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Wagering Paraphernalia Act

The Wagering Paraphernalia Act is another statute that was a part of the 1961 federal legislative package designed to cut off those activities that profited organized crime and to assist the states in enforcing their gambling laws. The Wagering Paraphernalia Act, codified as 18 U.S.C. §1053, generally prohibits the interstate transportation of gambling materials.

18 U.S.C. §1953 the Statute

> Interstate transportation of wagering paraphernalia
>
> (a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined under this title or imprisoned for not more than five years or both.
>
> (b) This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or

transportation in interstate or foreign commerce of any newspaper or similar publication, or (4) equipment, tickets, or materials used or designed for use within a State in a lottery conducted by that State acting under authority of State law, or (5) the transportation in foreign commerce to a destination in a foreign country of equipment, tickets, or materials designed to be used within that foreign country in a lottery which is authorized by the laws of that foreign country.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.

(d) For the purposes of this section (1) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States; and (2) "foreign country" means any empire, country, dominion, colony, or protectorate, or any subdivision thereof (other than the United States, its territories or possessions).

(e) For the purposes of this section "lottery" means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. "Lottery" does not include the placing or accepting of bets or wagers on sporting events or contests.

The Fabrizio Opinion.

87 S.Ct. 457
Supreme Court of the United States
UNITED STATES, Appellant,
v.
Anthony L. FABRIZIO.
No. 47.
Argued Nov. 7, 1966.Decided Dec. 12, 1966.

Appellee was indicted for violating 18 U.S.C. § 1953 by knowingly carrying from New Hampshire to New York 75 "acknowledgments of purchase" for "use" in the New Hampshire State Sweepstakes. A purchase acknowledgment, a receipt for the buyer's retention, is practically a carbon copy of the sweepstakes ticket, which is retained in the machine at the time of purchase. Section 1953 proscribes the carriage in interstate commerce (except by a common carrier) of any record, paper, or writing designed for use in a wagering pool with respect to a sporting event. The statute exempts parimutuel betting equipment, the transportation of betting materials for bets or sporting events into a State where such betting is legal, or the transportation of newspapers. Appellee moved to dismiss the indictment, contending that § 1953 was intended to reach only organized crime or illegal gambling activities, neither of which was alleged; that the New Hampshire state lottery was not an "illegal" wagering pool; and that purchase acknowledgments were valueless, and not for "use" in the state sweepstakes, since their retention was not necessary to collect winnings. From the District Court's dismissal of the indictment as charging acts not within the purview of §1953, a direct appeal was taken to this Court.
Held: The indictment states an offense under 18 U.S.C. § 1953. Pp. 385 U. S. 266-271.
(a) Congress manifested the broad purpose of thwarting the interstate movement of gambling paraphernalia by all persons except common carriers. Pp. 385 U. S. 266-267.
(b) The exemptions, which are consistent with the broad reach of the statute, would have included state-run wagering pools had Congress so intended. Pp. 385 U. S. 268-269.
(c) By receipting the purchase and assuring the ticket owner of proper registration, the acknowledgment serves a purpose and constitutes "use" in the sweepstakes within the meaning of §1953, at least here where the Government contends that it will prove
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that the acknowledgments specified in the indictment were being delivered by petitioner to out-of-state persons who had bought tickets through him. Pp. 385 U. S. 269-271.
Reversed.
MR. JUSTICE HARLAN delivered the opinion of the Court.
An indictment filed in the United States District Court for the Western District of New York charged appellee, Fabrizio, with knowingly carrying
"in interstate commerce from Keene, State of New Hampshire to Elmira, State of New York, . . . records, papers and writings, to-wit: 75 acknowledgements of purchase for a sweepstakes race of the State of New Hampshire, to be used, and adapted, devised and designed for use, in a wagering pool with respect to a sporting event, that is: a

sweepstake race of the State of New Hampshire, as he then well knew; all in violation of Section 1953 of Title 18, U.S.C."

That section provides in pertinent part:

"(a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or

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adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both."

"(b) This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication."

In response to a limited demand for a bill of particulars, the Government stated that the only records, papers, and writings in issue were the specified 75 acknowledgments, and that no violation of state law was charged. Appellee then moved to dismiss the indictment on the ground that it did "not set forth facts sufficient to charge the Defendant with the violation of" this statute. In a supporting affidavit, three specific shortcomings were claimed. Appellee first contended that § 1953 was intended to reach only the activities of organized crime or those participating in an illegal gambling or lottery enterprise. Absent an allegation that he was of this class, no crime under the statute was charged. Appellee also contended that the indictment was deficient under the statute for failure to name an "illegal" wagering pool, the New Hampshire lottery being a state enterprise. Finally, it was urged that the allegation in the indictment that the acknowledgments were "to be used, and adapted, devised and designed for use" in the New

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Hampshire Sweepstakes was impossible in fact or rested on a misinterpretation of "use," since the acknowledgments were valueless, and need not have been retained in order to collect on the sweepstakes.

The District Court thereupon dismissed the indictment, holding that "[t]he charge in the indictment does not come within the purpose of Section 1953 . . . as disclosed in the legislative history of the Act." The Government brought the case directly here under the provisions of the Criminal Appeals Act, 18 U.S.C. § 3731. We noted probable jurisdiction, 383 U.S. 904. Our function under that Act is limited to the construction of the statute, and

"this Court is not at liberty to go beyond the question of the correctness of that construction and consider other objections to the indictment. The Government's appeal does not open the whole case."

United States v. Borden Co., 308 U. S. 188, 308 U. S. 193. *See also United States v. Keitel,* 211 U. S. 370. [Footnote 1] For reasons to follow, we reverse.

We turn to the specific deficiencies alleged by appellee, noting first that the indictment tracks the language of § 1953, and thus makes it incumbent upon appellee to demonstrate that the additional allegations he claims to be necessary are required to fulfill the statutory purpose. We may dispose quickly of appellee's first contention. The language of § 1953 makes it applicable to "Whoever, except a common carrier . . . " engages in the forbidden conduct. The need to exempt common carriers makes it clear that Congress painted with a broad brush, and did not limit the applicability of § 1953 in the respects urged by appellee. In companion legislation
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where Congress wished to restrict the applicability of a provision to a given set of individuals, it did so with clear language. [Footnote 2] A statute limited without a clear definition of the covered group, as would be the case with § 1953 under appellee's view of it, might raise serious constitutional problems. *Lanzetta v. New Jersey,* 306 U. S. 451. And the asserted restriction would defeat one of the purposes of the section which is aimed not only at the paraphernalia of existing gambling activities, but also at materials essential to the creation of such activities. As the legislative hearings made clear, such materials are often legally fabricated and transported by persons engaged in legitimate businesses. [Footnote 3] Since the purpose of Congress was to thwart the interstate movement of such paraphernalia, the accomplishment of that goal required reaching "whoever" knowingly carried such materials in interstate commerce. [Footnote 4]
Appellee's next contention, earnestly supported by the State of New Hampshire as *amicus,* is based on a similar reading of the legislative intent. Appellee emphasizes the congressional desire to attack organized crime, a purpose not served by restrictions on the distribution of
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New Hampshire Sweepstakes materials. Appellee argues that the specific exemption in § 1953(b) of certain legal gambling enterprises from the provisions of § 1953(a) and the limitation of § 1953(a) itself to three types of gambling favored by organized crime reflect a congressional policy of respecting the individual gambling policies of the States, and that these exemptions and limitations are merely indicative of that general policy. The New Hampshire Sweepstakes, not being in existence when § 1953 was passed, is necessarily exempted, so it is said, by policy, rather than wording. The Government, on the other hand, contends that the specific exceptions point up the breadth of § 1953(a) and the congressional desire to apply it except where Congress itself had carefully examined and approved exemption.
We find the Government's contention more in keeping with the language and purposes of the Act. Although at least one State had legalized gambling activities at the time the bill was passed, and the Congress was certainly aware of legal sweepstakes run by governments in other countries, Congress did not limit the coverage of the statute to "unlawful" or "illegal" activities. The sponsors of the bill made it clear that the measure as drafted was not so limited. [Footnote 5] In passing 18 U.S.C. § 1084 and 18 U.S.C. § 1952 as companion provisions
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to § 1953, Congress exempted transmission of legal gambling information from the former, and limited the latter to those engaged in "unlawful activity." Thus, it is

reasonable to assume that Congress would have given a specific indication of exemption for state-run wagering pools if it had desired to exempt them.
Exemption would also defeat one of the principal purposes of § 1953, aiding the States in the suppression of gambling where such gambling is contrary to state policy. For example, New York prohibits the sale of lottery tickets and the transfer of any paper purporting to represent an interest in a lottery "to be drawn within or without" that State regardless of the legality of the lottery in the place of drawing. N.Y.Const., Art. I, § 9, N.Y.Penal Law, §§ 1373, 1382. To allow the paraphernalia of a lottery, state-operated or not, to flow freely into New York might significantly endanger that policy. It is clear that the lottery statutes apply to state-operated, as well as illegal, lotteries, and that § 1953 was introduced to strengthen those statutes by closing the loopholes placed in them by the narrow interpretation of included materials by this Court in *France v. United States,* 164 U. S. 676, and *Francis v. United States,* 188 U. S. 375. [Footnote 6] It would be anomalous to hold that, where Congress meant to bar the lottery tickets themselves from interstate commerce, it would allow the free circulation of other paraphernalia of the lottery.
Appellee's final contention raises a more troublesome problem under the Criminal Appeals Act under which this case is here. The indictment alleges the knowing interstate carriage of "records, papers and writings," and that these are "to be used, and adapted, devised and designed for use" in a forbidden activity. The Government contends that the question whether an acknowledgment can
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be, and was, so used is one of fact for the trial and not presently before this Court. In *United States v. Wiesenfeld Warehouse Co.,* 376 U. S. 86, 376 U. S. 91-92, the Court dealt with a defendant's claim that a statute was not applicable to him because of his peculiar situation by stating:
"Whatever the truth of this claim, it involves factual proof to be raised defensively at a trial on the merits. We are here concerned only with the construction of the statute as it relates to the sufficiency of the information, and not with the scope and reach of the statute as applied to such facts as may be developed by evidence adduced at a trial."
Here, also, we might justifiably refuse to consider appellee's contention. However, the operation of the New Hampshire Sweepstakes, while a matter of fact, is not a disputed issue and a valid question is raised as to the construction of the use requirement in § 1953. Thus, this case may be considered similar to *United States v. Hvass,* 355 U. S. 570, where, in an appeal under the Criminal Appeals Act, this Court determined the question whether a district court rule was a "law of the United States" for the purposes of the perjury statute. Thus, we may inquire whether an acknowledgment of purchase can, after issuance, have a use in the New Hampshire Sweepstakes.
New Hampshire Sweepstakes tickets are sold by a special machine. The customer writes a name and address on each ticket, and is not restricted to purchasing for himself. [Footnote 7] The owner of a ticket may be an individual who has not come to New Hampshire to make the purchase. The completed ticket is held in storage in the machine, and eventually used in the drawing. The acknowledgment, practically a carbon copy of the ticket, is ejected from the machine. It need not be retained to collect a prize, since all prizes are paid directly to the
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person named on the ticket, and thus appellee claims it has no use in the sweepstakes. But common sense and ordinary experience negative such a formalistic conclusion. The acknowledgment serves a significant psychological purpose by receipting the purchase and assuring the owner that his ticket is properly registered. Before this function is fulfilled by delivery of the acknowledgment to the owner of the ticket, the acknowledgment remains a record, paper or writing "to be used" in the sweepstakes. [Footnote 8] The Government contends that it will prove that the acknowledgments specified in this indictment were in fact being delivered to out-of-state ticket owners who had not themselves purchased their tickets in New Hampshire, but had done so through Fabrizio, and were thus assured of the proper completion of their purchases. We think it sufficient to hold that such a state of facts is comprehended by this indictment, and within the terms of 18 U.S.C. § 1953. The constitutional power of Congress to enact the statute as we have construed it is not questioned by appellee.

The judgment of the United States District Court for the Western District of New York is reversed, and the case remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

[Footnote 1]

Thus, the sufficiency of the indictment as a pleading is not at issue, *United States v. Gilliland,* 312 U. S. 86, nor are questions relating to the bill of particulars presently before us. *See United States v. Comyns,* 248 U. S. 349, 248 U. S. 353. Of course, on remand, these questions will remain unaffected by anything decided today.

[Footnote 2]

Thus, 18 U.S.C. § 1084 is limited to persons "being engaged in the business of betting or wagering."

[Footnote 3]

See Hearings on H.R. 468 before Subcommittee No. 5 of the House Committee on the Judiciary, 87th Cong., 1st Sess., p. 261 (testimony of Mr. Stinson for American Totalisator Co.); Hearings on S. 1653 before the Senate Committee on the Judiciary, 87th Cong., 1st Sess., pp. 20 (testimony of Mr. Jacobs for Jennings & Co.), 25 (testimony of Mr. Nelson for Bally Manufacturing Co.).

[Footnote 4]

See, e.g., Hearings on H.R. 468, *supra,* n 3, at 26, where the Attorney General made clear that the primary purpose of the bill was to assist local enforcement of laws pertaining to gambling and like offenses: S.Rep. No. 589, 87th Cong., 1st Sess., p. 2, specified that the prohibition of the bill was "on the transportation of wagering paraphernalia," and would, without amendment, have comprehended the shipment of parimutuel equipment by legitimate business concerns.

[Footnote 5]

During the Senate Hearings, Assistant Attorney General Miller, representing the Department of Justice, was specifically asked whether the bill was intended only to apply to "illegal" activities under state law. He unequivocally replied:

"No sir. That proviso is not in here. It was the position of the Department that these types of paraphernalia, records, and other devices should be barred from interstate commerce."

Hearings on S. 1653, *supra,* note 3 p. 294. Before the House Committee studying the bill, Mr. Miller was equally explicit. He noted that the Irish Sweepstakes would be covered by the bill, and soon after declared that Congress might consider a special exemption for parimutuel materials, since these arose in activities legal under state law. Hearings on H.R. 468, *supra,* n 3, p. 352.

[Footnote 6]

See H.R.Rep. No. 968, 87th Cong., 1st Sess., pp. 2-3; 107 Cong.Rec. 13902 (remarks of Senator Eastland).

[Footnote 7]

New Hampshire Sweepstakes Commission, New Hampshire Sweepstakes Program 5-8.

[Footnote 8]

See the colloquy between Assistant Attorney General Miller and Senators Keating and Kefauver reported at 293-294 of Senate Hearings on S. 1653, *supra,* n 3. There, Mr. Miller distinguished between paraphernalia which had served and exhausted its use, *e.g.,* losing tickets on a horse race, and paraphernalia whose function was not yet exhausted.

The Mendelsohn Case Court Opinion

United States Court of Appeals,
Ninth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Martin MENDELSOHN, Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,
v.
Robert BENTSEN, Defendant-Appellant.
Nos. 88-5073, 88-5076.

Argued and Submitted Oct. 13, 1989.

Decided Feb. 20, 1990.

Defendants were convicted in the United States District Court for the Central District of California, David V. Kenyon, J., of conspiring to transport and aiding and abetting the interstate transportation of wagering paraphernalia, and they appealed. The Court of Appeals, Canby, Circuit Judge, held that: (1) computer program to aid in sports bookmaking was not protected speech, and applicable statute was not substantially overbroad; (2) disk containing program was not "similar publication" within meaning of statutory exception, and disk was "device" within meaning of statute; (3) violation of statute did not require specific intent to violate the law; and (4) defendant's statement to detective constituted limited waiver of attorney- client privilege.

Affirmed.

CANBY, Circuit Judge:

Martin Mendelsohn and Robert Bentsen appeal convictions for conspiring to transport and aiding and abetting the interstate transportation of wagering paraphernalia, in violation of 18 U.S.C. § § 371, 1953. The item they transported was a computer disk containing a program to aid in bookmaking. Both defendants were sentenced to three years probation. We affirm the judgments.

BACKGROUND

Mendelsohn and Bentsen mailed a computer floppy disk from Las Vegas, Nevada to California, to one Michael Felix, an undercover policeman posing as a bookmaker. The disk was encoded with a computer program called SOAP (Sports Office Accounting Program).

SOAP provided a computerized method for recording and analyzing bets on sporting events. The floppy disk had limited storage capacity; the instructions consequently directed the user to copy the program from the floppy disk onto the hard disk of a computer, and then to use the hard disk to run the computer operation and store data. Once copied into the computer, SOAP could be used to record and review information about game schedules, point spreads, scores, customer balances, and bets. A SOAP user could calculate changing odds and factor in a bookmaker's fee to bets. The operator could quickly erase all records, although the records could be retrieved by using another special program.

Bentsen demonstrated the SOAP program to Felix and offered future assistance. SOAP advertisements promised unlimited telephone support to customers. The defendants knew that most customers used SOAP for illegal bookmaking. The defendants also sold SOAP to bettors and tried unsuccessfully to sell it to legal sports bookmakers and to game companies.

DISCUSSION

1. The First Amendment Defense

The defendants contend that SOAP is speech protected by the first amendment. They compare it to an instruction manual for a computer. They note that computer programs have qualified under the copyright laws as literary works and works of authorship. See Apple Computer, Inc. v. Formula Int'l, Inc. 725 F.2d 521 (9th Cir.1984); 17 U.S.C. § § 101, 102(a).

Mendelsohn proposed an instruction informing the jury that it could not convict unless it found that "it was the intent of one or both of the defendants and the tendency of the computer program at issue here to produce or incite any lawless act, which was in fact likely to occur...." This proposed instruction tracks language in Brandenberg v. Ohio, 395 U.S. 444, 447, 89 S.Ct. 1827, 1829, 23 L.Ed.2d 430 (1969) ("[A] State [may not] ... proscribe advocacy of ... law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.")

The district court rejected the defendant's First Amendment defense, ruling that
[t]he acts for which Defendants have been indicted are too close in time and substance to the ultimate criminal conduct, making a defense based on the First Amendment inapplicable. There is no evidence in this case that any speech by Defendants was directed to ideas or consequences other than the commission of a criminal act. This is not a situation in

which Defendants were addressing themselves, for example to the unfairness of state or federal gambling laws.

The defendants were entitled to their proposed instruction if it was "supported by law and ha[d] some foundation in the evidence." United States v. Escobar de Bright, 742 F.2d 1196, 1198 (9th Cir.1984) (emphasis in original). For a first amendment instruction to meet these requirements, there must be some evidence that the defendants' speech was informational in a manner removed from immediate connection to the commission of a specific criminal act. See United States v. Freeman, 761 F.2d 549, 551 (9th Cir.1985) cert. denied, 476 U.S. 1120, 106 S.Ct. 1982, 90 L.Ed.2d 664 (1986) (First Amendment defense for defendant who gave false tax information at seminars).

The defendants rely upon United States v. Dahlstrom, 713 F.2d 1423 (9th Cir.1983), cert. denied 466 U.S. 980, 104 S.Ct. 2363, 80 L.Ed.2d 835 (1984), where the defendant gave seminars instructing others how to set up tax shelters of questionable legality, but did not set up the tax shelters himself. We stated that, under those circumstances, the defendant could assert a first amendment defense. Id. at 1428. We find Dahlstrom distinguishable. Here, Mendelsohn and Bentsen did not use SOAP to instruct bookmakers in legal loopholes or to advocate gambling reform. They furnished computerized directions for functional use in an illegal activity. There was no evidence that the defendants thought Felix was going to use SOAP for anything other than illegal bookmaking. On the contrary, the defendants knew that SOAP was to be used as an integral part of a bookmaker's illegal activity, helping the bookmaker record, calculate, analyze, and quickly erase illegal bets.

The question is not whether the SOAP computer program is speech, but whether it is protected speech. "Where speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone." United States v. Freeman, 761 F.2d at 552 (no first amendment defense when defendant helped file a false income tax return); see also United States v. Aguilar, 883 F.2d 662, 685 (9th Cir.1989) (defendants showed alien where and how to cross border illegally); United States v. Schulman, 817 F.2d 1355 (9th Cir.), cert. denied, 483 U.S. 1042, 108 S.Ct. 362, 97 L.Ed.2d 803 (1987) (defendant reported false loans stemming from financing transactions); United States v. Solomon, 825 F.2d 1292 (9th Cir.1987), cert. denied 484 U.S. 1046, 108 S.Ct 782, 98 L.Ed.2d 868 (1988) (defendant helped create and manage illegal tax shelters); United States v. Kelley, 864 F.2d 569 (7th Cir.) cert. denied, 493 U.S. 811, 110 S.Ct. 55, 107 L.Ed.2d 23 (1989) (defendant sold tax shelters, participated in closings, and received commissions).

Although a computer program under other circumstances might warrant first amendment protection, SOAP does not. SOAP is too instrumental in and intertwined with the performance of criminal activity to retain first amendment protection. No first amendment defense need be permitted when words are more than mere advocacy, "so close in time and purpose to a substantive evil as to become part of the crime itself." United States v. Freeman, 761 F.2d at 552. We conclude that the SOAP computer program was just such an integral and essential part of ongoing criminal activity. The district court did not err in rejecting the defendant's proposed jury instruction based on the first amendment.

2. Overbreadth

The defendants argue that 18 U.S.C. § 1953 is overbroad because it proscribes "knowing" interstate transport of wagering paraphernalia, but does not require that the distributor "intend" to incite illegal activity, thus proscribing some protected speech. To invalidate a statute on this ground, the overbreadth must be substantial in comparison with the statute's legitimate sweep. See Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S.Ct. 2908, 2917, 37 L.Ed.2d 830 (1973); see also, New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) (upholding a statute that prohibited distribution of obscene material despite arguably impermissible applications).

Section 1953 provides in part: "Whoever ... knowingly carries or sends in interstate ... commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; ... shall be fined ... or imprisoned...." The statute exempts "any newspaper or similar publication." Nearly all of the wagering paraphernalia covered by Section 1953 is easily identifiable and unprotected by the first amendment. The overbreadth, if it exists, is far from substantial. We will not invalidate this statute simply because "there are marginal applications in which ... [it] would infringe on First Amendment values." Parker v. Levy, 417 U.S. 733, 760, 94 S.Ct. 2547, 2563, 41 L.Ed.2d 439 (1974).

3. The "Newspaper or Similar Publication" Exception

The district court ruled that SOAP was not a "newspaper or similar publication" under the exception to 18 U.S.C. § 1953. The exception was "primarily designed to exclude ... a newspaper or other publication containing racing results or predictions." H. Rep. No. 968, 87th Cong., 1st Sess. (1961), reprinted in 1961 U.S.Code, Cong. & Admin.News 2634, 2636. "Similar publication" has not been fully defined, but it does include publications containing betting news, race results, and predictions of the

outcome of races or games. United States v. Kelly, 328 F.2d 227 (6th Cir.1964). One can envision a computer disk containing such information, but SOAP did not. SOAP did not bring the bookmaker any news of the betting world. It contained no information about races, games, bets, or even betting strategy. Rather, SOAP helped computerize the bookmaker's system of keeping records and making bets. Classifying SOAP as a publication similar to a newspaper requires a stretch of the statutory language beyond the possible intention of Congress. The district court did not err in its ruling.

4. A Device Designed for Use in Bookmaking

The district court instructed the jury that, "A computer disk encoded with a software program is a device within the meaning of 18 United States Code § 1953." The defendants contend that this definition was erroneous, and that the district court should have given the defense instruction that a "device" includes only "an object or thing upon which information regarding one or more bets are (or are intended to be) written or otherwise recorded." Bets could be recorded on SOAP, but generally were not because the SOAP disk had little space for recording information. SOAP instructions directed the user to copy SOAP onto his computer's hard disk, and then record the bets.

"Device" is not defined by statute or by case law. The defendants urge a narrow interpretation of "device" under the principle of ejusdem generis, on the theory that "device" is a general word following a list of more specific words which describe items used to record illegal bets. The defendants' argument fails because "device" follows a number of equally general, non- defined and non-specific words in § 1953, such as "paraphernalia," "paper," and "writing."

Although Congress heard testimony regarding items used to record bets, such as blank lottery tickets, bookmaker's records, and flash paper, it did not limit § 1953 to those or similar items. On the contrary, Congress employed broad language to "permit law enforcement to keep pace with the latest developments ..." because organized crime has shown "great ingenuity in avoiding the law." S.Rep. No. 589, 87th Cong., 1st Sess., p. 3. Congress intended Section 1953 to ban the interstate commerce of records of bets and accounts, "and other material utilized in a bookmaking operation." H.Rep. No. 968, 87th Cong., 1st Sess. (1961), reprinted in 1961 U.S.Code, Cong. & Admin.News 2634, 2635. The district court did not err, therefore, in instructing that a computer disk with a program was a "device," even though bets would not necessarily be recorded on it.
The defendants next argue that there was insufficient evidence to convict, because the prosecution did not prove that SOAP was designed for "substantially exclusive" use in illegal bookmaking. Section 1953 broadly

proscribes devices "used, or to be used, ... or designed for use in ... bookmaking." The defendants offer no authority for the requirement of "substantially exclusive" use or design, but contend that Congress could not have intended to ban from interstate commerce every item used in a bookmaking business, from pencils to coffeemakers.

Whatever merit the defendants' argument may have with regard to such generic items as pencils, it does not encompass their computer program that was far more narrowly targeted for use in bookmaking. The few, if any, legal uses of SOAP by large bettors do not immunize SOAP's major, illegal use from the reach of § 1953. In this respect, the erasable feature of SOAP is comparable to flash paper, an instantly combustible paper that is used both by magicians to entertain and by illegal bookmakers to record bets on a medium that may quickly be destroyed in the event of a police raid. Flash paper may not be sent in interstate commerce if intended for use in illegal gambling. See United States v. Scaglione, 446 F.2d 182 (5th Cir.1971). Neither, we conclude, may SOAP. [*Foot Note 2 - . The defendants point out that selling gaming devices without any further participation in illegal gambling is insufficient for prosecution under 18 U.S.C. § 1952, a companion statute which requires intent to facilitate the illegal activity. United States v. Gibson Specialty Co., 507 F.2d 446, 451 (9th Cir.1974); 18 U.S.C. § 1952; contra United States v. Rogers, 788 F.2d 1472, 1476 (11th Cir.1986) (defendant need not associate with illegal venture for the purpose of advancing it; he need only make illegal activity easy or less difficult). Unlike § 1952, however, § 1953 does not explicitly require such intent. See United States v. Fabrizio, 385 U.S. 263, 265, 87 S.Ct. 457, 459, 17 L.Ed.2d 351 (1966) (government need not allege participation in illegal gambling to prosecute under § 1953).]* Under this construction of § 1953, it follows that there was sufficient evidence so that "any rational trier of fact could have found" that SOAP was a device used or designed to be used in illegal bookmaking. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

5. Specific Intent to Violate the Law

For the substantive offense, the district court gave a standard jury instruction defining the term "knowingly." The district court rejected the defendants' proposed instruction that, in order to convict, the jury must find that the defendants acted "purposely intending to violate the law."

Congress prohibited "knowing" interstate transportation of gambling paraphernalia. 18 U.S.C. § 1953. "Knowing" usually connotes a general intent crime, especially when the words "willfully" or "with intent to" are absent. United States v. Flores, 753 F.2d 1499, 1505 (9th Cir.1985) (en banc). Consequently, the only court to face this issue held that a violation of § 1953 does not require specific intent to violate the law. United States

v. Marquez, 424 F.2d 236, 240 (2nd Cir.), cert. denied, 400 U.S. 828, 91 S.Ct. 56, 27 L.Ed.2d 58 (1970) (noting that the case involved obvious gambling paraphernalia and defendants not unaware of possible law violations); see also United States v. Kohne, 358 F.Supp. 1053 (W.D.Penn.1973) (no knowledge that act is unlawful is required for 18 U.S.C. § 1955, a related statute prohibiting illegal gambling operations). We agree, and decline to impose this heightened mens rea requirement urged by the defendants.

The defendants rely on dicta in United States v. Erlenbaugh suggesting that mere knowing transportation of a writing would be insufficient to convict a "wholly innocent person" who was unaware that the writing's contents were designed for use in bookmaking. Erlenbaugh v. United States, 409 U.S. 239, 247-248, 93 S.Ct. 477, 482-483, 34 L.Ed.2d 446 (1972) (holding that the newspaper exception to § 1953 did not apply to a companion statute). The defendants, however, are not such "wholly innocent person[s]," and the instruction they requested went far beyond the suggestion in Erlenbaugh. The defendants knew quite well what SOAP contained, because they designed it, marketed it, and instructed others on its use. They may or may not have known that selling SOAP outside of Nevada was illegal, but the statute does not require that knowledge. The district court did not err in rejecting the defendants' requested intent instruction.

