2d 107 (2nd Cir. 1969).
13. *See, e.g., U*nited States v. Rosenberg, 299 F. Supp. 1241, 1244 (S.D. N.Y. 1969); United States v. Isa, 413 F.2d 244, 246 (7th Cir. 1969).
14. *See, e.g.*, United States v. Cullen, 305 F. Supp. 695 (E.D. Wis. 1969); United States v. Eageston, 417 F.2d 11 (10th Cir. 1969).
15. United States v. Hon. Thomas R. McMillen, ——F.2d—— (7th Cir. 1972); Sendejas v. United States, 428 F.2d 1040 (9th Cir. 1970), *cer. denied* 400 U.S. 879 (1970); Gollaher v. United States, 419 F.2d 520, 528 (9h Cir. 1969).
16. Palermo v. United States, 360 U.S. 343 (1959).
17. *See, e.g.*, United States v. Mahany, 305 F. Supp. 1205 (N.D. Ill. 1969); United States v. Fassler, 46 F.R.D. 43 (S.D. N.Y. 1968).
18. Lewis v. United States, 340 F.2d 678, 682 (8th Cir. 1965).

the provisions of 18 U.S.C. § 3500(c). Whether the substance of the report is covered on direct examination and thus producible after the witness is through testifying is to be determined by the judge.[19] The general rule is that the statement or report must relate to the events and activities testified to by the witness and not his general background.[20]

If the government claims that portions of the statements are irrelevant, then 18 U.S.C. § 3500(c) provides that the trial court must inspect the statements *in camera* and delete the unrelated portions before delivering it to the defendant.

Perhaps the Court in *United States v. Barber*[21] said it best when it stated that motions to inspect statements and reports of FBI Agents

> . . . will be denied as they are likewise exempt from production under Rule 16(b), being internal government documents made in connection with the investigation and prosecution of the case. (citations omitted) This, however, does not preclude their production at trial for purposes of cross-examination if the FBI Agents should testify.

The third part of A(3) relates to a motion to inspect all physical or documentary evidence in the government's possession. This motion is akin to Rule 16(b) which provides that the court "may" allow inspection of books, papers, documents, tangible objects, buildings or places. The word "may" is important as the allowance of inspection of such items is not an "automatic right" as is the case in relation to the defendant's own statements. In addition, the defendant must show the materiality of the items he wishes to inspect and that his request is reasonable.[22] But what is material and what is reasonable? It has been held that anything which the government plans to introduce in evidence against a defendant is material and a request for production of that evidence is reasonable.[23] Additionally, Rule 16(b) applies only to documents which are in the "possession" of the government. This is not as broad as the requirement of production under 16(a), which calls for disclosure of statements which the government "knows" about.

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19. United States v. Birnbaum, 337 F.2d 490 (2nd Cir. 1964).

20. United States v. Cardillo, 316 F.2d 606, 615-16 (2nd Cir. 1963), *cert. denied* 375 U.S. 822 (1963).

21. United States v. Barber, 297 F. Supp. 917 (D. Del. 1969).

22. United States v. Mahany, 305 F. Supp. 1205, 1209 (N.D. Ill. 1969); United States v. Morrison, 43 F.R.D. 516, 519 (N.D. Ill. 1967).

23. United States v. Hrubik, 280 F. Supp. 481 (D. Alas. 1968); For further guidelines on materiality and reasonableness see, United States v. Smith, 209 F. Supp. 907 (E.D. Ill. 1962).

The government does not have to supply documents if the defendant has equal access to these documents.[24]

The provisions found on A(4) of the form follow the provisions of Rule 16(g) and are merely a continuing motion for production of all the items covered by A(1), A(2) and A(3) that subsequently come into the government's possession.

A(5) of the form has seven parts labeled (a) through (g). They allow the defendant to make certain motions requesting information which, if ordered to be given or given voluntarily, will in essence disclose the primary aspect of the government's case to the defendant. These disclosures seem to remove the guess work required by the defense as to the case that the prosecution has against its client. Although such disclosures of government strategy do not seem to be required, it appears that the disclosures allow both sides to get to the real issues of the case very quickly. A(5)a asks if the government will rely on prior acts or convictions of a similar nature for proof of knowledge or intent.

The law appears to be clear that the government may rely on prior and subsequent similar crimes to prove the intent of the defendant to commit the crime which has been charged.[25] Any subsequent acts which are similar to the crime charged in the indictment are admissible on the issue of intent if these acts are not too distant in time.[26] The form provides that the defendant may stipulate as to prior convictions without waiving his right to object to their introduction on grounds other than authenticity.

A(5)b provides for disclosure of whether the government will call expert witnesses and if so, allows disclosure of their names, qualifications, subject of testimony, and disclosure of the expert's report. This too allows much broader discovery than the former practice.

A(5)c allows the defendant to obtain reports of physical or mental examinations in the control of the government. This also relates to Rule 16(a) which provides that upon the motion of the defendant, the Court may order the government to permit copying, photographing or inspection of any relevant results or reports of physical or mental examinations.
Rule 16(a) has been interpreted to provide for the disclosure of these materials.[27]

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24. United States v. Ball, 49 F.R.D. 153 (E.D Wis. 1969); United States v Love, 42 F.R.D. 661 (D. N.H. 1967).
25. United States v. Johnson, 382 F.2d 280 (2nd Cir. 1967); United States v. Klein, 340 F.2d 547 (2nd Cir. 1965), *cert. denied*, 382 U.S. 850 (1965).
26. United States v. Smith, 283 F.2d 760 (2nd Cir. 1960), *cert. denied*, 365 U.S. 815 (1961); United States v. Marchisio, 344 F.2d 653, 667 (2nd Cir. 1965).
27. *See, e.g.*, United States v. Carr, 437 F.2d 662 (D.C. Cir. 1970); United States v. Turner, 274 F. Supp. 412 (E.D. Tenn. 1967).

