UNITED STATES OF AMERICA
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 86-0207
	)	(Chief Judge Robinson)
JONATHAN JAY POLLARD	)	

OPPOSITION OF UNITED STATES
TO DEFENDANT'S MOTION FOR
PRODUCTION OF EVIDENCE

The United States of America, by and through the United States Attorney for the District of Columbia, hereby opposes defendant's Motion for Production of Evidence, and in support of its opposition, submits the following:

Introduction

On March 4, 1987, defendant is to be sentenced by the Court upon a plea of guilty to an indictment charging defendant with Conspiracy to Deliver National Defense Information to a Foreign Government, in violation of 18 U.S.C. § 794(c).[1/] Although defendant entered his plea of guilty over seven months ago, he has waited until this late date, only two weeks before sentencing, to demand discovery of certain information contained in government files unrelated to the instant case. By letter dated February 5,

1/ At the outset of the Points and Authorities filed by defendant in support of his Motion for Production of Evidence, defendant mistakenly asserts that he entered a plea of guilty to a violation of 18 U.S.C. § 793, an offense carrying a maximum penalty of ten years. In fact, defendant may be sentenced by the Court to incarceration for any term of years, or for life.

1987, defendant sought the production of two categories of information: (1) the contents of any government file relating to cases of espionage committed by American citizens on behalf of Israel; and (2) the TOP SECRET, compartmentalized damage analysis filed by the government in United States v. Ronald Pelton.[2/] The only "authority" provided by defendant in support of the first of these two requests was a New York Times article dated July 11, 1986. With respect to defendant's second request, for which he provided no authority, it should be noted that the highly-publicized sentencing of Ronald Pelton occurred on December 16, 1986, at which time the fact of an in camera filing of a classified damage analysis in that case was a matter of public record. In his motion and accompanying memorandum, defendant has offered no explanation for his delay in seeking the discovery he now requests. With this background, the government addresses hereinbelow each of defendant's discovery demands.

1. Information Re: Others Suspected of Israeli Espionage

There is no better measure of the validity of a legal argument than the weight of the supporting legal authority which is cited. In view of his inability to locate any legal authority supporting

2/ A copy of the February 5, 1987, letter request is attached as Exhibit A to defendant's Points and Authorities. The government promptly responded to defendant's request by letter dated February 9, 1987, a copy of which is attached as Exhibit B to defendant's Points and Authorities.

this discovery request, defendant resorts to citing newspaper articles based on annonymous sources. Worse yet, he cites the articles inaccurately.

The specific request here at issue has been framed by defendant as follows:

> "Documents relating to the detention and disposition of persons suspected of conducting espionage activities on behalf of the government of Israel." (Points and Authorities at p.2)(emphasis added).

This request is grounded in the specific representation, contained in defendant's Points and Authorities, that

> "[a]ccording to an article in the New York Times dated July 11, 1986, attached hereto as Exhibit C, the government has detained other individuals accused of spying for Israel prior to defendant's arrest, but chose not to prosecute those individuals for their crimes." (p.5)(emphasis added)

A line-by-line review of the article cited by defendant reveals not a word regarding a prior espionage case in which an individual was detained, let alone one detained and released. Thus, it can be seen that the sole premise upon which defendant has based his discovery request is demonstrably inaccurate. For this reason alone, his motion should be summarily denied.

In contrast to defendant's inaccurate citation of newspaper articles, the government submits the following representations to the Court, based upon discussions with senior officials of the Internal Security Section of the United States Department of Justice.[3/]

3/ This Section of the Criminal Division has responsibility for the supervision of all investigations and prosecutions of the espionage laws. The collective experience of these officials encompasses all such investigations and prosecution conducted for more than a decade.

First, contrary to defendant's assertion, Internal Security Section officials are aware of no prior instances in which a U.S. citizen suspected by law enforcement authorities of espionage activities on behalf of Israel has been detained and released. Second, criminal prosecution has never been declined by the Department of Justice in cases wherein reliable and admissible evidence had been obtained by law enforcement officers of the systematic, clandestine provision of U.S. classified information by an American citizen acting on behalf of Israel. Third, Internal Security Section officials are unaware of <u>any</u> prior instance of espionage committed by a U.S. citizen on behalf of Israel in exchange for money. In view of the foregoing, defendant's suggestion "that it was the established policy of the Department of Justice not to prosecute U.S. citizens for espionage activities on behalf of Israel. . ." (Points and Authorities at p.6) is frivolous.