6. The Testimony of Mendelsohn's Former Attorney

Mendelsohn told Detective Felix that his attorney said that selling SOAP was legal. He later told Felix that his attorney said he did not know what would happen if Mendelsohn sold SOAP interstate. Over defendants' objections, the district court found a limited waiver of the attorney/client privilege and permitted Mendolsohn's former attorney, Raby, to testify. Raby testified that he told Mendelsohn that sending SOAP outside Nevada violated federal law.

Defendant Mendelsohn argues that there was no waiver because he did not truthfully disclose the advice his attorney gave him and he did not disclose a significant portion of attorney-client communication. He also questions the testimony's relevance, and if relevant, he argues that it was more prejudicial than probative. Defendant Bentsen claims prejudice by admission of the testimony against Mendelsohn, and appeals the denial of his motion for severance and mistrial.

We review de novo whether there has been a waiver of privilege. United States v. Zolin, 809 F.2d 1411, 1415 (9th Cir.1987). We review the district court's evidentiary rulings for abuse of discretion. United States v. Kessi, 868 F.2d 1097, 1107 (9th Cir.1989).

We agree with the district court that Mendelsohn's statement to Felix constituted a limited waiver of the attorney-client privilege. See Weil v. Investment/Indicators, 647 F.2d 18, 24-25 (9th Cir.1981). Mendelsohn's intent or lack of intent to waive the attorney-client privilege is not dispositive. Id. Nor do we believe that the waiver is ineffective because Mendelsohn may have misstated what his attorney told him.

The district court was careful to confine the attorney's testimony to the subject of Mendelsohn's limited waiver. This case is therefore distinguishable from those in which a limited waiver was urged as a ground for opening a much larger field. See In re Dayco Corp., 99 F.R.D. 616 (S.D.Ohio 1983) (release of two-page findings did not warrant discovery of entire report); In re von Bulow, 828 F.2d 94, 102-103 (2nd Cir.1987) (extrajudicial disclosure of privileged communications in a book did not waive privilege beyond "matters actually revealed"). The district court did not err with regard to the waiver.

Nor did the district court abuse its discretion in its other rulings related to the attorney's testimony. The testimony was relevant to show, among other things, unlawful intent in forming a conspiracy. See Fed.R.Evid. 401. The probative value could properly be found to outweigh any prejudice to Mendelsohn, under the standard of Fed.R.Evid. 403.

Finally, the admission of the evidence against Mendelsohn did not require a severance and a mistrial for Bentsen. The defendants proposed no jury instruction limiting the effect of the attorney's testimony, and none was given. The jury, however, could reasonably separate the evidence as it related to the two defendants, in light of the relative lack of complexity of the trial and the weight of the evidence against each defendant. United States v. Catabran, 836 F.2d 453, 460 (9th Cir.1988); United States v. DeRosa, 670 F.2d 889 (9th Cir.), cert. denied, 459 U.S. 993, 103 S.Ct. 353, 74 L.Ed.2d 391 (1982).

CONCLUSION
As to both defendants Mendelsohn and Bentsen, we affirm the judgments of the district court.

AFFIRMED.

The Norberto Opinion

373 F.Supp.2d 150
UNITED STATES of America
v.
Michael NORBERTO, Robin Hansson, and Christine Forsythe, Defendants.

No. 04 CR 328(ADS)(ARL).
United States District Court, E.D. New York.
June 15, 2005.

Roslynn R. Mauskopf, United States Attorney, by Geoffrey R. Kaiser, Assistant

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United States Attorney, Central Islip, NY, for U.S.

Morvillo, Abramowitz, Grand, Iason & Silberberg P.C., New York City (Robert J. Anello, Richard F. Albert, Richard C. Tarlowe, of Counsel), for Michael Norberto.

Jeffrey W. Waller, LLC, Hauppauge, NY (Jeffrey W. Waller, Of Counsel), for Christine Forsythe.

MEMORANDUM OF DECISION AND ORDER

SPATT, District Judge.

This case involves allegations that the defendants Michael Norberto ("Norberto"), Christine Forsythe ("Forsythe"), and Robin Hansson ("Hansson"), collectively (the "Defendants"), operated an illegal gambling enterprise in the United States that sold shares in a lottery conducted by the Government of Spain to customers around the world. On January 21, 2005, Hansson pleaded guilty to the second count in the indictment which charged the Defendants with a money laundering conspiracy in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i) and 1956(a)(2)(A).

Presently before the Court are motions by Norberto and Forsythe pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure seeking an order dismissing the Indictment in its entirety.

I. BACKGROUND

For purposes of this motion, unless otherwise stated, the allegations in the Indictment are deemed to be true. *See United States v. Velastegui,* 199 F.3d 590, 592 n. 2 (2d Cir.1999). The Court will now review the allegations in the indictment.

In or about and between 1991 and September 2002, the Defendants allegedly operated an illegal gambling enterprise in the United States that sold shares in a lottery conducted by the Government of Spain to customers around the world. The Indictment alleges that this operation was facilitated through a "complex web of companies controlled by the defendants and their coconspirators" and that these corporate entities were utilized to conceal the existence of the criminal enterprise and launder the proceeds.

A. The Parties and Relevant Entities

With regard to the Defendants and the relevant companies, it is alleged that Norberto owned Package Fulfillment Center, Inc. ("PFC") and Tech Mailing Services, Inc. ("Tech Mailing"), both located in Bohemia, New York. Hansson was the President and Chief Executive Officer of Profile Direct, Inc. ("Profile Direct"), a New York corporation, and Value Stores, Inc. ("Value Stores"), a Delaware corporation. Both Profile Direct and Value Stores were located in Bohemia, New York. Forsythe was the President and Chief Executive Officer of CF International Marketing, Inc. ("CFI"), a New York corporation. The Indictment also alleges that the Defendants utilized various entities in Curacao, Canada, and Australia to process payments by the customers of the operation.

B. The Lottery

Each December, the Government of Spain conducted an annual lottery drawing called "El Navidad." The top prize in the drawing is called "El Gordo," meaning the "Fat One." Tickets were sold to the public through official lottery offices in Spain. Each ticket entitled the holder to a chance of winning a share of the El Navidad prizes. Although the rules and regulations of El Navidad prohibited individuals from taking tickets outside the country, it is undisputed that this lottery is played by people throughout

Europe and around the world. As noted in *The Irish Times:*

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Almost three-quarters of the tickets [from the 2004 lottery] went to outsiders, and this year for the first time Sort, [a small Pyrennean village whose name means "lucky" in Catalan], went onto the internet. Hopeful punters from the United States, Japan, Germany, France or Italy as well as many other parts of Spain, purchased their tickets on line spreading the millions around the globe....

(12/23/04 Ir. Times 9, 2004 WL 104002722, "Lucky little village Sort lives up to its name in big lottery.").

C. The Test Mailings and the Alleged Scheme

In or about 1991 and 1992, co-conspirators John Does # 1, # 2, and # 3, along with others, conducted "test mailings" in Europe consisting of solicitations ("Lottery Solicitations") to purchase chances, shares, and interests in the El Navidad Lottery, which was referred to in promotional materials as the "El Gordo Lottery" ("El Gordo Interests"). These test mailings were allegedly conducted to determine the profitability of soliciting the purchase of El Gordo Interests outside of Spain.

Following the test mailings, John Doe # 1, John Doe # 2, and John Doe # 3, together with others, set up two organizations to conduct mass mailings of Lottery Solicitations for the purchase of El Gordo interests. One of these organizations was based in the United States (the "U.S. Operation") and offered El Gordo interests under promotional names, including Worldwide Lottery Commission (the "WLC Promotion"). The second organization was based in Canada (the "Canadian Operation") and offered El Gordo interests under promotional names including Transworld Lottery Commission (the "TLC Promotion.").

The Indictment alleges that between August 1993 and May 1999, the U.S. Operation was directed and supervised by Norberto and Hansson. Beginning in or about 1999, the U.S. Operation was also directed and supervised by Forsythe. According to the Indictment, these individuals, through Profile Direct, Value Stores and CFI, caused the Lottery Solicitations to be sent worldwide to individuals, exclusive of United States residents, allegedly in violation of laws prohibiting the importation and transportation of lottery tickets and other shares and interests in lotteries.

The Indictment further alleges that in order to avoid detection and minimize the impact of potential law enforcement seizures of Lottery Solicitations and related mailings to and from their customers, including customer payments and mailings acknowledging receipt of payment (collectively, "Lottery Mailings"), and to facilitate participation in the gambling operation, the Defendants and others allegedly: (1) used multiple vendors in the United States to print the Lottery Mailings and to forward them to different foreign locations for distribution; (2) contracted with multiple commercial mail receiving agencies in the United States and abroad, including Mail Boxes, Etc., and Packaging Plus, to secure locations and addresses for the receipt of responses and remittances to the Lottery Solicitations; and (3) included in the Lottery Solicitations facsimile numbers associated with Value Stores located in Bohemia, New York and entities in Australia and Canada to which credit card payments could be submitted for participation in the gambling operation.

To further conceal the fact that they were operating an illegal gambling enterprise in the United States, the Indictment alleges that the Defendants falsely represented that they and the companies they directed, namely Profile Direct, Value

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Stores, and CFI, were acting as "agents" on behalf of an off-shore marketing company named International Marketing Center, Inc. ("IMC"), located in Curacao. It is further alleged that the Defendants disguised the proceeds of their enterprise as royalty payments, consulting fees, and commissions paid to them from IMC.

The Defendants also used Pacific Network Services, Ltd. ("PNS"), a Canadian entity, to process checks and money orders submitted for purchase of El Gordo Interests. They also contracted with two Australian companies, namely USA Credit Card Services, Inc. ("USA Credit") and Terry Morris International, Inc. ("Morris International"), to collect the credit card authorizations received from the U.S. Operation by facsimile and mail.

The Indictment alleges that in or about and between November 1994 and December 1999, the U.S. Operation collected over $16 million from customer responses mailed as part of the WLC Promotion.

D. The Wire Transfers

The Indictment further alleges that between November 1994 and December 1999, PNS collected more than $4.7 million from the U.S. Operation. Hansson and Forsythe caused wire transfers from the PNS Account in Canada to the Value Stores Account in an amount exceeding $4.7 million.

During that same time, USA Credit collected more than $9 million from the U.S. Operation. Hansson and Forsythe subsequently caused wire transfers from the USA Credit Account of more than $4.6 million to various accounts held by companies operated and controlled by Norberto.

From December 1997 until December 1999, Morris International collected approximately $2.6 million from the U.S. Operation. Hansson and Forsythe allegedly caused wire transfers from the Morris International Account in an amount of over $900,000 to various accounts held by companies operated and controlled by Norberto, including accounts held by Value Stores, CFI, and Tech Mailing.

On April 6, 2004, a forty count Indictment was filed. Count One of the Indictment alleges a conspiracy to transport and mail lottery materials in violation of 18 U.S.C. §§ 1301, 1302, 1952(a)(3), and 1953(a); Count Two alleges a money laundering conspiracy in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i) and 1956(a)(2)(A); Counts Three through Twenty One allege international money laundering with respect to transfers from PNS to accounts held by Value Stores and CFI in violation of 18 U.S.C. § 1956(a)(2)(A); Counts Twenty-Two through Twenty-Six allege international money laundering with respect to transfers from USA Credit to accounts held by CFI and Tech Mailing in violation of 18 U.S.C. § 1956(a)(2)(A); and Counts Twenty-Seven through Forty allege international money laundering with respect to transfers from Morris International to accounts held by Tech Mailing, PFC, Value Stores and CFI in violation of 18 U.S.C. § 1956(a)(2)(A).

II. DISCUSSION

A. Count One — Conspiracy to Transport and Mail Lottery Materials in violation of 18 U.S.C. §§ 1301, 1302, 1952(a)(3), and 1953(a).

Count One of the Indictment alleges a "Conspiracy to Transport and Mail Lottery Materials" in violation of 18 U.S.C. §§ 1301, 1302, 1952(a)(3) and 1953(a).

1. As to Sections 1301, 1302 and 1953(a).

The Defendants first contend that the 1979 statutory amendments of 18

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U.S.C. §§ 1307(b)(2) and 1953(b)(5) shield them from liability under Sections 1301, 1302 and 1953(a) because these subsections exempt the activities alleged in the indictment.

Section 1301 prohibits "mailing or otherwise sending not only actual foreign lottery tickets but any paper purporting to represent the tickets or interests in such tickets." *Federal Trade Commission v. World Media Brokers, Inc.,* No. 02 Civ. 6985, 2004 WL 432475, at * 7 (N.D.Ill. Mar.2, 2004.); 18 U.S.C. § 1301. In particular, this section makes unlawful whoever:

[B]ring[s] into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in

interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift, enterprise, or similar scheme; or, being engaged in the business of procuring for a person in 1 State such a ticket, chance, share, or interest in a lottery, gift, enterprise or similar scheme conducted by another State (unless that business is permitted under an agreement between the States in question or appropriate authorities of those States), knowingly transmits in interstate or foreign commerce information to be used for the purpose of procuring such a ticket, chance, share, or interest; or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1301.

Similarly, section 1302, applies to one who "knowingly deposits in the mail, or sends or delivers by mail" certain lottery materials, including:

Any letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme;

Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes;

Any article described in section 1953 of this title [which includes "wagering paraphernalia" such as "any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in ... (c) in a numbers,

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policy, bolita, or similar game." (18 U.S.C. § 1953)].

18 U.S.C. § 1302.

The Defendants do not dispute the fact that the Lottery Solicitations were not intended for use in a lottery conducted or run by the foreign country to which the Lottery Solicitations were sent. Rather, the Lottery Solicitations were intended to solicit the purchase of lottery tickets of *another* foreign country, namely Spain. However, in support of their motion to dismiss, the **Defendants argue that the statutory exceptions to Sections 1301, 1302, and 1953(a) that concern the transportation or mailing to an addressee within a foreign country, namely 18 U.S.C. §§ 1307(b)(2) and 1953(b)(5), render the charged conduct lawful.**

Section 1307(b)(2) states in pertinent part:

The provisions of sections 1301, 1302, and 1303 shall not apply to the transportation or mailing ... to an addressee within a foreign country of equipment, tickets, or material designed to be used within that foreign country in a lottery which is authorized by the law of that foreign country.

Section 1953(b)(5) mirrors this language and states that "[Section 1953(a)] shall not apply to ... the transportation in foreign commerce to a destination in a foreign country of equipment, tickets, or materials designed to be used within that foreign country in a lottery which is authorized by the laws of that foreign country."

The Defendants contend that because the Lottery Solicitations "were `designed to be used within the foreign countr[ies]' to which they are sent," Norberto Mem. in Sup. at 10, the statutory exceptions found in Sections 1307(b)(2) and 1953(b)(5) preclude liability. The validity of this argument hinges on the definition and interpretation of the word "authorized." **The Defendants argue that in the context of these exceptions, the word "authorized," makes it lawful to send lottery materials to a foreign country that permits lotteries in general, and/or permits its citizens to play the lotteries of another country. On the other hand, the Government takes a much narrower view of "authorize" and interprets it to only apply to situations where the foreign country itself runs, conducts, or administers the lottery for which the solicitations are sold.**

Recently, in *Andersen LLP v. United States,* ___ U.S. ___, 125 S.Ct. 2129, ___ L.Ed.2d ___ (2005), the Supreme Court reiterated the fundamental rule of statutory interpretation of a federal criminal statute:

We have traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, and out of concern that a fair warning should be given to the world in the language that the common world will understand, of what the law intends to do if a certain line is passed.

Andersen v. United States, 125 S.Ct. at 2134 (internal quotations and citations omitted). Furthermore, in *Andersen* the Supreme Court advised that statutes must be "simply interpret[ed]... as written." *Id.* at 2135; *see also Porcelli v. United States,* 404 F.3d 157, 163 (2d Cir.2005) ("[P]enal statutes ought to be construed in accordance with their plain meaning, so that the least sophisticated citizen may read the statute and regulate his or her conduct consistently therewith.").

Here, because Congress provided no definition of the word "authorize," the Court must consider the "ordinary, common-sense meaning of the word[ ]." *United States v. Dauray,* 215 F.3d 257, 260 (2d Cir.2000); *Andersen,* 125 S.Ct. at 2135. In

that regard, the Supreme Court advised that "the natural meaning of [the term in question] provides a clear answer." *Id.* To find the "natural meaning" of a word or term, the Court must look to sources such as the standard widely accepted law dictionary as the Supreme Court did in *Andersen.* According to Black's Law Dictionary 143 (8th ed.2004), the word "authorize" means "[t]o give legal authority; to empower [or][t]o formally approve; to sanction." Similarly, according to the American Heritage Dictionary of the English Language (2000), to "authorize" means "[t]o grant authority or power to. To give permission for; sanction;" and according to *Webster's Third New International Dictionary* 146-147 (unabridged ed.1993), "authorize" is defined as "to endorse, empower, ... or permit by or as if by some recognized or proper authority ... to endow with... effective legal power...." Thus, the word "authorize" does not merely mean "to permit" or "to allow," as the Defendants contend. Rather, according to the plain meaning of the word "authorize" there must be an affirmative granting of formal approval or permission to allow the conduct in question.

Although the Defendants attempt to expand the scope of these exceptions to include material that is "designed to be used within the foreign countr[ies] to which they are sent," Norberto Mem. in Sup. at 10, a plain reading of the relevant language reveals that the exception is limited to "material, equipment, or tickets ... [that are] designed to be used within that foreign country *in a lottery which is authorized by the law of that foreign country.*" 18 U.S.C. §§ 1307(b)(2) and 1953(b)(5). The language "*that* foreign country" indicates that in order for the mailing and/or transportation of the Lottery Solicitations to be lawful, they must be designed to be used for the lottery that is "formally approved" by the country to which the shipment of lottery material, equipment, or tickets was sent. At this juncture, in this case, there is nothing in the record to indicate that any of the countries to which the Defendants sent the

Lottery Solicitations has statutes authorizing or "giv[ing] legal authority" to participate in lotteries administered by Spain.

The Defendants also argue that if Congress had intended that the exceptions in Sections 1307(b)(2) and 1953(b)(5) were limited to lottery materials that are sent to a foreign country to be used in a lottery conducted or formally authorized by that country, it could have used the same language found in Section 1307(b)(1) which applies to "the transportation or mailing ... to addresses within a State of equipment, tickets, or material concerning a lottery which is *conducted* by that State acting under the authority of State law." (emphasis added); *see also* 18 U.S.C. § 1953(b)(4). The Court acknowledges that "[a] statute is to be considered in all its parts when construing any one of them." *United States v. Dauray,* 215 F.3d 257, 262 (2d Cir.2000) (internal quotation and citation omitted). However, the Court finds that there is a logical explanation for the different language in the subsections that apply to the States compared with the subsections that apply to foreign countries. Unlike the States which almost always conduct and/or administer their own State Lotteries, *see, e.g.,* N.Y. Const, art. 1 § 9 ("[n]o lottery or the sale of lottery tickets ... or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature ... shall hereafter be authorized or allowed within this state...."), such is not the case for foreign countries. For example, unlike the State of New York which has a state run lottery, the

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United Kingdom *authorizes* a private company known as "Camelot" to be the government sanctioned operator of its National Lottery. *See About Camelot: Camelot and The National Lottery, at* http://www.camelotgroup.co.uk/about/cam — lott.jsp. Similarly, in Australia, the New South Wales ("NSW") Lotteries Corporation is owned by the NSW Government and is licensed to conduct various lottery games. *See About NSW Lotteries, at* **http://www.nswlotteries.com.au/about/index.html.** Thus, when considering the lottery practices of foreign countries, it is not always the case that the lottery is conducted by the government of the foreign country. Indeed, the different terms used in the otherwise similar subsections are logical under the circumstances and in effect rebut the Defendants' argument in that regard.

Finally, the Court notes that with regard to Section 1307, the Second Circuit has expressly stated, although in a footnote and in dicta, that the purpose of this section "was to allow United States *manufacturers* to export lottery-related materials for use in foreign countries ... not to attract players to ongoing lotteries." *United States Postal Service v. C.E.C. Services,* 869 F.2d 184, 186 n. 1 (2d Cir.1989) (emphasis added) (internal citation omitted). In addition, although consideration of a statute's legislative history is a matter of last resort and is only considered "[w]hen the plain language and canons of statutory interpretation fail to resolve statutory ambiguity," the Court cannot ignore the legislative history of these sections which support the Court's determinations. The legislative "Statement" in support of these exceptions is particularly instructive as to its purpose, and states in part:

> The Subcommittee on Administrative Law and Governmental Relations held a hearing on H.R. 1301. Testimony at the hearing [on H.R. 1301] established that today, if a United States company wishes to sell lottery related materials to a foreign country, such as England, which has laws authorizing lotteries, the company must go to that country and set up a plant there. It cannot manufacture the materials here and ship them to the purchasing country. As amended, this bill is intended to alleviate this situation and allow for such shipments from the United States.

Id. Thus, it is not clear whether the exceptions in Sections 1307(b)(2) and 1953(b)(5) even apply to the Lottery Solicitations.

Accordingly, for the reasons stated above, the Court finds that the statutory exceptions found in sections 1307(b)(2) and 1953(b)(5) do

not preclude criminal liability under sections 1301, 1302 and 1953(a) and the motion to dismiss the allegations relating to Sections 1301, 1302 and 1953(a) based on these exceptions is denied.

2. As to the Applicability of Section 1302.

The Defendants next argue that Section 1302 does not apply to the conduct in question because there are no allegations that the United States mail was used to carry out the conspiracy. In support of their argument, the Defendants point to language in the Indictment that states that the Defendants "caused the Lottery Solicitations to be *sent* worldwide to individuals, exclusive of United States residents" and to language in the Bill of Particulars stating that the "means by which [the Lottery Solicitations] were sent *included* trucking, air freight and foreign mail." Bill of Particulars, at ¶ G.

Even assuming that the United States mail was not used to send the Lottery Solicitations, Section 1302 also makes it unlawful to mail "[a]ny check, draft, bill, money, postal note, or money order, for

the purchase of any ticket or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme."

Here, the Indictment alleges that the Defendants "*contracted with multiple commercial mail receiving agencies in the United States* and abroad, to secure locations and addresses for the receipt of responses and remittances to the Lottery Solicitations," Indictment ¶ 12 (emphasis added), and that "[b]etween November 1994 and December 1999, the U.S. Operation collected over $16 million from responses to the Lottery Solicitations *mailed* as part of the WLC Promotion." *Id.* at ¶ 16 (emphasis added). Thus, the Indictment does allege that the United States mail was used in furtherance of the scheme.

Even if the Defendants did not directly place the "responses and remittances" in the mail, a principal is "anyone who `causes an act to be done, which if directly performed by him would be an offense against the United States.' and makes him punishable as such." 18 U.S.C. § 2(b); *see also United States v. Dunne,* 99 F.Supp. 196, 198 (E.D.Pa.1951) (Holding that the defendant was properly indicted and convicted for "knowingly caus[ing] [a letter concerning a lottery] to be mailed to him."). In the Court's view, given the nature of the Lottery Solicitations and the fact that the Defendants are alleged to have contracted with commercial mail receiving agencies in the United States, namely "Mail Boxes Etc." and "Packing Plus" to "secure locations and address for the receipt of responses and remittances to the Lottery Solicitations," Indictment, at ¶ 12, the Indictment sufficiently alleges a violation of Section 1302. Accordingly, the motion to dismiss on the ground that there are no allegations that the United States mail was used to carry out the scheme, is denied.

3. As to Section 1953(a).

The Defendants move to dismiss the charges brought pursuant to 18 U.S.C. § 1953(a). Section 1953(a) provides:

Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in ... (c) a numbers, policy, bolita, or similar game shall be [guilty of a crime].

In particular, the Defendants argue that there cannot be a violation of this section because the Lottery Solicitations in question were not to be used in a "numbers, policy, bolita, or similar game," because this subsection does not expressly include lotteries. In support of this contention, Norberto primarily relies on dicta from *Schwartz v. Upper Deck Co.,* in which the Southern District of California, in a footnote, stated that section 1953 does not apply to lotteries because "lotteries are not mentioned [in § 1953(a)(c)], as they are in similar language in 18 U.S.C. § 1955(b)(2). 183 F.R.D. 672, 678 n. 6 (S.D.Cal.1999). On the principle of *expressio unius, exclusio alterius,* § 1953 is not applicable to lotteries." However, *Schwartz* fails to reconcile

the above mentioned statement with the Supreme Court's holding in *United States v. Fabrizio,* 385 U.S. 263, 269, 87 S.Ct. 457, 17 L.Ed.2d 351 (1966):

It is clear that the lottery statutes apply to state operated as well as illegal lotteries and that § 1953 was introduced to strengthen those statutes by closing the loopholes placed in them by the narrow interpretation of included materials by this Court in *France v. United States,* 164 U.S. 676, 17 S.Ct. 219, 41 L.Ed. 595 and *Francis v. United States,* 188 U.S.

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375, 23 S.Ct. 334, 47 L.Ed. 508. It would be anomalous to hold that where Congress meant to bar the lottery tickets themselves from interstate commerce it would allow the free circulation of other paraphernalia of the lottery.

Fabrizio, 385 U.S. at 269, 87 S.Ct. 457; *See also United States v. Baker,* 241 F.Supp. 272, 277 (D.M.Pa.1965) ("`There is no doubt but that the clear Congressional intent was to include all types of lottery schemes within the purview of the statute as embraced in the words "numbers, policy, bolita, or similar game."'") *aff'd.* 364 F.2d 107, 112 (3d Cir.1966) ("[W]e think there are similarities, taking into account the way the numbers game is played, between the lottery in question and policy...."); *United States v. Stuebben,* 799 F.2d 225, 227 (5th Cir.1986) (upholding a conviction of a defendant who ran a company which purchased Illinois State Lottery tickets for customers residing in Louisiana, and in the course of business, used interstate commerce to transport betting slips to Chicago).

In addition, the Court finds that the fact that Section 1953(b)(5) specifically excludes "the transportation in foreign commerce to a destination in a foreign country of equipment, tickets, or materials designed to be used within that foreign country in a *lottery* which is authorized by the laws of that foreign country" from the coverage of this statute further evidences Congressional intent to include lotteries within the meaning of 18 U.S.C. § 1953(a). Thus, the Court finds that Section 1953(a)(c) encompasses lotteries.

This holding is supported by the legislative history of Section 1953(c) which states:

This bill is designed to prevent the easy interstate transportation of wagering paraphernalia. Federal laws which are designed to suppress traffic in lottery tickets in interstate or foreign commerce have been on the statute books since 1895 (18 U.S.C., secs. 1301, 1305). These statutes make illegal the transportation in interstate or foreign commerce of "any paper, certificate or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery..."

. . . . .

Under the proposed bill, it would be a felony to send or carry knowingly in interstate or foreign commerce any wagering paraphernalia or device adapted or designed for use in bookmaking, wagering pools with respect to a sporting event, or numbers, policy, bolita, or similar game. The violation carries with it a penalty of a fine of not more than $10,000 or imprisonment of not more than 5 years, or both. *The language of the proposal make[s] clear that it will include slips, papers, or paraphernalia which may be used in a lottery scheme not yet in existence or already completed.* It also bans the interstate transportation of slips recording the accounts and numbers bet in a numbers lottery and betting slips and other material utilized in a bookmaking operation. The game known as bingo does not come within the scope of this bill, however.

United States Code Congressional and Administrative News, Vol. 2, 87th Congress, First Session, at 2635 (emphasis added).

The Supreme Court's statement in *Erlenbaugh v. United States,* is not inapposite. In that case the Supreme Court stated that

Section 1953 has a narrow, specific function. It erects a substantial barrier to the distribution of certain materials used in the conduct of various forms of illegal gambling. By interdicting the flow of

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these materials to and between illegal gambling businesses, the statute purposefully seeks to impede the operation of such businesses.

409 U.S. 239, 242, 93 S.Ct. 477, 34 L.Ed.2d 446, 93 S.Ct. 477 (1972).

Again, the Defendants attempt to argue that because the sale of the Lottery Solicitations does not violate the laws in the foreign country in which they are sold, there is no "illegal gambling business." However, the Court notes that the scheme in question may be considered an "illegal gambling business" on the basis that it violates New York State law and/or laws of the United States, namely 18 U.S.C. §§ 1301 and 1302, among others statutes, and/or the laws of foreign countries. *See, e.g.,* Criminal Code of Canada, Part VII Disorderly Houses, Gaming and Betting, R.S.C.1985, ch. C-46, § 206 (Making illegal the "sale or offer for sale of any ticket, chance or share, in any such [foreign] lottery....").

