

Gangs

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GANGING UP ON GANGS
HOW THE FEDS USE RICO TO PROSECUTE GANGS AND HOW TO DEFEND IT

presented by

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I. BACKGROUND

The RICO (Racketeer and Influenced and Corrupt Organization Act) was originally passed in 1970 to deal with the Mafia. RICO is attractive to federal prosecutors because it permits the conviction of individuals for being members of a group or "enterprise" that commits crime, rather than simply focusing on prosecuting each individual for their individual crimes. In 1994, the Clinton anti-crime package beefed up the RICO laws, adding the death penalty as a possible sentence for RICO convictions, and made the law very attractive to federal prosecutors seeking to stem gang activity. Back then, the feds looked at gangs like the Crips and the Bloods. Now the gangs they look at are Sur 13, MS 13 (Mara Salvatrucha 13), La Gran Familia, 18th Street, and others.

In October of 1997, the US Attorney's manual was amended to urge prosecutors to consider prosecuting gangs for RICO-related charges of Violent Acts in Aid of Racketeering Activity under 18 U.S.C. §1959. However, bear in mind that all RICO prosecutions must be approved by the Criminal Division of the Department of Justice.

In the Northern District of Georgia, there have been many different types of gang prosecutions. Some of the more prominent gang prosecutions here have been a large Vietnamese gang, various gangs allegedly related to La Gran Familia and Sur 13, as well as a Rap Group and their entourage prosecuted as a gang.

Defending these cases can be quite daunting for several reasons. First and foremost, there are frequently many acts of violence that can create a guidelines nightmare. In addition, the defendants are often afraid to cooperate. Moreover, the prosecutors are quite protective of the witnesses. Frequently, you will receive little or no

discovery to aid in your preparation. Investigation can be quite tedious as your client may be accused of multiple criminal acts spanning time frames of up to ten years.

Since every gang case is different, it is impossible to provide a roadmap to defending every such case. However, these materials are an effort to jumpstart your own creativity in defending the case, negotiating the case, and mitigating the sentencing exposure your client faces in a gang case.

II. WHERE DO I BEGIN?

In a gang case, your client may likely already be in custody on a prior state conviction which is also alleged as an overt act of the federal RICO conspiracy or a substantive predicate act of the substantive RICO charge. If so, you can skip to the next section.

If your client was free, however, prior to the arrest on the RICO indictment, it is important to aggressively pursue a bond even in the face of what feels to you like a certain loss. Why? These RICO cases take years! The Brownside Locos case was indicted here in the N.D. Ga in 2002. One of the lawyers in the case told me that the last two defendants in the case are going to trial next month in 2006. In the Diablos case (that's the rap group), the first defendant was arrested in early 2003. Sentencing took place in the Summer of 2005. If you get your client a bond, he will have at least two years to straighten up, get a job, support his family, i.e. give you lots of great stuff to use at sentencing. The benefit of this cannot be minimized. Not only do the Judge's go easy on these guys, even the prosecutors seem to give you better deals when your guy is out and working.

Another reason to go after a bond even when you think you have no shot is simply to use the opportunity as a great PR opportunity for your client. Often in federal gang cases, the charges acts are from many years ago. If your client is now 25, has two kids, and is working, even if he participate in 7 drive-by shootings when he was 19, you want the Judge and the prosecutor to hear it now. So appeal the denial of bond to the District Judge, even if it is just to educate everyone about how he has changed. Even after losing such a motion, the hearing can change the whole tenor of the case. In these long cases, you may not get back in front of the District Judge for two years. During that time, the Judge may already be forming his opinion of the hierarchy in the organization.

Attached hereto as Appendix A is such a bond appeal. In addition, you may want to consider a motion to reconsider bond where the case is taking forever, or where there is a changed circumstance. Appendices B, C, and D. These motions also lost, but the clients got enormous benefits at sentencing in large part because of the PR from these bond motions.

III. PRETRIAL MOTIONS - WHAT DO I FILE?

1. A Bill of Particulars

In a large RICO conspiracy, these are very important and often granted. Appendix E.

2. Severance

(a) Frequently other alleged gang members will have denied the existence or their membership in a gang. You can seek to sever and to use the statements yourself. Appendix F.

(b) If your client is charged with a substantive offense, like a drug charge, and your defense is that it was not connected to the enterprise, move to sever and if you lose, remember to renew your motion to sever at the close of the government's case where they fail to link the substantive drug activity to the enterprise. Appendix I.

3. Motion to Enforce Proffer Agreement (and get early discovery)

The government gets firmly entrenched in their version of what happened and will often accuse your client of lying if he tried to cooperate and his story does not match the government's version of events. In gang cases, they government will try to revoke your proffer agreement. You can move to enforce the agreement and for disclosure of what they are basing their allegation that your client was untruthful. This could be the only real discovery you get in the case. Appendix G and J.

4. Motion to Unseal Pleas of Co-defendants

In these cases, the government usually files all of the pleas under seal. Often things are said during the plea colloquy that you need to know. Before trial, move to unseal all those pleas so you can order the transcripts. Appendix K.

5. Motion to Obtain Presentence Reports of Co-operating witnesses

Appendix L.

6. Motion to Redact Indictment

If you have convinced the government that some of the overt acts your client was originally named in are not correct, make sure they redact the indictment before trial.

Appendix M.

IV. HOW DO I INVESTIGATE SUCH A BIG CASE?

Since you will likely receive little meaningful discovery, it is up to you to investigate the case. That can be a pretty big task as the conspiracy might have spanned more than five years and involved hundreds of overt acts. I always take the discovery we received and organize it according to overt acts charged in the indictment. Then, I take each overt act in which my client is alleged to be involved and treat each one as if it is its own case. If that "case" started as a state prosecution, it is important to obtain the complete file from the state law enforcement agency and state prosecutor's office. From there, investigate each of the overt acts exactly as if you were preparing to try each one separately. You will need an investigator and you will need more than \$1600.00. Appendix H is a motion for funds.

V. DEVELOPING A DEFENSE

These are the basic theories of defense in a RICO/Gang case:

1. There is no enterprise
2. My guy is not a member of the enterprise
3. My guy did some bad stuff but none of the stuff was in furtherance of the enterprise
4. My guy did not do any of the bad stuff alleged

These can be used in combination. You may want to consider using an expert to help you develop these defenses. There are gang experts around the country who can assist with this.

Check out www.streetgangs.com and Alex Alonso or www.gangcolors.com and Lisa Taylor-Austin.

The government may try to qualify one of their agents as an expert. One such agent has his own website. Check out www.joemerling.com.

VI. NEGOTIATING YOUR BEST DEAL

1. Using the racketeering acts/substantive counts with maximum sentences to cap your exposure
2. Lock them in and make it tight.

At your plea colloquy, do not admit any acts your client does not agree to or that you do not want included at sentencing. Use your investigation to get the government to agree on the record that certain overt acts they cannot prove.

3. Meet with the probation officer before you plead to go over how the guidelines are going to work. This is not a drug case and those guidelines can be really tricky.
4. Do not agree to a guidelines sentence if you can help it. A great sentencing memorandum could save you years. Appendix N.

Possible sentencing issues:

- Lengthy Pretrial Detention
- Voluntary Surrender
- Post-offense rehabilitation
- Delay between offense and Indictment

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES,)
) Case No. 1:03-CR-155-CAP
v.)
)
REGINALD WHITE,)
)
Defendant.)

DEFENDANT'S DE NOVO APPEAL FROM COURT'S
DENIAL OF MOTION FOR BOND

COMES NOW, the defendant Reginald White, by and through his undersigned counsel and shows the court the following:

BACKGROUND

1.

A detention hearing was held on July 1, 2003. At that time, the pretrial services report indicated that there was a bench warrant outstanding for this defendant. The defendant submitted to the court that he was not the individual wanted on that warrant. The court indicated that bond would be reconsidered in the event that the defendant was able to obtain documentation that the warrant was not for him.