A(5)d is a request for reports of scientific tests, experiments or comparisons and other reports of experts that the government has which pertain to the case. The language of Rule 16(a) provides for this disclosure.[28]

A(5)e provides for the inspection and copying of books, papers, documents, photographs or tangible objects which the government received from or which belong to the defendant or which will be used at the hearing or trial. This follows closely the provisions of Rule 16(b), which authorizes the Court to order discovery of these items, but only if the request is reasonable and the items are material.[29] It has been held that Rule 16(b) only applies to items in the control, custody and possession of the government and thus the discovery allowed is not as broad as is allowed by Rule 16(a), which provides for discovery of items "known" to the government. Rule 16(b), however, does not apply to reports, memos and internal governmental documents prepared by government agents.[30]

A(5)f allows the government to supply the defendant with a list of prior convictions of any person the government intends to call as a witness. This would appear to be far more than what the present statutes, court rules and cases allow, because if the government is not required to provide a list of its witnesses or their statements, it follows that the government would not have to provide a means for impeachment of its own witnesses. On the other hand, it could conceivably be argued that such information would be properly discoverable under the *Brady v. Maryland*[31] doctrine requiring disclosure of evidence favorable to the accused.

A(5)g is a provision requesting the government to disclose its intentions to use prior felony convictions for impeachment of the defendant if he should testify. This use of course is a trial strategy that would not ordinarily be discoverable. The result of disclosing to the defendant that he can be subject to cross examination on prior felony convictions might bear heavily on his decision to remain silent or to testify. The government has the right to impeach a witness by cross examining him as to prior convictions of a felony or a crime involving moral turpitude.[32] It has been held, however, that the trial court has some discretion in declining to allow the use of these prior convictions for impeachment.[33] Some courts

28. *See* United States v. Bel Mar Laboratories, 284 F. Supp. 875 (E.D. N.Y. 1968).
29. United States v. Mahany, 305 F. Supp. 1205 (N.D. Ill. 1969).
30. Gollaher v. United States, 419 F.2d 520 (9th Cir. 1969).
31. Brady v. Maryland, 373 U.S. 83 (1963).
32. United States v. Owens, 263 F.2d 720 (2nd Cir. 1959); United States v. Provoo, 215 F.2d 531 (2nd Cir. 1954).
33. United States v. Palumbo, 401 F.2d 270 (2nd Cir. 1968); *cert. denied*, 394 U.S. 947 (1969).

have held that such discretion should be used sparingly.[34] The New Rules of Evidence for United States Courts and Magistrates[35] which become effective July 1, 1973, unless rejected by Congress, contain the general law as it now exists. Rule 609 allows the use of criminal convictions for impeachment if they are those generally regarded as felonies or those involving dishonesty or false statements. Under the Rules of Evidence only convictions within the last ten years are allowed to be used for impeachment.[36]

A further provision of A(5)g allows the defendant to stipulate as to his prior convictions, but maintains his right to object to their admission on grounds other than authenticity.

Part A(6) of the Omnibus form requires the government to disclose whether the proceedings before the grand jury were recorded and if they were recorded the government is required to state whether or not a transcript will be provided to the defendant. It also allows the defendant to move for production of the recordings.

It is not required that testimony before a grand jury be recorded.[37] The provisions of Rule 16 are also applicable here however, and some of the general law relating to production of testimony before a grand jury, if such testimony is recorded, indicates that a defendant is entitled to copies of his testimony made before a grand jury.[38] As to testimony of other grand jury witnesses it is generally not discoverable by way of pre-trial motions but is discoverable after the witness has testified, if the defendant shows a particularized need.[39]

Part A(7) of the Omnibus Order provides for disclosure by the government as to whether an informer was involved; if an informer will be called as a witness; and whether the government will provide the defendant with the name, address and phone number of the informant or if the government will claim privilege of nondisclosure. If the government claims the privilege then the defendant may use the Order to move for disclosure.

The law is well settled that the government generally has the privilege of refusing to disclose the identity of informants at trial.[40]

The court in *Roviaro*[41] stated that:

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34. *See, e.g.*, United States v. Cacchillo, 416 F.2d 231 (2nd Cir. 1969).
35. Revised Draft of 1971, FED. R. EV. (R.D. 1971), which appears in permanent form in 51 F.R.D. 315 [Hereinafter referred to as Rules of Evidence].
36. FED. R. EV. 609(b) (R.D. 1971).
37. United States v. Barson, 434 F.2d 127 (5th Cir. 1970).
38. United States v. Tanner, 279 F. Supp. 457 (N.D. Ill. 1967).
39. United States v. Harflinger, 436 F.2d 928 (8th Cir. 1970).
40. McCray v. United States, 386 U.S. 300 (1967); Roviaro v. United States, 353 U.S. 53 (1957).
41. Roviaro v. United States, 353 U.S. 53, 59 (1957).

> The purpose of the privilege is furtherance and protection of the public interest in effective law enforcement.[42]

However, the *Roviaro* decision went on to state that there is "no fixed rule" concerning disclosure and that disclosure:

> . . . must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

In Wigmore's treatise on Evidence it is mentioned that:

> Communications of this kind ought to receive encouragement. They are discouraged if the informer's identity is disclosed.[43]

Often the question in this area is whether the informer should be identified prior to trial rather than at trial. In commenting on that point the United States Supreme Court has said:

> . . . , the Court in the exercise of its power to formulate evidentiary rules for federal criminal cases has consistently declined to hold that an informer's identity need always be disclosed, in a federal criminal trial, let alone in a preliminary hearing to determine probable cause for an arrest or search.[44]

The privilege of nondisclosure is not an absolute privilege. Thus, if the defendant can show that disclosure is necessary to insure a fair trial, the informer's identity must be disclosed.[45] It has been held that there is no need to disclose the identity of an informer if he is not an active participant in the crime, or if he is not a witness to the crime.[46]

The foregoing general law has for the most part been incorporated into the New Rules of Evidence to become effective on July 1, 1973, unless rejected by Congress.[47]