Finally, the Defendants argue that even if section 1953 is held to include lotteries, because the Defendants are alleged to have only offered foreign consumers the opportunity to participate in an existing state-sponsored lottery in Spain, they were not *conducting* a lottery. The Defendants cite *United Postal Serv. v. Amada,* 200 F.3d 647 (9th Cir.2000) and *Pic-A-State Pa, Inc. v. Pennsylvania,* No. 93 Civ. 0814, 1993 WL 325539, at *3 (M.D.Pa.1993) *rev'd on other grds.* 42 F.3d 175 (3d Cir.1994) in support of this argument.

However, both of these cases are distinguishable from the case at bar. The *Amada* defendants were prosecuted under the provisions of 39 U.S.C. § 3005 which prohibits mailings where the person is "conducting" an illegal private lottery. The issue in *Amada* was whether the defendants operated and/or conducted a lottery. *Id.* at 651. Similarly, the court in *Pic-A-State Pa* was charged with determining whether the plaintiff, which operated a lottery ticket-ordering business through wire communications rather than via "tangible objects," was engaged in "the business of wagering and betting" as defined in 18 U.S.C. § 1084. *Pic-A-State Pa.,* 1993 WL 325539, at *3. ***Amada* and *Pic-A-State* are distinguishable from the case at bar because, unlike 39 U.S.C. § 3005 and 18 U.S.C. § 1084, for purposes of Section 1953(a), it is irrelevant whether the Defendants were actually "conducting" the lottery or "in the business of wagering and betting." Rather the relevant inquiry is whether the Lottery Solicitations were "used, or to be used, or adapted, devised, or designed for use in ... a numbers policy, bolita, or similar game." 18 U.S.C. § 1953.**

Accordingly, the motion to dismiss the charges based on section 1953 is denied.

4. As to the Applicability of Section 1952(a)(3)

The Defendants are also charged with violating the Travel Act, 18 U.S.C. § 1952(a)(3). This section makes unlawful

Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to ... otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity....

Section 1952(b) defines "unlawful activity" in part, as "any business involving gambling ... in violation of the laws of the State in which they are committed or of the United States."

The Defendants argues that the Indictment is deficient because it does not identify or specify the alleged state law violation and it merely alleges that the unlawful

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activity is "a gambling enterprise in violation of the laws of the State of New York and the United States." An indictment is sufficient if it "contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend." The fact that the Indictment does not specify the exact State and/or Federal Law that serves as the predicate for liability under this statute does not in and of itself warrant its dismissal. It is well-settled that "[a]n indictment

is sufficient when it charges a crime with sufficient precision to inform the defendant of the charges he must meet and with enough detail that he may plead double jeopardy in a future prosecution based on the same set of events...." *United States v. Stavroulakis,* 952 F.2d 686, 693 (2d Cir.1992).

The Defendants place great reliance on *U.S. v. Miller,* 774 F.2d 883 (8th Cir.1985), a case addressing a different criminal statute, namely 18 U.S.C. § 1955, where the conviction was reversed because "an allegation that some state statute has been violated does not fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." (internal quotations omitted).

However, "[u]nder *Miller,* a charge ... will be dismissed only if the count fails to give a sufficient description of the activities forming the basis for the charge *and* the count lacks any citation to the underlying state statute." *See United States v. Gotti,* No. 02 Cr. 606, 2003 WL 124148, at * 3 (Jan. 15, 2003) (citing *Miller,* 774 F.2d at 885-86). In addition, "the prejudice rule also applies with equal force when considering [omissions in citations of the substantive federal crime] with respect to citations of state or federal law statutes which serve as a predicate act for the substantive federal offense." *United States v. Giampa,* No. 92 Cr. 437, 1992 WL 322028, at * 3 (S.D.N.Y. Oct.29, 1992).

Unlike the indictment discussed in *Miller,* the indictment in this case gives the Defendants "a sufficient description of the activities forming the basis of the charge." *Gotti,* 2003 WL 124148, at *1; *see also Giampa,* 1992 WL 322028 (S.D.N.Y. Oct.29, 1992) ("The unlawful activity [i.e. the conspiracy to assault and threaten to commit a crime of violence] which constituted the violation of state law is set forth in the indictment and the failure to cite to sections of New York's Penal Law with respect to such illegal activity had no bearing on [the] defendant['s] ... preparation for this case."). Therefore, in the Court's view, the Defendants have not demonstrated prejudice from the omission of the state citations in this case.

The Defendants next argue that "no unlawful" activity is alleged under the Travel Act because the charged conduct does not constitute gambling under Section 1952. In support of their argument, the Defendants again point to *United States Postal Service v. Amada,* 200 F.3d 647 (9th Cir.2000). As stated above, the defendants in *Amada* were charged with violating a different statute, 39 U.S.C. § 3005, which prohibits mailings where the person is "conducting" an illegal private lottery. 18 U.S.C. § 1952(a)(3) does not have this same limitation of covered activity.

Thus, the Court finds that the Indictment properly alleges a violation of Section 1952(a)(3). Accordingly, the motion to dismiss the charges brought pursuant to this section is denied.

B. As to Counts Two through Forty — The Money Laundering Counts

Count Two of the Indictment charges the Defendants with a money laundering conspiracy in violation of 18 U.S.C.

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§§ 1956(a)(1)(A)(i) and (a)(2)(A). Counts Three through Forty allege that the Defendants engaged in various international money laundering schemes in violation of Section 1956(a)(2)(A). Section 1956(a)(2)(A) makes unlawful

Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the united States to or through a place outside the United States or to a place in the United States from or through a place outside the United States ... with the intent to promote the carrying on of specified unlawful activity.

The Defendants seek the dismissal of Counts Two through Forty on the basis that the Government did not properly allege the specified unlawful activities underlying the money laundering, namely, 18 U.S.C. §§ 1952 and 1953. Because the Court has found that the Indictment properly alleges violations of Sections 1952 and

1953, the Defendants' motion to dismiss Counts Two through Forty is similarly denied.

C. As to the Additional Contentions of Forsythe.

In addition to the above mentioned arguments, Forsythe sets forth the following additional contentions in support of her motion to dismiss. With respect to Count One, Forsythe argues: (1) that she may not be held criminally liable for alleged conduct of corporations which she is not alleged to have controlled; (2) that the Indictment fails to state a conspiracy to violate 18 U.S.C. §§ 1952 and 1953 because it does not allege that the underlying conduct is illegal; and (3) that the Section 1952 violation is deficient because it does not charge that she had the intent to violate a specific state law. As to Counts Two through Forty, Forsythe contends that: (1) the Indictment does not state any acts that can serve as a predicate for money laundering; (2) the Indictment does not sufficiently allege that she knew she received the proceeds of unlawful activity or intended to promote or carry on that activity.

Rule 7(c) of the Federal Rules of Criminal Procedure requires a criminal indictment to contain a "plain, concise and definite written statement of the essential facts constituting the offense charged." For purposes of a motion to dismiss an indictment, the Court must treat the allegations in the indictment as true. *See United States v. Velastegui,* 199 F.3d 590, 592 n. 2 (2d Cir.1999). The Second Circuit has instructed that "`[a]n indictment is sufficient when it charges a crime with sufficient precision to inform the defendant of the charges he must meet and with enough detail that he may plead double jeopardy in a future prosecution based on the same set of events....'" *United States v. Walsh,* 194 F.3d 37, 44 (2d Cir.1999) (quoting *United States v. Stavroulakis,* 952 F.2d 686, 693 (2d Cir.1992)) (citations and internal quotation marks omitted).

The Court finds that the Indictment sets forth the alleged violations in sufficient detail and that there are no defects in the indictment against Forsythe that warrant dismissal. The Indictment includes specific acts committed by all of the Defendants, including Forsythe, in furtherance of the conspiracy charged in Count One. Furthermore, the Indictment sets forth the dates and amounts of each transaction relating to the money laundering counts.

An indictment need only track the language of the statute charged and state the approximate time and place of the alleged crime. *See United States v. Pirro,* 212 F.3d 86, 92 (2d Cir.2000) ("We have consistently upheld indictments that do little

more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime.") (internal quotations and citations omitted). The Indictment in this case more than satisfies these requirements.

"Based on the role assumed by a faithful grand jury in the accusatory process, an indictment, if valid on its face, is enough to call for trial of the charges on the merits." *United States v. Labate,* No. S100CR632, 2001 WL 533714, at *10 (S.D.N.Y. May 18, 2001) (citations and quotations omitted). Accordingly, the motion by Forsythe to dismiss the Indictment on the grounds that it contains the above mentioned pleading deficiencies is denied.

III. CONCLUSION

Based on the foregoing, it is hereby

ORDERED, that the motions by Norberto and Forsythe to dismiss the Indictment are **DENIED** in their entirety.

SO ORDERED.

Travel Act

The Travel Act is another statute that was a part of the 1961 federal legislative package designed to cut off those activities that profited organized crime and to assist the states in enforcing their gambling laws. The Travel Act has the ability to elevate a wide variety of state offenses, including gambling crimes, to federal offenses.

The Travel Act, codified as 18 U.S.C. §1052, generally prohibits travel or the use of any facility in interstate or foreign commerce to promote, manage, further or carry on any business enterprise involving illegal gambling.

18 U.S.C. §1952 the Statute

Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to--

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform--

(A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or

(B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

(b) As used in this section (i) "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the

United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title and (ii) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Attorney General.

DISCUSSION

Is the travel act limited to gambling businesses?

Do you believe the travel act applies to bettors that cross state lines to engage in placing illegal wagers?

Does the travel act apply to businesses that conduct illegal gambling while actively pursuing residents of other states to participate?

The Polizzi Opinion

States Court of Appeals, Ninth Circuit.
UNITED STATES of America, Plaintiff-Appellee,

v.

Michael Santo POLIZZI, Defendant-Appellant.
UNITED STATES of America, plaintiff-Appellee,

v.

Jack S. SHAPIRO, Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,

v.

Peter James BELLANCA, Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,

v.

Anthony GIARDANO, Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,

v.

Arthur J. ROOKS, Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,

v.

Anthony Joseph ZERILLI, Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,

v.

EMPRISE CORPORATION, a New York corporation,

Defendant-Appellant.
Nos. 72-2983 to 72-2989

|

April 30, 1974, As Modified on Denial of Rehearing

July 18, 1974.

OPINION

RENFREW, District Judge:

In 1966 and 1967, appellants Zerilli and Polizzi acquired hidden interests in Vegas **Frontier**, Inc. (VFI), a Nevada corporation, which leased and operated the **Frontier** Hotel in **Las Vegas**, Nevada. VFI was also licensed to conduct gambling at the hotel, which opened in July of 1967. Neither Zerilli nor Polizzi was licensed by the Nevada gaming authorities, nor was either man's interest in VFI disclosed to those authorities. After extensive negotiations, VFI was sold in November, 1967, to Howard Hughes.

Following a very lengthy and complex trial,[1] Zerilli, Polizzi, and the other appellants were convicted of conspiracy (**18 U.S.C. § 371**) to violate **18 U.S.C. § 1952**[2] (Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises) and of substantive violations of that section. Appellants challenge their convictions on a number of bases. They contend:

1. That the prosecution failed to show a violation of **1952**.

2. That, if a violation were shown, the laws in question would be unconstitutionally vague.

3. That the court erred in instructing the jury.

4. That the publicity surrounding their trial deprived them of a fair trial and that there was jury misconduct which the court refused to investigate.

5. That the label ‘Mafia’ was applied to them in a public list of Mafia figures made by the Department of Justice and that the list was submitted in the grand jury proceedings and ***869** in the trial in this case and that these actions constitute a deprivation of their rights of due process.

6. That the trial court committed error in the permission it gave to the prosecution to cross-examine certain of the appellants about their reputations as members of the Mafia when the appellants had not presented evidence of character or reputation.

7. That they were deprived of a fair trial by misconduct of the prosecutor which the trial court sanctioned.

8. That the testimony of a key prosecution witness should have been stricken in that the prosecution's untimely production of his pretrial statements violated the Jencks Act.

9. That error was committed in the admission of the testimony of that witness on the grounds that part of the testimony was conclusively demonstrated to be false, and admitted to be false by the witness.

10. That promises of leniency made to the witness by the prosecution were not disclosed.

11. That the acts complained of were a unitary crime and that it was not proper for them to be convicted of a conspiracy and substantive violations based upon the same conduct.

12. That the venue of the trial court was improper.

13. That the court below erred in refusing to grant appellant Giordano's[2a] motion for severance.

14. That the court below erred in failing to instruct the jury that evidence admitted after appellant Giordano had rested at the close of the prosecution's case could not be considered against him.

15. That appellant Giordano's motion for acquittal at the close of the prosecution's case should have been granted.

16. That appellant Emprise is not liable for any criminal acts that its predecessor in interest allegedly committed.

17. That the evidence was insufficient to support their convictions.

18. That the trial was materially tainted by leads from unlawful electronic surveillance.

Having carefully considered each of these contentions, we affirm the convictions below. Although this opinion is longer than we would have preferred, appellants have raised and argued so many points in 534 pages of briefs, exclusive of appendices and exhibits, that we find a lengthy opinion unavoidable.

I. Violation of § **1952**

[1] Appellants' threshold contention is that their conduct did not come within the coverage of the federal Travel Act (**18 U.S.C. § 1952**), raising two issues as to the meaning of the statute. Section **1952** condemns interstate travel or the use of interstate facilities in the furtherance of 'any unlawful activity,' defined as including 'any business enterprise involving gambling * * * offenses in violation of the laws of the State in which they are committed or of the United States * * *.' A violation of § **1952** thus must be premised upon another distinct violation of state or federal law.

Although state law becomes the focus of this inquiry, 'the gravamen of a charge under § **1952** is the violation of federal law * * *.' United States v. Karigiannis, 430 F.2d 148, 150 (7 Cir. 1970) (Clark, J.), cert. denied, 400 U.S. 904, 91 S.Ct. 143, 27 L.Ed.2d 141 (1970). 'Reference to state law is necessary only to identify the type of unlawful activity in which the defendants intended to engage.' United States of America v. Rizzo, 418 F.2d 71, 74 (7 Cir. 1969), cert. denied, 397 U.S. 967, 90 S.Ct. 1006, 25 L.Ed.2d 260 (1970).

While the Government's theory was not succinctly stated, either in its brief or at oral argument, it does emerge ***870** from a careful reading of the indictment and information[3] together with the court's instructions to the jury[4] that appellants violated the federal Travel Act by conduct which was a 'business enterprise' that involved 'gambling * * * offenses' in violation of Nevada Revised Statutes (N.R.S. § 463.160[5] in that Zerilli and Polizzi's interests in the gambling conducted by VFI at the **Frontier** Hotel were hidden from the nevada gaming authorities.

Appellants' first argument is that since VFI had a gambling license as required by Nevada law, their activity could not be unlawful within the meaning of the federal Travel Act. They rely considerably on one instruction, to which the government did not object, that VFI was licensed and that the gambling it conducted could not be found illegal.[6] Appellants, counsel stated at oral argument that, even if appellants procured the VFI license fraudulently, there would be no criminal violation of Nevada law. We disagree.

This instruction meant only that the trial court did not believe that the prosecution could rely upon N.R.S. § 463.160(1)(a). The license would not be ***871** viewed as void ab initio, and the appellants could not be prosecuted for conducting a gambling enterprise without a license. Nor could the prosecutor 'pierce the corporate veil' to reach appellants.[7] The instruction does not, however, legitimize all the acts of appellants in obtaining the license. N.R.S. § 463.160(1)(c) covers precisely the charges here against appellants: receiving compensation from gambling conducted without having procured and maintained licenses as required by law.[8]

[2] [3] Appellants argue, however, that N.R.S. § 463.160(1)(c) only requires that the gambling be licensed and does not reach fraud or other violations in obtaining the license. Acceptance of this construction of Nevada law would effectively emasculate the statutory scheme of requiring the disclosure of the identities of the persons who would be involved in the gambling enterprise. This disclosure requirement has as its purpose the prevention of the infiltration of criminal elements into gambling in Nevada.[9] Section 463.160(1)(c) requires not only that a license be procured and maintained, but also that it must be procured and maintained in a manner that satisfies the other provisions of the gambling law. The term 'as required by statute' must be viewed in light of the strong state policy behind that statutes. The interpretation offered by appellants would give free rein to criminal elements in their attempts to infiltrate Nevada gambling. The most they would risk would be the administrative revocation of their corporation's license. They would become criminally liable only if they operated a gambling enterprise without procuring a license, and the most dangerous elements could easily avoid such a blatant violation of Nevada law. Given these considerations, the only reasonable construction of N.R.S. § 463.160(1)(c) is that persons receiving compensation from the gambling operation must fulfill all other state requirements surrounding the granting of a license.[10]

[4] [5] Appellants violated those other provisions by failing to disclose the identities of Zerilli and Polizzi as persons having an interest in VFI. Under N.R.S § 463.170(2), applicants for a corporate license had to disclose 'persons having any direct or indirect interest therein of any nature whatsoever, whether financial, administrative, policymaking or supervisory * * *.'[11] ***872** The disclosure requirement must be complete in order to meet the policy of the Nevada gambling laws. Appellants stress that the corporate-license application form supplied by the state required only the listing of the names of corporate officers and shareholders. Since VFI's application complied with this requirement, they argue, there was no failure to disclose. This argument, if accepted, would turn the detailed statutes governing the control of licensing into a mere formality. Disclosure of nominal officers and shareholders would guarantee legality and shield the very persons as to whom the disclosure requirements are directed. The Attorney General of Nevada in 1960 gave his opinion that N.R.S. § 463.170(2) gave power to state authorities 'to require

those persons having administrative, policymaking or supervisory interest in the operation to qualify for licensing.' To utilize that authority effectively, he stressed, the authorities would need to obtain information about those persons. Official Opinions of the Attorney General of Nevada, 1960-1962, pp. 83-84 (1960). There was no hint that formalities suffice or should be exalted over substance. In this case, the information and indictment emphasized that Zerilli and Polizzi held the real interests in VFI and controlled the nominal shareholders. The trial court, in its instructions on the definition of 'owner' as used in the Nevada statutes, stressed the reality of ownership rather than formal titles. (Reporter's Transcript, Vol. 43, p. 8765.) These statutes require disclosure of the names of all persons with actual control or financial interests in the gambling enterprise.[12]

[6] [7] [8] [9] The acts of appellants charged and proven in this case therefore were prohibited by state law.[13] Appellants, however, raise further objections. They contend that, even if they did violate Nevada law, their violations were not criminal and therefore do not come within the ambit of § **1952**. They characterize their conduct as merely 'operating a casino with a state corporate license ***873** but without other required state licenses.' That theory, however, is based upon the government's contention that all persons with a direct or indirect interest in a gambling casino must be licensed. We find no such requirement in Nevada law.[14] The violations of Nevada law in question here were not by VFI, but rather by those in control of VFI, who did not disclose the interests of Zerilli and Polizzi. The trial court preserved the corporate fiction and the legality of the gambling operations conducted by the corporation. Hence appellants' argument that N.R.S. § 463.310 specifically establishes only an administrative penalty available to the authorities in this case— revocation of VFI's license— is in error. That provision does set the procedures for disciplinary action against the licensee, but here the licensee has not been prosecuted for violating Nevada law. Since there is no specific penalty prescribed for a violation of N.R.S. § 463.160(1)(c), the 'catch-all' section, N.R.S. § 463.360(2)[15] would apply.[16] That violation, there characterized as a gross misdemeanor, would be a criminal infraction.[17]

[10] Appellants' second argument is that § **1952** reaches only wholly unlawful business enterprises and, since gaming is legal in Nevada, the federal Travel Act does not apply. They cite United States v. Roselli, 432 F.2d 879 (9 Cir. 1970), cert. denied, 401 U.S. 924, 91 S.Ct. 883, 27 L.Ed.2d 828 (1971), rehearing denied, 402 U.S. 924, 91 S.Ct. 1366, 28 L.Ed.2d 665 (1971), in support. Their reliance upon Roselli is misplaced. There the Court accepted only for the purposes of argument the premise that the scope of § **1952** was limited to illegal business enterprises and even on that basis found such an illegal enterprise (432 F.2d 879 at 887-888). Appellants overlook that earlier in that opinion this Court observed:

'If section **1952** applied only when all business activity was absolutely prohibited in the particular field, the reach of the section would be materially diminished without apparent reason in terms of the statute's purpose. There is no evidence that Congress intended this result.' 432 F.2d 879 at 887.

Nor do appellants' general references to the legislative history of § **1952** support this contention.[18] The statutory language is clear. 'Section **1952** speaks not of illegal

gambling, but of a more ***874** inclusive category: 'gambling * * * offenses.'' United States v. Roselli, 432 F.2d 879, 887 (9 Cir. 1970), cert. denied, 401 U.S. 924, 91 S.Ct. 883, 27 L.Ed.2d 828 (1971), rehearing denied, 402 U.S. 924, 91 S.Ct. 1366, 28 L.Ed.2d 665 (1971). See also Turf Center, Inc. v. United States, 325 F.2d 793, 795 (9 Cir. 1963).

[11] [12] This Court's construction of the scope of § **1952** will not open the federal courts to the prosecutorial abuses which appellants have depicted for the Court: Prosecutions of minor illegal acts incidental to an otherwise legal business. The legislative history of § **1952** does demonstrate that its main purposes are to attack organized crime and to aid local authorities in combatting it.[19] Courts would simply not allow it to be used to extend federal prosecutions far from these purposes.[20] See Erlenbaugh v. United States, 409 U.S. 239, 245, 93 S.Ct. 477, 34 L.Ed.2d 446 (1972).

[13] We conclude that appellants engaged in a business enterprise involving gambling offenses in violation of Nevada law and **18 U.S.C. § 1952**.

II. Vagueness

[14] Appellants challenge the statutes under which they have been charged and convicted as being unconstitutionally vague. 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939). Appellants' attack is directed at the Nevada statutes and not the language of § **1952**, which has been upheld previously against claims of vagueness. See, e.g., United States v. Cozzetti, 441 F.2d 344, 348 (9 Cir. 1971); Turf Center, Inc. v. United States, 325 F.2d 793, 795 (9 Cir. 1963); United States v. Smith, 209 F.Supp. 907, 917-918 (E.D.Ill.1962). We have already held that the Nevada statutes clearly proscribe the conduct charged against appellants.[21] The construction of those statutes urged by appellants is unreasonable and conflicts with the manifest purpose of the Nevada gambling legislation requiring precise and stringent controls relating to the licensing of gambling. Violation of the statutes in the manner charged against appellants is a criminal offense.[22] In affirming these convictions, we are not enlarging the original legislation by interpretation. Cf. Bouie v. City of Columbia, 378 U.S. 347, 350-352, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964); Pierce v. United States, 314 U.S. 306, 311, 62 S.Ct. 237, 86 L.Ed. 226 (1941).

Moreover, the trial court instructed the jury that specific intent was an element of the offense charged against appellants.[23] Thus the jury found that appellants knew that Nevada law and been violated in the procurement of ***875** VFI's license. 'A mind intent upon willful evasion is inconsistent with surprised innocence.' United States v. Ragen, 314 U.S. 513, 524, 62 S.Ct. 374, 379, 86 L.Ed. 383 (1942). See also United States v. National Dairy Corp., 372 U.S. 29, 33, 35, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963); Screws v. United States, 325 U.S. 91, 103, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945). The record here is clear that appellants were not the helpless victims of an unconstitutionally vague statute.[24]

III. Jury Instructions

A. Nevada Statutes and Regulations

Appellants contend that the court below erred in several respects in its instructions to the jury. Certain of these claims concern specific instructions relating to the Nevada statutes. Appellants' objections are based upon a misunderstanding of the government's legal theory of the case. Viewed as a whole, the court's instructions constitute a reasonable construction of § **1952** and the Nevada statutes governing the licensing of gambling operations.

[15] Appellants also argue that it was error to read to the jury, without explanation, N.R.S. § 463.130.[25] But that section is a self-explanatory statement of Nevada legislative policy and is important in understanding the purpose and meaning of the other sections. These Nevada statutes form a unified legislative plan; particular sections cannot be fully understood without relating them to the entire statutory scheme. Therefore, under these circumstances, it was not error to read to the jury sections other than N.R.S. §§ 463.160 and 463.200, the two sections upon which the indictment and information were based.

[16] N.R.S. § 463.300, dealing with voting trust agreements, was also read to the jury. Appellants argue that this was confusing, since the court had earlier instructed the jury that the evidence presented had failed to establish a violation of § 463.300. The court refused appellants' instruction which would have directed the jury to disregard all evidence concerning the voting trust agreement. In light of the court's specific instruction, no further instructions were necessary to prevent the jury from finding a violation of § 463.300. It is also highly unlikely that reading that section in these circumstances confused the jury. Cf. United States v. Lookretis, 422 F.2d 647, 651 (7 Cir. 1970), cert. denied, 398 U.S. 904, 90 S.Ct. 1693, 26 L.Ed.2d 63 (1970).

[17] Although conceding that the court properly charged the jury that violations of the regulations of the Nevada State Gaming Commission could not constitute criminal offenses, appellants nevertheless assert that error was committed in instructing that such a violation could be considered as an act in furtherance of a conspiracy. This instruction was proper and necessary in that without it the jury might have thought that it had to disregard completely a violation of the regulations.

B. Sending Statutes and Regulations to the Jury Room

[1]**18**[1] Appellants urge that sending the statutes and regulations into the jury room, especially without limiting instructions, was prejudicial error. ***876** This question is within the sound discretion of the trial judge. United States v. Gross, 451 F.2d 1355, 1358-1359 (7 Cir. 1971); United States v. Bearden, 423 F.2d 805, 813 (5 Cir. 1970), cert. denied,400 U.S. 836, 91 S.Ct. 73, 27 L.Ed.2d 68 (1970). In this case, the statutes and regulations were extremely complex, and the trial judge may justifiably have believed that it would be better to give the jury the statutes and regulations rather than to have them attempt a reconstruction from notes or from memory. In his effort to avoid confusion, the trial judge did not abuse his discretion.

C. Reading Indictment and Information to Jury and Sending Copies to Jury Room

[19] Appellants argue that it was reversible error to read the indictment and information both at the beginning of trial and during the instructions. Given the extraordinary length and complexity of the trial, however, the trial court may properly have judged that a re-reading was required to avoid confusion.[26] The decision to read the indictment to the jury is within the sound discretion of the trial court, and we find no abuse of that discretion here.[27]

[20] [21] The court below also sent to the jury room copies of the indictment and information. That decision is also generally within the discretion of the trial judge. United States v. Murray, 492 F.2d 178, 193-194 (9 Cir. 1973); Souza v. United States, 304 F.2d 274, 280 (9 Cir. 1962). Appellants contend that they should have been advised before closing arguments that the court intended to send the information and indictment. See Dallago v. United States, 138 U.S.App.D.C. 276, 427 F.2d 546, 553 (1969). We agree, but the failure to do so here is not prejudicial error.[28] Under all the circumstances of this case, especially the court's cautionary instruction on the use of the indictment and information and the detailed instructions on what could be considered evidence by the jury, we do not find that error prejudicial in any respect.

D. Specific Intent

[22] In claiming error in the court's instructions on specific intent,[29] appellants urge us to follow United States v. Stagman, 446 F.2d 489, 492-493 (6 Cir. 1971), and hold that specific intent to violate state law is an element of the offense under § **1952**. This Court however, has previously approved an instruction similar to the one given in this case. See Turf Center, Inc. v. United States, 325 F.2d 793, 797 and n. 5 (9 Cir. 1963). Moreover, to the extent that Stagman requires proof that an accused under § **1952** intended to violate state law himself, we find that it conflicts with the clear meaning of the language used in § **1952**. As the court in Stagman recognized, the intent required in the statute 'refers to the entire phrase 'to * * * carry on * * * any unlawful activity.'' 446 F.2d at 492. ***877** to violate state law, but rather specific intent to facilitate an activity which the accused knew to be unlawful under state law. This interpretation, apart from its consistency with the literal terms of § **1952**, also supports the purposes of that statute in attacking organized crime by furnishing federal help to local authorities in their attempts to control such crime. It would not subject innocent persons to criminal jeopardy in travelling interstate since for a conviction, proof would be required at the least 'that the defendant intended with bad purpose'[30] to facilitate the violation of state law.

[23] Although the instructions on specific intent, viewed alone, could have been more precise, taking the instructions as a whole, they reasonably informed the jury that they had to find that appellants knew that what they were facilitating was an unlawful activity under state law.

E. Advice of Counsel

[24] As an adjunct to their argument on specific intent, appellants claim that the court should have instructed the jury that reliance on advice of counsel could show a lack of specific intent. Given the evidence in this case, the advice given by counsel was an insignificant factor in the criminal enterprise found by the jury; thus the court below did

not err in refusing to give an 'advice of counsel' instruction. See United States v. Shewfelt, 455 F.2d 836, 838-839 (9 Cir. 1972), cert. denied, 406 U.S. 944, 92 S.Ct. 2042, 32 L.Ed.2d 331 (1972); Bisno v. United States, 299 F.2d 711, 719-720 (9 Cir. 1961), cert. denied, 370 U.S. 952, 82 S.Ct. 1602, 8 L.Ed.2d 818 (1962).