STATEMENT OF FACTS

2.

The bench warrant presented to the court reflected that a Reginald White with the birth date of 8/3/1975 failed to appear on a simple battery (misdemeanor) case in Fulton County, Georgia. The social security number provided by that individual was 257-35-7178.

This defendant's social security number is 254-27-1140. The City of Atlanta jail identified the true name of the individual as

Carlos Marques White, not Reginald White.

3.

The Sheriff has provided a full booking history on this defendant, Reginald White, which was presented to the Magistrate Judge. The government has conceded that the warrant was not for this defendant.

4.

In addition, there is an allegation that the defendant violated some probation that he purportedly on. However, as was presented to the Magistrate Judge, this defendant was in the custody of the Georgia Department of Corrections at the time he was allegedly failing to appear on probation.

5.

Substantial evidence was presented at the bond hearing that this defendant has significant ties to the Atlanta area, and has a steady work history with an employer which was verified to the court. This defendant also provided a transcript of his recent technical school attendance and grades. The court initially denied bond, but advised the defendant if he could show proof that there was no outstanding warrant, he could ask that bond be reconsidered. The defendant did so. The government responded. Despite the new information, the defendant was denied bond.

CITATION OF AUTHORITY

6.

18 U.S.C. §3142(b) mandates release on bond **unless** the court determines that such will not reasonably assure the person's

appearance or will endanger the safety of another person or the community. As set forth in 18 U.S.C. § 3142(g), the factors to be considered are the following:

1. The nature and circumstance of the offense charged.
2. The Weight of the Evidence
3. History and Characteristics of Defendant
4. Danger to the Community

Considering all these factors, the court should only detain a defendant where there is no combination of conditions that will assure appearance or prevent risk to the community. In this case, the defendant has already presented sufficient information to rebut the presumption. He presented a letter from his employer stating that he was and will continue to be employed. He presented his school records demonstrating that he is certified in the trade in which he is working, as well as the hours of attending school and grades he received. Significantly this was accomplished during the same time period of the alleged conspiracy. During a large portion of the alleged conspiracy, Mr. White was incarcerated and could not possibly have been participating. Numerous members of his family appeared in court at the hearing, demonstrating his clear ties to the community. He supports a wife and young children. His criminal history is not violent. He has always appeared in court. Thus, the defendant submits that this court can craft conditions sufficient to achieve the purposes of the court. The defendant is willing to remain on home monitoring while on bond. This would enable him to continue to work and support his family.

7.

It must be remembered that we are dealing with the deprivation of the liberty of [an individual] who is presumed to be innocent.

United States v. Fisher, 618 F. Supp. 536, 537-8 (D.C. Pa. 1985), *aff'd*, 782 F.2d 1032 (3d Cir.), *cert. denied*, 107 S.Ct. 231 (1986).

8.

The government has only proffered the information contained in the indictment. That information seems to be entirely based on undisclosed, confidential informants. Discovery does not include any reports of interviews or witness statements, or direct evidence showing any ties between Mr. White and the charged conspiracy. Thus, the "evidence" before the court has no weight at all. Since the source of the information has not been disclosed, the court cannot determine that the weight of the evidence is sufficient to deny this defendant bond.

WHEREFORE, the defendant submits that the court should grant this defendant a reasonable bond and set a bond with specific conditions sufficient to accomplish the goals of the statute.

Respectfully submitted,

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Georgia Bar No. 123380

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(404) 355-3031
Counsel for Reginald White

CERTIFICATE OF SERVICE

I hereby certify that I have on this day served a true and correct copy of the within and foregoing Defendant's De Novo Appeal From Court's Denial of Motion for Bond upon counsel by depositing a copy of the same in the United States Mail with First Class postage prepaid, addressed as follows:

Yonette Sam Buchanan, AUSA
Assistant United States Attorney
600 Richard B. Russell Building
75 Spring Street, S.W.
Atlanta, Georgia 30335

This the _____ day of _____, 2003.

Leeza R. Cherniak
Georgia Bar No. 123380
Attorney for Defendant

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

UNITED STATES OF AMERICA)
)
v.) Case No.: 2:04-CR-000042
ADAM CRUZ,)
)
Defendant.)

DEFENDANT'S MOTION FOR RECONSIDERATION OF BOND

COMES NOW, the defendant Adam Cruz, by and through his undersigned counsel and shows the court the following:

1.

Adam Cruz made his initial appearance on October 20, 2004. Detention was ordered on October 25, 2004.

2.

The defendant's only criminal history is a charge of DUI from which he received 12 months probation in 2002.

3.

At the time the initial bond determination was made, defendant Cruz was under indictment in the Superior Court of Hall County. The State indictment was nolle prossed on April 18, 2005. See Exhibit A.

4.

Due to this change in circumstances, the defendant respectfully requests a hearing on this motion for reconsideration of bond. The defendant has been gainfully employed in the past, and can present evidence at a hearing that his previous employer is willing to re-employ him in the event that he is released on bond.

5.

The instant case has been declared complex and is likely to take more than a year to reach trial. It is not atypical for cases of this nature to take nearly two years from indictment to trial. Courts have found that sixteen months of pretrial incarceration exceed the due process limitations on the duration of pretrial confinement. See United States v. Zannino, 798 F. 2d 544 (1st Cir. 1986); United States v. Hare, 873 F. 2d 796 (5th Cir. 1989); United States v. Claudio, 806 F. 2d 334 (2d Cir. 1986); United States v. Melendez-Carrion, 790 F. 2d 984 (2d Cir. 1986) (a detention lasting 8 months was unconstitutional punishment when based on the ground of dangerousness, but may be within constitutional limits if based on the risk of flight).

6.

Courts have ordered release to a half-way house or the use of ankle monitors where the length of pretrial detention becomes so long as to offend the notion of due process. See United States v. Ailemen, 165 F.R. D. 571 (N.D. Ca. 1996); United States v. Infelise, 934 F. 2d 103 (7th Cir. 1991); United States v. Gould, 2003 U.S. Dist. LEXIS 10166 (M.D. LA 2003). Conditions of pretrial detention are actually much more restrictive than conditions of incarceration in the federal prison system when serving a sentence.

7.

In this case, now that the defendant is not under a separate State indictment, and based on the expected length of his pretrial

detention, the defendant respectfully requests the court to reconsider whether there are any conditions of release that would satisfy the court's concerns. The defendant respectfully submits that home monitoring and/or halfway house would be appropriate conditions, along with a surety bond, to insure appearance in court and the safety of the community. This would allow the defendant to work and assist in supporting the family, while remaining restricted from other activities.

8.

It must be remembered that we are dealing with the deprivation of the liberty of [an individual] who is presumed to be innocent.

United States v. Fisher, 618 F. Supp. 536, 537-8 (D.C. Pa. 1985), aff'd, 782 F.2d 1032 (3d Cir.), cert. denied, 107 S.Ct. 231 (1986)

WHEREFORE, the defendant respectfully requests that the detention order be vacated and that the court craft specific conditions of bond (such as half-way house or ankle monitoring) that would sufficiently address the concerns relating to bond.

Respectfully submitted,

/s/ Leeza R. Cherniak
Leeza R. Cherniak
Georgia Bar No. 123380

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Counsel for Adam Cruz

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CERTIFICATE OF SERVICE

I hereby certify that I have on this day served a true and correct copy of the within and foregoing Defendant's Motion for Reconsideration of Bond upon counsel by upon counsel using the ECF system which will automatically send e-mail notification of such filing to opposing counsel, Robert McBurney.

This the 24th day of May, 2005.

/s/ Leeza R. Cherniak
Leeza R. Cherniak
Georgia Bar No. 123380
Attorney for Defendant

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hearing, as well as some additional information which was not available at the hearing. See Exhibit "A" and "B".

