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THE OMNIBUS PRETRIAL CONFERENCE

HONORABLE BRUCE M. VAN SICKLE*

Exposure to the Omnibus Pretrial Conference, for me, first occurred during a New Judges Seminar administered by the Federal Judicial Center. As a lawyer principally grounded in civil matters, I soon learned that my greatest judicial burdens are found on the criminal side of the work. In fact, criminal cases must be analyzed in two distinct steps:

1. Protection of the defendant's constitutional and procedural rights;¹
2. Development of the case on its merits.

The defendant in a Federal Court has a constitutionally mandated right to counsel.² This means competent counsel.³

At the same time, it is a fact of life that many persons who are unable to stay out of the clutch of the criminal laws, are also unable to afford competent counsel. Counsel must then be appointed and paid,⁴ but the amount a court can approve as counsel fees is strictly controlled.⁵ This means that since we cannot, in fairness, impose the burden of criminal defenses on a few lawyers, we must be able to assure that the defendant can get competent representation from any one of many lawyers. The Omnibus Pretrial Conference helps us do this because it presents the criminal procedural problems in a way that the civil trial lawyer finds familiar, thus letting him meet and grapple with problems, using the expertise he has developed in his civil practice.

The Omnibus Pretrial Conference is simply a pretrial under Rule 17.1 of the Federal Rules of Criminal Procedure. At that conference the Court insists that the parties make full use of the thrust of the discovery sections of the rules.⁶ The Court also makes full

* J.D. 1941, University of Minnesota; Judge, United States District Court, District of North Dakota.

1. For a caustic and comprehensive analysis of this phase see Campbell, *Delays in Criminal Cases*, 55 F.R.D. 229 (1973).

2. U.S. CONST. amend. VI.

3. *United States v. Coriola*, 323 F.2d 180 (3rd Cir. 1963).

4. See 18 U.S.C. § 3006A (1970)

5. *Id.*

6. FED. R. CRIM. P. 7(f), 16.

use of the thrust of the Jencks Act,⁷ and of *Brady v. Maryland*.⁸ The procedure itself is a carefully prepared checksheet which forces counsel for the defendant and counsel for the Government to prepare their cases:

1. As to protection of the defendant's rights, and
2. On the merits.

The basic idea was developed in 1967 by The Honorable James M. Carter, then United States District Judge for the Southern District of California, with the cooperation of Edwin L. Miller, Jr., United States Attorney, Southern District of California, and the defense lawyers in the Southern District of California. The project was originally begun at the direction of the "Sub-committee on Proceedings Prior to Trial" of the "American Bar Association Project on Standards for Criminal Justice."⁹

The stated purposes of the project were to:

1. Eliminate written motion practice, except where necessary;
2. Secure discovery by the Prosecutor and the defense within the Constitutional limits permitted;
3. Encourage voluntary discovery by the Prosecutor of its basic case;
4. Rule upon and supervise additional discovery requested by the parties;
5. Expose and dispose of lurking Constitutional issues;
6. Provide a period of time prior to the Omnibus Pretrial Conference for disclosure, exploration and discussion between counsel.
7. Allow the defendant discovery so that he may make an informed decision as to a plea of guilty, if such is his decision.
8. Use the Omnibus Pretrial Conference, as far as possible, for those cases where either:
 - a) Sufficient information has not been secured for an informed plea, or
 - b) Where the case will probably go to trial.
9. Postpone for formal hearings those matters which will require, of necessity, preparation of written documents, affidavits, memorandum and/or the calling of witnesses.¹⁰

7. 18 U.S.C. § 3500 (1970).

8. 373 U.S. 83 (1963).

9. See the report of that committee, *Discovery and Procedure Before Trial*, (1971).

10. *The Omnibus Hearing Project*, a mimeographed form prepared by the United States Court, Middle District of Florida.

In areas of heavy criminal case load, for example, Florida, Texas, California and Missouri, where a full time magistrate has been authorized, the magistrate handles the pretrial conference before the arraignment. As a result, if the problem is one which justifies a guilty plea, the plea can be taken at the arraignment.