Part A(8) of the Omnibus Order provides for disclosure of whether or not any electronic surveillance has been made of the defendant or his premises and whether or not any leads developed

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42. *Id.* at 62.
43. 8 WIGMORE, EVIDENCE, § 2374 at 761-62 (McNaughton Rev. 1961).
44. McGray v. United States, 386 U.S. 300, 312 (1967).
45. United States v. Hanna, 341 F.2d 906 (6th Cir. 1965); United States v. Coke, 339 F.2d 183 (2d Cir. 1964).
46. United States v. Sklaroff, 323 F. Supp. 296 (S.D. Fla. 1971); *See also* Roviaro v. United States, 353 U.S. 53 (1957); Portomene v. United States, 221 F.2d 582 (5th Cir. 1955). United States, 353 U.S. 53 (1957); Portomene v. United States, 221 F.2d 582 (5th Cir. 1955).
47. FED. R. EV. 510 (R.D. 1971).

from such surveillance. The fourth amendment to the United States Constitution has been held not to proscribe wiretapping.[48]

Federal law since 1934, however, has prohibited the unauthorized interception and divulgence of a telephone conversation.[49] Presently the matter of wiretapping is covered by the Omnibus Crime Control and Safe Streets Act of 1968.[50] It also includes prohibitions against other forms of electronic surveillance. Evidence which is obtained in violation of the statutory law is generally inadmissible.[51]

Part A(9) of the Omnibus Order provides for disclosure to the defendant of any information the government has indicating entrapment. This disclosure could possible fall under the purview of the rule that evidence favorable to the accused must be disclosed pursuant to *Brady v. Maryland*.[52] Ordinarily a defendant can plead entrapment only if he admits that he committed the crime charged.[53] Entrapment is said to occur when the criminal conduct was the product of the creative activity of law enforcement officials.[54] The entrapment defense does not extend to inducement by private citizens, but is available if government agents acted through private citizens.[55] The government is not guilty of entrapment by merely affording an opportunity for continuing an established course of criminal conduct.[56]

B. DISCOVERY BY THE GOVERNMENT

Part B of the Omnibus form pertains to discovery by the government. Many of these discovery matters are covered by Rule 16(c) which basically provides that if the court grants the relief sought by the defendant under Rules 16(a)2 and 16 (b), it may upon motion grant certain discovery to the government. However, authorized discovery by the government has to be regulated by the accused's Fifth Amendment right against self incrimination.[57]

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48. Olmstea v. United States, 277 U.S. 438 (1928); *See also* Katz v. United States, 389 U.S. 347 (1967).
49. 47 U.S.C. § 605.
50. 18 U.S.C. §§ 2510-2520.
51. Bernanti v. United States, 355 U.S. 96 (1957); Nardone v. United States, 302 U.S. 379 (1937).
52. *Supra* note 8.
53. United States v. Hendricks, 456 F.2d 167 (9th Cir. 1972).
54. Sorrells v. United States, 287 U.S. 435, 451 (1932); *See also* Lopez v. United States, 373 U.S. 427 (1963).
55. United States v. Buie, 407 F.2d 905 (2nd Cir. 1969) *aff'd* 396 U.S. 87 (1969); *See also* Pearson v. United States, 378 F.2d 555 (5th Cir. 1967).
56. United States v. Dono, 428 F.2d 204 (2d Cir. 1970) *cert. denied,* 400 U.S. 829 (1920).
57. U.S. CONST. amend. V. No person shall be held to answer for a capitol, or otherwise infamous crime, . . . nor shall he be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

Parts B (10) a-e provide for various responses the defendant may make to the government's requests relating to competency, insanity and diminished mental responsibility. The disclosures to be made are whether there will be a claim of incompetency to stand trial; whether there will be reliance on a defense of insanity; whether the defendant has supplied names of lay and professional witness on the insanity issue; whether defendant has permitted the government to inspect and copy all the medical reports under his control or the control of his attorney, and; whether the defendant will or will not submit to a psychiatric examination by a court-appointed doctor on the issue of his insanity at the time of the offense. There is no provision for the government to make a motion for disclosure of this information, contrary to many of the disclosure possibilities on the Omnibus form under discovery for the defendant. Furthermore, if there is a claim of incompetency to stand trial because of insanity or diminished responsibility, the defendant would have to raise it prior to trial. Ordinarily, the trial judge is, at the outset of a trial, going to be unaware of relevant facts relating to the merits of a defense or claim of insanity. Thus, it is the defendant's responsibility to raise the issue of insanity as well as the issue of a request for a bifurcated trial.[58] Additionally, federal law requires the United States Attorney to file a motion to have a judicial determination of the mental competency of the accused if there is reasonable cause to believe that he is presently insane or mentally incompetent to understand the charges against him and assist in his own defense.[59] Obviously, if there is a judicial proceeding on the competency or insanity question the government would be advised of it before the main trial.Thus, the government is not gaining anything from the possible disclosures under B (10) a-e.

Where the mental state of the accused is at issue it is in the interest of justice for the trial court to permit both the defendant and the government full access to the reports and conclusions of all psychiatric witnesses.[60] Rule 16 (c) also provides for disclosure to the government of such reports conditioned on the granting of a defendant's motion under Rule 16 (a) (2).

It appears that the trial court has the power, if not the responsibility, to order the defendant to submit to a psychiatric examination in certain cases.[61] Allowing a court-appointed psychiatrist to testify

58. Parmen v. United States, 399 F.2d 559 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 858 (1968); Harried v. United States, 389 F.2d 281 (1967).

59. 18 U.S.C. § 4244.