The defendant was arrested on this indictment on October 20, 2004. He was ordered detained on October 24, 2004. At the time of his arrest, he was living at home with his mother and father, and his four siblings who range in age from 2 to 20. The allegations in the indictment were used to find that he was a danger to the community. Defendant Cruz is named in three overt acts:²

Overt Act 9(h): An assault with a firearm that allegedly occurred on November 11, 2000.

Overt Act 9(m): Possession of cocaine that allegedly occurred on September 26, 2002.

Overt Act 9(p): Possession of marijuana that allegedly occurred on December 12, 2002.

At the hearing, the defendant introduced the dismissal of the state charge that is Overt Act 9(h). Significantly, that overt act, which is the only allegedly violent act with which this defendant is charged in the indictment, was dismissed by Assistant District Attorney John Warr³ because there was no evidence against this defendant other than "mere presence." The dismissal order also

²The defendant is not named in Overt Act 9(v), which is the subject of the State indictment which was recently nolle prossed, as noted above. However, the government has maintained that this defendant was involved in that act which is alleged to have occurred in May 2003.

³John Warr is prosecuting the instant case.

noted that there were NOT two qualifying offenses against this defendant under the Street Gang Terrorism and Prevention Act.

The defendant noted at the hearing on June 8, 2005, that this admission that this overt act was based on evidence so thin that it had been dismissed because the evidence showed only mere presence, should have a bearing on this court's decision regarding bond.

In addition, the defendant introduced substantial evidence, that even if he was allegedly a danger to the community during the period of time surrounding the alleged overt acts, at the time of his arrest he was not any kind of danger. Specifically, the defendant introduced a letter from his employer at Lanier Cold Storage verifying that he was employed full-time up until his arrest. The employer even held the job open for him after his arrest, until bond was denied a few days later.

In addition, the defendant's Uncle, Lucio Ramirez, who is a manager at Lanier Cold Storage, appeared at the bond hearing and advised the court that there was a position for Cruz and he would be rehired if he were to receive a bond now. In addition, Cruz introduced evidence that in the year 2004, prior to obtaining permanent employment at Lanier Cold Storage in June of 2004, he had worked for Spherion, earning \$4078.00 and Tyler Staffing, earning \$1474. The W-2's supporting this employment were introduced at the hearing. The defendant proffered that he earned around \$7.00/hour at these jobs. Thus, it is clear that he was working full-time at

temporary jobs prior to obtaining the permanent employment. The W-2 for Lanier Cold Storage for 2004 reflects income of \$7670.83.⁴

At the time of the hearing, the Magistrate Judge inquired as to whether or not the defendant had evidence of his employment in previous years. Same was not available at the hearing. However, since that time the undersigned has obtained the tax returns for those years. Same reflect that in the year 2003, the defendant earned \$10,795, working mostly temporary jobs. Again, at approximately \$7.00/hour, this indicates that the defendant worked full-time nearly every week of the year 2003. Significantly, the evidence which was proffered at the hearing is that the defendant also attended night school during that same time. The year 2002, the defendant graduated from High School (in May of 2002).⁵ In 2002, the defendant's tax return reflects that he earned \$8291.00.⁶

The defendant's father was present in the courtroom and verified the proffer of counsel that just prior to his arrest, and

⁴The defendant was earning approximately \$9.00 per hour at Lanier Cold Storage; therefore, it is evident that he spent most waking hours at work during the period immediately preceding his arrest.

⁵The evidence at the hearing reflected that the defendant completed high school in May of 2002, but lacked some English credit for his diploma. Thereafter, he attended night school to complete those credits and received a high school diploma that was dated May of 2002, which is when he should have graduated with his class.

⁶Other evidence at the trial reflected that the defendant has been working since he was 15 years old. His W-2 for 2001 reflects income of \$5126.00.

while Cruz was working full-time at Lanier Cold Storage, Cruz was also working weekends with his father as "DJ" for weddings and private parties.

In court for the hearing were: Jesus Ramirez, Cruz' uncle, Lucio Ramirez, Cruz' uncle, Cristina Ramirez, Cruz' aunt, Marco Ramirez, Cruz' uncle, Estrella Ramirez, Cruz' aunt, as well as his mother, father, and four siblings.

In addition, Brenda Davidson, a project coordinator at Siemens Automotive in Gainesville, testified on Cruz' behalf. She testified that he had worked for her on and off for several years through Spherion temporary agency. She stated that he was an excellent worker, always willing to go out of his way to help. She testified that she specifically requests him when she calls Spherion for temporary help. Also, in court was a friend of the family, Tabitha Martin.

Counsel proffered, and each of the witnesses in the courtroom verbally assented, that none of them, all of whom know Adam Cruz in different capacities, feel that Adam Cruz is a danger to the community.

The defendant respectfully submits that all of these facts sufficiently rebut the presumption that Adam Cruz constitutes a danger to the safety of the community. More importantly, this overwhelming amount of favorable evidence about Mr. Cruz reflect that there are certainly conditions sufficient to ensure the safety

of the community, while allowing Mr. Cruz to reside at home and work.⁷

ARGUMENT AND CITATION OF AUTHORITY

18 U.S.C. §3142(b) mandates release on bond **unless** the court determines that such will not reasonably assure the person's appearance or will endanger the safety of another person or the community. As set forth in 18 U.S.C. § 3142(g), the factors to be considered are the following:

1. The nature and circumstance of the offense charged.
2. The Weight of the Evidence
3. History and Characteristics of Defendant
4. Danger to the Community

Considering all these factors, the court should only detain a defendant where there is no combination of conditions that will assure appearance or prevent risk to the community. In this case, the defendant has already presented sufficient information to rebut the presumption. The defendant respectfully submits that the Magistrate Judge erred in not specifically considering whether or not Cruz is a danger to the community at the present time, instead of focusing on unproved allegations from two years earlier.

In addition, prior to denying the motion, the court should

⁷The only prior conviction of this young man is a DUI.

consider the various alternatives to detention, such as curfews⁸, house arrest, and electronic monitoring. In addition, the defendant submits to the court that if he continues to be detained, that detention will likely exceed one year, as the case has not yet been certified for trial.

It must be remembered that we are dealing with the deprivation of the liberty of [an individual] who is presumed to be innocent.

United States v. Fisher, 618 F. Supp. 536, 537-8 (D.C. Pa. 1985), aff'd, 782 F.2d 1032 (3d Cir.), cert. denied, 107 S.Ct. 231 (1986).

CONCLUSION

Whereas, the Court had already found that Adam Cruz is not a risk of flight, the new information presented is sufficient to show that there are conditions of bond that can be crafted to ensure the safety of the community, while allowing the defendant to be free to assist with his defense and work full-time in support of his family.

Respectfully Submitted,

/s/ Leeza R. Cherniak
Leeza R. Cherniak
Georgia Bar No. 123380
Attorney for Adam Cruz

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⁸The defendant notes that Lanier Cold Storage has advised that the current opening for Cruz at that company would be for night shift.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this day served a true and correct copy of the within and foregoing De Novo Appeal From Magistrate Judge's Order Dated June 9, 2005 Denying Bond upon counsel using the ECF system which will automatically send e-mail notification of such filing to opposing counsel, H. Allen Moye.

This the 17th day of June, 2005.

/s/ Leeza R. Cherniak
Leeza R. Cherniak
Georgia Bar No. 123380
Attorney for Defendant

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA)
)
v.) Case No.: 1:03-CR-531-BBM
) 1:04-CR-474-BBM
ALEXANDRO LOYA-PLANCARTE,)
)
 Defendant.)
)

DEFENDANT'S MOTION FOR RECONSIDERATION OF BOND

COMES NOW, the defendant by and through his undersigned counsel and shows the court the following:

1.

Defendant was arrested on August 8, 2003. Detention was ordered.

2.

The courts have found that sixteen months of pretrial incarceration exceed the due process limitations on the duration of pretrial confinement. See United States v. Zannino, 798 F. 2d 544 (1st Cir. 1986) ("even so, we shall assume that in many, perhaps most, cases sixteen months would be found to so exceed the due process limitations on the duration of pretrial confinement").