Even defendant admits that as to any past instances in which espionage on behalf of Israel was merely suspected, "one can only speculate" that the absence of criminal proceedings "might" have been attributable to presumptions concerning the degree of damage to the national security, as opposed to, for example, lack of admissible evidence. (Defendant's Points and Authorities at p.6). It is clear, however, that such "speculation" cannot serve as a justification for defendant's desire to conduct a fishing expedition through the government's files:

> "The Constitution does not demand complete disclosure of the prosecutor's files. The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense." United States v. Jackson, 579 F.2d, 553, 560 (10th Cir. 1978), citing, United States v. Agurs, 427 U.S. 97 (1976).

See also, United States v. Williams, 580 F.2d 578, 585 (D.C.Cir.), cert. denied, 439 U.S. 832 (1978) (defendant has no right to rummage through the government's files and to justify trial court's indulgence of inquiry into requested evidence, defendant must first satisfy trial court with the solidity of discovery claim).

The principle that a discovery request must be based upon more than a "hope" that the sought-after information will be materially favorable has been uniformly followed where a defendant demands access to information contained in unrelated cases. See, e.g. United States v. Devine, 787 F.2d 1086, 1088 (7th Cir. 1986) (discovery of information contained in other cases denied even where those cases part of the same undercover operation); United States v. Jacob, 781 F.2d 643, 646-47 (8th Cir. 1986)(discovery request for government's records of other cases involving same offense with which defendant charged denied where defendant made no showing that others not prosecuted were similarly situated to defendant); United States v. Caldwell, 750 F.2d 341, 347 (5th Cir. 1984)(discovery request for information from other federal cases in which inmates had been searched in same manner as defendant denied);

United States v. Balk, 706 F.2d 1056, 1059-60 (9th Cir. 1983) (denying discovery request for government's records of all cases involving same offense with which defendant charged where defendant made no showing that others not prosecuted were similarly situated); United States v. Ness, 652 F.2d 890, 892 (9th Cir.1981)("The fact that access to government's files might be helpful to a defendant seeking to prove discriminatory prosecution does not relieve him of the burden of making an initial showing, nor does the fact in itself entitle every defendant raising such a claim to discovery"); United States v. Richman, 638 F.2d 182 (10th Cir. 1980)(insufficient showing for discovery of government records reflecting numbers of others prosecuted for same offense and methods for selecting prosecutions); United States v. Israelski, 597 F.2d 22, 26 (2nd Cir. 1979)(defendant not entitled to discovery of names of individuals involved in other schemes with government witness on mere showing that information obtained from these individuals might be helpful to defendant); United States v. Catlett, 584 F.2d 864 (8th Cir. 1978)(no discovery, in camera inspection or hearing necessitated by mere allegation that government files in unrelated cases might support defendant's claim of selective prosecution); United States v. Flores, 540 F.2d 432, 437-38 (9th Cir. 1976)(a "hunch" that a similar fact pattern may have occurred in past cases not a sufficient showing of materiality to warrant discovery of information from unrelated cases); United States v. Berrios, 501 F.2d 1207, 1210-12 (2nd Cir. 1974)(discovery of government records

in unprosecuted cases denied where defendant fails to show "colorable basis" that documents in government's possession would show non-prosecution of others similarly situated to defendant--newspaper article submitted by defendant not colorable basis); United States Napper, 574 F.Supp. 1521, 1525-26 (D.D.C. 1983)(discovery of records relating to other investigations of same offense with which defendant charged denied absent "colorable basis" for belief records would support defense of selective prosecution -- newspaper articles not colorable basis); United States v. Mosley, 500 F.Supp. 601, 605-06 (N.D. N.Y. 1980) (denying discovery request for documents reflecting government criteria for seeking prosecutions of same offense with which defendant charged where defendant alleged based on newspaper accounts of prosecution criteria, that production of records may lead to discovery of favorable evidence); United States v. Delmonte, 470 F.2d 248, 250 (D. Mass. 1979)(discovery of information relating to government's non-prosecution of other individuals denied where defendant failed to show that others were similarly situated to defendant); United States v. Germain, 411 F. Supp. 719, 726 (S.D. Ohio 1975)(denying discovery request for all governments files for investigation of same offense with which defendant charged where defendant has made no showing of materiality).