F. Kotteakos Instruction

[25] Appellants contend that they were entitled to a 'multiple conspiracy' instruction following the principle of Kotteakos v. United States,328 U.S. 750, 767-768, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). See also United States v. Griffin, 464 F.2d 1352, 1355-1357 (9 Cir. 1972), cert. denied,409 U.S. 1009, 93 S.Ct. 444, 34 L.Ed.2d 302 (1972), Having carefully reviewed the entire reporter's transcript of trial and all documents in evidence, we find that there is no variance between the allegations of the indictment and information and the evidence presented at trial and that therefore the trial court did not err in not giving a 'multiple conspiracy' instruction.

G. Suppression of Evidence

A letter from appellant Bellanca to Emprise Corporation was not produced by the defense in response to a grand jury subpoena because of a claim of attorney-client privilege. The court gave a general instruction on suppression of evidence, apparently in part on the basis that failure to produce the letter could be evidence of suppression.[31] Appellants also complain of the court's refusal to give an instruction on attorney-client privilege.

[26] Even if the giving of the suppression of evidence instruction were error, we find that the weight of other evidence against appellants is such that the error could not have been prejudicial. The court below, moreover, had instructed the jury on the attorney-client privilege during the trial.[32]

***878** H. Perjurer's Testimony

[27] Appellants also claim error in the court's failure to give a cautionary instruction on the testimony of a perjurer. Their initial proposed instruction referred to the witness, Maurice Friedman, as an admitted perjuror when in fact he had been convicted of perjury and had not pled guilty. Appellants submitted a revised instruction after the instructions conference substituting 'convicted' for 'admitted', but it was rejected as untimely. Even if this were error, which we do not find, any prejudice resulting from it was cured by the instructions given on prior inconsistent statements[33] and on the weight of the testimony of an informer.[34] These instructions sufficiently alerted the jury to the caution necessary in weighing the testimony of a witness like Friedman. Cf. United States v. Evanchik, 413 F.2d 950, 954 (2 Cir. 1969); United States v. Ross, 322 F.2d 306, 307 (4 Cir. 1963), cert. denied, 375 U.S. 970, 84 S.Ct. 490, 11 L.Ed.2d 418 (1964).

I. Skimming[35]

[28] Appellants argue that the trial court committed error in not admonishing the jury during instructions that the prosecution's argument about 'skimming' should be disregarded as unsupported by evidence and as not appearing in the indictment or information. Whatever prejudice to appellants could have resulted from the prosecutor's

argument was cured by the trial court's painstaking instructions on the elements of the offenses charged. The trial judge read the language of the information and indictment to the jury and sent copies of them to the jury room. The jury was fully apprised of the charges against appellants; 'skimming' was not one of them.

IV. Prejudicial Publicity

Appellants claim that they were prejudiced by the publicity given their case both before and during trial and that the trial judge failed to take adequate measures to detect and prevent that prejudice. The pretrial publicity consisted mainly of newspaper articles on the case.[36] These articles commented, for instance, upon the alleged ties of appellants to the Mafia and upon the 'skimming' allegations of the prosecution.

Appellants also point to several incidents during trial which in their view also led to prejudicial publicity. Newspaper articles referred, for example, to evidence which had not been admitted linking appellants Zerilli and Polizzi to James Hoffa, the former Teamster official, in a prior attempt to invest in a **Las Vegas** casino. On another occasion a witness mentioned in the absence of the jury that during a previous recorded and transcribed conversation, he 'had in mind' Zerilli and Polizzi when he used the terms 'Mafia' and 'Cosa Nostra.' References to this comment appeared in the newspapers. Later a newspaper disclosed the court's ruling at a sidebar conference sustaining the prosecutor's objection to a question asking Polizzi to explain his testimony on cross-examination that he had been falsely accused by the Department of Justice of being in ***879** the Mafia.[37] The prosecutor had mentioned at that sidebar conference surveillance logs of Zerilli and Polizzi disclosing 'the whole Mafia organization in Detroit,' and the newspaper article referred to that comment. The motion picture The Godfather was released during the trial, and a local television personality discussed during his program the book and Zerilli and Polizzi and their alleged links to the Mafia. Finally, after the jury had reached its verdicts, one juror allegedly told defense counsel that other jurors had read newspaper articles on the case during trial and that this had been 'devasting to the defendants.' Although this juror had been in the courtroom during a hearing on a motion for a new trial, the court refused appellants' request to have him testify but permitted defense counsel to file affidavits. The juror was subsequently unwilling to submit an affidavit, but defense counsel did file an affidavit purporting to state what the juror had said.

[29] An accused has an unquestioned right to have jurors decide his guilt or innocence who are not biased by what has appeared in the media. In some instances prejudicial publicity before and during trial may be so obvious and overwhelming that an appellate court must overturn a conviction without delving into a detailed analysis of the possibility of prejudice and the judicial action taken to a curb it. See Sheppard v. Maxwell, 384 U.S. 333, 349-352, 89 S.Ct. 1507, 16 L.Ed.2d 600 (1966); Estes v. Texas, 381 U.S. 532, 542, 544, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); Rideau v. Louisiana,373 U.S. 723, 726, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963); Irvin v. Dowd,366 U.S. 717, 725, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). After a review of appellants' evidence and arguments on this question, we do not find that the situation here reached that extreme, and therefore we do not find 'bias or preformed opinion' which would require reversal as a matter of law. Beck v. Washington, 369 U.S. 541, 557, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962); United States v. Silverthorne, 430 F.2d 675, 678 (9 Cir. 1970), cert. denied,400 U.S. 1022, 91 S.Ct.

585, 27 L.Ed.2d 633 (1971). We must now determine the probability of prejudice in this case and whether the court responded adequately to curtail the chance of an unfair trial. Marshall v. United States, 360 U.S. 310, 312, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959).

A. Pretrial Publicity

[30]‘ The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. * * * When pretrial publicity is great, the trial judge must exercise correspondingly great care in all aspects of the case relating to publicity which might tend to defeat or impair the rights of an accused. The judge must insure that the voir dire examination of the jurors affords a fair determination that no prejudice has been fostered.’ Silverthorne v. United States, 400 F.2d 627, 637-638 (9 Cir. 1968). In a case of substantial pretrial publicity, the voir dire must not simply call for the jurors' subjective assessment of their own impartiality, and it must not be so general that it does not adequately probe the possibility of prejudice. 400 F.2d at 638.

If this case were to be considered closely similar to Silverthorne, supra, in the seriousness of the question of prejudice from pretrial publicity, there is little doubt that the initial voir dire was not sufficiently probing to meet the Silverthorne standards. The trial judge's questions on pretrial publicity were limited ***880** to two questions addressed to the first prospective panel of jurors[38] and later questions addressed to an individual prospective juror.[39] The answers gave no indication of possible prejudice.

[31] [32] [33] We find, however, that the pretrial publicity in this case was not substantial enough to have required the trial judge to interrogate the prospective jurors at length about it. The judge was aware of the publicity, and clearly it was his judgment that the pretrial publicity was not a significant danger to a fair trial.[40] His concern seemed greater about the possible effects of publicity during trial. The pretrial publicity in this case does not resemble the situation in Silverthorne v. United States, 400 F.2d 627, 639 (1968). Unless a trial judge clearly has erred in his estimation of the action needed to uncover and prevent prejudice from pretrial publicity, an appellate court should not intervene and impose its estimate. The court closest to the situation can best evaluate the proper way to walk the difficult line between a vigorous voir dire to determine any possible bias and avoidance of creating bias by specific questions which add ‘fuel to the flames' in suggesting the presence of controversial issues. Beck v. Washington, 369 U.S. 541, 548, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962). The court below did not abuse its discretion by the way it handled the question of pretrial publicity.

B. Publicity During Trial

[34] [35] When the possibility of prejudice from publicity arises during trial, the trial court has ‘the affirmative duty * * * to take positive action to ascertain the existence of improper influences on the jurors' deliberative qualifications and to take whatever steps are necessary to diminish or eradicate such improprieties.’ Silverthorne v. United States, 400 F.2d 627, 643 (9 Cir. 1968). See also Gordon v. United States, 438 F.2d 858, 872-873 (5 Cir. 1971), cert. denied, 404 U.S. 828, 92 S.Ct. 139, 30 L.Ed.2d 56 (1971), rehearing denied, 404 U.S. 960, 92 S.Ct. 312, 30 L.Ed.2d 279 (1971). The better practice, if there is a clear chance of prejudice, is for the court to interrogate each juror in camera

about the possibly prejudicial publicity. Silverthorne v. United States, 400 F.2d 627, 644 (9 Cir. 1968); Coppedge v. United States, 106 U.S.App.D.C. 275, 272 F.2d 504, 508 (1959). The trial judge carries a difficult burden. He is called upon to question the jurors, but repeated questioning could itself be prejudicial in inciting in the jurors 'joint or individual curiosity and encourage attempts to read the very newspaper articles sought to be kept from their knowledge.' ***881** Silverthorne v. United States, 400 F.2d 627, 643 (9 Cir. 1968). His very questions may disclose or accentuate controversial issues. Unless he has clearly abused his discretion, we shall uphold the trial judge's delicate estimation of the needs of the case of which he has firsthand experience.

[36] During his initial voir dire of prospective jurors, the judge indicated that the jurors would not be sequestered but that they would be expected to avoid hearing or seeing anything about the case.[41] One prospective juror was questioned about adherence to that admonition; she indicated that she would find it difficult to follow and was excused. Appellants argue that allowing the jurors to read newspapers with the admonition to avoid stories on the trial after glancing at headlines itself raised enough possibility of prejudice to require reversal. We disagree. The relevant questions are the nature of the headlines and the actions taken by the court to cure any possibility of prejudice.[42]

Early in the trial on February 24, 1972, the court again admonished the jury to avoid any publicity about the case.[43] The very next day, after newspaper stories linking Zerilli and Polizzi to James Hoffa, the court undertook an in camera interrogation of each juror separately, in the absence of all defendants, counsel and other jurors. The judge asked whether they had read the articles and whether they had seen or heard anything about the case in the newspapers, on television, or on the radio. He also gave them another general admonition. Nothing said by any of the jurors during this interrogation revealed a possibility of prejudice from the publicity.[44] We agree with appellants ***882** that it would have been preferable to ask each juror about the newspaper carrying the Hoffa story which apparently was in the jury room, but each juror's other answers would have to be willful falsehoods if each had in fact read the article in the jury room. If the jurors had read the story, 'even the most biased argument would be hard put to suggest that all twelve jurors, sworn to try the indictments fairly would deliberately break their oaths by remaining in the box, having read the items, instead of bowing out under the wise protection of the court and saving not only their dignity but their honor.' United States v. Carlucci, 288 F.2d 691, 696 (3 Cir. 1961), cert. denied, 366 U.S. 961, 81 S.Ct. 1920, 6 L.Ed.2d 1253 (1961).

On March 9, 1972, after newspaper articles were published referring to appellants and their links to organized crime as discovered by United States Senate investigators, the court declined to question the jurors again, in the belief that new questioning could itself undermine the jury's belief in its own integrity.[45] On March 21, 1972, after the leak of the ruling at the sidebar conference, the court, having the opportunity to observe on a daily basis the demeanor of the jurors and after expressing his confidence in their ability to obey his admonitions, again declined to interrogate the jurors anew.[46]

[37] On April 3, 1972, the trial court on its own motion conducted an in camera questioning of each juror.[47] Again defendants, counsel, and the other jurors were not present. He asked them generally whether they had read, seen, or heard anything in the

media about the case. The jurors indicated that they had not. Appellants argue that Juror Foss, whose family was keeping a scrapbook of articles concerning the trial, must have been exposed to publicity surrounding the case. Here is the record:

'The Court: Mr. Foss, you will recall that some time ago I called the jurors in one at a time to ask them if they had read any newspaper articles about this case and because of the length of the trial I thought it wise to emphasize it again and to call them in to ask if they had read any newspaper ***883** articles about the case. Have you read any?

'Juror Foss: No. My People cut the articles out of the paper before they give me the paper. Before they bring the paper to me in the morning they cut everything out. They have got it in a scrapbook somewhere.

'The Court: And you will wait until the case is over before you read it?

'Juror Foss: I won't read anything about the case.

'The Court: That is fine.

'Juror Foss: I will decide it on the facts the courtroom.' Reporter's Transcript, Vol. 31, pp. 6010-6011.

The argument is frivolous.

After the verdicts were reached, the trial judge questioned each juror separately in his chambers. He stressed on this occasion whether the term 'Mafia' or related terms had been factors in the jury's deliberations.[48] It seems that the terms were discussed briefly at the beginning ***884** of the jury's deliberations and once during a lunchtime, but the jurors agreed that those terms and issues had not been factors in their decisions. The judge also asked them about their exposure to the book and the motion picture The Godfather. Two jurors had read the book, but said that it had not influenced their decisions. He asked all but four jurors general questions about their exposure to newspaper, television, and radio publicity, again without any revelations of possible prejudice.

[38] Finally, on June 12, 1972, at a hearing on a motion for a new trial, defense counsel told the court of juror Palmer's revelation that other jurors had been reading newspaper stories about the case and that it had been 'devastating to the defendants.' The court refused defense counsel's request for an immediate examination of jurors Palmer and Dewey who were in the courtroom, but stated that counsel could file affidavits on the matter. Palmer subsequently refused to submit an affidavit, although defense counsel did submit two affidavits.[49] While it may generally be preferable for the trial court to allow such an examination of jurors in order ***885** to dispel any doubts as to the integrity of the jury's deliberations, such action was not required here. The trial judge, after having questioned juror Palmer on three separate occasions during and immediately after trial in the privacy of his chambers, could understandably have been skeptical of such a belated attack on the jury's verdicts. The record is not barren on this point,[50] and the court ***886** could reasonably have found juror Palmer's disclosure as reported by defense counsel unworthy of belief. Palmer's unwillingness to submit an affidavit strongly supports that judgment.[51]

[39] In this case the problem of publicity was not insignificant, but it was a problem that was handled by proper judicial supervision. 'The right to publish a prejudicial article does not carry with it the right of an accused to an automatic mistrial. Such an outcome would give to the press a power over judicial proceedings which may not be countenanced.' Mares v. United States, 383 F.2d 805, 808 (10 Cir. 1967), cert. denied, 394 U.S. 963, 89 S.Ct. 1314, 22 L.Ed.2d 564 (1969). After our detailed review, we cannot say that there is a serious possibility that the jury was influenced by considerations apart from evidence properly admitted at trial. The trial judge admonished the jury on at least four occasions to avoid publicity about the case. He interrogated the jurors individually three times. The fact that the jurors discussed the term 'Mafia' and related issues does not in itself require reversal. Cf. United States v. Lazarus, 425 F.2d 638, 640-641 (9 Cir. 1970), cert. denied, 400 U.S. 869, 91 S.Ct. 102, 27 L.Ed.2d 108 (1970), rehearing denied, 400 U.S. 954, 91 S.Ct. 233, 27 L.Ed.2d 261 (1970). For appellants' arguments of prejudice and juror Palmer's disclosure to be true, the other jurors would in effect have committed perjury on several occasions and have entered into a conspiracy of silence. The trial judge found that incredible. We agree. 'Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct.' ***887** Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 485, 53 S.Ct. 252, 255, 77 L.Ed. 439 (1933) (Brandeis, J.). 'If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day.' Holt v. United States, 218 U.S. 245, 251, 31 S.Ct. 2, 6, 54 L.Ed. 1021 (1910) (Holmes, J.). No reversible error was committed in the trial court's handling of the question of prejudicial publicity; we do not find 'that the probability of prejudice arose and was not eliminated.' Silverthorne v. United States, 400 F.2d 627, 644 (9 Cir. 1968).

V. Department of Justice 'Mafia' List

The United States Department of Justice in 1969 included appellants Zerilli and Polizzi on a list of known Mafia figures. See 115 Cong.Rec., Part 17, pp. 23440-23441 (August 12, 1969). Appellants contend that the presence of those names on that list was the motivating factor in the prosecution of this case and also that the prosecution made several prejudicial comments, based upon appellants' alleged Mafia connections, to the grand and petit juries.

[40] Their first point, that their inclusion on the 'Mafia list' was the prime motivation for the prosecution, is not supported by anything in the record and is strongly contradicted by the testimony of three government officials prominent in this prosecution.[52]

The next contention, that the prosecution 'poisoned' the grand jury proceedings by comments referring to the Mafia, is unsupported by the record or by the authorities appellants cite. The portions of the transcript of the proceedings before the grand jury which appellants quote in their opening brief are not evidence of grand jury bias. 'Mafia' is mentioned by the prosecutor in one question. The possible use of force is the basis of four questions referring to appellant Shapiro. One witness is asked whether he is fearful or apprehensive as a result of his testimony. Appellants allege that the grand jury was 'repeatedly told' of a prior arrest of appellant Zerilli; and the prosecutor commented on the alleged association of Zerilli and Polizzi with 'tough guys, Italians, from New York.'

[41] [42] [43] [44] Appellants have a difficult burden to satisfy in their challenge to the indictment. 'An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.' Costello v. United States, 350 U.S. 359, 363, 76 S.Ct. 406, 409, 100 L.Ed. 397 (1956). A valid indictment does not require support by 'adequate or competent evidence.' 350 U.S. at 364.[53] See also United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). Appellants have not demonstrated a reasonable ***888** inference of bias on the part of the grand jury resulting from the comments of the prosecutor.[54] See Beck v. Washington, 369 U.S. 541, 545-549, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962). 'The quantum of evidence necessary to indict is not as great as that necessary to convict. If a grand jury is prejudiced by outside sources when in fact there is insufficient evidence to indict, the greatest safeguard to the liberty of the accused is the petit jury and the rules governing its determination of a defendant's guilt or innocence. And, if impartiality among the petit jurors is wanting, the cure is reversal by the appellate courts.' Silverthorne v. United States, 400 F.2d 627, 634 (9 Cir. 1968).[55]

[45] Appellants also argue that the 'Mafia list' played an impermissible role in the trial. They refer, however, only to the comments of the prosecutor in closing argument that appellants 'substituted the corporate resolution for the pistol.'[56] There was no express reference to the Mafia in the prosecutor's statement, nor could such a reference be reasonably implied.

VI. Cross-Examination on Reputation

Appellants argue that the trial court committed reversible error in allowing the prosecution to cross-examine Polizzi and Zerilli on their reputations. The government contends that the cross-examination was permissible as to Polizzi because he had opened the subject of his reputation on direct examination and as to Zerilli in order to impeach his testimony about why he could not be licensed.

'The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him.' Michelson v. United States, 335 U.S. 469, 479, 69 S.Ct. 213, 220, 93 L.Ed. 168 (1948). Throughout the presentation of its case, the prosecution avoided raising the issue of the Mafia links of Zerilli and Polizzi in demonstrating that they could not themselves obtain licenses from the Nevada authorities. On direct examination Polizzi testified that the reason why he could not be licensed was that he had a 'problem.' He never described the specifics of this problem.

For all that the jury knew from Polizzi's direct testimony, his 'problem' could have been one of short duration— e.g., insufficient financing— which would not have indefinitely precluded licensing. If so, there would have been no motive for furtive investment. Thus, the nature of Polizzi's 'problem' was clearly relevant. And while the trial judge did order Polizzi to answer the question regarding the 'problem,' he did not order the defendant to use the word 'Mafia.' Polizzi could have answered the question truthfully and specifically without using the 'Mafia' term— for example, he could have said ***889** that he understood that he would not be considered a suitable person for a license.

[46] Thus, since the general nature of Polizzi's problem was directly relevant and the prejudicial Mafia connection was volunteered by Polizzi, the trial court's ruling was well within its wide discretion in controlling cross-examination and in balancing its probative value against possible prejudice.

This result is even clearer as to Zerilli. The reason why Zerilli could not be licensed was not admissible merely to impeach Zerilli or his attorney— it was directly relevant to Zerilli's guilt. If the reason Zerilli could not be licensed was, as he testified, his ownership interest in a race track, then his testimony of continuing interest in the enterprise because of an intention to invest later might be credible. The race track regulation was apparently unclear and Zerilli could in any event sell his race track interest. However, if the reason he could not be licensed was his reputation, then any hope of investing later would be doubtful since his reputation was unlikely to change. Zerilli therefore had a strong motive to make his investment surreptitiously. Moreover, there was no mention of the Mafia in connection with Zerilli, only of his 'reputation,' so that the court did not err in permitting the government to cross-examine Zerilli on the reasons why he could not be licensed.

VII. Misconduct of the Prosecutor and Trial Judge

Appellants cite many episodes of what they assert to be misconduct by the prosecutor, sanctioned by the trial judge, which deprived them of a fair trial. After having carefully reviewed each of these assertions, we do not find that they amount to a deprivation of appellants' right to a fair trial. No good would be served by a discussion of each of the points raised, but we shall discuss several representative claims.[57]

[47] In his closing arguments, the prosecutor did make comments which could have conveyed the impression that appellants were violent individuals.[58] This question, however, is tied closely to the issue of the influence of the Mafia references on the jury. We have found that the court below carefully handled that issue,[59] and we find that these comments were not so prejudicial to appellants so as to require reversal of the jury's verdicts.

[48] Appellants argue that the prosecutor gave his personal opinion of appellants' guilt to the jury and referred to the indictment in this case as supporting him. The prosecutor did mention the grand jury indictment, but he used it to rebut appellants' argument to ***890** the jury that the prosecutor was pursuing in effect a personal vendetta against appellants.[60] The reference to the indictment in these circumstances does not constitute improper argument. Cf. United States v. Cummings, 468 F.2d 274, 277-278 (9 Cir. 1972); Hall v. United States, 419 F.2d 582, 587 (5 Cir. 1969). Moreover, the jury was instructed that the indictment and information were not evidence and were merely methods of accusing a defendant of a crime. Reporter's Transcript, Vol. 43, pp. 8736-8737.

[49] On four occasions, in ruling on questions addressed to two government witnesses, the trial judge made comments that appear to vouch for the credibility of the witnesses. However, we cannot accept the appellants' assertions of prejudice. They did not object to any of the judge's statements, and they certainly knew how to object when they thought it

important to do so. The error, if any, could easily have been corrected, had there been objection. For example, in one instance, at the end of the colloquy, the court said '* * * in any instance the jury is to draw no inference from the questions as bringing any truthfulness to us.' Reporter's Transcript, Vol. 2, p. 244. The court, moreover, instructed the jury not to assume from his comments during trial that he held particular opinions about the issues in question and that they were the sole judges of the credibility of witnesses and of the weight of evidence. See United States v. Jackson, 482 F.2d 1167, 1175-1176 (10 Cir. 1973); United States v. Cunningham, 423 F.2d 1269, 1276 (4 Cir. 1970).

[50] [51] Appellants contend that the trial court first received evidence, in the presence of the jury, on the question of the applicable Nevada law, rendering the matter one for the jury's decision, but then at the end of the trial took the issue away from the jury by instructing it as to the state law. The determination of the applicable state law in a case such as this is a question for the court. Cf. United States v. D'Amato, 436 F.2d 52, 54 (3 Cir. 1970); United States v. Lyon, 397 F.2d 505, 513 (7 Cir. 1968), cert. denied, 393 U.S. 846, 89 S.Ct. 131, 21 L.Ed.2d 117 (1968). To receive testimony on the question of state law in the presence of the jury is unnecessary, but not prejudicial error unless the combination of the testimony and the court's instructions clearly leave the jury in confusion or in doubt as to the applicable state law. We do not find prejudicial error here.

[52] Also cited as error is the trial court's comment that a certain question could be decided if one of the appellants took the stand.[61] This was not an infringement of appellant Bellanca's right against self-incrimination. 'The test is whether the language used was manifestly ***891** intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.' Knowles v. United States, 224 F.2d 168, 170 (10 Cir. 1955).[62] No such finding could be reached here. It was an off-hand comment which could have had no influence on the jury. This point is an example of a practice appellants have followed many times on this appeal: quoting out of context remarks of the prosecutor and especially the trial judge and supplying an 'argument' for reversal by dramatic and hyperbolic language. Appellants argue that after this incident 'appellant Bellanca had to take the stand or suffer the possibility of an untoward inference by the jurors.' The episode in fact was a pedestrian exchange which, if anything, probably left the jury with the impression that appellants would be able to establish the point through other witnesses, including appellant Bellanca if he testified.

[53] Appellants' next point is that the prosecution evaded a prior ruling by the court that it could not offer evidence of prior similar acts by appellants. The court, after hearing the proffered evidence in the absence of the jury, instructed the jury that there was no evidence of prior similar acts and that any comments of the prosecutor on the issue were to be disregarded. In addition, each juror was asked whether the comments had prejudiced them, and each juror said that he had not been prejudiced. The prosecution nevertheless subsequently inquired on cross-examination about prior attempts to invest in **Las Vegas**. This line of inquiry was permitted by the court for the limited purpose of showing Zerilli and Polizzi's earlier interest in investing in a **Las Vegas** casino. However, the probative value of that testimony was not great enough to justify its admission in light of the possibility of confusing the jury which in effect was asked to consider the evidence

on one issue but not on another, although the issues of motive and prior similar acts, if not identical, were closely related. We do not find, however, that prejudice to appellants actually resulted in light of other and substantial evidence supporting the verdicts.

The government attempted to use a deposition of Benjamin Reisman, an attorney employed by appellant Emprise, on its redirect examination of Maurice Friedman. The deposition was taken in 1970, before appellants were indicted, during the course of other legal proceedings. Appellant Rooks was later asked on cross-examination by the prosecution whether he had heard the reading of the deposition and whether he knew of the events described in the deposition. On cross-examination of appellant Zerilli, the prosecutor used the deposition again in an attempt to refresh Zerilli's recollection.

[54] The use of the deposition cannot be justified by Rule 15 of the Federal Rules of Criminal Procedure since it was not taken at the motion of a defendant, it was taken before the indictment and information here were filed, no order of the court had been obtained, and no notice had been given to the parties. The prosecution argues that it offered the evidence only as to the corporate defendant Emprise. The deposition was taken in connection with legal proceedings against Jeremy Jacobs, the President of Emprise. The court admitted it not on the authority of Rule 15, but rather on the ground that it was a prior statement of a witness in a case where the parties and issues were substantially the same as in the present case. We need not decide whether there was error.[63] Another deposition of Reisman was taken and read into the record without objection, thereby curing any defect ***892** arising from the admission of the first deposition. Appellants' counsel had the opportunity to ask Reisman about his prior statements, thus fulfilling appellants' right to confront adverse witnesses.

If it were error to allow the prosecution to ask appellant Rooks about the first Reisman deposition, there was no possible prejudice.[64] The same is true of the use of the deposition as possibly refreshing Zerilli's memory; the incident was insignificant.[65]

[55] The prosecution, as the representative of the government, is expected to follow high standards in conducting its case. 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.' Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). But during an extensive and fiercely contested trial, we cannot realistically expect perfection. Cf. Lutwak v. United States, 344 U.S. 604, 619, 73 S.Ct. 481, 97 L.Ed. 593 (1953). Upon hindsight, there were things said by the prosecution which would have been better unsaid. But nothing said or done deprived appellants of a fair trial.

[56] The main instrument for insuring that the conduct of counsel does not deprive the accused of a fair trial is the trial judge. In this case the trial judge clearly did his best to give appellants a fair trial. Compare United States v. Dellinger, 472 F.2d 340, 385-391 (7 Cir. 1972), cert. denied, 410 U.S. 970, 93 S.Ct. 1443, 35 L.Ed.2d 706 (1973). Errors were committed, but none so prejudicial, so fatal, either individually or collectively, as to require reversal. 'Few, if any judges can altogether avoid words or action, inadvertent or otherwise, which seem inappropriate when later examined in the calm cloisters of the

appellate court. But unless such misadventures so persistently pervade the trial or, considered individually or together, are of such magnitude that a courtroom climate unfair to the defendant is discernible from the cold record, the defendant is not sufficiently aggrieved to warrant a new trial.' Smith v. United States, 305 F.2d 197, 205 (9 Cir. 1962), cert. denied, 371 U.S. 890, 83 S.Ct. 189, 9 L.Ed.2d 124 (1962). Appellants have failed to make a persuasive showing that their constitutional rights were violated, and our careful review of the entire record does not lead to a reasonable inference that the jury's verdicts were the end result of anything other than an impartial consideration of properly admitted evidence.