3.

"[W]hen does the duration of pretrial detention violate due process?" United States v. Hare, 873 F. 2d 796 (5th Cir. 1989). The Fifth Circuit held that the answer to this question must be reached on a case-by-case basis. Id. at 801. However, factors relating to the length of pretrial detention must be considered,

such as the length of pretrial detention that has already occurred or may occur in the future, the non-speculative nature of the future detention, the complexity of the case, and whether the strategy of one side or the other occasions the delay. Id. In Hare, the detention had already spanned more than ten months when the Fifth Circuit remanded for the District Court to consider the length of delay.

4.

In this case, Alexandro Loya-Plancarte has been held in pretrial detention for twenty months.

5.

Defendants held for more than 14 months have been found to have suffered a violation of their substantive due process rights. See United States v. Claudio, 806 F. 2d 334 (2d Cir. 1986). In Claudio, the Second Circuit noted that Chief Judge Feinberg, in United States v. Melendez-Carrion, 790 F. 2d 984 (2d Cir. 1986), noted that a detention lasting 8 months was unconstitutional punishment when based on the ground of dangerousness, but may be within constitutional limits if based on the risk of flight.

6.

The Speedy Trial Act states that priority should be given to incarcerated defendants, prescribing that their trials should begin within 90 days after the start of detention. Id. at 340. During the debate of the Bail Reform Act, the Senate was assured that 90 days is the "worse case limit." 130 Cong. Rec. S941 (statement of Senator Thurmond. Id. at 340.

7.

It is not sufficient for the government to simply blame the complexity of the case. The government elected to re-indict after losing the motion to suppress. See United States v. Salerno, supra, (Feinberg, C.J. dissenting on other grounds) (in complex case the government may have to either arrange for swift procedure [transcripts] or pretrial detention may not be available); Warneke, infra ("The government is not blameless . . . Mixing too many defendants with too many charges is a surefire recipe for delay").

8.

Defendants are protected from excessive pretrial detention by the Due Process Clause of the Fifth Amendment, which permits release if the defendant is held too long. See United States v. Warneke, 199 F. 3d 906 (7th Cir. 1999). The defendant's remedy under such circumstances is a review of the detention order. Id. at 908. In Warneke, the defendants were held in pretrial detention for 17 months before the indictment was dismissed and a superseding indictment issued. Issuing an opinion in December of 1999, the Seventh Circuit noted that it was "deeply concerned" about the length of the delay and that if the case was not brought to trial by the Spring, "the district court will be obliged to consider ordering a less restrictive alternative to straight pretrial detention." Id. at 909.

9.

Courts have ordered release to a half-way house or the use of ankle monitors where the length of pretrial detention becomes so

long as to offend the notion of due process. See United States v. Ailemen, 165 F.R. D. 571 (N.D. Ca. 1996); United States v. Infelise, 934 F. 2d 103 (7th Cir. 1991); United States v. Gould, 2003 U.S. Dist. LEXIS 10166 (M.D. LA 2003).

10.

The defendant respectfully submits that the unconstitutional and unconscionable length of the pretrial detention in this case merits the court's reconsideration of the earlier detention order.

11.

It must be remembered that we are dealing with the deprivation of the liberty of [an individual] who is presumed to be innocent.

United States v. Fisher, 618 F. Supp. 536, 537-8 (D.C. Pa. 1985), aff'd, 782 F.2d 1032 (3d Cir.), cert. denied, 107 S.Ct. 231 (1986)

WHEREFORE, the defendant respectfully requests that the detention order be vacated and that the court craft specific conditions of bond (such as half-way house or ankle monitoring)

that would sufficiently address the concerns relating to bond but put an end to the indefinite pretrial detention of Mr. Loya-Plancarte.

Respectfully submitted,

/s/ Leeza R. Cherniak
Leeza R. Cherniak
Georgia Bar No. 123380

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Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I have on this day served a true and correct copy of the within and foregoing Defendant's Motion for Reconsideration of Bond upon counsel by upon counsel using the ECF system which will automatically send e-mail notification of such filing to opposing counsel, Robert McBurney.

This the 25th day of April, 2005.

/s/ Leeza R. Cherniak
Leeza R. Cherniak
Georgia Bar No. 123380
Attorney for Defendant

LAW OFFICES OF LEEZA R. CHERNIAK
Suite 300
1800 Peachtree Street
Atlanta, Georgia 30309
(404) 355-3031

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,)
)
v.) CRIMINAL ACTION
) NO. 1:03-CR-155-CAP
REGINALD WHITE,) (Second Superseding)
) Defendant.)

DEFENDANT WHITE'S MOTION FOR BILL OF PARTICULARS
AND MEMORANDUM OF LAW IN SUPPORT THEREOF

COMES NOW, the defendant Reginald White, by and through his undersigned counsel, and moves the court for a bill of particulars and shows the court the following:

1.

Rule 7(f), Federal Rules of Criminal Procedure provides:

"the Court may direct the filing of Bill of Particulars. A Motion for a Bill of Particulars may be made before arraignment or within ten days after arraignment or at such other later time as the court may permit. A Bill of Particulars may be amended at any time subject to such conditions as justice requires."

2.

By this motion, this defendant seeks particulars as to the elements and participation in the alleged conspiracy and alleged roles in the alleged conspiracy. The indictment is insufficient to inform the defendant of what the charges against the defendant are, thus a Bill of Particulars is needed. Cefalu v. United States, 234 F.2d 522 (10th Cir. 1956); and United States v. Slaughter, 89 F.Supp. 205 (D.D.C. 1950).

3.

The fact that the indictment is valid is no defense to a Bill

of Particulars, thus the underlying purpose of rule 7(f) is not to cure defects in the government pleadings, but rather to "furnish the defendant further information respecting the charge stated in the indictment when necessary to the preparation to the defendant's defense, and to avoid prejudicial surprise at trial." United States v. Haskin, 345 F.2d 111, 114 (6th Cir. 1965); Pipkins v. United States, 243 F.2d 491 (5th Cir. 1957); United States v. Beardon, 423 F.2d 805, 809 (5th Cir. 1970) and where the information sought is necessary to the preparation of a defense or to prevent surprise, then the "accused is entitled to this as of right" regardless of whether such disclosure would be privileged or otherwise.

4.

NAME OF CO-CONSPIRATORS

The names of all co-conspirators who are not named in the indictment but are known to the prosecution, should be provided by the government by Bill of Particulars. United States v. Tanner, 279 F.Supp. 457, 475 (N.D. Ill. 1967). In this case, where the indictment actually contains language such as "others **known** to the grand jury," but not identified, all unindicted co-conspirators must be provided. See Second Superseding Indictment at 5, 12(¶18,21,23,24) 13 (¶29), 15(¶¶37,38,39), and 16(¶42).

OVERT ACTS

5.

The overt acts which the government contends were committed in the furtherance of the alleged conspiracy and upon which the

government may rely at trial shall be provided by the government by Bill of Particulars. United States v. Leach, 427 F.2d 1107, 1110 (1st Cir. 1970). The precise time of day, place and city where the overt acts of the alleged conspiracy were committed should be produced by the government's Bill of particulars, since defendant is entitled to be appraised of the precise time and date within a city in which an offense is alleged to have occurred, as well as the time and place where each overt act of conspiracy is alleged to have been performed, United States v. Crisona, 271 F.Supp. 150, 156 (S.D. N.Y. 1967). The particular acts of a conspiracy alleged to have been personally performed by defendants shall be provided by the government's Bill of Particulars. United States v. Tanner, 279 F.Supp. 457, 474-476.

6.