It is significant that in support of his request for information about other individuals suspected of Israeli espionage, defendant does not even attempt to show that those individuals were "similarly situated" to defendant, i.e., that those individuals

were engaged in the systematic, long-term provision of thousands of U.S. classified documents in exchange for money. Defendant's failure to make such a showing is, in view of the foregoing authority, fatal to defendant's discovery request. It should also be noted that many of the decisions cited hereinabove involve defendants who sought discovery of unrelated case information to support a claim of selective prosecution. If courts have uniformly rejected such discovery requests by defendant's challenging the legality of the indictment, the reasoning of these decisions surely must be applicable where a defendant has pled guilty, is awaiting sentence, and who seeks discovery in the hope of supporting what can best be described as a "selective allocution" argument.

Defendant's discovery request also ignores the principle that each case must be judged on its own facts. The breadth and volume of the U.S. classified information sold by defendant to Israel was enormous, as great as in any reported case involving espionage on behalf of <u>any</u> foreign nation. Accordingly, the likelihood that evidence materially favorable to defendant might be found in the files of investigations of mere suspected, gratuitous and isolated espionage on behalf of Israel is exceedingly remote.

As the Court is well aware, government decisions to commence prosecution involve myriad factors, including, among others, whether: (1) sufficient admissible evidence exists; (2) the compromised information previously had been properly protected by the United States government in order to prevent injury to the national

security; (3) the admissible evidence reveals a continuous course of conduct; and (4) the suspect sought to and did enrich himself through his wrongdoing. In espionage cases the government must also determine whether the suspect is protected by diplomatic immunity. It is also notable that since the enactment of the Classified Information Procedures Act of 1980 (CIPA), which enables the government to determine the classified information which will be elicited during the prosecution, the government is better able to weigh the damage to the national security which could be caused by further disclosure of classified information during discovery and trial, against the likelihood of conviction and imposition of a substantial jail sentence. The number of espionage indictments filed by the government has risen substantially since 1980.

The fact the government analyzed the above-described factors and may have concluded successful prosecution was unlikely in some other case where, unlike here, espionage was only suspected should be of no consequence in determining the appropriate sentence to be imposed upon defendant. On June 4, 1986, defendant entered a plea of guilty and acknowledged as true a Factual Proffer describing his systematic, clandestine, compromise of thousands of U.S. classified documents in exchange for monies paid in excess of $50,000, and the expectation of ten times that amount. Thus, a host of factors compelling the imposition of a substantial prison sentence are present in the instant case. That such factors might have been

absent in other cases cannot possibly serve to excuse, explain, or mitigate the venality of defendant's actions and resulting impact on the national security.[4/]

2. The Pelton Damage Assessment

Initially it must be recognized that the particular document which defendant seeks to obtain is a TOP SECRET affidavit, submitted by the Director of the National Security Agency (NSA) for filing in camera in United States v. Pelton; this TOP SECRET affidavit contains SCI information that neither defendant nor his attorneys are cleared to access. The affidavit describes the classified information which Ronald Pelton orally disclosed to his Soviet handlers relating to U.S. collection of particular Soviet signals.