VIII. Production of Jencks Act Statements

Appellants claim that the prosecution's failure to produce four pretrial statements by its witness, Maurice Friedman, in conformance with the Jencks Act, **18 U.S.C. § 3500**, requires a ***893** reversal. Two of the purported statements are interview memoranda prepared by an assistant United States Attorney; another is a report by an F.B.I. agent of one of the interviews; and the last is the transcript of a tape recording of a conversation between Friedman and one Dr. Victor Lands. The two interview memoranda and the 'Lands transcript' were disclosed to appellants after Friedman's cross-examination had begun.

[57] [58] The two interview memoranda and the F.B.I. report are not Jencks Act statements. A written statement falls within that statute only if it is 'made by said witness and signed or otherwise adopted or approved by him.' **18 U.S.C. § 3500(e)(1)**. The record shows that Friedman had not signed, adopted, or approved these three written reports. The government attorney who wrote the memoranda took no notes during the interviews and testified that the memoranda were his summaries, conclusions, and interpretations of what Friedman had said. It does not appear that the F.B.I. report differs in these respects. The rationale of the Jencks Act is to provide the defense with material that could impeach a government witness. 'We think it consistent with this legislative history, and with the generally restrictive terms of the statutory provision, to require that summaries of an oral statement which evidence substantial selection of material, or which were prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent, are not to be produced.' Palermo v. United States, 360 U.S. 343, 352-353, 79 S.Ct. 1217, 1225, 3 L.Ed.2d 1287 (1959). See also Campbell v. United States, 373 U.S. 487, 83 S.Ct. 1356, 10 L.Ed.2d 501 (1963); Rosenberg v. United States, 360 U.S. 367, 369, 79 S.Ct. 1231, 3 L.Ed.2d 1304 (1959); Wilke v. United States, 422 F.2d 1298, 1299 (9 Cir. 1970).

[59] [60] [61] The Lands transcript presents a more difficult question of construing the Jencks Act, a problem which we find unnecessary to resolve in this case.[66] Assuming for the purposes of argument that it should have been disclosed, we find that the untimely disclosure here was not prejudicial to appellants. Disclosures are required by the Jencks Act only for impeachment purposes.[67] Palermo v. United States, 360 U.S. 343, 345, 79 S.Ct. 1217, 3 L.Ed.2d 1287 (1959); United States v. Harris, 458 F.2d 670, 677 (5 Cir. 1972); cert. denied, 409 U.S. 888, 93 S.Ct. 195, 34 L.Ed.2d 145 (1972). The material in the Lands transcript could not have been used to impeach Friedman's testimony on direct examination. Though a question of inconsistency perhaps did arise with Friedman's

testimony on cross-examination, appellants did then have the transcript. Indeed Friedman was questioned about it on recross-examination.[68] Cf. United States v. Scaglione, 446 F.2d 182, 184 (5 Cir. 1971), cert. denied, 404 U.S. 941, 92 S.Ct. 284, 30 L.Ed.2d 254 (1971). The prosecution is obligated to disclose to the defense statements falling within the Jencks Act regardless of anyone's perception of the utility of the statements for impeachment. But if, upon review, a failure to disclose appears clearly to be harmless and is not a willful avoidance and egregious dereliction of the prosecutor's statutory obligation, then a court need not invoke the drastic remedies of striking testimony or calling a mistrial as provided by ***894 18 U.S.C. § 3500(d)**. Cf. United States v. American Radiator & Stand. San. Corp., 433 F.2d 174, 203 (3 Cir. 1970), cert. denied, 401 U.S. 948, 91 S.Ct. 928, 28 L.Ed.2d 231 (1971); Pierce v. United States, 414 F.2d 163, 169 (5 Cir. 1969), cert. denied, 396 U.S. 960, 90 S.Ct. 435, 24 L.Ed.2d 425 (1969).

IX. The Lands Transcript

The Lands transcript is a transciption of a tape-recorded conversation between Maurice Friedman and one Dr. Victor Lands in 1967. During that talk, Friedman said in reference to the attempt to secure a Nevada gambling license for VFI:

'There are thirty-two people who have invested three and a half million dollars coming before this Commission, all of whom have been approved at least by a majority of this three-man Board. I told you that we feel pretty good except that our lawyer is very, very nervous, and he understands through the grapevine that we are going to have one hell of a time— the thirty-two of us. The Mafia, Casa Nostra— everything's going to come out. This is a public hearing. The press will know.'

On cross-examination Friedman testified that he had stated in 1967 that there were hidden interests in VFI. The court then ordered the prosecution to disclose the Lands transcript. With the jury absent, Friedman verified the accuracy of the transcript. He said that in using the terms 'Mafia' and 'Cosa Nostra' he was referring to appellants Zerilli and Polizzi. He also testified that he was referring to hidden interests in VFI when he said to Lands 'everything's going to come out.' Upon objection by the defense, the transcript was not admitted as evidence, but the court did permit testimony about the Lands conversation. The court, in an understandable effort to avoid any possible prejudice to appellants Zerilli and Polizzi, ordered Friedman not to use the terms 'Mafia' and 'Cosa Nostra' in his testimony before the jury. On redirect examination, Friedman testified that he had mentioned to Lands that Zerilli and Polizzi held hidden interests in VFI. On recross-examination Friedman admitted that in the Lands conversation he had not used the words 'hidden interests' nor referred specifically to any of appellants.

[62] Although the trial court clearly had the best of motivations in its handling of the Lands transcript question, preventing prejudice to appellants from the use of the terms 'Mafia' and 'Cosa Nostra,' it did commit error. Because of the vagueness of the terms used, the probative value of the Lands transcript in this case was insubstantial and was clearly outweighed by the possible prejudice arising from the terms 'Mafia' and 'Cosa Nostra' and, in an attempt to eliminate that possibility, by the danger of allowing testimony deviating from and therefore misrepresenting the actual terms used in the

transcript. The court thus should not have admitted any testimony referring to the Lands transcript.

Appellants argue that they were seriously prejudiced by this error. They characterize this episode as a purposeful distortion of the Lands transcript, a falsification of the record, which resulted in the admission of testimony which is conclusively demonstrated to be false by the transcript itself and admitted to be false by the witness. We disagree. The trial court did not order Friedman to substitute 'Zerilli' and 'Polizzi' for 'Mafia' and 'Cosa Nostra.' Friedman was instructed only not to use the latter terms. At the most the witness may have misunderstood the court as suggesting such a substitution.[69] Moreover, the ***895** Lands transcript did not contradict Friedman's testimony, as appellants argue. Nor did it confirm that testimony, as the government urges. The Lands transcript and Friedman's testimony were simply not expressly inconsistent. Friedman could, as he did in the absence of the jury, have commented on what he meant by some of the terms he had used in talking to Lands. If he had been permitted to say to the jury that, in using 'Mafia' and 'Cosa Nostra', he was referring to Zerilli and Polizzi, his testimony would clearly have had a strong impact on the jury adverse to appellants. As it was, his testimony was less precise on this point[70] and was heavily qualified on recross-examination.[71] In light of the substantial evidence in the record supporting appellants' convictions, we do not find that the error in handling the Lands transcript was so prejudicial as to require reversal.

[63] We find that, in light of all of the evidence of record, appellants also did not suffer prejudice from the government's argument to the jury concerning the Lands transcript, and that the court's response to the jury's request for a reading of the testimony about the Lands conversation was not an abuse of its discretion.[72] United States v. Baxter, 492 F.2d 150, 175 (9th Cir. 1973); United States v. De Palma, 414 F.2d 394, 396-397 (9 Cir. 1969), cert. denied, ***896** 396 U.S. 1046, 90 S.Ct. 697, 24 L.Ed.2d 690 (1970).

X. Concealment of Prosecution Promises of Leniency

[64] Appellants contend that the prosecution failed to disclose its agreements with or promises of leniency to its key witness, Maurice Friedman, as required by Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Friedman, serving prison sentences concurrently for three federal convictions, had his sentences modified after appellants' convictions and was released from prison. The prosecution did disclose a promise to Friedman that his testimony in this case would be called to the attention of the Parole Board, but maintained that no other promises were made. Appellants argue that the prosecution did also promise to urge the reduction of Friedman's sentences and stipulated that Friedman's motions for modification of sentence could remain submitted but undecided until after the trial in this case.[73] Appellants, however, do not argue that express agreements were reached, but rather that there was an implicit mutual understanding that the prosecution would try to help Friedman.

[65] [66] [67] Having reviewed the arguments and evidence presented by appellants on this point, we do not find that they establish undisclosed promises by the prosecution.[74] The prosecution did disclose a promise to inform the Parole Board of Friedman's testimony. This disclosure alerted the defense and the jury to the possibility that the testimony was

motivated by self-interest. Cf. United States v. Sidman, 470 F.2d 1158, 1165 (9 Cir. 1972). The trial court then instructed the jury specifically on carefully weighing the testimony of 'an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication.'[75] Defense counsel did cross-examine Friedman about his motive for testifying. Finally, the pending motions for modification of sentence were public records, available to the defense, and could have been the basis for cross-examining Friedman.

I concur in the portions of this opinion prepared by Judges Browning and Duniway.

BROWNING, Circuit Judge:

I concur in the portions of this opinion prepared by Judges Renfrew and Duniway.

XI. Unitary Crime Contentions

[68] Appellants argue that 'this case concerns a unitary event— the maintenance of Vegas **Frontier** Inc. from ***897** July 27, 1967 to November 27, 1967,' and therefore conviction and punishment on a count charging conspiracy and several counts charging substantive offenses was improper.[1] The argument includes two propositions: that Congress did not intend to make conspiracy to violate **18 U.S.C. § 1952** a separate crime from the substantive offense; and that Congress did not intend to allow prosecution as a separate offense of each of several acts of travel where the illegal intent during each act related to the same unlawful activity. Neither proposition has merit.

A.

[69] [70] [71] [72]' The distinctiveness between a substantive offense and a conspiracy to commit it is a postulate of our law. 'It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. "" '' Callanan v. United States, 364 U.S. 587, 593, 81 S.Ct. 321, 325, 5 L.Ed.2d 312 (1961), quoting Pinkerton v. United States, 328 U.S. 640, 643, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946). Accordingly, unless there is specific language to the contrary, Congress presumably intended to permit punishment as separate offenses of both the substantive crime and a conspiracy to commit it. 364 U.S. at 594-595. There is no such language here, in either the statute[2] or legislative history.[3]

B.

Turning to the second proposition, the language of the statute seems unambiguous. The offense defined is an act of travel or use of an interstate facility, with the requisite intent, plus subsequent performance of another act of the kind specified in the statute. Appellants argue, however, that the legislative history indicates that section **1952** was directed at a 'course of conduct,' and therefore various acts of travel in furtherance of a single 'unlawful activity,' **18 U.S.C. § 1952**(b), should be held to ***898** constitute only one crime. But 'the 'course of conduct' referred to in the . . . legislative history of Section **1952** refers to the nature of the business promoted or facilitated— and not to the essence of the federal offense, which is 'travel.' United States v. Teemer, 214 F.Supp. 952, 958

(N.D.W.Va.1963),[4] quoted with approval in Katz v. United States, 369 F.2d 130, 135 (9th Cir. 1966).

No appellate court appears to have discussed the proper unit of prosecution under section **1952**,[5] but similar federal statutes making it a crime to use interstate transportation or communications facilities in aid of illegal purposes have been construed to permit prosecution of each use of such facilities as a separate offense. See, e.g., Sanders v. United States, 415 F.2d 621, 626-627 (5th Cir. 1969); Katz v. United States, supra; Mitchell v. United States, 142 F.2d 480 (10th Cir. 1944). The cases upon which appellants rely (Braverman v. United States, 317 U.S. 49, 63 S.Ct. 99, 87 L.Ed. 23 (1942); United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 73 S.Ct. 227, 97 L.Ed. 260 (**1952**); Bell v. United States, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955), and Rewis v. United States, 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971)) are inapposite.[6]

[73] In view of the plain import of the language of section **1952**, the absence of any contrary indication in the legislative history,[7] and the construction ***899** given comparable statutes over the years, we conclude that each act of travel may be treated as a separate violation of section **1952**.

XII. Venue

Appellants raise two venue-related claims. They contend venue was improperly laid in the Central District of California as to some of the substantive counts.[8] They also contend the trial court abused its discretion by denying motions under Federal Rule of Criminal Procedure 21(b) to transfer the proceedings to Detroit or **Las Vegas**.

A.

Appellants argue venue was improperly laid as to certain substantive counts for two reasons. First, relying on United States v. Bozza, 365 F.2d 206 (2d Cir. 1966), they argue that the act of carrying on, or distributing the proceeds of, unlawful activity, required to complete an offense under section **1952**, did not occur in the Central District of California, though travel with the requisite intent did. Second, they argue that some of the defendants in each count were charged not with themselves traveling but with aiding and abetting the travel of others. Again, appellants rely on Bozza: 'Congress seems to have been content with venue where the defendants' own accessorial acts were committed or where the crime occurred, without providing still another where the accessorial acts of agents took place.' 365 F.2d at 221.

But in Bozza, the offense related to the offense of receiving stolen stamps. As the Bozza court pointed out, this is not 'a continuing offense which is 'held, for venue purposes to have been committed wherever the wrongdoer roamed' . . .', (quoting Travis v. United States, 364 U.S. 631, 634, 81 S.Ct. 358, 5 L.Ed.2d 340 (1961)) but rather is a "single act which occurs at one time and at one place in which only it may be tried, although preparation for its commission may take place elsewhere" (quoting Reass v. United States, 99 F.2d 752, 754 (4th Cir. 1938)). 365 F.2d at 220.

[74] In contrast, the offense under section **1952** is one 'involving . . . transportation in interstate . . . commerce,' which by express provision of the general venue statute, 'is a continuing offense and . . . may be . . . prosecuted in any district from, through, or into which such commerce . . . moves.' **18 U.S.C. § 3237(a)**. See United States v. Guinn, 454 F.2d 29, 33 (5th Cir. 1972); cf. United States v. Barnard, 490 F.2d 907, 911 (9th Cir. 1973).

Thus, a defendant can be prosecuted for traveling in violation of section **1952**, or for aiding and abetting such travel, in any district in which the travel occurred.

B.

[75] [76] [77] Whether the proceedings should have been transferred is an entirely separate question. Rule 21(b), Federal Rules of Criminal Procedure, permits transfers 'for the convenience of parties and witnesses, and in the interest of justice.' Since the decision as to whether to grant such a transfer 'must largely rest in the sound judicial discretion of the trial judge,' Wagner v. United States, 416 F.2d 558, 562 (9th Cir. 1969), our review is limited to whether that discretion was abused. We conclude it was not.

***900** Appellants' first motion requested a transfer to Detroit; **Las Vegas** was also mentioned as a proper venue for trial, but the motion did not request transfer there. In support of their motion, appellants pointed out that most of the appellants and many of the anticipated defense witnesses lived in the Detroit area, and that much of the conduct relevant to the charges occurred there. But relevant conduct had occurred in many places, including the Los Angeles area and nearby **Las Vegas**, where the business enterprise that defendants allegedly sought to control was located. Nevada law was important to the case, as appellants argued. The relevance of this circumstance is obscure; in any event, it scarcely favored trial in Detroit as against Los Angeles. Both government and defense witnesses were widely dispersed, but 10 of the 31 persons on the government's list of anticipated witnesses resided in the Los Angeles area. The criminal calendar in the federal district court in Detroit was seriously delayed; the Los Angeles calendar, on the other hand, would permit the early trial for which appellants had repeatedly called. This consideration, admittedly relevant, see Platt v. Minnesota Mining & Manufacturing Company, 376 U.S. 240, 243-244, 84 S.Ct. 769, 11 L.Ed.2d 674 (1964), appears to have swung the balance.

On the basis of the information before the trial court, the decision on the first motion seems entirely reasonable. Appellants' residence was a factor to be considered, but was not controlling. Platt v. Minnesota Mining & Manufacturing Company, supra, 376 U.S. at 245-246; Jones v. Gasch, 131 U.S.App.D.C. 254, 404 F.2d 1231, 1240 n.43 (1967). The considerations for and against a transfer seemed fairly balanced, or at least not so clearly weighted against Los Angeles as the trial forum as to overcome the substantial interest in avoiding the delay that would have followed transfer to Detroit's congested calendar.

Appellants' main argument is not that the court abused its discretion in the balance it struck on the facts before it on the first motion. Rather, appellants assert that 'the prosecution misrepresented to the court that numerous of its witnesses would be Los Angeles area residents, and that Detroit witnesses desired by appellants would be called

by the prosecution itself, thereby obviating some of the prejudice to the defense of a distant trial.'

The trial judge was under no misapprehension regarding the Detroit witnesses when he ruled against the initial motion to transfer; the government had advised the court it did not intend to call more than one or two witnesses from Detroit. It is true that many of the Los Angeles witnesses on the government's first list disappeared from the second list, filed several months later. But it is hardly surprising that the prosecution's plans with respect to witnesses changed in the course of preparing this complex case for trial, particularly since government counsel who prepared the first list had been replaced by new government counsel.[9] Appellants' forecasts regarding the number and residence of their witnesses turned out to be no more reliable than the government's.

Several months after denial of the initial transfer motion, both sides filed new witness lists. The prosecution ***901** dropped most of its Los Angeles witnesses and added a number from **Las Vegas**. The defense renewed its motion for change of venue, this time pressing for transfer to **Las Vegas**. It appeared, however, that the condition of the criminal docket in **Las Vegas** was such that a reasonably speedy trial could not be obtained, whereas trial in Los Angeles was imminent. The trial court denied the renewed motion both on this ground and because the witnesses then expected to be called resided throughout the country.

[78] [79] This was not an abuse of discretion. It is proper to require a greater showing of inconvenience when a change of venue is sought late in proceedings.[10] As the trial court observed, there was no 'ideal place for the holding of this trial.' Wherever the trial was held, both sides would bear significant transportation and lodging expenses. Moreover, most of the **Las Vegas** witnesses were government witnesses; since the government appeared willing to pay the expense of transporting them, it is hard to see how defendants would be more inconvenienced by trial in Los Angeles than in **Las Vegas**. The improbability of a speedy trial in **Las Vegas** was a factor entitled to great weight, especially since one defendant had already moved for dismissal on speedy trial grounds.

The motion for change of venue was renewed a third time, after yet another set of witness lists was filed. The trial judge reiterated his belief that only compelling reasons could justify transfer when trial was imminent. For the reasons stated, this final denial was not an abuse of discretion.

XIII. Giordano's Severance Motions

Appellant Giordano complains that the trial court abused its discretion in denying his motions for severance under Rule 14, Federal Rules of Criminal Procedure, submitted both before and during trial.

[80] Denial of Giordano's pretrial severance motion was clearly correct. Although Giordano was indicted on only one count, that count charged conspiracy. For obvious reasons, a joint trial is particularly appropriate where conspiracy is charged. Davenport v. United States, 260 F.2d 591, 594 (9th Cir. 1958). See American Bar Association, Standards Related to Joinder and Severance 39 (Approved Draft 1968).

[81] [82] The government represented that Giordano was among the ‘leaders' in the unlawful scheme and furnished the court with a summary of the evidence it expected to offer linking Giordano to the conspiracy. Moreover, the government stated that a separate trial would be substantially as long as a joint one, since a full exposition of the entire scheme was necessary to establish the significance of Giordano's separate conduct. On this record the advantages and economy of a joint trial clearly outweighed the remote possibility of unwarranted prejudice. See United States v. Donaway, 447 F.2d 940, 943 (9th Cir. 1971).

The balance may not have been so clear when Giordano moved for severance during trial. Although there is no suggestion of bad faith, the evidence against Giordano did not entirely justify government counsel's optimistic forecast. Nonetheless, there was sufficient evidence other than acts and statements of co-conspirators to show that Giordano participated in the conspiracy. Since this is so, it is difficult to understand how Giordano could have benefited from severance, for evidence of the acts and statements of the other defendants pursuant ***902** to and in furtherance of the conspiracy would have been admissible against Giordano if tried alone.[11] United States v. Kenny, 462 F.2d 1205, 1218 (3d Cir. 1972); see also United States v. Roselli, 432 F.2d 879, 901 (9th Cir. 1970). Moreover, as the government asserted, all or substantially all such evidence probably would have been introduced in a separate trial. It is possible that the government might have considered the time and effort required for a separate trial too great a price to pay for the conviction of Giordano alone, but loss of that possibility hardly demonstrates that Giordano was ‘prejudiced by a joinder’ within the meaning of Rule 14.

The trial judge took great pains to protect Giordano's right to an independent evaluation by the jury of the evidence against him. Twice during voir dire the court admonished the jury that each defendant— naming them, including Giordano— was entitled to be judged as an individual. No less than six times during instructions to the jury the court stressed the importance of separate determinations of each defendant's guilt or innocence on the basis of the evidence pertaining to the particular defendant. Several times the court warned that association with participants in a conspiracy does not prove that a defendant was a member of the conspiracy. This jury's ability and determination to make discriminating judgments is evidenced by the fact that it did not convict one of the most active participants in the conspiracy, defendant Polizzi, on one of the nine substantive counts on which he was charged. Obviously, this jury did not render a mass judgment. United States v. Berlin, 472 F.2d 13, 15 (9th Cir. 1973). There may be cases in which even careful jury instructions cannot cure the possibility of prejudice by association inherent in conspiracy trials,[12] but this was not one of them.

Giving due recognition to the somewhat stricter showing required to justify severance when the trial has been partially or wholly completed,[13] we conclude that Giordano's motions for severance during trial were properly denied.

XIV. Giordano's Requested Instruction

Giordano rested at the close of the government's case-in-chief. He asked for a jury instruction that no evidence introduced thereafter could be considered against him. The request was denied. Giordano's co-defendants then testified in their own defense. In

arguing the case to the jury, the government ***903** drew implications from this testimony adverse to Giordano.

[83] Giordano's decision not to offer evidence in his own behalf preserved his right to a review of the denial of his motion for acquittal on the basis of the government's evidence alone. See United States v. Figueroa-Paz, 468 F.2d 1055, 1058 (9th Cir. 1972). But this is not to say, if denial of the motion to acquit was proper, that the jury was not entitled to consider all of the evidence, including that presented by Giordano's co-defendants, in determining Giordano's guilt.

[84] [85] Evidence offered in defense in the trial of a single defendant is available for all purposes, and the rule is the same in a joint trial of multiple defendants— evidence offered by one may support the conviction of the others. See Rickey v. United States, 242 F.2d 583, 586 (5th Cir. 1957); Maupin v. United States, 225 F.2d 680, 682 (10th Cir. 1955). This court has held that the same rule is applicable even to a defendant who has rested at the close of the government's case, and an instruction of the kind sought by Giordano is therefore properly refused. Brown v. United States, 56 F.2d 997, 999-1000 (9th Cir. 1932).[14]

[86] There is a substantial reason for the rule. One purpose of a joint trial of defendants allegedly involved in a single scheme is to facilitate evaluation by the jury of the evidence against each defendant in light of the entire course of conduct. 'Such procedure not only increases the speed and efficiency of the administration of justice but also serves to give the jury a complete overall view of the whole scheme and helps them to see how each piece fits into the pattern.' Rakes v. United States, 169 F.2d 739, 744 (4th Cir. 1948). See ABA Standards Relating to Joinder and Severance 39 (Approved Draft 1968). This purpose of joinder would be frustrated as to a particular defendant if he could bar consideration as to him of some of the relevant evidence by resting before that evidence was introduced.

[87] As we emphasized in Brown, a defendant who rests his case may nonetheless cross-examine or introduce evidence to impeach or contradict a co-defendant who testifies thereafter. See also United States v. Zambrano, 421 F.2d 761, 763 (3d Cir. 1970). In the present case, as in Brown, there was no request to cross-examine the co-defendants or to admit rebuttal evidence. It is even clearer here than in Brown that 'if such request had been made, it would have been granted,' 56 F.2d 1000, since the trial judge asked Giordano's attorney after each defense witness whether he had any questions to ask by way of cross-examination.[15]

XV. Sufficiency of the Evidence— Giordano

We consider Giordano's contention that the evidence was insufficient as to him separately from the same contention as to other defendants. The case ***904** against Giordano was the weakest; and, unlike other defendants, Giordano did not waive his right to review of the motion to acquit made at the close of the government's case. For the latter reason, we consider only the evidence produced against Giordano in the prosecution's case-in-chief.

[88] [89] As Giordano points out, the government offered no direct evidence of his participation in the conspiracy.[16] But 'circumstantial evidence is not inherently less probative than direct evidence,' United States v. Nelson, 419 F.2d 1237, 1239 (9th Cir. 1969), and, in many conspiracy cases, is the only kind of evidence available. White v. United States, 394 F.2d 49, 51 (9th Cir. 1968). Thus, denial of the motion to acquit is subject to the same standard on review as it would be if there were direct evidence of guilt: whether 'jurors reasonably could decide that they would not hesitate to act in their own serious affairs upon factual assumptions as probable as the conclusion' that Giordano participated in the conspiracy. United States v. Nelson, supra, 419 F.2d at 1245.

The government's theory was that at Zerilli's solicitation Giordano arranged for the investment of $150,000 in VFI when the enterprise was in critical need of funds; that the investment was made through Sansone, a St. Louis real estate investor and bank director, acting as a 'front'; and that following the investment Giordano participated at various critical stages in the illegal enterprise.

Some of the government's circumstantial evidence is described briefly in the margin.[17] Possibly the series of events disclosed by the evidence could be explained ***905** as coincidence, or as normal contacts among friends. On the other hand, 'the jury undoubtedly could have found these events too interlocked to constitute coincidence' (United States v. White, supra, 394 F.2d at 53); it could have drawn from the events the inferences suggested by the prosecution— that Giordano was brought into the conspiracy at least as early as June; that he arranged for the investment of $150,000 in VFI through Sansone; and that the purpose of Giordano's five trips to **Las Vegas** in 1967 was to watch over this hidden interest in VFI and participate in various key decisions. There comes a point when the innocent explanation is so much less likely than the culpable one that jurors properly could decide that a defendant in fact was acting in furtherance of the conspiracy and shared its illegal purpose. We believe that point was reached here as to Giordano.

Three legal arguments subsidiary to Giordano's challenge to the sufficiency of the evidence should be mentioned.

[90] 1. The government called Cusumano and Sansone as witnesses. Both denied that Giordano was involved in a Cusumano loan to Sansone. Giordano argues that the government is bound by this testimony. But the notion that a party is bound by the testimony of every witness it calls is 'long discredited,' Rodgers v. United States 402 F.2d 830, 833 (9th Cir. 1968), and is clearly not the law of this circuit. See cases cited in Rodgers, 402 F.2d at 833, n. 1.

[91] [92] Rodgers does hold that the government cannot rely on an inference when the only evidence presented by the government is inconsistent with the inference the government wishes drawn. However, Rodgers itself acknowledges that this does not 'mean that in every case where some of the government's evidence is arguably contrary to an inference that it wishes to have the jury draw from other evidence, the inference may not be drawn.' 402 F.2d at 834. See also United States v. Payne, 467 F.2d 828, 831 (5th Cir. 1972). Further, in Rodgers the evidence inconsistent with the desired inference was presented by a disinterested witness and was embodied in an uncontested document.

Here, Cusumano and Sansone were interested witnesses with motives to dissemble about Giordano's role, and the prosecution presented a great deal of other evidence, albeit circumstantial, connecting Giordano with the loan. It may be reasonable to require the prosecution to do more than rely on a general inference to counteract its own uncontested documentary evidence, but an inference specifically supported by other evidence is not barred simply because it is inconsistent with testimony of witnesses who were called by the government but have every reason to protect the defense.

[93] 2. Giordano argues that telephone company records showing calls between telephone numbers assigned to Giordano and Zerilli were inadmissible because there was no direct evidence as to who participated or what was said, citing Laughlin v. United States, 226 F.Supp. 112, 113 (D.D.C.1964). But this case held only that such records were insufficient corroboration in a perjury case, where 'direct and positive evidence of falsity of defendant's sworn statement' is required, and 'circumstantial evidence thereof is insufficient, no matter how persuasive.' 226 F.Supp. at 114. The Court of Appeals held such records admissible in a conspiracy case, distinguishing the district Court's ruling ***906** in the earlier perjury case because of the high degree of corroboration necessary in a perjury case. Laughlin v. United States, 128 U.S.App.D.C. 27, 385 F.2d 287, 293 (1967).[18]

Giordano also contends the government cannot rely upon inference to establish the contents of the telephone calls, citing Osborne v. United States 371 F.2d 913, 927-929 (9th Cir. 1967). But in Osborne, each telephone call was the subject of a separate count charging a separate violation of **18 U.S.C. § 1343**, 'Fraud by wire, radio, or television.' Proof of the contents of the particular telephone call was therefore crucial to conviction on the particular count. In the present case, the exact content of each telephone call is not crucial to conviction; the telephone calls themselves are not the subject of the charge. Proof of their occurrence, especially their timing and frequency, is merely circumstantial evidence tending, with other circumstantial evidence, to show Giordano's participation in the conspiracy.