The twenty-six page indictment names sixteen defendants and includes ten counts, plus forfeiture counts. The indictment alleges thirteen paragraphs under the section "Manner and Means of the Enterprise." Most of these paragraphs make vague assertions such as "Certain members of the enterprise would obtain tattoos and wear clothing and jewelry bearing the name of the enterprise" or "Certain members of the enterprise would utilize stolen automobiles which would then be used to commit crimes." The defendant has no way of knowing whether he is alleged to have been involved in any of these vague allegations. Moreover, the time span of the alleged RICO conspiracy is "from in or about 1997, to the return of this indictment [August 12, 2003]." That is a time period of at least

six years. In addition, even the few specific overt acts alleged as to this defendant are very vague in time frame. For example, on page 12 of the superseding indictment, paragraph 19, it is alleged that "In or about 2001" Reginald White brandished weapons and threatened a person known to the grand jury. The date of this alleged occurrence is not even certain as to the year it occurred, no less any particular date. The alleged "victim(s)" of the occurrence(s) are apparently known to the grand jury, but not disclosed to this defendant. There is nothing in the discovery materials provided thus far which provides any information more particular than this vague assertion in paragraph 19.

DEFENDANT'S MEMBERSHIP IN THE CONSPIRACY

7.

The time, date, place and manner in which the defendant is alleged to have become a member of the charged conspiracy should be provided by the government's Bill of Particulars. United States v. Tanner, supra. The manner in which the defendant is alleged to have aided, abetted, conspired and confederated or caused the commission of the offense charged, including the dates, places and nature of acts of which it is claimed that the defendant accomplished same should be provided by the government's Bill of Particulars. United States v. Tucker, 473 F.2d 1290 (6th Cir. 1973); United States v. Baker, 262 F.Supp. 657 (D.D.C. 1966). The indictment appears to span at least a six year period. Thus, the defendant should be put on notice as to when he is alleged to have entered the conspiracy, as well as when, if ever, he discontinued

participation in the conspiracy.

PERSONS PRESENT AT OFFENSE

8.

The names of any persons present at or who participated in the commission of the offense should be provided by the government by Bill of Particulars. United States v. Covelli, 210 F.Supp. 589 (N.D. Ill. 1962); United States v. Tanner, 279 F.Supp. 457 (N.D. Ill. 1967); United States v. Rimanich, 422 F.2d 817 (7th Cir. 1970). The only law enforcement reports provided in discovery are for the few occurrences alleged in the indictment that happened to have resulted in arrests by state or local law enforcement agencies. Thus, there is no discovery indicating what evidence might support the allegation that the defendant was a leader of this alleged enterprise (Second Superseding Indictment at 6); there is no discovery regarding when, why, or at whom this defendant is alleged to have brandished weapons and threatened "persons known to the grand jury." (Second Superseding Indictment at 12). The defendant cannot possibly prepare any defense to these allegations based on the paucity of the information provided by the indictment unless a bill or particulars is granted.

ACTS UPON WHICH GOVERNMENT INTENDS TO RELY
WITH REGARDS TO THE ALLEGED CONSPIRACY

9.

With regard to the particulars requested relating to the alleged conspiracy, it is imperative that the government provide the defendant with the precise period of said alleged conspiracy, as well as when such conspiracy allegedly began in order to

determine whether or not certain facts or conducts fall within the applicable statute of limitations and to adequately prepare defenses thereto and to be provided with particulars as to the names of the alleged co-conspirators who personally committed the various acts alleged therein in order to adequately prepare the defense thereto. United States v. Tanner, 279 F.Supp. 457, 474-476.

10.

This defendant spent a period of time encompassed by the indictment in the custody of the Georgia Department of Corrections. After his release therefrom, this defendant attended school full-time and then worked full-time. If a bill of particulars is provided which provides the date and time of his alleged involvement in any acts allegedly linked to the enterprise, this defendant will likely be able to verify and prove an alibi defense. The government's failure to either provide notice in the indictment or any discovery which provide such information has deprived this defendant of any ability to prepare a defense.

11.

All requests in the motion for Bill of Particulars are essential facts in the crime alleged and should be granted pursuant to United States v. Lupino, 171 F.Supp. 648 (D. Minn. 1958); and United States v. Williams, 203 F.2d 572 (5th Cir. 1953). Without same, defendant cannot adequately prepare a defense and will be subject to prejudicial surprise at trial. If the defendant does not receive this information, counsel will not be able to provide effective assistance of counsel.

WHEREFORE, defendant prays this court enter an order directing the government to file a Bill of Particulars in response to defendant's request herein.

Respectfully submitted,

Leeza R. Cherniak
Georgia Bar No. 123380
Attorney for Defendant

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Suite 300
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(404) 355-3031

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CERTIFICATE OF SERVICE

I hereby certify that I have on this day served a true and correct copy of the within and foregoing Motion for Bill of Particulars and Memorandum of Law In Support Thereof upon counsel for all parties by depositing a copy of the same in the United States Mail with First Class postage prepaid, addressed as follows:

Yonette Sam-Buchanan
Assistant United States Attorney
600 Richard B. Russell Building
75 Spring Street, S.W.
Atlanta, Georgia 30303

This the _____ day of _____, 2003.

Leeza R. Cherniak
Georgia Bar No. 123380
Attorney for Defendant

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in the same areas as the Diablo's. Oliver blurted out that no one had the authority to speak for the "Diablo's" other than himself and "Barry" and showed concern that these individuals had in fact claimed any affiliation.

3.

Co-defendant Oliver seeks to suppress the statement. Presumably, he is not going to testify at trial. Defendant White seeks to admit the statement as it tends to show that White and others charged were not members of the enterprise the government describes as the "Diablo's." This assertion goes to the heart of White's defense in this case.

4.

Fed. R. Evid. 804(b)(3) provides for admission of the statement, stating:

(3) Statement against interest. A statement which was at the time of the making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the defendant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

5.

The United States Supreme Court has held that "[w]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be mechanistically applied to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038 (1973). Court have interpreted the Supreme Court's edict, along with the Rule, to mean that the exclusion of a hearsay statement rises to the level of a due process violation where the hearsay statement bears persuasive assurances of trustworthiness and is critical to the defense. See *United States v. Cambra*, 360 F. 3d 997, 1003 (9th Cir. 2004) (reversing conviction where actual shooter's hearsay statements regarding who was involved were excluded); see also *United States v. Paguio*, 114 F. 3d 928 (9th Cir. 1997).

6.

In *United States v. Paguio*, 114 F. 3d 928, the Ninth Circuit reversed a conviction where a declarant's hearsay statement against his own penal interest was improperly excluded. In evaluating the admissibility of the statement, the court noted:

To get a statement against penal interest into evidence under 804(b)(3), the proponent must show that: (1) the declarant is unavailable as a witness; (2) the statement so far tended to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless he believed it to be true; and (3) corroborating circumstances clearly indicate the trustworthiness of the statement.

Id. at 932.

7.

The first factor, unavailability, cannot be disputed. Under Rule 804, a witness asserting a valid privilege, such as the Fifth Amendment protection against self-incrimination, is unavailable.

8.

The second factor, whether the statement "tended" to subject the declarant to criminal liability similarly should not be in dispute. Co-defendant Oliver was advised that he was being charged with being a member of racketeering enterprise called the "Diablo's." Oliver then "blurted" out that he and "Barry" were the only ones who could speak for the "Diablo's." "The word 'tending' broadens the phrase so that the statement need not be a plain confession making the difference between guilty and not guilty." *Id.* at 933-934.

9.

The final factor, corroborating circumstances, while not as clear cut as the first two factors, also weighs in favor of admission. The Courts have set out a list of several factors to be considered in determining whether or not the corroboration required by Rule 804(b)(3) is present:

1. Whether the declarant had at the time of making the statement pled guilty or was still exposed to prosecution for making the statement;
2. The declarant's motive in making the statement and whether there was a reason for the declarant to lie;
3. Whether the declarant repeated the statement;
4. The party or parties to whom the statement was made;

5. The relationship of the defendant with the accused; and,
6. The nature and strength of independent evidence relevant to the conduct in question.