60. United States v. Carr, 437 F.2d 662 (D.C. Cir. 1970), *cert. denied,* 401 U.S. 920 (1970).

61. Tanner v. United States, 434 F.2d 260 (10th Cir. 1970), *cert. denied,* 402 U.S. 912 (1971); United States v. Weiser, 428 F.2d 932 (2nd Cir. 1969).

on the basis of the psychiatric examination has been held not to be a violation of the defendant's right against self incrimination.[62]

Part B(11)a-b is a provision allowing the defendant to disclose whether he will rely on alibi as a defense and whether he has provided the government with a list of his alibi witnesses. Again this possible disclosure appears purely voluntary since no provision is made for allowing the government to make a motion for such disclosure. The United States Supreme Court has held that a notice of alibi rule which provided that the defendant disclose when he was going to rely on alibi as a defense and also provide a list of his alibi witnesses, which further required the state to provide a list of its alibi witnesses on rebuttal, did not violate the Fifth Amendment rights of the accused.[63]

> The Court in *Williams v. Florida*[64] stated:
> Nothing in the Fifth Amendment privilege entitles a defendand as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense. . . .
> Petitioner concedes that absent the notice-of-alibi rule the constitution would raise no bar to the Court's granting the State a continuance at trial on the ground of surprise as soon as the alibi witness is called.
> But if so utilizing a continuance is permissible under the Fifth and Fourteenth Amendments, *then surely the same result may be accomplished through pre-trial discovery,* as it was here, avoiding the necessity of a disrupted trial. (emphasis added)

It would thus appear there would be no error committed if the court were to order the disclosure relating to alibi upon motion.

Part B(12)a-b relates to whether the defendant has disclosed to the government the results of scientific tests. There again is no provision for the government to make a motion for production. However, under Rule 16(c) it clearly appears that the government has a right to this disclosure provided the court has granted the defendants' motions under Rule 16(a)(2). All of these Rule 16(a)(2) motions are under part A(5) of the omnibus order.

Part B(13)(a)1-6 relates to disclosure of the defendant's defense. It appears that the holding in *Williams v. Florida*[65] has disposed of the self incrimination arguments made against such disclosure. This is done on a voluntary basis although it would seem that

62. United States v. Weiser, 428 F.2d 932 (2nd Cir. 1969).
63. Williams v. Florida, 939 U.S. 78 (1969).
64. *Id.* at 85-86.
65. *Id.*

if the government made a motion for such disclosure the court could properly order the disclosure on the authority of *Williams*.

Part B(13)b provides for disclosure of whether the defendant will waive the husband and wife privilege. Presumably, the husband and wife privilege referred to on the form includes both the marital communication privilege and the adverse testimony privilege. The marital communicatons ". . . privilge, generally, extends only to utterances and not to acts."[66]

It has been stated that the four basic factors that are considered in determining whether the privilege should be allowed are whether:

1. The communications originate in confidence.
2. The confidence is essential to the relation.
3. The relation is a proper object of encouragement by the law.
4. The injury that would inure to it by disclosure is probably greater than the benefit that would result in judicial investigation of the truth.[67]

The adverse testimony privilege prohibits the spouses testimony regardless of the extent of knowledge. However, it can be asserted only during the existence of the marriage and is destroyed by the death or divorce of the spouse.[68]

The new proposed Rules of Evidence contain a husband-wife privilege.[69] The Rules basically retain the husband-wife adverse testimony privilege but it is stated in the committee's advisory notes following Rule 505 that "the rule recognizes no privilege for confidential communications." However, if there is a valid reason for retaining either the marital communication privilege or the adverse testimony privilege in the new Rules of Evidence then there is far greater reason to retain the communication privilege. It would seem that if one made an incriminatory statement to his or her spouse that it would be more deserving of protection than would be the protection of fact testimony relating to acts performed by the spouse.

Under present law[70] and under the proposed Rules of Evidence[71] there are exceptions to the husband-wife privilege. The most important exception is that if the crime is committed against the spouse or a child of either; the one committing the crime cannot preclude

66. Pereira v. United States 347 U.S. 1, 6 (1954); *See also* United States v. Mitchell, 137 F.2d 1006, 1009 (2nd Cir. 1943) *cert. denied*, 321 U.S. 794 (1943). 8 WIGMORE, EVIDENCE, § 2337 at 657 (McNaughton Rev. 1961).
67. 8 WIGMORE, EVIDENCE, § 2332 at 642 (McNaughton Rev. 1961).
68. Hawkins v. United States, 358 U.S. 74 (1958).
69. FED. R. EV. 505 (R.D. 1971).
70. Wyatt v. United States, 362 U.S. 525 (1960).
71. FED. R. EV. 505(c) (R.D. 1971).

the testimony of his or her spouse by claiming the husband-wife privilege.

Parts 13c,d,e and f refer to disclosures relating to whether the defendant will testify; call additional witnesses; call character witnesses; or supply names, addresses and phone numbers of his witnesses. The Omnibus Order contains a choice of "will," "may" or "will not" and in virtuaally every case in which this writer has participated, the word "may" has been chosen. Thus the government gains no useful informaton.

The disclosures provided for under B (14) are really not discovery disclosures because they are matters which of necessity must be discussed by the government and the defendant before trial. Part B (14) a merely provides for disclosure of whether the defendant knows of any constitutionala problems such as those involved in pre-trial procedure, arrest and search and seizure. Part B (14) b is a provision allowing the defendant to disclose whether he wishes to present to the court any motion or matter other than those included on the Omnibus form. And finally, Parts B (14) c & d merely refer to whether there is a probability of disposition of the case without trial and whether the defendant will waive a jury trial.

C. MOTIONS REQUIRING SEPARATE HEARINGS BEFORE A U.S. DISTRICT COURT JUDGE

Part C of the Omnibus form relates to motions which require a separate hearing before the district judge. Part C (15) of the Omnibus Order has to do with motions for suppression of physical evidence and admissions and confessions and requires a separate hearing before the district judge. Because of the vast amount of law covering these matters, the individually listed grounds for the motions will not be dealt with here. If a motion to suppress is made, an evidentiary hearing is held and the Court must determine if the evidence must be suppressed or allowed to stand.