In areas such as North Dakota, the criminal case load is not heavy, but lawyers, and particularly lawyers for indigent defendants, are slow to take up their criminal cases because they have no organized plan of attack on them. This is undoubtedly due in part to the fact that the protection of the defendant's constitutional and procedural rights has become a nightmarish quagmire of probable malpractice charges against the lawyer. The lawyer wants to do his duty, and represent the defendant expertly. But, in today's criminal law atmosphere, any result not satisfactory to the defendant exposes a lawyer to a habeas corpus¹¹ motion with the inevitable charge that the lawyer was incompetent. It is no wonder the lawyer prefers to take his chances on a trial that in many cases should be handled by a plea. The matter is then resolved in an arena where the lawyer is at ease, and he will have demonstrated his efforts on behalf of the defendant.

An unfortunate result now commonly occurring is that cases that should not be tried, are tried, with a waste of time, and with increased burden on the lawyer who cannot charge a fee commensurate with his efforts. Every lawyer who has defended in the criminal courts has had the experience of being unable to convince his client that a particular case should not be tried; that the best interests of the client will be served by his making a guilty plea. The presence of the defendant is required at every stage of the trial.¹² I take this to include the Omnibus Pretrial Conference. The defendant's participation at this stage can become a matter of great importance. In *Fay v. Noia*,¹³ the Supreme Court said: "A choice made by counsel not participated in by the petitioner does not automatically bar (habeas corpus) relief."¹⁴

The disclosure of the United States Attorney in the course of the Omnibus Pretrial Conference allows the defendant to understand fully the case against him, and is invaluable in assisting him to reach his decision in respect to a plea. By the same token, if after such a disclosure, and the defense disclosures, a plea is not forthcoming, the United States Attorney must rethink his case carefully before it is taken before a jury.

The United States Attorney for the State of North Dakota has

11. 28 U.S.C. § 2255 (1970).

12. FED. R. CRIM. P. 43.

13. 372 U.S. 391 (1963).

14. *Id.* at 439.

agreed in principle to participate in the Omnibus Pretrial Conference, but makes actual commitments on a case-to-case basis.

A few attorneys have refused to participate in the Omnibus Pretrial Conference, but, in my limited experience, I observe that they have not done well for their clients by that refusal. The defense attorney normally asks: "Why should I disclose? I have no obligation to put in any evidence?" But, in fact, it is the rare criminal case where the defendant presents to the jury absolutely no case and tries the entire matter on the Government case.

The Omnibus Pretrial Conference is being used on an experimental basis in the Western Divisions of the Federal District Court, North Dakota District. After careful testing, it will be reviewed by the Federal District Bench of the entire district in order to determine the manner and extent of its further use.

The procedure, as used in the Western Divisions of the District of North Dakota, is as follows:

At the time of the arraignment, or as soon as counsel for the defendant has been identified, the Clerk of the United States District Court sends to counsel for both sides, a mailing which includes:¹⁵

1. A letter of explanation addressed to "Members of the Bar concerned with criminal cases."
2. A letter from the Clerk of the United States District Court explaining the procedural steps.
3. A form of written consent to participate, or refusal to participate, in the Omnibus Pretrial Conference.
4. A form of proposed "Order On Omnibus Pretrial Conference."

If both parties signify their willingness to proceed, a pretrial conference is immediately set. As pointed out in the instructions, counsel for both sides are asked to get together and complete their disclosures before the pretrial conference. At the pretrial conference, the "Order On Omnibus Pretrial Conference" form is followed. Motions are made and rulings are made forthwith. Where the matter is one which requires presentation of evidence, or analysis in brief, time for hearing or briefing is allowed. As a reading of the Order will show, the procedure is:

First, to take up the defendant's discovery;

Second, discovery for the Government is completed;

Third, motions requiring extended hearing are scheduled;

15. See appendix hereto.

Fourth, any relevant stipulations are considered;

Finally, the Order is approved by the principals, if they will approve, is signed by the Judge, and is filed as an Order of the Court.

As a matter of practice, I have not requested approval of the Order by the defendant, or the attorneys. Instead they are left free to attack any decisions or rulings made by me in the course of the hearing. Also, as a matter of practice, I have insisted that my handwritten worksheet be signed and filed as the Order. Thus, the original notes of the pretrial conference are preserved. I then have the Clerk reproduce the worksheets and send the reproductions out to counsel as service of the Order under the local rules, so that counsel may have accurate copies of the original notes of the conference, along with the Order.

It is understandable, and to be expected, that both the United States and the defendant would be hesitant to use this "radical" approach to criminal trial work at first. And it is well for the defense counsel to realize that utilization of the procedure increases the number of guilty pleas, thus decreasing the number of guilty verdicts.¹⁶ At the same time, the procedure forces dismissal where the case cannot stand the light of examination. Certainly preparation of the case according to the outline of the Order should protect an attorney from a successful claim that he had not furnished adequate representation.