See *United States v. Brainard*, 690 F. 2d 1117 (4th Cir. 1982) (conviction reversed where statements against penal interest by hearsay declarant excluded); *United States v. Noel*, 938 F. 2d 685 (6th Cir. 1991); *United States v. Slaughter*, 891 F. 2d 691 (9th Cir. 1989) (conviction reversed where co-defendant asserted Fifth Amendment privilege and her previous out-of-court statement was excluded which tended to support the defendant's entrapment defense and to impeach other witnesses).

10.

The burden on the offering party is not to remove all doubt regarding the statement. The corroborating circumstances need only show the trustworthiness of the statement. See *Brainard*, 690 F. 2d at 1124-1125. Thus, it is the circumstances surrounding the statement that matter, not the credibility or reliability of the declarant. "The Rule requires not a determination that the defendant is credible, but a finding that the circumstances clearly indicate that the statement was not fabricated. It is the statement rather than the declarant which must be trustworthy." *Id.*

11.

In this case, the circumstances surrounding the statement clearly corroborate its trustworthiness. The statement was made at the time that the co-defendant was still very much susceptible

to criminal charges. The statement was clearly not made for the purpose of protecting defendant White as a relative or close friend. In fact, White is not mentioned at all. The statement was made to law enforcement. The statement was clearly against penal interest and applies directly to the issue at the heart of this RICO conspiracy case: the existence of an enterprise and who was in it.

12.

It should be noted that cases where the government has sought to introduce an inculpatory statement under Rule 804(b)(3), and convictions have been reversed where the introduction was held improper under the Confrontation Clause, are not relevant to the inquiry here. The Courts have made it clear that the standard is completely different where the government seeks to introduce an inculpatory out-of-court statement than when a defendant seeks to introduce an exculpatory out-of-court statement. *See United States v. Paguio*, 114 F. 3d at 934 ("The Constitution gives the 'accused', not the government, the right of confrontation"); *see also Cambra*, 360 F. 3d at 1007 (9th Cir. 2004) (cases citing inherent distrust of custodial statements apply to cases where the co-defendant inculcates a defendant in order to exonerate himself); *United States v. Sarmiento-Perez*, 633 F. 2d 1092 (5th Cir. 1981) (citing inherent untrustworthiness of third party confessions offered to inculcate an accused).

WHEREFORE, for all the foregoing reasons, if the court is not going to allow admission of the statement at trial against co-

defendant Oliver, defendant White seeks a severance from Oliver in order to introduce the statement. In addition, should the statement not be introduced at trial by the government, the defendant seeks a pretrial ruling that the statement is admissible under Fed. R. Evid. 804(b)(3).

Respectfully submitted,

Leeza R. Cherniak
Georgia Bar No. 123380
Attorney for Defendant

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CERTIFICATE OF SERVICE

I hereby certify that I have on this day served a true and correct copy of the within and foregoing Motion Severance From Co-Defendant Eddie Oliver and Motion In Limine Seeking Admission of Co-Defendant's Oliver's Statement Under Fed. R. Evidence 804(B)(3) and Memorandum of Law In Support Thereof upon counsel using the ECF system which will automatically send e-mail notification of such filing to opposing counsel, Yonette Sam-Buchanan.

This the 2nd day of February, 2005.

/s/ Leeza R. Cherniak
Leeza R. Cherniak
Georgia Bar No. 123380
Attorney for Defendant

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,)
)
v.) CRIMINAL ACTION
) NO. 1:03-CR-155
REGINALD WHITE,) (THIRD SUPERSEDING)
) Defendant.)

MOTION FOR INVESTIGATIVE FUNDS AND REQUEST
TO FILE MOTION UNDER SEAL

Comes now the defendant, Reginald White, by and through his undersigned counsel, who moves the court for additional investigative funds and shows the court the following:

1.

Reginald White was indicted along with fifteen other defendants in a twenty-six page, fourteen count indictment alleging a RICO conspiracy that spanned from 1997 through 2003, as well as numerous substantive counts. On March 2, 2004, the Third Superseding Indictment was returned. The most recent indictment is 29 pages, with fourteen counts.

2.

White is named in Count One (overt acts 18, 23, 24, 25, 27), and Count Six. It is further alleged that White is one of the "leaders of the enterprise" (Third Superseding Indictment at 6).

3.

As noted in the defendant's earlier Motion for Bill of Particulars, the government has provided almost no discovery in this case. Other than a couple police reports which discuss conduct several years old for which White was never prosecuted

there is no discovery which supports the allegations contained in the indictment.

4.

The government has failed and refused to provide any reports and is relying on informants which it has determined will not be disclosed until trial. The government has even failed to provide any reports or statements of Billy Ladson and Lidonda Carter, even though it is public knowledge that these two individuals are cooperating. Throughout the indictment, the government repeatedly fails to identify those involved in the acts. Throughout the indictment, the government identifies those involved as persons "known to the grand jury" or by initials such as "C.J." "J.F" or "D.B." Defense counsel is not aware of who any of these individuals are. This has left the defendant in a position of essentially reconstructing the government's case, by locating and interviewing witnesses in the community.

5.

The government has failed and refused to even provide a list of unindicted co-conspirators, which the court ordered them to provide 45 days prior to trial. In order to investigate this very large and complex case which spans approximately a six-year time frame, the defendant's counsel will need much more than 45 days prior to trial. Consequently, it will be necessary to investigate and determine who the unindicted co-conspirators might be, especially those who are apparently witnesses or participants in some of the charged acts.

6.

The defendant is facing a likely life sentence if he is convicted.

7.

The type of investigation which is needed, looking for witnesses not even identified, will require an investigator familiar with the Perry Blvd. neighborhood, as well as someone able to mingle in the community to identify the unindicted co-conspirators, as well as to sort out the role, if any, White had in the neighborhood. In addition, the required investigation may put the investigator in danger.

8.

The defendant has consulted with Nicholas McKnight of Apex Investigations. Mr. McKnight's resume is attached hereto as Exhibit A. In addition, Apex employs several former City of Atlanta police officers and Fulton County Deputy Sheriff. After reviewing the credentials of several investigators, as well as telephone conferences with several investigators, defense counsel has determined that this is the only available investigator who has the background and familiarity with the Atlanta neighborhoods involved to adequately investigate this case.

9.

The defendant notes that he has previously received \$1000.00 for investigative funds, of which \$949.00 were used nearly a year ago, and were not adequate to investigate this large case. Those funds were sufficient only to sort out the defendant's complicated

criminal history, as well as to clear up a misidentification. These were important issues for calculating criminal history, but do not even begin to fully investigate this case.

10.

Upon consulting with several investigators, prior to selecting the one best suited for this particular case, it appears that the assignment will require an estimated 120 hours of investigative time at a rate of \$75.00 per hour. This investigator actually bills at \$85.00 per hour, but has agreed to reduce the hourly rate in light of the court-appointed nature of the work. Thus, the defendant requests an additional \$9,000.00 in funds for an investigator to be paid \$75.00 per hour, plus expenses and mileage at the government rate.

11.

The investigation will essentially investigate several separate offenses, as if it were several separate cases, as follows:

Overt Act 18: Investigation of incident in 2001 where White is alleged to have "brandished weapons and threatened to beat persons known to the grand jury." In response to court order granting portion of bill of particulars, government has identified these two people as William Wallace and Frederick Green. The investigator will need to locate these two individuals, interview them, determine if any police reports were filed, and identify, locate and interview any witnesses.

Overt Acts 23 and 24: Investigation of incident on April 19, 2001, where defendant White and others are alleged to have beat a person identified only as "C.J." The investigator will need to identify "C.J.", interview him, as well as identifying and locating the "others" involved in the alleged beating.

Overt Act 25: Investigate a drug charge from October 2001, which was never prosecuted, including identifying any witnesses, drug amounts, etc. . . .

Overt Act 27: Investigate a robbery of a person identified only as "M.A." and identify, locate and interview the "others known to the grand jury" that were involved.