Part C (16) a provides for a motion for dismissal of the indictment or information because of failure to state an offense. Rule 12 sets forth guidelines relating to the defenses and objections that can be raised. The objection that the indictment fails to charge an offense may be raised before the trial by a motion to dismiss.[72] An indictment may also be attacked subsequent to a plea of guilty if it fails to allege an offense.[73] The court may also take notice

72. Universal Milk Bottle Service v. United States, 188 F.2d 959 (6th Cir. 1951).
73. United States v. Briscoe, 428 F.2d 954 (8th Cir. 1970) *cert. denied,* 400 U.S. 966 (1970) (*rehearing denied*, 401 U.S. 926 (1971).

of the failure of the indictment to charge an offense at any time during the proceedings.[74]

Part C(16)b allows a motion to dismiss the indictment or information or a count because of duplicity. Duplicity of charges would appear to be a defect in the institution of the prosecution and thus, must be raised by motion before trial.[75] Duplicity in an indictment means the charging of more than one offense in a count.[76] In a situation where there is duplicity because two distinct crimes are charged in one count, the count is void because the defendant is denied the unanimous concurrence of a jury on each offense charged before conviction.[77]

Part C(16)c is the basis for a motion to sever the defendants case and for a separate trial.

Rule 8(a) allows joinder of two or more offenses in the same indictment or information and Rule 8(b) allows joinder of two or more defendants in the same indictment or information if they allegedly participated in the same transaction constituting the offense. Rule 13 allows the court to order joint trial of indictments or informations against defendants if they could have been joined in a single indictment or information. Rule 14 gives the court the power on its own motion, or upon a motion by the defendant, to sever the cases of jointly indicted defendants or to sever jointly alleged offenses if joinder is prejudicial.

Separate trials by way of a motion for severance are not a matter of right,[78] and granting of motions for severance falls squarely within the trial court's discretion.[79] The trial judge is, however, under a continuing duty at all stages of the trial to take whatever action is appropriate to counter any unfair prejudice that may arise.[80] The trial judge's ruling on severance matters is subject to reversal only when there is a showing of an abuse of his discretion,[81] or when clear prejudice is shown.[82] Motions for severance must be timely made.[83]

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74. United States v. Vannatta, 189 F. Supp. 937 (D. Hawaii 1960); *See also* FED. R. CRIM. P. 12(b)(2).

75. FED. R. CRIM. P. 16(b)(2). *See also* Notes of the Advisory Committee on Rules following Rule 16.

76. United States v. Barndom, 320 F. Supp. 520 (W.D. Mo. 1970); United States v. Zolli, 51 FED. R.D. 522 (E.D. N.Y. 1970).

77. United States v. Warner, 428 F.2d 730 (8th Cir. 1970).

78. Barnes v. United States, 347 F.2d 925 (8th Cir. 1965).

79. *See, e.g.*, Williams v. United States, 416 F.2d 1064 (8th Cir. 1969); Bailey v. United States, 410 F.2d 1209 (10th Cir. 1969).

80. United States v. Wilson, 434 F.2d 494 (D.C. Cir. 1970).

81. United States v. Rosselli, 432 F.2d 879 (9th Cir. 1970).

82. United States v. Schroeder, 433 F.2d 846 (8th Cir. 1970) *cert. denied*, 400 U.S. 1024 (1971), *cert denied*, 401 U.S. 943 (1972).

83. United States v. Melville, 312 F. Supp. 234 (S.D. N.Y. 1970). *See also* United States *ex rel.* Green v. Rundle, 452 F.2d 232 (3rd Cir. 1971) where the court held that if a motion was not made prior to trial it was not timely; United States v. Parson, 452 F.2d 1007 (9th Cir. 1970), where the court held that when defendant did not move for sever-

Part C(16)d provides for a motion to sever certain counts of an indictment or information and for separate trial thereon. Rule 8(a) FRCP provides for joinder of offenses. A motion for severance of the counts in an indictment or information is directed to the discretion of the trial court.[84] The discussion of Part C(16)c of the Omnibus Order is also pertinent here.

Part C(16)e authorizes a motion for a bill of particulars. Rule 7(f) provides that the court may direct the filing of a bill of particulars. The Rule further states that such a motion should be made before arraignment or within ten days after arraignment, although it can be permitted at a later time. Bills of particulars are to be granted only where they are necessary in order to inform the accused of the charge against him with sufficient precision to enable him to prepare a defense; to avoid surprise; and to enable him to plead his acquittal in bar of any further prosecution for the same offense.[85] A motion for a bill of particulars is addressed to the sound discretion of the court[86] and denial of the motion is seldom reversible error unless there is a showing that the defendant was unfavorably surprised or prejudiced at the trial by the government evidence.[87] On the other hand, a bill of particulars is not to be used as a device for disclosure of the government's case in advance of trial[88] nor can it be used to inquire into the government's legal theory of a case.[89] Furthermore, it has been held that a defendant is not entitled to the names of the government witnesses by way of a bill of particulars.[90]

Part C(16)f contains a motion for taking the deposition of a witness for testimonial purposes. Depositions of witnesses may be taken in certain instances pursuant to federal statute[91] and the criminal rules.[92] Depositions may only be taken in criminal cases by order of the court and are not to be allowed as a matter of right.[93] The burden of showing the necessity for taking a depo-

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ance he had waived his objection to misjoinder; It has also been held that failure to formally move for a severance constitutes a waiver of any future objections, United States *ex rel.* Dixon v. Carell, 284 F. Supp. 535 (3rd Cir. 1969).

84. United States v. Sanders, 463 F.2d 1086 (8th Cir. 1972); United States v. Corallo, 309 F. Supp. 1282 (D.C. N.Y. 1970); United States v. Claytor, 52 FED. R.D. 360 (D.C. N.Y. 1971).

85. United States v. Bonanno, 177 F. Supp. 106 (D.C. N.Y. 1959) *rev'd. on other grounds*, 285 F.2d 408 (2nd Cir. 1960); United States v. Rubino, 320 F. Supp. 613 (D.C. Pa. 1970).

