

II. MOTION TO COMPEL DISCLOSURE OF EXISTENCE AND SUBSTANCE OF PROMISES OF IMMUNITY, LENIENCY OR PREFERENTIAL TREATMENT

This motion should also be denied as moot. The government has not made any "promises of immunity, leniency or preferential treatment" to any witness in this case.

III. MOTION FOR PRODUCTION OF JENCKS ACT AND RULE 26.2 MATERIAL

The defendant has asked the Court to order early disclosure of Jencks Act materials. Memorandum of Law in Support of Motion for Production of Jencks Act and Rule 26.2 Material at 2. The Jencks Act provides:

In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a government witness (other than the defendant) shall be the subject of a subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

18 U.S.C. § 3500(a). The Act further provides that after a witness called by the government has testified on direct examination, the Court shall, on motion of the defendant, order the government to produce any statement of the witness in the possession of the government which relates to the subject matter of the witness's testimony. 18 U.S.C. § 3500(b). Thus, there is no authority for the defendant to compel the disclosure of Jencks materials for a trial witness prior to the direct examination of that witness.

Nevertheless, the government does not object to disclosing Jencks materials in advance of each witness's direct

examination. Accordingly, as the government informed the defendant last month when it furnished him with discovery materials, the government will provide early disclosure of Jencks material (including any grand jury testimony that qualifies under the Jencks Act) approximately three to five days before trial after it has decided which witnesses will testify at trial. See Discovery Letter at 4. Thus, the motion for early disclosure of Jencks material should be denied as moot.

IV. MOTION FOR GOVERNMENT AGENTS TO RETAIN, PRESERVE AND PRODUCE THEIR ROUGH NOTES

The government has no objection to the defendant's request for the preservation of notes prepared by government agents in connection with this investigation. However, the government agents assigned to this investigation have advised the undersigned that they did not take any notes in connection with this case, which adopts an investigation already conducted by the Philadelphia Police Department. The agents will retain any notes they generate from now until trial. Thus, this motion should be denied as moot.

V. MOTION TO REQUIRE NOTICE OF INTENTION TO USE OTHER CRIMES, WRONGS OR ACTS EVIDENCE

The defendant has requested notice of the government's intention to introduce evidence of "other crimes, wrongs or acts" against the defendant at trial. The government recognizes its obligation to provide the defendant with reasonable notice of such evidence in advance of trial. See Fed. R. Evid. 404(b). In accordance with that obligation, the government informed the

defendant a month ago that it intended to introduce "evidence of the defendant's involvement in narcotics trafficking activities other than those charged in the indictment to establish that the defendant knowingly possessed the drugs which were seized from him and that he intended to distribute those drugs." Discovery Letter at 6.

To the extent the defendant seeks more detailed notice under Rule 404(b), this memorandum will provide that notice. The government intends to introduce evidence of any criminal convictions of the defendant relating to the distribution of narcotics. The defendant's involvement in other drug trafficking activities is plainly admissible under Rule 404(b) to show knowledge, intent and absence of mistake.

The defendant was convicted at least once in the past of possession with the intent to distribute a controlled substance. The defendant pled guilty to that charge on October 16, 1997 in the Philadelphia County Court of Common Pleas ("CCP") (Case No. CP #9705-0658) and was sentenced to two years probation. In that case, the defendant admitted that he possessed with the intent to distribute approximately 55 packets of crack cocaine. The conviction is recent and extremely probative of knowledge, intent and absence of mistake in this case. While the government is not aware of any other drug trafficking convictions, it reserves the right to introduce evidence of other convictions under Rule 404(b) should such

evidence come to its attention.² Moreover, if the defendant denies possessing drugs altogether, the government also reserves the right to introduce evidence of his prior conviction in the CCP (Case No. MC #9709-4666) for knowing possession of narcotics.

Thus, the government has provided the defendant with the Rule 404(b) notice he seeks and, therefore, the motion should be denied as moot.

VI. MOTION TO DISCLOSE AND LIMIT THE INTRODUCTION OF EVIDENCE OF OTHER CRIMES, WRONGS AND ACTS PURSUANT TO FEDERAL RULE OF EVIDENCE 404(b)

The defendant's final motion seeks disclosure of the evidence the government intends to introduce at trial under Rule 404(b) and requests a pretrial hearing on the admissibility of that evidence. With respect to disclosure of Rule 404(b) evidence, the government already has provided the defendant with a certified copy of his prior conviction for possession with the intent to distribute crack cocaine. In addition, the government will provide the defendant with the police reports and preliminary hearing transcript relating to that conviction prior to trial. As to the defendant's request for an in limine hearing on the Rule 404(b) evidence, the government has no objection to that request. Prior to trial, the government will formally move

² When the defendant was indicted, he had at least two open cases in the CCP (Case Nos. CP #9802-0400 and CP #9804-0788) in which he was charged with possession with the intent to distribute a controlled substance. In the event the defendant is, or already has been, convicted in either or both of those cases, the government also intends to introduce evidence of those convictions under Rule 404(b).

for admission of the Rule 404(b) evidence and request that the Rule 404(b)/403 balancing test be performed before the evidence is admitted. Thus, this motion should also be denied as moot.

Respectfully submitted,

MICHAEL R. STILES
United States Attorney

J. HUNTLEY PALMER, JR.
Chief, Firearms
Assistant United States Attorney

MITCHELL E. ZAMOFF
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of April 1999, I served a copy of the foregoing Government's Memorandum in Response to Defendant's Pretrial Motions, by first-class mail, postage prepaid, on:

Michael Wenof, Esquire
1600 Market Street
Suite 1416
Philadelphia, PA 19103

MITCHELL E. ZAMOFF
Assistant United States Attorney