In addition to these specific overt acts, the investigator will need to investigate the general allegations regarding the Diablos, whether they are an "enterprise;" whether defendant White ever joined the enterprise; and, any evidence regarding whether White played a leadership role in the enterprise, if any. This will probably require actually interviewing residents of the neighborhood in which the Diablos are alleged to have been operating.

12.

The undersigned counsel submits that she cannot provide effective assistance of counsel in this case without the approval of adequate funds for investigation. Counsel is not trained or qualified to personally conduct the type of investigation that is required in this case.

13.

The defendant requests that this motion be presented ex parte and filed under seal.

WHEREFORE, the defendant respectfully requests that this motion for investigative funds be granted.

Respectfully Submitted,

Leeza R. Cherniak
Georgia Bar No. 123380
Attorney for Defendant

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES,)
) Case No. 1:03-CR-155-CAP
v.)
)
REGINALD WHITE,)
)
Defendant.)

MOTION OF REGINALD WHITE FOR SEVERANCE OF COUNTS

COMES NOW, the defendant, Reginald White, by and through his undersigned counsel and moves the court to sever Count Six from the the only other count in which he is charged, Count One, and shows the Court the following:

1.

Count One alleges that fifteen indicted defendants, and many other unindicted individuals, conspired to participate in an enterprise engaged in a pattern of racketeering activity. Most of the racketeering activities alleged in Count One can be characterized as violent crimes (i.e. murder, armed robbery, firearms offenses, threats of violence, kidnaping, assault with deadly weapons). There are also numerous individual drug crimes included in the "overt acts" listed in Count One.

2.

Count Six alleges that defendant Reginald White possessed with the intent to distribute 5 grams or more of "crack." The police report indicates that the reporting officer claimed to have seen Mr. White throw a plastic bag on the ground which was recovered and contained 17 grams of suspected cocaine.

3.

Defendant White appeared to answer these charges in the City of Atlanta Municipal Court. The charges were later dismissed.

4.

Even if the court were to assume that the allegations contained in the police report were true (which the defendant denies), there is no evidence connecting the charge to any enterprise at all, much less one known as the "Diablos."

5.

If the defendant were to be tried for this substantive drug offense, none of the evidence of violent crimes alleged as overt acts of the RICO conspiracy would be admissible in the trial of this substantive drug offense. Consequently, it is highly prejudicial for the two offenses to be tried together. Fed. R. Crim. P. 14.

6.

Furthermore, where the government has no evidence connecting the alleged substantive drug offense to an enterprise (even assuming an enterprise is proved and that White is shown to be a member), there would be a misjoinder under Fed. R. Crim. P. 8.

7.

Caselaw suggests that the court, in its discretion, may find that two counts should not be joined unless evidence of each would be admissible as evidence at the trial of the other. Whereas, the evidence of the drug offense, if the government's allegations are all proven true, might be admissible at the trial of Count One, it

is indisputable that all the evidence admissible at the trial of the RICO conspiracy would certainly not be admissible at a trial of the substantive drug count. See United States v. Daniels, 770 F. 2d 1111 (D.C.Cir. 1985).

8.

Fed. R. Crim. P. 14 gives the District Court broad powers to prevent the prejudice that can result when different charges are adjudicated in a single proceeding:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever relief justice requires.

9.

There is thus a high risk of undue prejudice whenever, as in this case, joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible.

Daniels, 770 F. 2d at 1116; see also United States v. Busic, 587 F. 2d 577 (3d Cir. 1978), rev'd on other grounds, 100 S. Ct. 1747. Furthermore, it is a "naive assumption" that prejudicial effects can be overcome by instructions to the jury. Id. at 1118. The Ninth Circuit, while declining to adopt a "per se" rule, notes that there is a danger in joining offenses where the other crimes evidence to be introduced would be otherwise inadmissible at a separate trial of one of the joined counts. See United States v. Lewis, 787 F. 2d 1318 (9th Cir. 1986) (concluding that the failure

to sever gun counts manifestly prejudiced the defendant's chance for acquittal on the killing charge).

10.

In addition, the defendant submits that there is no evidence to justify joining Count Six with Count One of the indictment. The defendant requests that the Court at a minimum require the government to make an in camera showing as to how the facts relating to Count Six are connected to the charged enterprise or its purpose. See United States v. Camacho, 939 F. Supp. 203 (S.D.N.Y. 1996).

11.

The government has made a general allegation that the purported enterprise included in its pattern of racketeering activity "felonious dealing in controlled substances. . . ." The government has also alleged that a purpose of the enterprise was that members and associates would obtain drugs for distribution in order to finance the enterprise's promotion of its musical recordings. However, overt act number 25 alleges only that Reginald White, individually, possessed crack on October 17, 2001. This same act is charged in a substantive drug count in County Six of the indictment. Discovery has not revealed any evidence that would connect Mr. White's alleged possession of a small amount of crack on October 17, 2001 to any purpose or activity of the enterprise alleged in the indictment. The government including the statement that White possessed "crack" on a date that happens to fall during the period of the alleged conspiracy is not sufficient

to show any connection to the enterprise. As such, there is a misjoinder under Rule 8.

12.

Multiple defendants may be charged and tried for multiple offenses only if the offenses are related pursuant to the test set forth in Rule 8(b), that is only if the charged acts are part of a 'series of acts or transactions constituting offense.'

Id. at 206, citing United States v. Turoff, 853 F. 2d 1037 (2d Cir. 1988). There must be a relationship between the offense and the business of the enterprise. Id. Since there is none, in addition to being a prejudicial joinder, Count Six is also misjoined.

WHEREFORE, the defendant respectfully requests that Count Six be severed.

Respectfully submitted,

Leeza R. Cherniak
Georgia Bar No. 123380

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1800 Peachtree Street
Suite 300
Atlanta, Georgia 30309
(404) 355-3031
Counsel for Reginald White

CERTIFICATE OF SERVICE

I hereby certify that I have on this day served a true and correct copy of the within and foregoing Motion by depositing a copy of the same in the United States Mail with First Class postage prepaid, addressed as follows:

Yonette Sam Buchanan, AUSA
Assistant United States Attorney
600 Richard B. Russell Building
75 Spring Street, S.W.
Atlanta, Georgia 30335

Joseph Plummer, AUSA
Assistant United States Attorney
600 Richard B. Russell Building
75 Spring Street, S.W.
Atlanta, Georgia 30335

This the _____ day of _____, 2004.

Leeza R. Cherniak
Georgia Bar No. 123380
Attorney for Defendant

LAW OFFICES OF LEEZA R. CHERNIAK
Suite 300
1800 Peachtree Street
Atlanta, Georgia 30309
(404) 355-3031

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,)
)
v.) CRIMINAL ACTION
) NO. 1:01-CR-824
LEON FONSECA,)
)
) Defendant.)

MOTION OF LEON FONSECA TO UNSEAL PLEA AND
SENTENCING PROCEEDINGS OF CO-DEFENDANT

COMES NOW the defendant, Leon Fonseca, by and through his undersigned counsel, who moves the court for an order unsealing the plea and sentencing proceedings of a co-defendant whose plea and sentencing has been filed under seal, and in support hereof shows to the court the following:

1.

The decision whether to seal a judicial record is, at least with respect to common law right of access, committed to the discretion of the district court. *Nixon v. Warner Communications, Inc.*, 98 S. Ct. 1306 (1978).

2.

In this case, however, there are two constitutional rights implicated. First, the First Amendment guarantee of public access to all aspects of court proceedings. See *Washington Post v. Robinson*, 935 F. 2d 282 (D.C. Cir. 1991). Fonseca has a right of access to these records of court proceedings under the First Amendment. In addition, this is a criminal prosecution. Fonseca has a constitutional right of access to the information, which should be public, to investigate and prepare his defense. A deprivation of access to this information violates the defendant's

Fifth and Sixth Amendment rights. Moreover, it is believed that these proceedings contain information which is either exculpatory, or impeaching, or both.