86. Turner v. United States, 426 F.2d 480 (6th Cir. 1970).

87. United States v. Kushner, 135 F.2d 668 (2nd Cir. 1943), *cert. denied*, 320 U.S. 212 (1943).

88. United States v. Poindexter, 325 F. Supp. 786 (S.D. N.Y. 1971); United States v. Bearden, 423 F.2d 805 (5th Cir. 1970), *cert. denied*, 400 U.S. 836 (1970).

89. United States v. Verra, 203 F. Supp. 87 (S.D. N.Y. 1962).

90. Nipp v. United States, 422 F.2d 509 (10th Cir. 1969); United States v. Glass, 421 F.2d 832 (9th Cir. 1969).

91. 18 U.S.C. § 3503.

92. FED. R. CRIM. P. 15.

93. United States v. Massi, 277 F. Supp. 371 (W.D. Ark. 1968).

sition is on the defendant that desires the deposition.[94] Furthermore, despoitions in criminal cases are only to be used in exceptional cases.[95]

Part C(16)g gives authority for a motion to require the government to secure the appearance of a witness who is subject to government direction at the trial. The court, in its discretion, can order production of witnesses[96] and in fact pursuant to the criminal rules[97] can require that the cost of calling a witness, both process and fees, will be paid by the government if the defendant is unable to pay.

Part C(16)h is a motion for dismissal for delay in prosecution. The federal criminal rules provide that if there is unnecessary delay, the indictment, information or complaint may be dismissed.[98] The Federal Constitution's Sixth Amendment right to a speedy trial is of course also involved in a motion for dismissal because of delay. The purpose of the Rule allowing dismissal for unnecessary delay and the Sixth Amendment guarantee of a speedy trial are said to be directed to a delay in prosecution to which the defendant has not contributed.[99] Such a motion is addressed to the court's discretion.[100]

Part C(16)i is a motion to inquire into the reasonableness of the defendant's bail,[101] while Part C(16)j provides for a motion for continuance. This motion for continuance is directed to the court's discretion.[102]

Part C(16)k is a motion to change the venue of the trial. The Federal Rules of Criminal Procedure provide that venue may be transferred[103] and whether a transfer should be allowed is again discretionary with the court.[104]

Parts (17)a-j of the Omnibus Order sets out a series of motions which the government may make. The court's primary concern must be protection of the defendant's constitutional rights. The most common right involved is the Fifth Amendment right against self-incrimination. This privilege must be weighed against the public interest in obtaining evidence. Usually, an inspection of the bodily

94. United States v. Bronston, 321 F. Supp. 1269 (S.D. N.Y. 1971).
95. United States v. Rosenstein, 303 F. Supp. 210 (S.D. N.Y. 1969).
96. United States v Kaufman, 393 F.2d 172 (7th Cir. 1968).
97. FED. R. CRIM. P. 17(b).
98. FED. R. CRIM. P. 48(b).
99. United States v. Alagia, 17 FED. R.D. 15 (D.C. Del. 1955).
100. United States v. Aberson, 419 F.2d 820 (2nd Cir. 1970).
101. *See* FED. R. CRIM. P. 46; 18 U.S.C. § 3141 *et. seq.*; U.S. CONST. amend VIII also states that excessive bail is prohibited.
102. Hemphill v. United States, 392 F.2d 45 (8th Cir. 1968) *cert. denied*, 393 U.S. 877 (1968).
103. FED. R. CRIM. P. 21.
104. United States v. Phillips, 433 F.2d 1364 (8th Cir. 1970) *cert. denied*, 401 U.S. 917 (1971); United States v. Herold, 309 F. Supp. 997 (E.D. Wis. 1970).

features of the defendant by the tribunal or by a witness does not violate the privilege because it does not call upon the accused to be a witness.[105] A motion to have the defendant appear in a lineup as provided in Part (17) a could properly be granted as the Supreme Court has said that a lineup does not violate a defendant's privilege against self incrimination. However, conducting one without counsel would violate his Sixth Amendment right to counsel.[106]

Motions to have the defendant speak for voice identification; be fingerprinted; pose for photographs; try on articles of clothing; surrender clothing for experimental purposes or comparison; permit the taking of specimens from under fingernails; permit taking of samples of blood, hair and other materials of his body which involves no unreasonable intrusion; provide samples of handwriting; or submit to an external physical inspection of his body are provided for in Parts (17) b-j respectively. These motions are proper and can be granted by the court without fear of Fifth Amendment self-incrimination violations.[107]

CONCLUSION

The foregoing discussion presents in summary fashion the prevailing law on the matters which are found in the Omnibus Order which is being used in the Federal District Court in North Dakota in some criminal cases. It is clear that if the government cooperates fully and voluntarily discloses, or is ordered to disclose all the matters covered by the order, the defendant will receive far more information than that to which he is presently entitled. Thus, the scope of discovery under the Omnibus procedure is considerably greater for the defendant than has been possible in criminal proceedings in the past. On the other hand, the disclosures which the defendant may voluntarily make, or be ordered to make are really nothing more than the government is entitled to under the current statutes, criminal rules and case law.

All of the arguments made by proponents of broad pre-trial discovery have not necessarily been borne out by the Omnibus procedure as used in North Dakota. However, sufficient time has perhaps not yet elapsed for a fair evaluation of all these arguments.