[94] [95] 3. Giordano makes the same contention with respect to proof regarding his trips to **Las Vegas**— that no inference can be drawn from the fact that they occurred— and we reject it for the same reasons. He also argues that hotel records evidencing his stays at the Dunes Hotel in **Las Vegas** in 1967 should not have been admitted because other contemporaneous hotel records were destroyed 'in accordance with routine hotel policy' prior to the return of the indictment in 1971. The argument is that if the indictment had been returned earlier the records might have been in existence and might have contained exculpatory or explanatory evidence demonstrating that Giordano's visit had an innocent purpose. Giordano cites United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

The contention is frivolous. The Sixth Amendment does not apply to pre-indictment delay, 404 U.S. at 313, and Giordano has not shown that the delay involved here violated the Due Process Clause. 404 U.S. at 324-326. We need not consider, therefore, whether suppression of evidence would be a proper remedy if a due process violation had occurred. Cf. Strunk v. United States, 412 U.S. 434, 93 S.Ct. 2260, 37 L.Ed.2d 56 (1973).

DUNIWAY, Circuit Judge:

I concur in the portions of this opinion prepared by Judges Renfrew and Browning.

XVI. Criminal Liability of Emprise Corporation.

Appellant Emprise Corporation argues that it is not liable for any criminal acts committed by its predecessor in interest. The facts are these: Before March 1, 1970, there was a New York corporation called High Park Corporation, which owned all of the shares of another New York corporation, Emprise Corporation (Old Emprise). On March 1, 1970, Old Emprise merged into its parent, High Park Corporation. On March 17, 1970, High Park Corporation amended its corporate name to Emprise Corporation (New Emprise).

The February 26, 1971, indictment in this case charged 'Emprise Corporation' as a defendant. In July, 1971, it became clear that this meant Old Emprise, and, on September 9, 1971, the district court dismissed as to Old Emprise for want of personal jurisdiction over it. The government filed an information against New Emprise. New Emprise moved to dismiss, but this motion was denied, and New Emprise was convicted of violating **18** U.S.C. §§ 371 and **1952** and was fined $10,000. The charged offense was committed by Old Emprise, before the merger.

***907** The question is whether the surviving corporation of a merger, here New Emprise, can be held criminally liable for acts committed by a former subsidiary constituent corporation (Old Emprise) which later merged into the survivor.

[96] Appellants argue that in this federal case we must apply federal law, regardless of what the state law may be, and that under federal law only the constituent corporation, not the surviving corporation, can be prosecuted. Of course we apply federal law. That, however, does not answer the question. Federal courts, in deciding federal cases, often borrow otherwise applicable state law as the federal law to be applied in a federal case when doing so is reasonable and there is no contrary federal policy. Here, Old Emprise and New Emprise are New York corporations. We can think of no federal policy that would prohibit our borrowing New York law in deciding whether New Emprise is liable for a crime committed by Old Emprise. Neither can appellants, beyond mere assertion.

[97] [98] Under the Constitution, the federal government is not expressly granted the power to form corporations; it may do so only under the necessary and proper clause.[1] See, e.g., McCulloch v. Maryland, 1819, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579. The result is that nearly all corporations in the United States are creatures of state law. This also means that when Federal statutes refer to 'corporations' they necessarily include within that word corporations created under state law. Some Federal statutes are expressly applicable to state created corporations. See, e.g., 15 **U.S.C.** § 7; Melrose Distillers v. United States, 1959, 359 U.S. 271, 272, 79 S.Ct. 763, 3 L.Ed.2d 800. In this case New Emprise was convicted of violations of **18** U.S.C. §§ 371 and **1952**. § 371 refers to 'persons' and § **1952** to 'whoever.' Under the Federal Rules of Construction, 1, **U.S.C.** § 1.

'In determining the meaning of any Act of Congress, unless the context indicates otherwise—

the words ‘person’ and ‘whoever’ include corporations * * * as well as individuals;

* * * *‘ p

The term ‘corporations' as used in 1 **U.S.C**. **§** 1 clearly includes corporations formed under state law. See Alamo Fence Company of Houston v. United States, 5 Cir., 1957, 240 F.2d 179, 181. Nothing in the contexts of §§ 371 and **1952** indicates meanings for the terms ‘persons' and ‘whover’ other than those of 1 **U.S.C**. **§** 1. Therefore, the existence and status of corporations charged under §§ 371 and **1952** should be determined by reference to the law of the state of their incorporation, unless the application of that law would conflict with federal policy. Cf. Melrose Distillers v. United States, supra, 359 U.S. at 274. In this case, no such conflict exists, and New York law, therefore, will be applied.

Convenience and common sense also point to the adoption of New York law as the federal law in this case, for the purpose of determining whether New Emprise is criminally liable. Both Old and New Emprise are artificial creations, wholly dependent on New York law for their existence. New York law defines their powers, rights and liabilities, prescribes their procedures, governs their continued existence, and defines the terms upon which mergers may occur and the effect to be given to mergers. These corporations were created under New York law by people, however, and any penalty imposed on them is, indirectly, a penalty imposed upon the people who own and control them. If New York law provides for the imposition of such a penalty for acts for which those people bear the ultimate responsibility, there is no good reason for relieving them of the penalty because it arises ***908** from federal law. See Alamo Fence Company of Houston v. United States, supra, 240 F.2d at 183.

[99] Under modern state corporation laws, a corporation once formed, in the absence of a provision limiting its juristic life, exists perpetually unless it is dissolved or its corporate character is annulled.[2] It is often said that the merger of a corporation into another is similar to the death of an individual, in that all current or future litigation by or against it is abated except insofar as the state of incorporation may continue its juristic life. Melrose Distillers v. United States, 1959, 359 U.S. 271, 272, 79 S.Ct. 763, 3 L.Ed.2d 800; Oklahoma Natural Gas Co. v. Oklahoma, 1927,273 U.S. 257, 259-260, 47 S.Ct. 391, 71 L.Ed. 634; United States v. Safeway Stores, Inc., 10 Cir., 1944, 140 F.2d 834, 836; United States v. Brakes, Inc., 157 F.Supp. 916, 918-919 (S.D.N.Y.1958); United States v. Cigarette Merchandisers Ass'n, 136 F.Supp. 214, 215 (S.D.N.Y.1955) (and cases cited therein at 215, n. 4). We turn to the New York law to determine the effect of the merger in this case.

The relevant state statute governing the question here is N.Y.Bus.Corp. § 906(b) (3) (McKinney 1963, Consol.Laws, c. 4), which provides that after a certificate of merger or consolidation has been filed,

The surviving or consolidated corporation shall assume and be liable for all of the liabilities, obligations and penalties of each of the constituent corporations. No liability or obligation due or to become due, claim or demand for any cause existing against any such corporation, or any shareholder, officer or director thereof, shall be released or impaired

by such merger or consolidation. No action or proceeding, whether civil or criminal, then pending by or against any such constituent corporation, or any shareholder, officer or director thereof, shall abate or be discontinued by such merger or consolidation, but may be enforced, prosecuted, settled or compromised as if such merger or consolidation had not occurred, or such surviving or consolidated corporation may be substituted in such action or special proceeding in place of any constituent corporation.

[100] The first sentence of § 906(b)(3) states that the surviving corporation is liable for its constituents' 'liabilities, obligations and penalties . . ..' While no court has decided whether 'liabilities' and 'obligations' as used in § 906(b)(3) refer to criminal liabilities and obligations, two courts have held that these words, as used in other provisions of New York's corporation laws, do refer to criminal liability. United States v. Cigarette Merchandisers Ass'n., supra (construing § 90 of the New York Stock Corporation Law); People v. Bankers' Capital Corp., 1930, 137 Misc. 293, 241 N.Y.S. 693 (construing § 216(1)(e) of the New York General Corporation Law). We note, too, that § 906(b)(3) also uses the word 'penalties.' We therefore hold that the first sentence of § 906(b)(3) permits the maintenance of a prosecution against the surviving corporation for crimes allegedly committed by a constituent corporation.

Such a construction of New York's corporation law is not unique. New York courts have held that civil causes of action arising before a merger or consolidation may be instituted against the surviving or the consolidated corporation. ***909** O'Brien v. New York Edison Co., et al. (two cases). 19 F.Supp. 968 (S.D.N.Y.1937); Cameron v. United Traction Co., 1902, 67 App.Div. 557, 73 N.Y.S. 981; Lee v. Stillwater and Mechanicville St. Ry. Co., 1910, 140 App.Div. 779, 125 N.Y.S. 840. Appellants cite numerous cases which hold that a constituent corporation[3] or a dissolved corporation[4] remains subject to criminal prosecution. None of these cases, however, holds that a surviving corporation (in the case of a merger or consolidation) may not be prosecuted. These cases therefore do not conflict with our holding. We adopt, as to the liability of New Emprise, the New York law as the federal law in this case. We leave to another day the question whether we would borrow applicable state law if that law were to purport to relieve both the constituent corporation and the surviving corporation of liability for crimes of the constituent corporation.

XVII. Sufficiency of the Evidence.

Appellants argue that the evidence is insufficient to sustain their convictions. Except as to appellant Giordano, whose arguments we have discussed above (see part XV, supra), their arguments lack substance. It would serve no useful purpose to set out the evidence in detail. We have examined it, and we find it more than sufficient.

XVIII. The Taint of Illegal Electronic Surveillance.

Appellants claim that the trial was materially tainted by leads from unlawful electronic surveillance.

Between 1962 and 1965, the government conducted electronic surveillance against appellants Zerilli, Polizzi and Giordano.' The product of this surveillance is embodied in

typewritten transcriptions or ‘logs' of the intercepted conversations. The government concedes that the electronic surveillance was conducted illegally.

The prosecutors were initially unaware of this surveillance, but on June 3, 1971, they were informed of it by the Justice Department. On September 8, 1971, the district court ruled that there would be a post-trial Alderman hearing.[5] An in camera hearing was held on November 13, 1971, at which the court ruled that pretrial access to the logs would be limited to appellants Zerilli, Polizzi, Giordano, and their respective attorneys. At the post-trial Alderman hearing, which commenced on June 12, 1972, and continued on June 13, June 14, June 15, June 23, and July 7, 1972, the court concluded that ‘the evidence in this case came from an independent source and was not tainted by the illegal electronic surveillance.’

Appellants argue that the evidence accumulated from the unlawful surveillance was used in their prosecution and fatally contaminated their trial. Alternatively, they ask that we remand for a more complete Alderman hearing.

a. Standing.

[101] Only Zerilli, Polizzi and Giordano were subjected to electronic surveillance and the court ordered that only these three appellants and their attorneys be given access to the logs. On appeal, appellants Shapiro and Bellanca assert that they, as coconspirators, should also have been given access to these logs. ***910** This same argument was made by petitioners in Alderman v. United States, supra, and was rejected. 394 U.S. at 171-176. See also Mancusi v. DeForte, 1968, 392 U.S. 364, 88 S.Ct. 2120, 20 L.E.2d 1154; Simmons v. United States, 1968, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247; Jones v. United States, 1960, 362 U.S. 257, 261, 80 S.Ct. 725, 4 L.Ed.2d 697; Wong Sun v. United States, 1963, 371 U.S. 471, 491-492, 83 S.Ct. 407, 9 L.Ed.2d 441; Goldstein v. United States, 1942, 316 U.S. 114, 121, 62 S.Ct. 1000, 86 L.Ed. 1312. The court's ruling as to standing was correct.

b. The Existence of Taint.

[102] [103] $102, 103$ At an Alderman hearing, the court must determine whether the prosecution used unconstitutionally seized material directly or indirectly to develop the evidence it produced at trial, or obtained its trial evidence from an independent and untainted source. Alderman v. United States, supra, 394 U.S. at 183. A defendant who shows that he was the victim of an unconstitutional search ‘must go forward with specific evidence demonstrating taint.’ 394 U.S. at 183. Then the burden shifts to the government to show that it acquired its evidence from an independent source.[6]

Appellants make numerous arguments to show that their trial was tainted by the use of the logs. We consider them seriatim.

1. The benchside conference of March 28, 1972.

Polizzi testified on direct examination that he was unable to obtain a Nevada gambling license in March, 1966, because he had a ‘problem.’ (R.T. 5391, 5398, 5402.) On cross-examination, the prosecutor asked the nature of Polizzi's problem. Polizzi then stated that

his ‘problem’ was that in 1963 he had been placed on the Attorney General's list of Mafia figures. (R.T. 5466.)

On redirect examination, Polizzi's attorney returned to the subject of the Mafia. Polizzi testified:

‘It was Mr. George Edwards who was the police commissioner of the City of Detroit that made his testimony before the Senate Committee, and he was the one that was directly responsible for putting my name on this chart.

. . . I was very disturbed and felt that I was falsely accused. I wrote a letter to the Mayor of Detroit and felt that it was unjust that for no rhyme or reason to just be put on there and be falsely accused of these things . . ..' (R.T. 5576-77.)

At this point, Mr. Kotoske, the prosecutor, approached the bench and, outside of the jury's hearing, told the court that Polizzi was perjuring himself and threatened to introduce the surveillance logs showing Polizzi's ties with organized crime in Detroit:

‘Mr. Kotoske: . . . If (Mr. Murphy, Polizzi's attorney) read those logs at all he understands that this man on the witness stand (Polizzi) and Tony Zerilli laid out the whole Mafia organization in Detroit, how they cut up black money—

. . . .e:

They laid out the whole organization, who is on this payoff, who is running the rackets, how the money is transferred, all discussion about black money, who it is that they have to eliminate from the organization, who they are going to— the whole complete thing, the complete structure is laid out there.

***911** I have sat by for about six weeks and let this nonsense go on. If he continues to persist in this, I have no alternative but to confront this witness with his own transcription of his voice and make him out a crown liar right in this courtroom.

I don't want to do that . . ..

We had better draw the line and abandon the topic or I am telling counsel I will come forward with those logs . . ..

The Court: Mr. Murphy, let me say this: . . . This thing has gone far enough. You have the ability to have your client make the explanation that he has made, but my suggestion to you— I am not ordering it at all, but my suggestion to you is that you ought not go much further with that, because it may open a wider door than you want to have opened. And I do not want this trial to get into a public accusation of who is or is not a member of the Mafia . . ..' (R.T. 5578-80.)

The line of questioning about the Mafia was dropped by Polizzi's counsel and the government never introduced the logs to impeach Polizzi's testimony.

[104] Appellants contend that the incident was a use of the surveillance logs at the trial and tainted the entire case. We cannot agree although it was indeed a ‘use.’ First, no evidence

from the logs was actually introduced. The prosecutor only threatened to use the logs to impeach Polizzi's character. Second, the government's threat came only after Polizzi at least twice testified to his own lack of Mafia connections, once on direct and again on cross. It cannot be said that the prosecutor's threat hindered the defense from making its point to the jury. Third, the threat to use the tapes did not form part of the government's case; it related solely to impeachment, after Polizzi had testified to his own lack of Mafia ties. Walder v. United States, 1954, 347 U.S. 62, 65, 74 S.Ct. 354, 98 L.Ed. 503, cf. Harris v. New York, 1971, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1. Such use would not be an unlawful taint.

2. The leak to the press.

On March 29, 1972, the day after the benchside conference, one Gene Blake, a Los Angeles Times reporter, was seen reading the government's copy of the previous day's transcript. (R.T. 5786.) Defendants' counsel accused the prosecutor of deliberately providing Mr. Blake with the transcript; the prosecutor denied this charge.[7] Defendant4s counsel then asked the court to order the Times not to report on the March 28 benchside conference, but the court refused.

[105] The next day a Times article was headlined 'Transcript Shows U.S. Bugged Vegas Defendants' Mafia Talks.' The article contained direct quotes from the March 28 benchside conference concerning the surveillance logs. Appellants assume that the jury saw this article and took it into account in reaching its verdict, and that therefore the trial was tainted by information from the logs. We cannot agree. There was no evidence that any juror read this article, nor were the logs used by the jury in their deliberations. Thus there was no 'relevance to (appellants' convictions) of any conversations which may have been overheard through . . . surveillance.' Alderman v. United States, supra, 394 U.S. at 186.

3. The Friedman sentencing memorandum.

One of the major sources of the prosecutor's case was the Friedman sentencing memorandum, a document prepared ***912** in connection with the sentencing of Maurice Friedman on February 3, 1969, in another case. Appellants claim that this document was tainted by information from the surveillance logs.

Looking at the evidence in the light most favorable to the government, the following testimony was produced concerning the sentencing memorandum: U.S. Attorney, David Nissen, who wrote this memorandum, relied on three sources for its preparation: (1) information he received from FBI agent Wayne Hill, (2) a tape supplied to him by one Dr. Victor Lands in connection with another trial (the Lands transcript), and (3) information he received from (then) U.S. Attorney William Matthew Byrne, Jr. (R.T. 10,029-31.)

[106] [107] $106, 107$ Appellants do not claim that the Lands transcript or Byrne's information is tainted; their only objection concerns agent Hill's information. Hill testified that all the information he received, which he subsequently passed on to Nissen,

came from either ‘live Bureau informants' (civilian informants) or from the Intelligence Division of the Los Angeles Police Department. (R.T. 9421-24.) He was then asked:

‘Q. Now do you know, Mr. Hill, that any of the information you provided Mr. Nissen that found its way into this sentencing memorandum was the result or can in any way be attributed to the surveillance logs in this case?

A. No, it could not.' (R.T. 9425.)

On cross-examination, Hill said that these live Bureau informants gave information to various FBI agents around the country, who passed the material on to Hill, who, in turn, passed the information on to Nissen, who wrote the memorandum. (R.T. 9522-23, 9563-65.) Although the names of the informants were not revealed (R.T. 9523), agent Hill did provide the names of two FBI agents who received such information. (R.T. 9524, 9531, 9563-64.) The appellants did not produce any evidence to refute Hill's testimony. The court properly concluded that the Friedman sentencing memorandum was not tainted.[8]

4. Lack of FBI monitors at the Alderman hearing.

Appellants argue that they did not receive a fair Alderman hearing because only one of the FBI personnel who conducted electronic surveillance was called as a witness.

Alderman provides a flexible standard as to what witnesses must be examined in a taint hearing:

‘Armed with the specified records of overheard conversations and with the right to cross-examine the appropriate officials in regard to the connection between those records and the case made against him, a defendant may need or be entitled to nothing else. Whether this is the case or not must be left to the informed discretion, good sense, and fairness of the trial judge.’ Alderman, supra, 394 U.S. at 185.

The district court adopted the following procedure to govern the taint hearing: There were numerous government officials throughout the country who had had access to the surveillance logs. The critical issue at the taint hearing, however, was not whether these officials had had access to the logs but whether any knowledge of the contents of the logs was imparted by these officials to the United States prosecutors in Los Angeles. Thus, instead of bringing all the government officials to the hearing, the court ordered the government to provide ***913** the defense with the names of all of them so that the defendants could ask each government prosecutor, on the witness stand, whether he had received any information about the logs from the named officials.[9] (Clerk's Transcript (hereinafter referred to as C.T.) 3321.)

At the taint hearing, three members of the prosecution team testified that the source of this case was the Friedman interview and sentencing memorandum.[10] Two members of the team testified that they were not even aware of the existence of the logs when the indictments in this case were handed down on February 26, 1971.[11] Judge Byrne, who left the United States Attorney's office in May, 1970, testified that he did not know that the logs existed in February, 1970, when he interviewed Mr. Friedman. (R.T. 9225.) U.S. Attorney Hornbeck knew of the existence of the logs, but had not read them and therefore

did not use any information from the logs to assist him before the grand jury. (R.T. 10,262.) In addition, three members of the team testified that they did not contact any government officials who had access to the logs.[12] Two other attorneys did contact one of these officials, James Ritchie,[13] but none of the information received from Ritchie related to the logs. This information, which consisted of some bank records, audits, and IRS personal interviews, was the result of subpoenas served on banks or of personal interviews.

The picture which thus emerges from the taint hearing is that no member of the prosecution team had read the logs or had any information derived from them when the indictments were handed down. Only two attorneys had contacted a government official who had access to these logs, and the information received from him was not derived from the logs. Moreover, by the time the indictments were handed down the evidence gathering process was complete, and no other significant evidence was produced at the trial. Counsel for appellants did not produce any witnesses to refute this testimony.

[108] [109] $108, 109$ While FBI monitors have testified at some taint hearings,[14] there is no rule that they must testify. The issues raised in cases in which the court has ordered FBI personnel to testify[15] are obviated here as a result of the prosecution team's undisputed testimony that they received no information related to the logs from any government officials who had access to the logs.

The district court concluded that the government met its 'ultimate burden of persuasion to show that its evidence is untainted.' Alderman, supra, 394 U.S. at 183. Having carefully examined the evidence produced at the taint hearing, we agree with the district court's finding.

Affirmed.

Supreme Court of the United States

James Wintfored REWIS and Mary Lee Williams, Petitioners,

v.

UNITED STATES.

No. 5342.

Argued Jan. 19, 1971.

Decided April 5, 1971.

Mr. Justice MARSHALL delivered the opinion of the Court.

In this case, petitioners challenge their convictions under the Travel Act, 18 U.S.C. s 1952, which prohibits interstate travel in furtherance of certain criminal activity.FN1 Although the United States Court of Appeals for the Fifth Circuit narrowed an expansive interpretation of the Act, the Court of Appeals affirmed petitioners' convictions. For the reasons stated below, we reverse.

FN1.Title 18 U.S.C. s 1952 (1964 ed. and Supp. V) provides:

'(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to-

'(1) distribute the proceeds of any unlawful activity; or

'(2) commit any crime of violence to further any unlawful activity; or

'(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

'and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

'(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.'

Petitioners, James Rewis and Mary Lee Williams, were convicted along with two other defendants in the United States District Court for the Middle District of Florida.FN2 Their convictions arose from a lottery, or numbers operation, which petitioners admittedly ran in Yulee, Florida, a small community located a few miles south of the Georgia-Florida state line. Petitioners are Florida residents, and there is no evidence that they at any time crossed state lines in connection with the operation of their lottery. The other two convicted defendants are Georgia residents who traveled from their Georgia homes to place bets at petitioners' establishment in Yulee.

FN2. Petitioners were convicted of eight substantive violations under s 1952 and of conspiracy to violate the section. Petitioner Rewis was sentenced to five years' imprisonment on each count, to run concurrently. Petitioner Williams was sentenced to three years' imprisonment on each count, to run concurrently, subject to parole under 18 U.S.C. s 4208(a)(2). Petitioner Rewis was also convicted of two counts of having failed to purchase a wagering tax stamp. These latter two convictions were reversed by the Court of Appeals under the intervening decisions of this Court in Marchetti v. United States, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968), and Grosso v. United States, 390 U.S. 62,88 S.Ct. 716, 19 L.Ed.2d 906 (1968).

The District Court instructed the jury that mere bettors in a lottery violated Florida law, and that if the bettors traveled interstate for the purpose of gambling, they also violated the Travel Act. Presumably referring to petitioners, the District Court further charged that a defendant could be found guilty under the aiding and abetting statute, 18 U.S.C. s 2,FN3 without proof that he personally performed every act constituting the charged offense. On appeal, the Fifth Circuit held that s 1952 did not make it a federal crime merely to cross a state line for the purpose of placing a bet and reversed the convictions of the two Georgia residents because the evidence presented at trial was insufficient to show that they were anything other than customers of the gambling operation.FN4 However, the Court of Appeals upheld petitioners' convictions on the ground that operators of gambling establishments are responsible for the interstate travel of their customers. 418 F.2d 1218, 1222.

FN3.18 U.S.C. s 2 provides:

'(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

'(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.'

FN4.418 F.2d 1218. The Government has not sought review of that part of the Court of Appeals decision reversing the conviction of the two Georgia residents.

We agree with the Court of Appeals that it cannot be said, with certainty sufficient to justify a criminal conviction, that Congress intended that interstate travel by mere customers of a gambling establishment should violate the Travel Act.FN5 But we are unable to conclude that conducting a gambling operation frequented by out-of-state bettors, by itself, violates the Act. Section 1952, prohibits interstate travel with the intent to 'promote, manage, establish, carry on, or facilitate' certain kinds of illegal activity; and the ordinary meaning of this language suggests that the traveler's purpose must involve more than the desire to patronize the illegal activity. **Legislative history of the Act is limited, but does reveal that s 1952 was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another.**FN6 In addition, we are struck by what Congress did not say. Given the ease with which citizens of our Nation are able to travel and the existence of many multi-state metropolitan areas, substantial amounts of criminal activity, traditionally subject to state regulation, are patronized by out-of-state customers. In such a context, Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies. **It is not for us to weigh the merits of these factors, but the fact that they are not even discussed in the legislative history of s 1952 strongly suggests that Congress did not intend that the Travel Act should apply to criminal activity solely because that activity is at times patronized by persons from another State. In short, neither statutory language nor legislative history supports such a broad-ranging interpretation of s 1952. And even if this lack of support were less apparent, ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity, Bell v. United States, 349 U.S. 81, 83, 75 S.Ct. 620, 99 L.Ed. 905 (1955).**

FN5. Both parties correctly concede that the questions in this case are solely statutory. No issue of constitutional dimension is presented.

FN6. Incorporated in the Senate report (S.Rep. No. 644, 87th Cong., 1st Sess., 2-3, dated July 27, 1961) the following appears:

'The bill, S. 1653, was introduced by the chairman of the committee, Senator James O. Eastland, on April 18, 1961, on the recommendation of the Attorney General, Robert F. Kennedy, as a part of the Attorney General's legislative program to combat organized crime and racketeering.

'The Attorney General testified before the committee in support of the bill, S. 1653, on June 6, 1961, and commented:

"We are seeking to take effective action against the racketeer who conducts an unlawful business but lives far from the scene in comfort and safety, as well as against other hoodlums.

"Let me say from the outset that we do not seek or intend to impede the travel of anyone except persons engaged in illegal businesses as spelled out in the bill. * * *

"The target clearly is organized crime. The travel that would be banned is travel 'in furtherance of a business enterprise' which involves gambling, liquor, narcotics, and prostitution offenses or extortion or bribery. Obviously, we are not trying to curtail the sporadic, casual involvement in these offenses, but rather a continuous course of conduct sufficient for it to be termed a business enterprise.'

"Our investigations also have made it quite clear that only the Federal Government can shut off the funds which permit the top men of organized crime to live far from the scene and, therefore, remain immune from the local officials."

The Government concedes as much, but offers an alternative construction of the Travel Act-that the Act is violated whenever the operator of an illegal establishment can reasonably foresee that customers will cross state lines for the purpose of patronizing the illegal operation or whenever the operator actively seeks to attract business from another State. The first half of this proposed interpretation-reasonable foreseeability of interstate patronage-does not merit acceptance. Whenever individuals actually cross state lines for the purpose of patronizing a criminal establishment, it will almost

always be reasonable to say that the operators of the establishment could have foreseen that some of their customers would come from out of State. So, for practical purposes, this alternative construction is almost as expansive as interpretations that we have already rejected. In addition, there is little, if any, evidence that Congress intended that foreseeability should govern criminal liability under s 1952.

There may, however, be greater support for the second half of the Government's proposed interpretation-that active encouragement of interstate patronage violates the Act. Of course, the conduct deemed to constitute active encouragement must be more than merely conducting the illegal operation; otherwise, this interpretation would only restate other constructions which we have rejected. Still, there are cases in which federal courts have correctly applied s 1952 to those individuals whose agents or employees cross state lines in furtherance of illegal activity, see, e.g., United States v. Chambers, 382 F.2d 910, 913-914 (CA6 1967); United States v. Barrow, 363 F.2d 62, 64-65 (CA3 1966), cert. denied, 385 U.S. 1001, 87 S.Ct. 703, 17 L.Ed.2d 541 (1967); United States v. Zizzo, 338 F.2d 577, 580 (CA7 1964), cert. denied, 381 U.S. 915, 85 S.Ct. 1530, 14 L.Ed.2d 435 (1965), and the Government argues that the principles of those decisions should be extended to cover persons who actively seek interstate patronage. Although we are cited to no cases that have gone so far and although much of what we have said casts substantial doubt on the Government's broad argument, there may be occasional situations in which the conduct encouraging interstate patronage so closely appropriates the conduct of a principal in a criminal agency relationship that the Travel Act is violated. *But we need not rule on this part of the Government's theory because it is not the interpretation of s 1952 under which petitioners were convicted. The jury was not charged that it must find that petitioners actively sought interstate patronage.* And we are not informed of any action by petitioners, other than actually conducting their lottery, that was designed to attract out-of-state customers. As a result, the Government's proposed interpretation of the Travel Act cannot be employed to uphold these convictions.

Reversed.