The direction of change in the Federal Rules of Criminal Procedure is to seek for open disclosure so that the Court may do justice instead of engaging in a "shell game." The direction of change is toward a type of trial practice to which the civil lawyer is already accustomed.

The result of the Omnibus Pretrial Conference, as I have observed it, is that the defendant goes into court understanding the case which is going to be presented against him, and the lawyer defending the case is at ease as to his procedure. In that situation, the case is handled with effectiveness and speed.

I am already convinced that the Omnibus Pretrial Conference assures a faster and more just resolution of the criminal cases, and allows the lawyer grounded in civil procedures to furnish competent representation for his client.

16. See the statistics gathered in NIMMER, *The Omnibus Hearing* (1971).

APPENDIX

I. THE PROPOSED OMNIBUS PRETRIAL FORM
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
DIVISION

UNITED STATES OF AMERICA,)
)
 vs.) Criminal No. _____
)
 _____) 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 the item number 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 or 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 government 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.

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.
7. 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.
8. 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:

9. 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.
10. 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).
11. 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.
12. Nature of Defense.
 - a. Defendant states that his defense includes: (circle appropriate response)
 - 1) lack of knowledge of contraband
 - 2) alibi

- 3) diminished 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 (will) (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.
13. 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.

14. 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)
 - a) 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) FRCP SHALL BE ACCEPTED AS HAVING BEEN TIMELY MADE)

15. 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 _____.)
(Granted) (Denied) _____
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)

16. 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 _____

II LETTER FROM CLERK EXPLAINING PROCEDURE

MEMBERS OF THE BAR CONCERNED WITH CRIMINAL CASES:

Enclosed you will find Omnibus Order form on criminal pre-trial.

You are urged to read and study the procedures outlined. Then consult your client and advise the Court and the United States Attorney in writing within three (3) days after the receipt of this letter whether or not you and your client will participate in the Omnibus procedure. Forms are enclosed for your convenience.

If you and your client elect to participate, it will be assumed that government counsel is also willing to do so, unless advice to the contrary is given to you and the Court in writing within three (3) days after receipt of your election. Counsel who participate should meet with each other on or before the pre-trial date for the purpose of engaging in required discovery, entering upon plea discussions, and reviewing the Omnibus Pre-Trial Form by circling the paragraph numbers with respect to which action is requested. The form should be completed to the fullest extent possible. In all cases an Omnibus hearing will be scheduled unless otherwise ordered by the Court.

You are reminded that Omnibus must be a cooperative two-way street to be effective. This does not mean, however, that the defendant must sacrifice any of his constitutional rights, because any disclosure made by him will ordinarily be with respect to those matters which he himself intends to disclose at the trial.

If, after reading the enclosed material, you have any questions about the procedures, you may contact the Court and its staff for clarification.

Very truly yours,

/S/ CLETUS J. SCHMIDT
CLETUS J. SCHMIDT, CLERK

III LETTER OF EXPLANATION

MEMBERS OF THE BAR CONCERNED WITH CRIMINAL CASES:

This letter is written and the recommendations are made after a conference between Judge Benson and Judge Van Sickle.

Rule 12(b)(1) of the Federal Rules of Criminal Procedure provides that the time to raise motions which can be determined without trial of the general issues, is before trial.

Rules 15, 16, 17 and 17.1, all look to the maximum use of discovery procedure in the manner which has proved so successful in civil cases.

Because this is an area where contests quickly develop over protection of defendant's rights, we feel that participation in the program must be by the defendant's express permission.

We enclose:

1. Original and two copies of a letter of consent. This letter of consent is to be used in accordance with the third paragraph of the second enclosure,
2. A copy of a letter instructing you how to use the Omnibus pre-trial hearing, and
3. A copy of the proposed order on the Omnibus hearing procedure.

We argue for use of the Omnibus hearing procedure because we feel that it assures that any lawyer undertaking a criminal defense will adequately represent

his client, and that disposition of the case can be made by all parties with a full knowledge of all the relevant facts.

We ask that you complete as much of the discovery prior to the pre-trial as is possible.

Yours truly,

/S/ BRUCE M. VAN SICKLE
BRUCE M. VAN SICKLE
Judge, U. S. District Court

IV WRITTEN CONSENT OR REFUSAL FORM

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: _____