

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

v.

ATLAS IRON PROCESSORS, INC.,
et al.,

Defendants.

)

) CASE NO. 97-0853-CR-NESBITT

)

) Magistrate Judge Robert L. Dubé

) (February 11, 1998, Order of Reference)

)

) **REPLY OF UNITED STATES TO**

) **RESPONSE OF DEFENDANT**

) **ANTHONY J. GIORDANO, SR.**

) **TO UNITED STATES' DEMAND OF**

) **NOTICE OF INTENTION TO OFFER**

) **DEFENSE OF ALIBI**

I

INTRODUCTION

Pursuant to Rule 12.1 of the Federal Rules of Criminal Procedure, the United States served a notice of demand upon defendant Anthony J. Giordano, Sr. ("Giordano, Sr.") of his intention to offer a defense of alibi to certain identified meetings. This demand set forth the date, time and location of three meetings attended by Giordano, Sr. and his co-conspirators in connection with the charged conspiracy. The demand specifically stated: "These meetings constitute a partial list of the acts performed by Anthony Giordano, Sr., in furtherance of the Sherman Act conspiracy charged in the Indictment that began at least as early as October 24, 1992, and continued at least as late as November 23, 1992." *Demand of Notice Pursuant to Rule 12.1 of Defendant Anthony J. Giordano, Sr.'s Intention to Offer Defense Of Alibi* ("Government's Notice of Alibi Demand"), p. 2. Giordano, Sr. has failed to respond to this demand as required under Rule 12.1. Accordingly, as provided in Rule 12.1, the United States requests that Giordano, Sr. be precluded from introducing any

alibi witnesses concerning defendant's presence or absence at the meetings listed in the United States' demand.

II

FACTS

In its demand, the United States set forth three meetings in which Giordano, Sr. participated with his co-conspirators in the charged conspiracy. The demand specifically stated that these meetings took place at the following locations, dates and times:

- (1) La Costa D'Oro restaurant in Boca Raton (on October 14, 1992, beginning around 8:00 p.m.);
- (2) Sea Ranch condominium in Fort Lauderdale (on October 24, 1992, beginning in the morning and lasting until about noon); and
- (3) Cafe Max restaurant in Pompano Beach (on December 21, 1992, beginning about 7:00 p.m.).

Government's Notice of Alibi Demand, p. 1. In addition, the United States specifically identified the participants at each such meeting.

In his response, Giordano, Sr. takes the position that he is not required to respond. Giordano, Sr. finds fault with the phrasing of the demand and has advanced two unconvincing arguments in support of his position. Giordano, Sr. argues he is not required to respond to the demand because: (1) "the Government has failed to state a criminal offense was committed at the times and place specified therein;" and (2) "the Indictment [does not] allege that the meetings described were overt acts in furtherance of the alleged conspiracy." *Response of Defendant Anthony J. Giordano, Sr., to United States' Demand of Notice of Intention to Offer Defense of Alibi*, p. 1. Giordano, Sr.'s arguments, however, find no support in either the law or facts.

III

LAW AND ARGUMENT

Discovery under Rule 12.1 is designed to give the government notice of a defendant's alibi defense in order to avoid unfair surprise and any delay at trial. United States v. Dupuy, 760 F. 2d 1492, 1498 (9th Cir. 1985). Moreover, "[t]he legislative history shows that the rule was designed to benefit the government." Id. (citations omitted). Rule 12.1 clearly is not intended to serve as a bill of particulars. United States v. Vela, 673 F.2d 86 (5th Cir. 1982); Dupuy, 760, F.2d at 1499.