Mr. Justice WHITE took no part in the decision of this case

500 F.2d 856

UNITED STATES of America, Plaintiff-Appellee,
v.
Michael Santo POLIZZI, Defendant-Appellant.
UNITED STATES of America, plaintiff-Appellee,
v.
Jack S. SHAPIRO, Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,
v.
Peter James BELLANCA, Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,
v.
Anthony GIARDANO, Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,
v.
Arthur J. ROOKS, Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,
v.
Anthony Joseph ZERILLI, Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,
v.
EMPRISE CORPORATION, a New York corporation, Defendant-Appellant.

Nos. 72-2983 to 72-2989.

United States Court of Appeals, Ninth Circuit.

April 30, 1974, As Modified on Denial of Rehearing July 18, 1974.

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Thomas Kotoske, Asst. U.S. Atty. (argued), William D. Keller, U.S. Atty., Richard Rosenfield, Earl Boyd, Asst. U.S.

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OPINION

Before BROWNING and DUNIWAY, Circuit Judges, and RENFREW, * district judge.

RENFREW, District Judge:

In 1966 and 1967, appellants Zerilli and Polizzi acquired hidden interests in Vegas Frontier, Inc. (VFI), a Nevada corporation, which leased and operated the Frontier Hotel in Las Vegas, Nevada. VFI was also licensed to conduct gambling at the hotel, which opened in July of 1967. Neither Zerilli nor Polizzi was licensed by the Nevada gaming authorities, nor was either man's interest in VFI disclosed to those authorities. After extensive negotiations, VFI was sold in November, 1967, to Howard Hughes.

Following a very lengthy and complex trial, 1 Zerilli, Polizzi, and the other appellants were convicted of conspiracy (18 U.S.C. 371) to violate 18 U.S.C. 1952 2 (Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises) and of substantive violations of that section. Appellants challenge their convictions on a number of bases. They contend:

1. That the prosecution failed to show a violation of 1952.

2. That, if a violation were shown, the laws in question would be unconstitutionally vague.

3. That the court erred in instructing the jury.

4. That the publicity surrounding their trial deprived them of a fair trial and that there was jury misconduct which the court refused to investigate.

5. That the label 'Mafia' was applied to them in a public list of Mafia figures made by the Department of Justice and that the list was submitted in the grand jury proceedings and

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in the trial in this case and that these actions constitute a deprivation of their rights of due process.

6. That the trial court committed error in the permission it gave to the prosecution to cross-examine certain of the appellants about their reputations as members of the Mafia

when the appellants had not presented evidence of character or reputation.

7. That they were deprived of a fair trial by misconduct of the prosecutor which the trial court sanctioned.

8. That the testimony of a key prosecution witness should have been stricken in that the prosecution's untimely production of his pretrial statements violated the Jencks Act.

9. That error was committed in the admission of the testimony of that witness on the grounds that part of the testimony was conclusively demonstrated to be false, and admitted to be false by the witness.

10. That promises of leniency made to the witness by the prosecution were not disclosed.

11. That the acts complained of were a unitary crime and that it was not proper for them to be convicted of a conspiracy and substantive violations based upon the same conduct.

12. That the venue of the trial court was improper.

13. That the court below erred in refusing to grant appellant Giordano's ** motion for severance.

14. That the court below erred in failing to instruct the jury that evidence admitted after appellant Giordano had rested at the close of the prosecution's case could not be considered against him.

15. That appellant Giordano's motion for acquittal at the close of the prosecution's case should have been granted.

16. That appellant Emprise is not liable for any criminal acts that its predecessor in interest allegedly committed.

17. That the evidence was insufficient to support their convictions.

18. That the trial was materially tainted by leads from unlawful electronic surveillance.

Having carefully considered each of these contentions, we affirm the convictions below. Although this opinion is longer than we would have preferred, appellants have raised and argued so many points in 534 pages of briefs, exclusive of appendices and exhibits, that we find a lengthy opinion unavoidable.

I. Violation of 1952

Appellants' threshold contention is that their conduct did not come within the coverage of the federal Travel Act (18 U.S.C. 1952), raising two issues as to the meaning of the statute. Section 1952 condemns interstate travel or the use of interstate facilities in the furtherance of 'any unlawful activity,' defined as including 'any business enterprise involving gambling * * * offenses in violation of the laws of the State in which they are committed or of the United States * * *.' A violation of 1952 thus must be premised upon another distinct violation of state or federal law.

Although state law becomes the focus of this inquiry, 'the gravamen of a charge under 1952 is the violation of federal law * * *.' United States v. Karigiannis, 430 F.2d 148, 150 (7 Cir. 1970) (Clark, J.), cert. denied, 400 U.S. 904, 91 S.Ct. 143, 27 L.Ed.2d 141 (1970). 'Reference to state law is necessary only to identify the type of unlawful activity in which the defendants intended to engage.' United States of America v. Rizzo, 418 F.2d 71, 74 (7 Cir. 1969), cert. denied, 397 U.S. 967, 90 S.Ct. 1006, 25 L.Ed.2d 260 (1970).

While the Government's theory was not succinctly stated, either in its brief or at oral argument, it does emerge

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from a careful reading of the indictment and information 3 together with the court's instructions to the jury 4 that appellants violated the federal Travel Act by conduct which was a 'business enterprise' that involved 'gambling * * * offenses' in violation of Nevada Revised Statutes (N.R.S. 463.160 5 in that Zerilli and Polizzi's interests in the gambling

conducted by VFI at the Frontier Hotel were hidden from the nevada gaming authorities.

Appellants' first argument is that since VFI had a gambling license as required by Nevada law, their activity could not be unlawful within the meaning of the federal Travel Act. They rely considerably on one instruction, to which the government did not object, that VFI was licensed and that the gambling it conducted could not be found illegal. 6 Appellants, counsel stated at oral argument that, even if appellants procured the VFI license fraudulently, there would be no criminal violation of Nevada law. We disagree.

This instruction meant only that the trial court did not believe that the prosecution could rely upon N.R.S. 463.160(1)(a). The license would not be

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viewed as void ab initio, and the appellants could not be prosecuted for conducting a gambling enterprise without a license. Nor could the prosecutor 'pierce the corporate veil' to reach appellants. 7 The instruction does not, however, legitimize all the acts of appellants in obtaining the license. N.R.S. 463.160(1)(c) covers precisely the charges here against appellants: receiving compensation from gambling conducted without having procured and maintained licenses as required by law. 8

Appellants argue, however, that N.R.S. 463.160(1)(c) only requires that the gambling be licensed and does not reach fraud or other violations in obtaining the license. Acceptance of this construction of Nevada law would effectively emasculate the statutory scheme of requiring the disclosure of the identities of the persons who would be involved in the gambling enterprise. This disclosure requirement has as its purpose the prevention of the infiltration of criminal elements into gambling in Nevada. 9 Section 463.160(1)(c) requires not only that a license be procured and maintained, but also that it must be procured and maintained in a manner that satisfies the other provisions of the gambling law. The term 'as required by statute' must be viewed in light of the strong state policy behind that statutes. The interpretation offered by appellants would give free rein to criminal elements in their attempts to infiltrate Nevada gambling. The most they would risk would be the administrative revocation of their corporation's license. They would become criminally liable only if they operated a gambling enterprise without procuring a license, and the most dangerous elements could easily avoid such a blatant violation of Nevada law. Given these considerations, the only reasonable construction of N.R.S. 463.160(1)(c) is that persons receiving compensation from the gambling operation must fulfill all other state requirements surrounding the granting of a license. 10

Appellants violated those other provisions by failing to disclose the identities of Zerilli and Polizzi as persons having an interest in VFI. Under N.R.S 463.170(2), applicants for a corporate license had to disclose 'persons having any direct or indirect interest therein of any nature whatsoever, whether financial, administrative, policymaking or supervisory * * *.' 11The

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disclosure requirement must be complete in order to meet the policy of the Nevada gambling laws. Appellants stress that the corporate-license application form supplied by the state required only the listing of the names of corporate officers and shareholders. Since VFI's application complied with this requirement, they argue, there was no failure to disclose. This argument, if accepted, would turn the detailed statutes governing the control of licensing into a mere formality. Disclosure of nominal officers and shareholders would guarantee legality and shield the very persons as to whom the disclosure requirements are directed. The Attorney General of Nevada in 1960 gave his opinion that N.R.S. 463.170(2) gave power to state authorities 'to require those persons having administrative, policymaking or supervisory interest in the operation to qualify for licensing.' To utilize that authority effectively, he stressed, the authorities would need to obtain information about

those persons. Official Opinions of the Attorney General of Nevada, 1960-1962, pp. 83-84 (1960). There was no hint that formalities suffice or should be exalted over substance. In this case, the information and indictment emphasized that Zerilli and Polizzi held the real interests in VFI and controlled the nominal shareholders. The trial court, in its instructions on the definition of 'owner' as used in the Nevada statutes, stressed the reality of ownership rather than formal titles. (Reporter's Transcript, Vol. 43, p. 8765.) These statutes require disclosure of the names of all persons with actual control or financial interests in the gambling enterprise. 12

The acts of appellants charged and proven in this case therefore were prohibited by state law. 13 Appellants, however, raise further objections. They contend that, even if they did violate Nevada law, their violations were not criminal and therefore do not come within the ambit of 1952. They characterize their conduct as merely 'operating a casino with a state corporate license

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but without other required state licenses.' That theory, however, is based upon the government's contention that all persons with a direct or indirect interest in a gambling casino must be licensed. We find no such requirement in Nevada law. 14 The violations of Nevada law in question here were not by VFI, but rather by those in control of VFI, who did not disclose the interests of Zerilli and Polizzi. The trial court preserved the corporate fiction and the legality of the gambling operations conducted by the corporation. Hence appellants' argument that N.R.S. 463.310 specifically establishes only an administrative penalty available to the authorities in this case-- revocation of VFI's license-- is in error. That provision does set the procedures for disciplinary action against the licensee, but here the licensee has not been prosecuted for violating Nevada law. Since there is no specific penalty prescribed for a violation of N.R.S. 463.160(1)(c), the 'catch-all' section, N.R.S. 463.360(2) 15 would apply. 16 That violation, there characterized as a gross misdemeanor, would be a criminal infraction. 17

Appellants' second argument is that 1952 reaches only wholly unlawful business enterprises and, since gaming is legal in Nevada, the federal Travel Act does not apply. They cite United States v. Roselli, 432 F.2d 879 (9 Cir. 1970), cert. denied, 401 U.S. 924, 91 S.Ct. 883, 27 L.Ed.2d 828 (1971), rehearing denied, 402 U.S. 924, 91 S.Ct. 1366, 28 L.Ed.2d 665 (1971), in support. Their reliance upon Roselli is misplaced. There the Court accepted only for the purposes of argument the premise that the scope of 1952 was limited to illegal business enterprises and even on that basis found such an illegal enterprise (432 F.2d 879 at 887-888). Appellants overlook that earlier in that opinion this Court observed:

'If section 1952 applied only when all business activity was absolutely prohibited in the particular field, the reach of the section would be materially diminished without apparent reason in terms of the statute's purpose. There is no evidence that Congress intended this result.' 432 F.2d 879 at 887.

Nor do appellants' general references to the legislative history of 1952 support this contention. 18 The statutory language is clear. 'Section 1952 speaks not of illegal gambling, but of a more

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inclusive category: 'gambling * * * offenses." United States v. Roselli, 432 F.2d 879, 887 (9 Cir. 1970), cert. denied, 401 U.S. 924, 91 S.Ct. 883, 27 L.Ed.2d 828 (1971), rehearing denied, 402 U.S. 924, 91 S.Ct. 1366, 28 L.Ed.2d 665 (1971). See also Turf Center, Inc. v. United States, 325 F.2d 793, 795 (9 Cir. 1963).

This Court's construction of the scope of 1952 will not open the federal courts to the prosecutorial abuses which appellants have depicted for the Court: Prosecutions of minor illegal acts incidental to an otherwise legal business. The legislative history of 1952 does

demonstrate that its main purposes are to attack organized crime and to aid local authorities in combatting it. 19 Courts would simply not allow it to be used to extend federal prosecutions far from these purposes. 20 See Erlenbaugh v. United States, 409 U.S. 239, 245, 93 S.Ct. 477, 34 L.Ed.2d 446 (1972).

We conclude that appellants engaged in a business enterprise involving gambling offenses in violation of Nevada law and 18 U.S.C. 1952.

II. Vagueness

Appellants challenge the statutes under which they have been charged and convicted as being unconstitutionally vague. 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939). Appellants' attack is directed at the Nevada statutes and not the language of 1952, which has been upheld previously against claims of vagueness. See, e.g., United States v. Cozzetti, 441 F.2d 344, 348 (9 Cir. 1971); Turf Center, Inc. v. United States, 325 F.2d 793, 795 (9 Cir. 1963); United States v. Smith, 209 F.Supp. 907, 917-918 (E.D.Ill.1962). We have already held that the Nevada statutes clearly proscribe the conduct charged against appellants. 21 The construction of those statutes urged by appellants is unreasonable and conflicts with the manifest purpose of the Nevada gambling legislation requiring precise and stringent controls relating to the licensing of gambling. Violation of the statutes in the manner charged against appellants is a criminal offense. 22 In affirming these convictions, we are not enlarging the original legislation by interpretation. Cf. Bouie v. City of Columbia, 378 U.S. 347, 350-352, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964); Pierce v. United States, 314 U.S. 306, 311, 62 S.Ct. 237, 86 L.Ed. 226 (1941).

Moreover, the trial court instructed the jury that specific intent was an elecment of the offense charged against appellants. 23 Thus the jury found that appellants knew that Nevada law and been violated in the procurement of

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VFI's license. 'A mind intent upon willful evasion is inconsistent with surprised innocence.' United States v. Ragen, 314 U.S. 513, 524, 62 S.Ct. 374, 379, 86 L.Ed. 383 (1942). See also United States v. National Dairy Corp., 372 U.S. 29, 33, 35, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963); Screws v. United States, 325 U.S. 91, 103, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945). The record here is clear that appellants were not the helpless victims of an unconstitutionally vague statute. 24

III. Jury Instructions

A. Nevada Statutes and Regulations

Appellants contend that the court below erred in several respects in its instructions to the jury. Certain of these claims concern specific instructions relating to the Nevada statutes. Appellants' objections are based upon a misunderstanding of the government's legal theory of the case. Viewed as a whole, the court's instructions constitute a reasonable construction of 1952 and the Nevada statutes governing the licensing of gambling operations.

Appellants also argue that it was error to read to the jury, without explanation, N.R.S. 463.130. 25 But that section is a self-explanatory statement of Nevada legislative policy and is important in understanding the purpose and meaning of the other sections. These Nevada statutes form a unified legislative plan; particular sections cannot be fully understood without relating them to the entire statutory scheme. Therefore, under these circumstances, it was not error to read to the jury sections other than N.R.S. 463.160 and 463.200, the two sections upon which the indictment and information were based.

N.R.S. 463.300, dealing with voting trust agreements, was also read to the jury. Appellants argue that this was confusing, since the court had earlier instructed the jury that

the evidence presented had failed to establish a violation of 463.300. The court refused appellants' instruction which would have directed the jury to disregard all evidence concerning the voting trust agreement. In light of the court's specific instruction, no further instructions were necessary to prevent the jury from finding a violation of 463.300. It is also highly unlikely that reading that section in these circumstances confused the jury. Cf. United States v. Lookretis, 422 F.2d 647, 651 (7 Cir. 1970), cert. denied, 398 U.S. 904, 90 S.Ct. 1693, 26 L.Ed.2d 63 (1970).

Although conceding that the court properly charged the jury that violations of the regulations of the Nevada State Gaming Commission could not constitute criminal offenses, appellants nevertheless assert that error was committed in instructing that such a violation could be considered as an act in furtherance of a conspiracy. This instruction was proper and necessary in that without it the jury might have thought that it had to disregard completely a violation of the regulations.

B. Sending Statutes and Regulations to the Jury Room

Appellants urge that sending the statutes and regulations into the jury room, especially without limiting instructions, was prejudicial error.

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This question is within the sound discretion of the trial judge. United States v. Gross, 451 F.2d 1355, 1358-1359 (7 Cir. 1971); United States v. Bearden, 423 F.2d 805, 813 (5 Cir. 1970), cert. denied,400 U.S. 836, 91 S.Ct. 73, 27 L.Ed.2d 68 (1970). In this case, the statutes and regulations were extremely complex, and the trial judge may justifiably have believed that it would be better to give the jury the statutes and regulations rather than to have them attempt a reconstruction from notes or from memory. In his effort to avoid confusion, the trial judge did not abuse his discretion.

C. Reading Indictment and Information to Jury and Sending Copies to Jury Room

Appellants argue that it was reversible error to read the indictment and information both at the beginning of trial and during the instructions. Given the extraordinary length and complexity of the trial, however, the trial court may properly have judged that a re-reading was required to avoid confusion. 26 The decision to read the indictment to the jury is within the sound discretion of the trial court, and we find no abuse of that discretion here. 27

The court below also sent to the jury room copies of the indictment and information. That decision is also generally within the discretion of the trial judge. United States v. Murray, 492 F.2d 178, 193-194 (9 Cir. 1973); Souza v. United States, 304 F.2d 274, 280 (9 Cir. 1962). Appellants contend that they should have been advised before closing arguments that the court intended to send the information and indictment. See Dallago v. United States, 138 U.S.App.D.C. 276, 427 F.2d 546, 553 (1969). We agree, but the failure to do so here is not prejudicial error. 28 Under all the circumstances of this case, especially the court's cautionary instruction on the use of the indictment and information and the detailed instructions on what could be considered evidence by the jury, we do not find that error prejudicial in any respect.

D. Specific Intent

In claiming error in the court's instructions on specific intent, 29 appellants urge us to follow United States v. Stagman, 446 F.2d 489, 492-493 (6 Cir. 1971), and hold that specific intent to violate state law is an element of the offense under 1952. This Court however, has previously approved an instruction similar to the one given in this case. See Turf Center, Inc. v. United States, 325 F.2d 793, 797 and n. 5 (9 Cir. 1963). Moreover, to the extent that Stagman requires proof that an accused under 1952 intended to violate state law himself, we find that it conflicts with the clear meaning of the language used in 1952. As the court in Stagman recognized, the intent required in the statute 'refers to the entire phrase 'to * * *

carry on * * * any unlawful activity." 446 F.2d at 492.
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to violate state law, but rather specific intent to facilitate an activity which the accused knew to be unlawful under state law. This interpretation, apart from its consistency with the literal terms of 1952, also supports the purposes of that statute in attacking organized crime by furnishing federal help to local authorities in their attempts to control such crime. It would not subject innocent persons to criminal jeopardy in travelling interstate since for a conviction, proof would be required at the least 'that the defendant intended with bad purpose' 30 to facilitate the violation of state law.

Although the instructions on specific intent, viewed alone, could have been more precise, taking the instructions as a whole, they reasonably informed the jury that they had to find that appellants knew that what they were facilitating was an unlawful activity under state law.

E. Advice of Counsel

As an adjunct to their argument on specific intent, appellants claim that the court should have instructed the jury that reliance on advice of counsel could show a lack of specific intent. Given the evidence in this case, the advice given by counsel was an insignificant factor in the criminal enterprise found by the jury; thus the court below did not err in refusing to give an 'advice of counsel' instruction. See United States v. Shewfelt, 455 F.2d 836, 838-839 (9 Cir. 1972), cert. denied, 406 U.S. 944, 92 S.Ct. 2042, 32 L.Ed.2d 331 (1972); Bisno v. United States, 299 F.2d 711, 719-720 (9 Cir. 1961), cert. denied, 370 U.S. 952, 82 S.Ct. 1602, 8 L.Ed.2d 818 (1962).

F. Kotteakos Instruction

Appellants contend that they were entitled to a 'multiple conspiracy' instruction following the principle of Kotteakos v. United States,328 U.S. 750, 767-768, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). See also United States v. Griffin, 464 F.2d 1352, 1355-1357 (9 Cir. 1972), cert. denied,409 U.S. 1009, 93 S.Ct. 444, 34 L.Ed.2d 302 (1972), Having carefully reviewed the entire reporter's transcript of trial and all documents in evidence, we find that there is no variance between the allegations of the indictment and information and the evidence presented at trial and that therefore the trial court did not err in not giving a 'multiple conspiracy' instruction.

G. Suppression of Evidence

A letter from appellant Bellanca to Emprise Corporation was not produced by the defense in response to a grand jury subpoena because of a claim of attorney-client privilege. The court gave a general instruction on suppression of evidence, apparently in part on the basis that failure to produce the letter could be evidence of suppression. 31 Appellants also complain of the court's refusal to give an instruction on attorney-client privilege.

Even if the giving of the suppression of evidence instruction were error, we find that the weight of other evidence against appellants is such that the error could not have been prejudicial. The court below, moreover, had instructed the jury on the attorney-client privilege during the trial. 32
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H. Perjurer's Testimony

Appellants also claim error in the court's failure to give a cautionary instruction on the testimony of a perjurer. Their initial proposed instruction referred to the witness, Maurice Friedman, as an admitted perjuror when in fact he had been convicted of perjury and had not pled guilty. Appellants submitted a revised instruction after the instructions conference substituting 'convicted' for 'admitted', but it was rejected as untimely. Even if this were error, which we do not find, any prejudice resulting from it was cured by the instructions given on prior inconsistent statements 33 and on the weight of the testimony of an

informer. 34 These instructions sufficiently alerted the jury to the caution necessary in weighing the testimony of a witness like Friedman. Cf. United States v. Evanchik, 413 F.2d 950, 954 (2 Cir. 1969); United States v. Ross, 322 F.2d 306, 307 (4 Cir. 1963), cert. denied, 375 U.S. 970, 84 S.Ct. 490, 11 L.Ed.2d 418 (1964).

I. Skimming 35

Appellants argue that the trial court committed error in not admonishing the jury during instructions that the prosecution's argument about 'skimming' should be disregarded as unsupported by evidence and as not appearing in the indictment or information. Whatever prejudice to appellants could have resulted from the prosecutor's argument was cured by the trial court's painstaking instructions on the elements of the offenses charged. The trial judge read the language of the information and indictment to the jury and sent copies of them to the jury room. The jury was fully apprised of the charges against appellants; 'skimming' was not one of them.

IV. Prejudicial Publicity

Appellants claim that they were prejudiced by the publicity given their case both before and during trial and that the trial judge failed to take adequate measures to detect and prevent that prejudice. The pretrial publicity consisted mainly of newspaper articles on the case. 36 These articles commented, for instance, upon the alleged ties of appellants to the Mafia and upon the 'skimming' allegations of the prosecution.

Appellants also point to several incidents during trial which in their view also led to prejudicial publicity. Newspaper articles referred, for example, to evidence which had not been admitted linking appellants Zerilli and Polizzi to James Hoffa, the former Teamster official, in a prior attempt to invest in a Las Vegas casino. On another occasion a witness mentioned in the absence of the jury that during a previous recorded and transcribed conversation, he 'had in mind' Zerilli and Polizzi when he used the terms 'Mafia' and 'Cosa Nostra.' References to this comment appeared in the newspapers. Later a newspaper disclosed the court's ruling at a sidebar conference sustaining the prosecutor's objection to a question asking Polizzi to explain his testimony on cross-examination that he had been falsely accused by the Department of Justice of being in

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the Mafia. 37 The prosecutor had mentioned at that sidebar conference surveillance logs of Zerilli and Polizzi disclosing 'the whole Mafia organization in Detroit,' and the newspaper article referred to that comment. The motion picture The Godfather was released during the trial, and a local television personality discussed during his program the book and Zerilli and Polizzi and their alleged links to the Mafia. Finally, after the jury had reached its verdicts, one juror allegedly told defense counsel that other jurors had read newspaper articles on the case during trial and that this had been 'devasting to the defendants.' Although this juror had been in the courtroom during a hearing on a motion for a new trial, the court refused appellants' request to have him testify but permitted defense counsel to file affidavits. The juror was subsequently unwilling to submit an affidavit, but defense counsel did file an affidavit purporting to state what the juror had said.

An accused has an unquestioned right to have jurors decide his guilt or innocence who are not biased by what has appeared in the media. In some instances prejudicial publicity before and during trial may be so obvious and overwhelming that an appellate court must overturn a conviction without delving into a detailed analysis of the possibility of prejudice and the judicial action taken to a curb it. See Sheppard v. Maxwell, 384 U.S. 333, 349-352, 89 S.Ct. 1507, 16 L.Ed.2d 600 (1966); Estes v. Texas, 381 U.S. 532, 542, 544, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); Rideau v. Louisiana,373 U.S. 723, 726, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963); Irvin v. Dowd,366 U.S. 717, 725, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). After a review of appellants' evidence and arguments on this question, we do not find that the situation

here reached that extreme, and therefore we do not find 'bias or preformed opinion' which would require reversal as a matter of law. Beck v. Washington, 369 U.S. 541, 557, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962); United States v. Silverthorne, 430 F.2d 675, 678 (9 Cir. 1970), cert. denied,400 U.S. 1022, 91 S.Ct. 585, 27 L.Ed.2d 633 (1971). We must now determine the probability of prejudice in this case and whether the court responded adequately to curtail the chance of an unfair trial. Marshall v. United States, 360 U.S. 310, 312, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959).

A. Pretrial Publicity

' The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. * * * When pretrial publicity is great, the trial judge must exercise correspondingly great care in all aspects of the case relating to publicity which might tend to defeat or impair the rights of an accused. The judge must insure that the voir dire examination of the jurors affords a fair determination that no prejudice has been fostered.' Silverthorne v. United States, 400 F.2d 627, 637-638 (9 Cir. 1968). In a case of substantial pretrial publicity, the voir dire must not simply call for the jurors' subjective assessment of their own impartiality, and it must not be so general that it does not adequately probe the possibility of prejudice. 400 F.2d at 638.

If this case were to be considered closely similar to Silverthorne, supra, in the seriousness of the question of prejudice from pretrial publicity, there is little doubt that the initial voir dire was not sufficiently probing to meet the Silverthorne standards. The trial judge's questions on pretrial publicity were limited

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to two questions addressed to the first prospective panel of jurors 38 and later questions addressed to an individual prospective juror. 39 The answers gave no indication of possible prejudice.

We find, however, that the pretrial publicity in this case was not substantial enough to have required the trial judge to interrogate the prospective jurors at length about it. The judge was aware of the publicity, and clearly it was his judgment that the pretrial publicity was not a significant danger to a fair trial. 40 His concern seemed greater about the possible effects of publicity during trial. The pretrial publicity in this case does not resemble the situation in Silverthorne v. United States, 400 F.2d 627, 639 (1968). Unless a trial judge clearly has erred in his estimation of the action needed to uncover and prevent prejudice from pretrial publicity, an appellate court should not intervene and impose its estimate. The court closest to the situation can best evaluate the proper way to walk the difficult line between a vigorous voir dire to determine any possible bias and avoidance of creating bias by specific questions which add 'fuel to the flames' in suggesting the presence of controversial issues. Beck v. Washington, 369 U.S. 541, 548, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962). The court below did not abuse its discretion by the way it handled the question of pretrial publicity.

B. Publicity During Trial

When the possibility of prejudice from publicity arises during trial, the trial court has 'the affirmative duty * * * to take positive action to ascertain the existence of improper influences on the jurors' deliberative qualifications and to take whatever steps are necessary to diminish or eradicate such improprieties.' Silverthorne v. United States, 400 F.2d 627, 643 (9 Cir. 1968). See also Gordon v. United States, 438 F.2d 858, 872-873 (5 Cir. 1971), cert. denied, 404 U.S. 828, 92 S.Ct. 139, 30 L.Ed.2d 56 (1971), rehearing denied, 404 U.S. 960, 92 S.Ct. 312, 30 L.Ed.2d 279 (1971). The better practice, if there is a clear chance of prejudice, is for the court to interrogate each juror in camera about the possibly prejudicial publicity. Silverthorne v. United States, 400 F.2d 627, 644 (9 Cir. 1968); Coppedge v. United States, 106 U.S.App.D.C. 275, 272 F.2d 504, 508 (1959). The trial judge carries a difficult

burden. He is called upon to question the jurors, but repeated questioning could itself be prejudicial in inciting in the jurors 'joint or individual curiosity and encourage attempts to read the very newspaper articles sought to be kept from their knowledge.'
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Silverthorne v. United States, 400 F.2d 627, 643 (9 Cir. 1968). His very questions may disclose or accentuate controversial issues. Unless he has clearly abused his discretion, we shall uphold the trial judge's delicate estimation of the needs of the case of which he has firsthand experience.