4/ We also wish to note an inconsistency between the scope of the discovery request as stated in counsel's letter of February 5, 1987 (Exhibit A to Points and Authorities) and as defined in defendant's motion. First, whereas counsel's letter requested information about cases involving the illegal provision of classified information to Israel, defendant's Motion seeks information regarding any instance where a mere suspicion of Israeli espionage existed. Secondly, whereas counsel's letter requested information in cases of espionage by U.S. citizens, defendant's Motion seeks information regarding espionage by any person on behalf of Israel. Defendant's Motion makes no effort to explain the inconsistencies between the two statements of his discovery request. However, because defendant's Motion specifically requests information only in cases where an individual was detained on suspicion of espionage, the government's representation that it is unaware of any such cases warrants summary rejection of his demand. To the extent that defendant implies in his pleadings that he is entitled to information contained in all investigative files, whether or not an individual was detained, the sheer breadth of this request constitutes grounds for dismissal. Simply stated, such a demand would encompass any instance of suspected Israeli espionage activity, whether engaged in by U.S. citizens or foreign nationals, occurring in the United States or abroad, since the creation of the State of Israel in 1948.

The affidavit also describes certain specific materials to which Pelton had access prior to his resignation from NSA in July, 1979 and which contained classified information which he may have orally compromised.[5/] The specific classified information disclosed by Pelton to his Soviet handlers was not among the TOP SECRET and SCI documents sold to Israel by defendant here. It is likewise true that none of the thousands of U.S. classified documents sold by defendant to Israel were compromised by Pelton. Thus, it is clear that there is no relationship between the damage analyses that have been prepared by the government in these two cases of espionage.

In support of his request for the Pelton damage assessment, defendant begins by noting the government's position with respect to his espionage activities on behalf of Israel, namely, defendant's conduct here was no less egregious than that caused by a person conducting espionage on behalf of the Soviet Union. (Points and Authorities at p.3). This is, of course, an accurate statement of the government's view. However, from this premise defendant leaps to the conclusion that he is entitled to study the classified damage assessment in what he apparently believes is a typical Soviet espionage case -- United States v. Pelton.

The flaw in this logic is that defendant has failed to identify, as he must, how it is that disclosure of the Pelton damage analysis could provide evidence materially favorable to defendant. The only reasoning offered in defendant's motion is contained in two paragraphs of defendant's Points and Authorities (at pp. 3-5).

5/ Pelton disclosed no classified documents to the Soviet Union. Rather, following his retirement he met with Soviet agents on approximately nine occasions over a five year period during which he orally related classified information he could recall.

In these two paragraphs, the only point made by defendant is that the Pelton damage assessment may help defendant refute the summary description of the injury he caused the national security which is contained in the pre-sentence report. Defendant asserts that the Pelton damage assessment is necessary to refute the summary statement of damage contained in the pre-sentence report because:

> "We can merely intuit that the analysis of the damage assessors in that case [Pelton] identified the documents and information compromised, analyzed the significance of that information, determined its importance to national security, described how that security was compromised, and projected the effects of that loss over a relevant period of time. Here, we have seen none of that in the Government's analysis."(Points and Authorities at p.4)(emphasis added).

This assertion is groundless.

As defendant well knows, the government's analysis of the damage caused by defendant's espionage activities is contained, not in the pre-sentence report, but rather in the forty-six page Declaration of Caspar W. Weinberger which was filed in camera on January 9, 1987. Moreover, as defendant and his counsel have conducted a lengthy review of the Weinberger Declaration, and have since December, 1986 been permitted to inspect the classified documents described and analyzed therein, it is disingenuous for defendant to contend that "we have seen none" of the identification analysis and assessment that defendant believes was submitted in Pelton. Defendant should not be permitted to justify his demand for access to highly classified damage assessment evidence

contained in an unrelated case by claiming, incorrectly, that such an assessment has not been done in the instant case.[6/]

While defendant's factual showing in support of this extraordinary discovery request is grossly inadequate, the legal basis offered to justify production is simply non-existent. In fact, aside from his rote citation to Brady v. Maryland, defendant cites no cases at all supporting the discovery by a defendant in one case of evidence developed in an unrelated case.

The absence of such legal authority is hardly surprising since to sustain such a request would be to expand the scope of discovery at sentencing well beyond that required for trial. Carried to its logical conclusion, defendant's reasoning would require the government, for example, to provide a defendant facing federal murder charges with access to the autopsy report filed in any other federal murder investigation -- after all, the murder suspect could argue, the heinousness of the murder he committed could not be properly assessed unless he could present evidence of the relative severity of wounds inflicted in federal murder cases nationwide. That defendant here seeks the "autopsy report" or damage assessment in but one unrelated case is only a difference in degree.