In United States v. Vela, 673 F.2d 86 (5th Cir. 1982), a criminal defendant objected to the government's demand for alibi under Rule 12.1, arguing that Rule 12.1 required the government to use the notice-of-alibi procedure for an entire criminal transaction or to eschew the use of the Rule entirely. Vela, 673 F.2d at 88. The thrust of the defendant's argument in Vela was that the government was limited to proof at trial of those events which took place during the time frame indicated in its demand under Rule 12.1. The Fifth Circuit rejected the defendant's argument, stating that many crimes, like the conspiracy charged in Vela, are committed over a long period of time. Id. The Fifth Circuit thus held that it is proper under Rule 12.1 for the government to "narrow its notice-of-alibi demand to a more limited interval." Id. at 89. Importantly, the Fifth Circuit held that rather than render Rule 12.1 useless in conspiracy situations, it is "permissible and consistent with the [R]ule's purpose for the prosecution to seek notice-of-alibi with respect to a *discrete temporal aspect* of the crime charged." Id. at 89 (emphasis added). See Dupuy, 760 F.2d at 1499 (finding Vela "precisely on point," and holding the government can invoke Rule 12.1 as to "discrete temporal aspects of the crime charged.").

A. THE DEMAND SPECIFICALLY STATES THAT THE MEETINGS
CONSTITUTE A PARTIAL LIST OF ACTS PERFORMED
BY GIORDANO IN FURTHERANCE OF THE CHARGED CONSPIRACY

In the instant case, the three meetings listed in the demand served upon Giordano, Sr. are discrete temporal aspects of the charged criminal conspiracy. The law is clear that the United States may tailor its demand to discrete components of the charged conspiracy. Moreover, Giordano, Sr.'s argument that the demand does not state that the alleged offense was committed at each of the meetings is simply untrue. In its demand, the United States specifically states that the meetings "constitute a partial list of the acts performed by

Anthony Giordano, Sr., in furtherance of the Sherman Act conspiracy charged in the Indictment that began at least as early as October 24, 1992, and continued at least as late as November 23, 1992.” Government’s Notice of Alibi Demand, p. 2.

Giordano. Sr.’s argument also loses steam in view of the Indictment and Bill of Particulars. The Indictment states that, among other things, the defendants and co-conspirators “met at various restaurants and elsewhere, and discussed and agreed upon fixing the price of scrap metal.” Indictment, ¶4. Further, the Bill of Particulars filed by the United States on May 18, 1998, lists the same meetings as identified in the demand, describing them as meetings “in connection with which occurred most of the collusive communications in furtherance of the charged conspiracy.” Bill of Particulars, p. 7. It is clear from the record that the United States has identified the meetings listed in the demand as comprising part of the charged conspiracy.

B. RULE 12.1 DOES NOT REQUIRE THAT THE INDICTMENT IDENTIFY THE MEETINGS LISTED IN THE DEMAND AS OVERT ACTS

Giordano, Sr. also argues he is not required to respond to the demand because the Indictment fails to specifically allege the meetings listed in the demand are overt acts committed in furtherance of the charged conspiracy. This argument, too, is misplaced, reading a nonexistent requirement into Rule 12.1.¹

¹ Indeed, Giordano, Sr.’s argument is also inconsistent with Section 1 of the Sherman Act, which requires no proof of any overt act in furtherance of the conspiracy. The agreement itself is what constitutes the crime under the Sherman Act. Consequently, the United States is not required to allege any overt acts in its Indictment. Taking Giordano, Sr.’s argument to its extreme, however, a criminal defendant charged with price fixing or market allocation under the Sherman Act would never be required to respond to a demand for alibi under Rule 12.1 if the Indictment does not specifically allege the date, time and location of an overt act committed in furtherance of the conspiracy. Not surprisingly, Giordano, Sr. cites no case law in support of this contention.

Moreover, Giordano, Sr.'s argument totally ignores the demand itself, which specifically states the listed meetings "constitute a partial list of the acts performed by Anthony Giordano, Sr., in furtherance of the Sherman Act conspiracy charged" Government's Notice of Alibi Demand, p. 2. Giordano, Sr.'s argument also finds no support in the Bill of Particulars, which describes the meetings listed in the demand as a partial list of acts committed in furtherance of the conspiracy. Bill of Particulars, p. 7.

IV

CONCLUSION

Pursuant to Rule 12.1(d), the United States respectfully requests that Giordano, Sr. be precluded from presenting at trial any witnesses concerning his absence from any of the meetings set forth in the demand. Giordano, Sr.'s arguments in support of his non-response are not supported by the facts or law and are poorly taken. Accordingly, this Court should enter the enclosed Order precluding Giordano, Sr. from presenting any alibi witnesses for the meetings listed in the demand.

Respectfully submitted,

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