It is true that virtually every defense motion which it is possible to make is listed on the form and that this would be useful to counsel

105. 8 WIGMORE, EVIDENCE, § 2265 at 386 (McNoughton Rev. 1961).
106. United States v. Wade, 388 U.S. 218 (1967).
107. *See generally* Schmerber v. California, 384 U.S. 757 (1966) (blood test); Holt v. United States, 218 U.S. 245 (1910) (try on clothing), United States v. Moore, 466 F.2d 547 (3rd Cir. 1972); 8 WIGMORE, EVIDENCE, § 2265 at 386-400 (McNaughton Rev. (1961)) and cases cited therein.

unfamiliar with criminal practice. Whether more finality is guaranteed by the procedure, because all of these motions can be made or not made at a single pre-trial hearing, is not assured. Finality will depend on whether the courts, on motions for a new trial or appeal, based on failure of counsel to make some of these motions, hold that their right to such a motion was waived when they choose not to make it or, conversely, hold that the defendant is not bound by his decision not to make the motion at the pre-trial hearing. Whether more pleas of guilty will be forthcoming because of extensive disclosure is as yet debatable but usage of the procedure has not been extensive enough to detect such a trend. The argument that extensive pre-trial discovery will identify potentially significant constitutional issues is not convincing because in most instances these issues are readily identifiable at the commencement of the case anyway.

If, however, full disclosures are made by both the government and the defendant it is probable that cases will proceed more smoothly. Trial strategy could be completely determined prior to jury selection if there was full disclosure. Accordingly, it seems that the defendant has much to gain by participating in the Omnibus procedure, but it is still an open question whether the government derives any benefit from it.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
_____DIVISION

UNITED STATES OF AMERICA,)
) CRIMINAL NO. _____
vs.
) DATE HELD _____
_____)

ORDER ON OMNIBUS PRE-TRIAL CONFERENCE

(INSTRUCTIONS: If an item numbered below is not applicable to this case, then counsel will note the same in the margin opposite he item numbered with the letters, "N.A.")

A. DISCOVERY BY DEFENDANT (Circle appropriate response)

1. The defendant states he (has (has not) obtained full discovery and (has) (has not) inspected the government file. (If government has refused discovery of certain materials, defendant's counsel shall state nature of such material.)

_____

_____

2. The government states it (has) (has not) disclosed all evidence in its possession, favorable to defendant on the issue of guilt.

3. The defendant requests and moves for: (Circled subparagraph shows motion requested)

a. Discovery of all oral, written or recorded statements or memorandum of them made by defendant to investigating officers or to third parties and in the possession of the government.
(Granted) (Denied)
_____
United States District Judge (Date)

b. Discovery of the names of the government's witnesses and their statements.
(Granted) (Denied)
_____
United States District Judge (Date)

c. Inspection of all physical or documentary evidence in government's possession.
(Granted) (Denied)
_____
United States District Judge (Date)

4. Defendant, having had discovery of items 2 and 3a, 3b and 3c, requests and moves for discovery and inspection of all further and additional information coming into the government's possession as to Items 2 and 3a, 3b, and 3c between this conference and trial.
(Granted) (Denied)
_____
United States District Judge (Date)

5. The defendant moves and requests the following information, and the government states: (Circle the appropriate responses)

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

following prior convictions, but reserves the right to object (on grounds other than authenticity) to their introduction in evidence at trial:

Date of Conviction_____ Offense_____
Date of Conviction_____ Offense_____
Date of Conviction_____ Offense_____

_____
Defendant

_____
Attorney for Defendant
Date_____

b. The government (will) (may) (will not) call expert witnesses to testify. The name of each witness, his qualifications, the subject of his testimony, and his reports (have been) (will be) supplied to the defendant.

c. Reports of physical or mental examinations in the control of the government (have been) (will be) supplied to defendant.

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

e. Inspection and/or copying of any books, papers, documents, photographs or tangible objections which the government:

1) obtained from or which belong to defendant, or

2) which will be used at the hearing or trial,

(have been) (will be) supplied to defendant.

f. Information in the United States Attorney's possession concerning a prior conviction of any person the governmet intends to call as a witness at the hearing or trial (has been) (will be) supplied to defendant.

g. The government (will) (may) (will not) use any prior felony conviction for impeachment of defendant if he testifies.

Date of Conviction_____ Offense_____
Date of Conviction_____ Offense_____
Date of Conviction_____ Offense_____

Defendant stipulates to such prior convictions, but reserves the right to object (on grounds other than authenticity) to their introduction in evidence at trial.

_____
Defendant

_____
Attorney for Defendant
Date_____

6. The government states that:

a. Proceedings before the grand jury (were) (were not) recorded.

b. Transcription 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) (will not be) supplied. The defendant (moves) (does not move) for the production of transcripts of such testimony. The hearing on the motion will be set before a United States District Judge upon notice.

7. The government states that:

a. There (was) (was not) an informer (or lookout) involved.

b. The informer (will) (will not) be called as a witness at the trial.

c. It (has) (has not) given defendant the name, address and phone num-

ber of the informer.

d. It will claim privilege of nondisclosure. The defendant moves for the disclosure of the name of such informer. The hearing on the motion will be set before a District Judge upon notice.

8. The government states that there:

a. (has) (has not) been any electronic surveillance of the defendant or his premises;

b. (has) (has not) been any lead obtained by electronic surveillance of defendant's person or premises.

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

B. DISCOVERY BY THE GOVERNMENT

The following statements are made by the defendant in response to the government's request:

10. Competency, Insanity and Diminished Mental Responsibility.

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

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

c. Defendant (has) (has not) supplied the name of his witnesses, both lay and professional, on the issue.

d. Defendant (has) (has not) permitted the government to inspect and copy all medical reports under his control or the control of his attorney.

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.

11. Alibi.

a. Defendant (will) (will not) rely on an alibi.

b. Defendant (has) (has not) furnished the government a list of his alibi witnesses (but desires to be present during any interview of such witnesses).

12. Scientific Testing.

a. Defendant (has) (has not) furnished the government the results of scientific tests, experiments or comparisons and the names of the persons who conducted the tests.

b. Defendant (has) (has not) provided the government with all records and memoranda constituting documentary evidence respecting such tests in his possession or under his control or (has) (has not) disclosed the whereabouts of said material. If such documentary evidence is not available but destroyed, the defendant (has) (has not) stated the time, place and date of said destruction and the location of reports, if any concerning the destruction.