6/ It is, of course, conceivable that since the evidence in Pelton involved the oral compromise of classified information in a specific area, the classified affidavit filed in that case could describe in greater detail all aspects of the resultant harm to the national security. Because defendant's disclosures in the instant case included thousands of classified documents, many hundreds of pages in length, covering hundreds of topics, it was possible for the government in the Weinberger Declaration to analyze only a small number of documents representative of those compromised by defendant.

In view of the absence of any legal authority or reasoning offered by defendant, the evidence he seeks from the Pelton case is more than he is entitled to receive. This conclusion, we believe, is compelled by the very same decisions which we have cited in opposition to defendant's other discovery request. (See pp.5-7, supra).

Finally, we submit that upon reading the arguments made by defendant in support of his Motion, one cannot escape the impression that defendant, finding it difficult to identify mitigating factors on the evidence in this case, is casting about in the hope of locating a more egregious case of espionage. We respectfully suggest that defendant's desire to present to this Court evidence of conduct which, defendant would argue, is more traitorous than his, is insufficient reason to justify the disclosure of classified information which is the subject of an entirely unrelated case.[7/]

CONCLUSION

In order to warrant a hearing on a motion, a party has the obligation to present legal authority and factual predicates sufficient to present a substantial issue for resolution by the Court.

7/ In this regard it should be noted that while Pelton's unlawful activities gravely damaged particular U.S. intelligence gathering methods, it does not follow that defendant's conduct compares favorably with that of Pelton. Defendant routinely compromised thousands of U.S. classified documents while Pelton's oral disclosures were episodic and based on his memory which continued to diminish over a period of five years. Pelton compromised specific intelligence gathering methods in a specific area, and damaged the U.S. position relative to the Soviet Union; defendant compromised a breadth and volume of classified information as great as in any reported espionage case and adversely affected U.S. interests vis a vis numerous countries including, potentially, the Soviet Union. Finally, the amount of money for which defendant sold U.S. secrets exceeded that received by Pelton in exchange for his disclosures.

This is particularly true where the moving party asks the Court to exclude the public from the hearing, arrange for the courtroom to be inspected and secured by the Court Security Officer, obtain a court reporter with appropriate security clearances, and assure that the sealed transcript is reviewed by appropriate classification authorities. In the government's view, no hearing on defendant's motion is necessary or warranted. Not a single case has been cited in support of the relief defendant requests. Moreover, the factual assertions contained in defendant's pleadings are, as explained hereinabove, demonstrably inaccurate. Defendant should not be permitted to obtain an eleventh hour closed hearing on a discovery motion based solely on newspaper articles, particularly where the articles are misquoted, and mischaracterization of the government's in camera damage analysis which has been reviewed by defendant, his counsel, as well as the Court. This is particularly true where defendant's claim -- that materially favorable evidence might be found in the government files of unrelated cases -- is by defendant's own admission based on mere speculation. (Points and Authorities at pp. 4, 6). In such circumstances, we respectfully suggest that a defendant's motion should be denied on the pleadings.[8/]

8/ In his Points and Authorities, defendant intimates that he might have some additional arguments to make in support of his motion which may result in the discussion of classified information. Such vague representations do not satisfy his obligation to identify a substantial issue for resolution by the Court. Defendant's counsel has raised no classified facts or argument in support of his discovery requests during discussions with government counsel that preceded the filing of defendant's motion. If defendant had any material factual representations in support of his discovery requests which were arguably classified, he could have filed a portion of his pleading with the Court Security Officer and requested that it be immediately delivered to the Court for inspection in camera. In any event, no amount of classified argument could compensate for the complete absence of legal authority cited by defendant in support of his Motion.

WHEREFORE, it is respectfully requested that defendant's Motion for Production of Evidence should be denied. A proposed Order is attached hereto for the Court's consideration.

Respectfully submitted,

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