

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA )  
 )  
 v. ) CASE NO. 97-0853-CR-NESBITT  
 )  
 ) Magistrate Judge Robert L. Dubé  
 ATLAS IRON PROCESSORS, INC., ) (February 11, 1998, Order of Reference)  
 et al., )  
 ) **REPLY OF UNITED STATES TO**  
 Defendants. ) **DEFENDANT DAVID GIORDANO'S**  
 ) **RESPONSE 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 David Giordano ("Giordano") 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 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 David Giordano 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 David Giordano's Intention to Offer Defense Of Alibi* ("Government's Notice of Alibi Demand"), p. 2. Giordano 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 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 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) Charcoal's restaurant in Miami Lakes (on September 21, 1992, beginning between 3:00 p.m. and 3:30 p.m.);
- (2) La Costa D'Oro restaurant in Boca Raton (on October 14, 1992, beginning around 8:00 p.m.); and
- (3) Don Shula's Steakhouse in Hialeah (on November 23, 1992, beginning in early to mid-afternoon, perhaps beginning at 4:30 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 takes the position that he is not required to respond to Items 1 and 2 of the demand. Giordano finds fault with the phrasing of the demand and has advanced two unconvincing arguments in support of his position. Giordano argues he is not required to respond to the demand because: (1) "[t]he Government has failed to state a criminal offense was committed at the time and place specified therein;" and (2) "the Indictment [does not] allege that the meeting described in this Demand was an overt act in furtherance of the alleged conspiracy." *Defendant David Giordano's Response to United States' Demand of Notice of Intention to Offer Defense of Alibi*, pp. 1-2. Giordano's arguments find no support in either the law or facts.

Remarkably, Giordano does provide a response to Item 3 of the demand. Responding to Item 3 and not responding to Items 1 and 2 amounts to little more than game-playing, since there is no difference between the underlying phrasing of Item 3 and Items 1 and 2. Even so, Giordano's response to Item 3 is improper.

### 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 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'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 David Giordano 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'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 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. Giordano pulls this argument from thin air, reading a nonexistent requirement into Rule 12.1.<sup>1</sup>

Moreover, Giordano's argument totally ignores the demand itself, which specifically states the listed meetings "constitute a partial list of the acts performed by David Giordano in furtherance of the Sherman Act conspiracy charged . . . ." Government's Notice of Alibi Demand, p. 2. Neither does Giordano's argument find support in the Bill of Particulars, which also describes the meetings listed in the demand as a partial list of acts committed in furtherance of the conspiracy. Bill of Particulars, p. 7.

C. GIORDANO'S RESPONSE TO  
ITEM 3 OF THE DEMAND IS IMPROPER

Giordano's responses to Item 3 of the demand is improper. Rule 12.1(a) specifically provides that Giordano is required to provide the United States -- within 10 days after service of the notice of alibi -- the names and addresses of any alibi witnesses he intends to call at trial, and state the specific place or places at which he claims to have been at the time of the meetings identified in the demand. Instead, Giordano reads Rule 12.1 as permitting him to hedge the timing of disclosure simply by stating that he is still investigating whether an alibi defense exists. Rule 12.1, however, does not permit Giordano to simply respond that he is still investigating whether he has an alibi witness(es), as he does in responding to Item 3 of the demand. Rule 12.1(c) provides that there is a continuing duty on the part of the defendant to disclose "additional witness[(es)]" who will be offered as alibi witnesses at trial. Rule 12.1(c), however, cannot be read to allow Giordano to alter the time requirement (within 10 days) specifically provided for in Rule

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<sup>1</sup> Indeed, Giordano'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'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 cites no case law in support of this contention.

12.1(a). Such a reading of the statute would render Rule 12.1(a) meaningless and allow the defendant, Giordano here, to control completely the timing of any disclosure of alibi witnesses. Again, Giordano's response to Item 3 amounts to little more than game-playing.

#### IV

#### CONCLUSION

Pursuant to Rule 12.1(d), the United States respectfully requests that Giordano be precluded from presenting at trial any witnesses concerning his absence from or lack of presence at each of the meetings set forth in the demand. Giordano's arguments in support of his non-response are not supported by the facts or law and are poorly taken.