13. Nature of Defense.

a. Defendant states that his defense includes: (circle appropriate response)

1) lack of knowledge of contraband

2) alibi
3) diminshed mental responsibility
4) entrapment
5) self defense
6) general denial. Defendant (will) (will not) offer evidence after government rests.

b. Defendant (will) (will not) waive husband and wife privilege.
c. Defendant (wll) (may) (will not) testify.
d. Defendant (will) (may) (will not) call additional witnesses.
e. Defendant will) (will not) call character witnesses.
f. Defendant will supply the government names, addresses, and phone numbers of additional witnesses for defendant _____days before trial.

14. Defendant's counsel states that: (circle appropriate response)

a. As of the date indicated below he (does) (does not) know of any problems involving delay in arraignment, the **Miranda** Rule or illegal search and seizure or arrest, or any other constitutional problem, except as set forth above.

b. He has inspected this form, and (does) (does not) know of any motion or matter that defendant desires to present to the Court, other than those indicated on this form.

c. There (is) (is not) (may be) a probability of a disposition of this case without trial.

d. Defendant (will) (will not) waive a jury and ask for a court trial.

C. MOTIONS REQUIRING SEPARATE HEARING BEFORE U. S. DISTRICT JUDGE.

15. The defendant moves: (circled subparagraph shows motion requested)

a. To suppress physical evidence in the government's possession on the grounds of: (circle appropriate response)

1) illegal search and seizure

2) illegal arrest

The hearing on such motion to suppress will be set before a United States District Judge upon notice.

(Defendant will file a formal motion to suppress such evidence accompanied by a memorandum brief within _____days. The government will file a responsive memorandum brief within _____days after receipt of defendant's brief.)

b. To suppress admissions or confessions made by defendants on grounds of: (circle appropriate subparagraph)

1) delay in arraignment
2) coercion or unlawful inducement
3) violation of the Miranda Rule
4) unlawful arrest
5) improper use of lineup (Wade, Gilbert, Stovall decisions)
6) improper use of photographs

The hearing on such motion to suppress is set for:
1) date of trial, or
2) upon notice.

c. All material uncovered during the course of surveillance (will) (will

not) be supplied to defendant. The defendant (moves) (does not move) for the production of such material. The hearing on the motion will be set before a United States District Judge upon notice.

(MOTIONS MADE IN THE COURSE OF THIS OMNIBUS PRE-TRIAL CONFERENCE PURSUANT TO RULE 12(b)(3) FRCrP SHALL BE ACCEPTED AS HAVING BEEN TIMELY MADE)

16. The defendant moves: (circled paragraph indicates the motion)

a. To dismiss for failure of the indictment or information to state an offense.
(Granted) (Denied) _____
United States District Judge (Date)

b. To dismiss the indictment or information (or count _____thereof) on the ground of duplicity.
(Granted) (Denied) _____
United States District Judge (Date)

c. To sever case of defendant _____ and for a separate trial.
(Granted) (Denied) _____
United States District Judge (Date)

d. To sever count _____ of the indictment or information and for a separate trial thereon.
(Granted) (Denied) _____
United States District Judge (Date)

e. For a Bill of Particulars.
(Granted) (Denied) _____
United States District Judge (Date)

f. To take a deposition of witness_____ for testimonial purposes and not for discovery.
(Granted) (Denied) _____
United States District Judge (Date)

g. To require government to secure the appearance of witness_____ _____ who is subject to government direction at the trial or hearing.
(Granted) (Denied) _____
United States District Judge (Date)

h. To dismiss for delay in prosecution.
(Granted) (Denied) _____
United States District Judge (Date)

i. To inquire into the reasonableness of bail. Amount fixed._____.
(Affirmed) (Modified to_____.)

_____
United States District Judge (Date)

j. To continue the trial of the case.
(Granted) (Denied) _____
United States District Judge (Date)

k. To change the venue of the trial.
(Granted) (Denied) _____
United States District Judge (Date)

17. The government moves that the defendant: (Circle appropriate paragraph)
a. appear in a lineup.
(Granted) (Denied) _____
United States District Judge (Date)

b. speak for voice identification by witness.
(Granted) (Denied) _____
United States District Judge (Date)

c. be fingerprinted.
(Granted) (Denied) _____
United States District Judge (Date)

d. pose for photographs (not involving a reenactment of the crime).
(Granted) (Denied) _____
United States District Judge (Date)

e. try on articles of clothing.
(Granted) (Denied) _____
United States District Judge (Date)

f. surrender clothing or shoes for experimental comparison.
(Granted) (Denied) _____
United States District Judge (Date)

g. permit the taking of specimens of material under fingernails.
(Granted) (Denied) _____
United States District Judge (Date)

h. permit the taking of samples of blood, hair and other materials of his body which involves no unreasonable intrusion.
(Granted) (Denied) _____
United States District Judge (Date)

i. provide samples of his handwriting.
(Granted) (Denied) _____
United States District Judge (Date)

j. submit to a physical external inspection of his body.
(Granted) (Denied) _____
United States District Judge (Date)

D. STIPULATIONS

Stipulations shall be executed by defendant, his counsel and the government's counsel and shall be attached hereto and filed at the omnibus hearing. Witness lists will be exchanged prior to trial.

E. Trial Date and Time: _____
Trial Place: _____

F. Trial by (Court) (Jury) Ordered.

G. Estimated trial time: _____

H. _____

APPROVED:

_____
Attorney for the United States.

_____
Attorney for Defendant.

_____
Defendant.

SO ORDERED:

_____
United States District Judge
Date _____

APPENDIX B

The Honorable Bruce M. Van Sickle
Judge, United States District Court
For the District of North Dakota
Room 213—Federal Building
Minot, North Dakota 58701

RE:_____Case No._____

( ) I have discussed the Omnibus Hearing Procedure with my client and wish to inform the Court that we do desire to participate.

( ) I have discussed the Omnibus Hearing Procedure with my client and wish to inform the Court that we do not desire to participate.

_____
Defendant.

_____
Attorney for Defendant.

Date:_____

cc: United States Attorney
Clerk, United States District Court