3.

While the government does have some limited right to seek to seal information that would jeopardize an ongoing investigation, see *United States v. Amodio*, 71 F. 3d 1044 (2d Cir. 1995), such a restriction must overcome the strong presumption of access.

Courts have given various descriptions of the weight to be given to the presumption of access, ranging from an "especially strong" presumption requiring "extraordinary circumstances" to justify restrictions, [cites omitted], to merely one of the interests that may bow before good reasons to deny the requested access.

Id. at 1048.

4.

Where, as here, the documents are ones that are generally available, the weight of the presumption is exceptionally strong. *Id.* at 1050; see also, *United States v. Graham*, 257 F. 3d 143 (2d Cir. 2001) (affirming denial of defendants' request to seal evidence presented at detention hearing due to fear of taint of jury pool).

5.

Plea agreements and sentencing proceedings are generally accessible and not filed under seal. Even where the defendant is cooperating with the government, the proceedings are generally public. To the extent that the documents or the transcripts of the proceedings may contain exculpatory or impeaching information, of this defendant or any other defendant or witness, these documents must be made available.

WHEREFORE, the defendant respectfully requests that the Court order that the plea and sentencing proceedings and related documents be unsealed and immediately made accessible. Moreover, the defendant seeks authorization under the Criminal Justice Act to obtain transcripts of the plea and sentencing hearings of said co-defendant for a review for exculpatory and impeaching information, and for use to prepare for his own trial.

Respectfully submitted,

Leeza R. Cherniak
Georgia State Bar No. 123380
Counsel for Leon Fonseca

LAW OFFICES OF LEEZA R. CHERNIAK
1800 Peachtree Street
Suite 300
Atlanta, Georgia 30309
(404)355-3031

CERTIFICATE OF SERVICE

I hereby certify that I have on this day served a true and correct copy of the within and foregoing Motion of Leon Fonseca to Unseal Plea and Sentencing Proceedings of Co-Defendant upon counsel by depositing a copy of the same in the United States Mail with First Class postage prepaid, addressed as follows:

Sandy Strippoli, Esq.
Assistant United States Attorney
400 Richard B. Russell Building
75 Spring Street, S.W.
Atlanta, Georgia 30303

This the _____ day of _____, 2002.

Leeza R. Cherniak
Georgia Bar No. 123380
Attorney for Leon Fonseca

LAW OFFICES OF LEEZA R. CHERNIAK
Suite 300
1800 Peachtree Street
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(404) 355-3031

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,)
)
v.) CRIMINAL ACTION
) NO. 1:01-CR-824
LEON FONSECA,)
)
 Defendant.)

DEFENDANT LEON FONSECA'S MOTION FOR PRODUCTION
OF PRESENTENCE REPORTS OF GOVERNMENT WITNESS

COMES NOW Leon Fonseca, the defendant in the above-styled matter, by and through his undersigned counsel, and moves the court to compel the government to provide, in advance of trial, Presentence Investigation Reports (PSR) for any co-defendants in the above-styled case.

1.

The reports contain information on the circumstances surrounding the offender's crime and on the offender's background, including the probation officer's sentencing recommendation. See, Fennell and Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 Harv. L. Rev. 1613, 1521-1630 (1980). Perhaps most significantly, the reports usually contain the defendant's own statement of the offense.

2.

Disclosure of a presentence report is generally limited to the person who is subject to the report, or his attorney. See Rule 32(c)(3)(E), F. R. Crim. P. However, Rule 32(c) is silent as to disclosure of presentence reports to a third party. See, *United States v. Preate*, 927 F. Supp. 163 (M.D. Pa. 1996). In *United*

States v. Figurski, 545 F. 2d 389, 391 (4th Cir. 1976), the Fourth Circuit held that disclosure of a presentence report to a third party should be made where the "lifting of confidentiality is required to meet the ends of justice." The *Figurski* court went on to conclude that if the report contains exculpatory material, that portion of the report **must be disclosed**. In addition, if the report contains material which could be used to impeach the witness, disclosure is similarly required.

3.

In *United States v. Anderson*, 724 F. 2d 596, 598 (7th Cir. 1984), the Seventh Circuit stated that "when a defendant suspects that a witness' presentence report contains impeachment material, he should request the trial court to make an *in camera* examination of the report." Consequently, the defendant requests such an examination in this case.

4.

If any co-defendant made a statement regarding the offense which is silent as to Mr. Fonseca, those statements are also exculpatory.

5.

[A] presentence report's presumption of confidentiality is not absolute. A third party seeking access to a presentence report may overcome the confidentiality by demonstrating that disclosure will serve the ends of justice.

Preate, supra.

6.

Moreover, it must be noted that the government has access to the information in the presentence reports, while this defendant is precluded from reviewing same on the basis of "confidentiality."

WHEREFORE, the defendant respectfully requests that the court order the government to provide the discovery set forth in more detail above. Any truly confidential portions of the reports (i.e. childhood abuse, etc. . .) can certainly be redacted prior to disclosure. However, the defendant's statement of the offense, offense conduct and criminal history sections are certainly not confidential and should be disclosed.

Respectfully submitted,

Leeza R. Cherniak
Georgia State Bar No. 123380

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1800 Peachtree Street
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(404)355-3031
Counsel for Defendant Fonseca

CERTIFICATE OF SERVICE

This is to certify that I have on this day served counsel in this matter with a copy of the foregoing pleadings by depositing a copy of same in the United States Mail with adequate postage thereon addressed to:

Sandy Strippoli, Esq.
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1800 Richard B. Russell Building
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Ray Norvell, Esq.
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Suite 115
Atlanta, GA 30338

Herb Shafer, Esq.
41 Forrest Place
Atlanta, GA 30328

This the _____ day of _____, 2002.

Leeza R. Cherniak
Georgia Bar No. 123380
Attorney for Leon Fonseca

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES,)
) Case No. 1:03-CR-155-CAP
v.)
)
REGINALD WHITE,)
)
Defendant.)

MOTION TO STRIKE SURPLUSAGE FROM INDICTMENT

COMES NOW, the defendant and moves to strike certain portions of the indictment and shows the court the following:

1.

Overt Acts 23 and 24 in the Third Superseding Indictment allege that defendant White was ordered by David Freeman to beat a person known as "C.J." and that Reginald White did beat CJ, after which David Freeman pointed a gun at "C.J." and threatened to beat him.

2.

The defendant had previously advised the government that he had not participated in the acts alleged in Overt Acts 23 and 24. The government had advised that they knew he had participated, and accused White of lying.

3.

On February 10, 2005, Assistant United States Attorney Plummer advised that based on recent debriefings, the government now believes that it was "mistaken" in believing that White participated in the acts charged in Overt Acts 23 and 24.

4.

The allegations against White in Overt Acts 23 and 24 are highly prejudicial and should be redacted from the indictment, in light of the fact that the government will not be attempting to prove same at trial. Fed. R. Crim. P. 7(d) provides that surplusage may be stricken. Courts have found same to be appropriate where the language is not necessary to the indictment and may be prejudicial to the defendant.

5.

In addition, defendant White moves the court to redact from Count 6, paragraph 2 which references his prior conviction. The fact of his prior conviction is only a sentencing factor and is irrelevant and prejudicial at trial. The prior conviction is not otherwise admissible at trial.

WHEREFORE, the defendant prays that the relief requested herein be granted.

Respectfully submitted,

/s/ Leeza R. Cherniak
Leeza R. Cherniak
Georgia Bar No. 123380
Attorney for Defendant

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CERTIFICATE OF SERVICE

I hereby certify that I have on this day served a true and correct copy of the within and foregoing Motion To Strike Surplusage From Indictment upon counsel using the ECF system which will automatically send e-mail notification of such filing to opposing counsel, Yonette Sam-Buchanan.

This the 11th day of February, 2005.

/s/ Leeza R. Cherniak
Leeza R. Cherniak
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Attorney for Defendant

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