During his initial voir dire of prospective jurors, the judge indicated that the jurors would not be sequestered but that they would be expected to avoid hearing or seeing anything about the case. 41 One prospective juror was questioned about adherence to that admonition; she indicated that she would find it difficult to fllow and was excused. Appellants argue that allowing the jurors to read newspapers with the admonition to avoid stories on the trial after glancing at headlines itself raised enough possibility of prejudice to require reversal. We disagree. The relevant questions are the nature of the headlines and the actions taken by the court to cure any possibility of prejudice. 42

Early in the trial on February 24, 1972, the court again admonished the jury to avoid any publicity about the case. 43 The very next day, after newspaper stories linking Zerilli and Polizzi to James Hoffa, the court undertook an in camera interrogation of each juror separately, in the absence of all defendants, counsel and other jurors. The judge asked whether they had read the articles and whether they had seen or heard anything about the case in the newspapers, on television, or on the radio. He also gave them another general admonition. Nothing said by any of the jurors during this interrogation revealed a possibility of prejudice from the publicity. 44 We agree with appellants
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that it would have been preferable to ask each juror about the newspaper carrying the Hoffa story which apparently was in the jury room, but each juror's other answers would have to be willful falsehoods if each had in fact read the article in the jury room. If the jurors had read the story, 'even the most biased argument would be hard put to suggest that all twelve jurors, sworn to try the indictments fairly would deliberately break their oaths by remaining in the box, having read the items, instead of bowing out under the wise protection of the court and saving not only their dignity but their honor.' United States v. Carlucci, 288 F.2d 691, 696 (3 Cir. 1961), cert. denied, 366 U.S. 961, 81 S.Ct. 1920, 6 L.Ed.2d 1253 (1961).

On March 9, 1972, after newspaper articles were published referring to appellants and their links to organized crime as discovered by United States Senate investigators, the court declined to question the jurors again, in the belief that new questioning could itself undermine the jury's belief in its own integrity. 45 On March 21, 1972, after the leak of the ruling at the sidebar conference, the court, having the opportunity to observe on a daily basis the demeanor of the jurors and after expressing his confidence in their ability to obey his admonitions, again declined to interrogate the jurors anew. 46

On April 3, 1972, the trial court on its own motion conducted an in camera questioning of each juror. 47 Again defendants, counsel, and the other jurors were not present. He asked them generally whether they had read, seen, or heard anything in the media about the case. The jurors indicated that they had not. Appellants argue that Juror Foss, whose family was keeping a scrapbook of articles concerning the trial, must have been exposed to publicity surrounding the case. Here is the record:

'The Court: Mr. Foss, you will recall that some time ago I called the jurors in one at a time to ask them if they had read any newspaper articles about this case and because of the length of the trial I thought it wise to emphasize it again and to call them in to ask if they

had read any newspaper
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articles about the case. Have you read any?

'Juror Foss: No. My People cut the articles out of the paper before they give me the paper. Before they bring the paper to me in the morning they cut everything out. They have got it in a scrapbook somewhere.

'The Court: And you will wait until the case is over before you read it?

'Juror Foss: I won't read anything about the case.

'The Court: That is fine.

'Juror Foss: I will decide it on the facts the courtroom.' Reporter's Transcript, Vol. 31, pp. 6010-6011.

The argument is frivolous.

After the verdicts were reached, the trial judge questioned each juror separately in his chambers. He stressed on this occasion whether the term 'Mafia' or related terms had been factors in the jury's deliberations. 48 It seems that the terms were discussed briefly at the beginning
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of the jury's deliberations and once during a lunchtime, but the jurors agreed that those terms and issues had not been factors in their decisions. The judge also asked them about their exposure to the book and the motion picture The Godfather. Two jurors had read the book, but said that it had not influenced their decisions. He asked all but four jurors general questions about their exposure to newspaper, television, and radio publicity, again without any revelations of possible prejudice.

Finally, on June 12, 1972, at a hearing on a motion for a new trial, defense counsel told the court of juror Palmer's revelation that other jurors had been reading newspaper stories about the case and that it had been 'devastating to the defendants.' The court refused defense counsel's request for an immediate examination of jurors Palmer and Dewey who were in the courtroom, but stated that counsel could file affidavits on the matter. Palmer subsequently refused to submit an affidavit, although defense counsel did submit two affidavits. 49 While it may generally be preferable for the trial court to allow such an examination of jurors in order
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to dispel any doubts as to the integrity of the jury's deliberations, such action was not required here. The trial judge, after having questioned juror Palmer on three separate occasions during and immediately after trial in the privacy of his chambers, could understandably have been skeptical of such a belated attack on the jury's verdicts. The record is not barren on this point, 50 and the court
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could reasonably have found juror Palmer's disclosure as reported by defense counsel unworthy of belief. Palmer's unwillingness to submit an affidavit strongly supports that judgment. 51

In this case the problem of publicity was not insignificant, but it was a problem that was handled by proper judicial supervision. 'The right to publish a prejudicial article does not carry with it the right of an accused to an automatic mistrial. Such an outcome would give to the press a power over judicial proceedings which may not be countenanced.' Mares v. United States, 383 F.2d 805, 808 (10 Cir. 1967), cert. denied, 394 U.S. 963, 89 S.Ct. 1314, 22 L.Ed.2d 564 (1969). After our detailed review, we cannot say that there is a serious possibility that the jury was influenced by considerations apart from evidence properly admitted at trial. The trial judge admonished the jury on at least four occasions to avoid publicity about the case. He interrogated the jurors individually three times. The fact that

the jurors discussed the term 'Mafia' and related issues does not in itself require reversal. Cf. United States v. Lazarus, 425 F.2d 638, 640-641 (9 Cir. 1970), cert. denied, 400 U.S. 869, 91 S.Ct. 102, 27 L.Ed.2d 108 (1970), rehearing denied, 400 U.S. 954, 91 S.Ct. 233, 27 L.Ed.2d 261 (1970). For appellants' arguments of prejudice and juror Palmer's disclosure to be true, the other jurors would in effect have committed perjury on several occasions and have entered into a conspiracy of silence. The trial judge found that incredible. We agree. 'Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct.' Fairmount Glass
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Works v. Cub Fork Coal Co., 287 U.S. 474, 485, 53 S.Ct. 252, 255, 77 L.Ed. 439 (1933) (Brandeis, J.). 'If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day.' Holt v. United States, 218 U.S. 245, 251, 31 S.Ct. 2, 6, 54 L.Ed. 1021 (1910) (Holmes, J.). No reversible error was committed in the trial court's handling of the question of prejudicial publicity; we do not find 'that the probability of prejudice arose and was not eliminated.' Silverthorne v. United States, 400 F.2d 627, 644 (9 Cir. 1968).

V. Department of Justice 'Mafia' List

The United States Department of Justice in 1969 included appellants Zerilli and Polizzi on a list of known Mafia figures. See 115 Cong.Rec., Part 17, pp. 23440-23441 (August 12, 1969). Appellants contend that the presence of those names on that list was the motivating factor in the prosecution of this case and also that the prosecution made several prejudicial comments, based upon appellants' alleged Mafia connections, to the grand and petit juries.

Their first point, that their inclusion on the 'Mafia list' was the prime motivation for the prosecution, is not supported by anything in the record and is strongly contradicted by the testimony of three government officials prominent in this prosecution. 52

The next contention, that the prosecution 'poisoned' the grand jury proceedings by comments referring to the Mafia, is unsupported by the record or by the authorities appellants cite. The portions of the transcript of the proceedings before the grand jury which appellants quote in their opening brief are not evidence of grand jury bias. 'Mafia' is mentioned by the prosecutor in one question. The possible use of force is the basis of four questions referring to appellant Shapiro. One witness is asked whether he is fearful or apprehensive as a result of his testimony. Appellants allege that the grand jury was 'repeatedly told' of a prior arrest of appellant Zerilli; and the prosecutor commented on the alleged association of Zerilli and Polizzi with 'tough guys, Italians, from New York.'

Appellants have a difficult burden to satisfy in their challenge to the indictment. 'An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.' Costello v. United States, 350 U.S. 359, 363, 76 S.Ct. 406, 409, 100 L.Ed. 397 (1956). A valid indictment does not require support by 'adequate or competent evidence.' 350 U.S. at 364. 53 See also United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). Appellants have not demonstrated a reasonable
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inference of bias on the part of the grand jury resulting from the comments of the prosecutor. 54 See Beck v. Washington, 369 U.S. 541, 545-549, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962). 'The quantum of evidence necessary to indict is not as great as that necessary to convict. If a grand jury is prejudiced by outside sources when in fact there is insufficient evidence to indict, the greatest safeguard to the liberty of the accused is the petit jury and the rules governing its determination of a defendant's guilt or innocence. And, if impartiality among the petit jurors is wanting, the cure is reversal by the appellate courts.' Silverthorne

v. United States, 400 F.2d 627, 634 (9 Cir. 1968). 55

Appellants also argue that the 'Mafia list' played an impermissible role in the trial. They refer, however, only to the comments of the prosecutor in closing argument that appellants 'substituted the corporate resolution for the pistol.' 56 There was no express reference to the Mafia in the prosecutor's statement, nor could such a reference be reasonably implied.

VI. Cross-Examination on Reputation

Appellants argue that the trial court committed reversible error in allowing the prosecution to cross-examine Polizzi and Zerilli on their reputations. The government contends that the cross-examination was permissible as to Polizzi because he had opened the subject of his reputation on direct examination and as to Zerilli in order to impeach his testimony about why he could not be licensed.

'The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him.' Michelson v. United States, 335 U.S. 469, 479, 69 S.Ct. 213, 220, 93 L.Ed. 168 (1948). Throughout the presentation of its case, the prosecution avoided raising the issue of the Mafia links of Zerilli and Polizzi in demonstrating that they could not themselves obtain licenses from the Nevada authorities. On direct examination Polizzi testified that the reason why he could not be licensed was that he had a 'problem.' He never described the specifics of this problem.

For all that the jury knew from Polizzi's direct testimony, his 'problem' could have been one of short duration-- e.g., insufficient financing-- which would not have indefinitely precluded licensing. If so, there would have been no motive for furtive investment. Thus, the nature of Polizzi's 'problem' was clearly relevant. And while the trial judge did order Polizzi to answer the question regarding the 'problem,' he did not order the defendant to use the word 'Mafia.' Polizzi could have answered the question truthfully and specifically without using the 'Mafia' term-- for example, he could have said

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that he understood that he would not be considered a suitable person for a license.

Thus, since the general nature of Polizzi's problem was directly relevant and the prejudicial Mafia connection was volunteered by Polizzi, the trial court's ruling was well within its wide discretion in controlling cross-examination and in balancing its probative value against possible prejudice.

This result is even clearer as to Zerilli. The reason why Zerilli could not be licensed was not admissible merely to impeach Zerilli or his attorney-- it was directly relevant to Zerilli's guilt. If the reason Zerilli could not be licensed was, as he testified, his ownership interest in a race track, then his testimony of continuing interest in the enterprise because of an intention to invest later might be credible. The race track regulation was apparently unclear and Zerilli could in any event sell his race track interest. However, if the reason he could not be licensed was his reputation, then any hope of investing later would be doubtful since his reputation was unlikely to change. Zerilli therefore had a strong motive to make his investment surreptitiously. Moreover, there was no mention of the Mafia in connection with Zerilli, only of his 'reputation,' so that the court did not err in permitting the government to cross-examine Zerilli on the reasons why he could not be licensed.

VII. Misconduct of the Prosecutor and Trial Judge

Appellants cite many episodes of what they assert to be misconduct by the prosecutor, sanctioned by the trial judge, which deprived them of a fair trial. After having carefully reviewed each of these assertions, we do not find that they amount to a deprivation of appellants' right to a fair trial. No good would be served by a discussion of each of the points raised, but we shall discuss several representative claims. 57

In his closing arguments, the prosecutor did make comments which could have

conveyed the impression that appellants were violent individuals. 58 This question, however, is tied closely to the issue of the influence of the Mafia references on the jury. We have found that the court below carefully handled that issue, 59 and we find that these comments were not so prejudicial to appellants so as to require reversal of the jury's verdicts.

Appellants argue that the prosecutor gave his personal opinion of appellants' guilt to the jury and referred to the indictment in this case as supporting him. The prosecutor did mention the grand jury indictment, but he used it to rebut appellants' argument to

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the jury that the prosecutor was pursuing in effect a personal vendetta against appellants. 60 The reference to the indictment in these circumstances does not constitute improper argument. Cf. United States v. Cummings, 468 F.2d 274, 277-278 (9 Cir. 1972); Hall v. United States, 419 F.2d 582, 587 (5 Cir. 1969). Moreover, the jury was instructed that the indictment and information were not evidence and were merely methods of accusing a defendant of a crime. Reporter's Transcript, Vol. 43, pp. 8736-8737.

On four occasions, in ruling on questions addressed to two government witnesses, the trial judge made comments that appear to vouch for the credibility of the witnesses. However, we cannot accept the appellants' assertions of prejudice. They did not object to any of the judge's statements, and they certainly knew how to object when they thought it important to do so. The error, if any, could easily have been corrected, had there been objection. For example, in one instance, at the end of the colloquy, the court said '* * * in any instance the jury is to draw no inference from the questions as bringing any truthfulness to us.' Reporter's Transcript, Vol. 2, p. 244. The court, moreover, instructed the jury not to assume from his comments during trial that he held particular opinions about the issues in question and that they were the sole judges of the credibility of witnesses and of the weight of evidence. See United States v. Jackson, 482 F.2d 1167, 1175-1176 (10 Cir. 1973); United States v. Cunningham, 423 F.2d 1269, 1276 (4 Cir. 1970).

Appellants contend that the trial court first received evidence, in the presence of the jury, on the question of the applicable Nevada law, rendering the matter one for the jury's decision, but then at the end of the trial took the issue away from the jury by instructing it as to the state law. The determination of the applicable state law in a case such as this is a question for the court. Cf. United States v. D'Amato, 436 F.2d 52, 54 (3 Cir. 1970); United States v. Lyon, 397 F.2d 505, 513 (7 Cir. 1968), cert. denied, 393 U.S. 846, 89 S.Ct. 131, 21 L.Ed.2d 117 (1968). To receive testimony on the question of state law in the presence of the jury is unnecessary, but not prejudicial error unless the combination of the testimony and the court's instructions clearly leave the jury in confusion or in doubt as to the applicable state law. We do not find prejudicial error here.

Also cited as error is the trial court's comment that a certain question could be decided if one of the appellants took the stand. 61 This was not an infringement of appellant Bellanca's right against self-incrimination. 'The test is whether the language used was manifestly

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intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.' Knowles v. United States, 224 F.2d 168, 170 (10 Cir. 1955). 62 No such finding could be reached here. It was an off-hand comment which could have had no influence on the jury. This point is an example of a practice appellants have followed many times on this appeal: quoting out of context remarks of the prosecutor and especially the trial judge and supplying an 'argument' for reversal by dramatic and hyperbolic language. Appellants argue that after this incident 'appellant Bellanca had to take the stand or suffer the possibility of an untoward inference by the

jurors.' The esisode in fact was a pedestrian exchange which, if anything, probably left the jury with the impression that appellants would be able to establish the point through other witnesses, including appellant Bellanca if he testified.

Appellants' next point is that the prosecution evaded a prior ruling by the court that it could not offer evidence of prior similar acts by appellants. The court, after hearing the proffered evidence in the absence of the jury, instructed the jury that there was no evidence of prior similar acts and that any comments of the prosecutor on the issue were to be disregarded. In addition, each juror was asked whether the comments had prejudiced them, and each juror said that he had not been prejudiced. The prosecution nevertheless subsequently inquired on cross-examination about prior attempts to invest in Las Vegas. This line of inquiry was permitted by the court for the limited purpose of showing Zerilli and Polizzi's earlier interest in investing in a Las Vegas casino. However, the probative value of that testimony was not great enough to justify its admission in light of the possibility of confusing the jury which in effect was asked to consider the evidence on one issue but not on another, although the issues of motive and prior similar acts, if not identical, were closely related. We do not find, however, that prejudice to appellants actually resulted in light of other and substantial evidence supporting the verdicts.

The government attempted to use a deposition of Benjamin Reisman, an attorney employed by appellant Emprise, on its redirect examination of Maurice Friedman. The deposition was taken in 1970, before appellants were indicted, during the course of other legal proceedings. Appellant Rooks was later asked on cross-examination by the prosecution whether he had heard the reading of the deposition and whether he knew of the events described in the deposition. On cross-examination of appellant Zerilli, the prosecutor used the deposition again in an attempt to refresh Zerilli's recollection.

The use of the deposition cannot be justified by Rule 15 of the Federal Rules of Criminal Procedure since it was not taken at the motion of a defendant, it was taken before the indictment and information here were filed, no order of the court had been obtained, and no notice had been given to the parties. The prosecution argues that it offered the evidence only as to the corporate defendant Emprise. The deposition was taken in connection with legal proceedings against Jeremy Jacobs, the President of Emprise. The court admitted it not on the authority of Rule 15, but rather on the ground that it was a prior statement of a witness in a case where the parties and issues were substantially the same as in the present case. We need not decide whether there was error. 63 Another deposition of Reisman was taken and read into the record without objection, thereby curing any defect

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arising from the admission of the first deposition. Appellants' counsel had the opportunity to ask Reisman about his prior statements, thus fulfilling appellants' right to confront adverse witnesses.

If it were error to allow the prosecution to ask appellant Rooks about the first Reisman deposition, there was no possible prejudice. 64 The same is true of the use of the deposition as possibly refreshing Zerilli's memory; the incident was insignificant. 65

The prosecution, as the representative of the government, is expected to follow high standards in conducting its case. 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.' Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). But during an extensive and fiercely contested trial, we cannot realistically expect perfection. Cf. Lutwak v. United States, 344 U.S. 604, 619, 73 S.Ct. 481, 97 L.Ed. 593 (1953). Upon hindsight, there were things said by the prosecution which would have been better unsaid. But nothing said or done deprived

appellants of a fair trial.

The main instrument for insuring that the conduct of counsel does not deprive the accused of a fair trial is the trial judge. In this case the trial judge clearly did his best to give appellants a fair trial. Compare United States v. Dellinger, 472 F.2d 340, 385-391 (7 Cir. 1972), cert. denied,410 U.S. 970, 93 S.Ct. 1443, 35 L.Ed.2d 706 (1973). Errors were committed, but none so prejudicial, so fatal, either individually or collectively, as to require reversal. 'Few, if any judges can altogether avoid words or action, inadvertent or otherwise, which seem inappropriate when later examined in the calm cloisters of the appellate court. But unless such misadventures so persistently pervade the trial or, considered individually or together, are of such magnitude that a courtroom climate unfair to the defendant is discernible from the cold record, the defendant is not sufficiently aggrieved to warrant a new trial.' Smith v. United States, 305 F.2d 197, 205 (9 Cir. 1962), cert. denied, 371 U.S. 890, 83 S.Ct. 189, 9 L.Ed.2d 124 (1962). Appellants have failed to make a persuasive showing that their constitutional rights were violated, and our careful review of the entire record does not lead to a reasonable inference that the jury's verdicts were the end result of anything other than an impartial consideration of properly admitted evidence.

VIII. Production of Jencks Act Statements

Appellants claim that the prosecution's failure to produce four pretrial statements by its witness, Maurice Friedman, in conformance with the Jencks Act, 18 U.S.C. 3500, requires a

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reversal. Two of the purported statements are interview memoranda prepared by an assistant United States Attorney; another is a report by an F.B.I. agent of one of the interviews; and the last is the transcript of a tape recording of a conversation between Friedman and one Dr. Victor Lands. The two interview memoranda and the 'Lands transcript' were disclosed to appellants after Friedman's cross-examination had begun.

The two interview memoranda and the F.B.I. report are not Jencks Act statements. A written statement falls within that statute only if it is 'made by said witness and signed or otherwise adopted or approved by him.' 18 U.S.C. 3500(e)(1). The record shows that Friedman had not signed, adopted, or approved these three written reports. The government attorney who wrote the memoranda took no notes during the interviews and testified that the memoranda were his summaries, conclusions, and interpretations of what Friedman had said. It does not appear that the F.B.I. report differs in these respects. The rationale of the Jencks Act is to provide the defense with material that could impeach a government witness. 'We think it consistent with this legislative history, and with the generally restrictive terms of the statutory provision, to require that summaries of an oral statement which evidence substantial selection of material, or which were prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent, are not to be produced.' Palermo v. United States, 360 U.S. 343, 352-353, 79 S.Ct. 1217, 1225, 3 L.Ed.2d 1287 (1959). See also Campbell v. United States, 373 U.S. 487, 83 S.Ct. 1356, 10 L.Ed.2d 501 (1963); Rosenberg v. United States, 360 U.S. 367, 369, 79 S.Ct. 1231, 3 L.Ed.2d 1304 (1959); Wilke v. United States, 422 F.2d 1298, 1299 (9 Cir. 1970).

The Lands transcript presents a more difficult question of construing the Jencks Act, a problem which we find unnecessary to resolve in this case. 66 Assuming for the purposes of argument that it should have been disclosed, we find that the untimely disclosure here was not prejudicial to appellants. Disclosures are required by the Jencks Act only for impeachment purposes. 67 Palermo v. United States, 360 U.S. 343, 345, 79 S.Ct. 1217, 3 L.Ed.2d 1287 (1959); United States v. Harris, 458 F.2d 670, 677 (5 Cir. 1972); cert. denied, 409 U.S. 888, 93 S.Ct. 195, 34 L.Ed.2d 145 (1972). The material in the Lands transcript could not have been used to impeach Friedman's testimony on direct examination. Though a question of inconsistency perhaps did arise with Friedman's testimony on cross-

examination, appellants did then have the transcript. Indeed Friedman was questioned about it on recross-examination. 68 Cf. United States v. Scaglione, 446 F.2d 182, 184 (5 Cir. 1971), cert. denied, 404 U.S. 941, 92 S.Ct. 284, 30 L.Ed.2d 254 (1971). The prosecution is obligated to disclose to the defense statements falling within the Jencks Act regardless of anyone's perception of the utility of the statements for impeachment. But if, upon review, a failure to disclose appears clearly to be harmless and is not a willful avoidance and egregious dereliction of the prosecutor's statutory obligation, then a court need not invoke the drastic remedies of striking testimony or calling a mistrial as provided by 18
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U.S.C. 3500(d). Cf. United States v. American Radiator & Stand. San. Corp., 433 F.2d 174, 203 (3 Cir. 1970), cert. denied, 401 U.S. 948, 91 S.Ct. 928, 28 L.Ed.2d 231 (1971); Pierce v. United States, 414 F.2d 163, 169 (5 Cir. 1969), cert. denied, 396 U.S. 960, 90 S.Ct. 435, 24 L.Ed.2d 425 (1969).

IX. The Lands Transcript

The Lands transcript is a transciption of a tape-recorded conversation between Maurice Friedman and one Dr. Victor Lands in 1967. During that talk, Friedman said in reference to the attempt to secure a Nevada gambling license for VFI:

'There are thirty-two people who have invested three and a half million dollars coming before this Commission, all of whom have been approved at least by a majority of this three-man Board. I told you that we feel pretty good except that our lawyer is very, very nervous, and he understands through the grapevine that we are going to have one hell of a time-- the thirty-two of us. The Mafia, Casa Nostra-- everything's going to come out. This is a public hearing. The press will know.'

On cross-examination Friedman testified that he had stated in 1967 that there were hidden interests in VFI. The court then ordered the prosecution to disclose the Lands transcript. With the jury absent, Friedman verified the accuracy of the transcript. He said that in using the terms 'Mafia' and 'Cosa Nostra' he was referring to appellants Zerilli and Polizzi. He also testified that he was referring to hidden interests in VFI when he said to Lands 'everything's going to come out.' Upon objection by the defense, the transcript was not admitted as evidence, but the court did permit testimony about the Lands conversation. The court, in an understandable effort to avoid any possible prejudice to appellants Zerilli and Polizzi, ordered Friedman not to use the terms 'Mafia' and 'Cosa Nostra' in his testimony before the jury. On redirect examination, Friedman testified that he had mentioned to Lands that Zerilli and Polizzi held hidden interests in VFI. On recross-examination Friedman admitted that in the Lands conversation he had not used the words 'hidden interests' nor referred specifically to any of appellants.

Although the trial court clearly had the best of motivations in its handling of the Lands transcript question, preventing prejudice to appellants from the use of the terms 'Mafia' and 'Cosa Nostra,' it did commit error. Because of the vagueness of the terms used, the probative value of the Lands transcript in this case was insubstantial and was clearly outweighed by the possible prejudice arising from the terms 'Mafia' and 'Cosa Nostra' and, in an attempt to eliminate that possibility, by the danger of allowing testimony deviating from and therefore misrepresenting the actual terms used in the transcript. The court thus should not have admitted any testimony referring to the Lands transcript.

Appellants argue that they were seriously prejudiced by this error. They characterize this episode as a purposeful distortion of the Lands transcript, a falsification of the record, which resulted in the admission of testimony which is conclusively demonstrated to be false by the transcript itself and admitted to be false by the witness. We disagree. The trial court did not order Friedman to substitute 'Zerilli' and 'Polizzi' for 'Mafia' and 'Cosa Nostra.' Friedman was instructed only not to use the latter terms. At the most the witness may have

misunderstood the court as suggesting such a substitution. 69 Moreover, the
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Lands transcript did not contradict Friedman's testimony, as appellants argue. Nor did it confirm that testimony, as the government urges. The Lands transcript and Friedman's testimony were simply not expressly inconsistent. Friedman could, as he did in the absence of the jury, have commented on what he meant by some of the terms he had used in talking to Lands. If he had been permitted to say to the jury that, in using 'Mafia' and 'Cosa Nostra', he was referring to Zerilli and Polizzi, his testimony would clearly have had a strong impact on the jury adverse to appellants. As it was, his testimony was less precise on this point 70 and was heavily qualified on recross-examination. 71 In light of the substantial evidence in the record supporting appellants' convictions, we do not find that the error in handling the Lands transcript was so prejudicial as to require reversal.

We find that, in light of all of the evidence of record, appellants also did not suffer prejudice from the government's argument to the jury concerning the Lands transcript, and that the court's response to the jury's request for a reading of the testimony about the Lands conversation was not an abuse of its discretion. 72 United States v. Baxter, 492 F.2d 150, 175 (9th Cir. 1973); United States v. De Palma, 414 F.2d 394, 396-397 (9 Cir. 1969), cert. denied,
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396 U.S. 1046, 90 S.Ct. 697, 24 L.Ed.2d 690 (1970).

X. Concealment of Prosecution Promises of Leniency

Appellants contend that the prosecution failed to disclose its agreements with or promises of leniency to its key witness, Maurice Friedman, as required by Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Friedman, serving prison sentences concurrently for three federal convictions, had his sentences modified after appellants' convictions and was released from prison. The prosecution did disclose a promise to Friedman that his testimony in this case would be called to the attention of the Parole Board, but maintained that no other promises were made. Appellants argue that the prosecution did also promise to urge the reduction of Friedman's sentences and stipulated that Friedman's motions for modification of sentence could remain submitted but undecided until after the trial in this case. 73 Appellants, however, do not argue that express agreements were reached, but rather that there was an implicit mutual understanding that the prosecution would try to help Friedman.

Having reviewed the arguments and evidence presented by appellants on this point, we do not find that they establish undisclosed promises by the prosecution. 74 The prosecution did disclose a promise to inform the Parole Board of Friedman's testimony. This disclosure alerted the defense and the jury to the possibility that the testimony was motivated by self-interest. Cf. United States v. Sidman, 470 F.2d 1158, 1165 (9 Cir. 1972). The trial court then instructed the jury specifically on carefully weighing the testimony of 'an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication.' 75 Defense counsel did cross-examine Friedman about his motive for testifying. Finally, the pending motions for modification of sentence were public records, available to the defense, and could have been the basis for cross-examining Friedman.

I concur in the portions of this opinion prepared by Judges Browning and Duniway.

BROWNING, Circuit Judge:

I concur in the portions of this opinion prepared by Judges Renfrew and Duniway.

XI. Unitary Crime Contentions

Appellants argue that 'this case concerns a unitary event-- the maintenance of Vegas Frontier Inc. from

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July 27, 1967 to November 27, 1967,' and therefore conviction and punishment on a count charging conspiracy and several counts charging substantive offenses was improper. 76 The argument includes two propositions: that Congress did not intend to make conspiracy to violate 18 U.S.C. 1952 a separate crime from the substantive offense; and that Congress did not intend to allow prosecution as a separate offense of each of several acts of travel where the illegal intent during each act related to the same unlawful activity. Neither proposition has merit.

A.

' The distinctiveness between a substantive offense and a conspiracy to commit it is a postulate of our law. 'It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." Callanan v. United States, 364 U.S. 587, 593, 81 S.Ct. 321, 325, 5 L.Ed.2d 312 (1961), quoting Pinkerton v. United States, 328 U.S. 640, 643, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946). Accordingly, unless there is specific language to the contrary, Congress presumably intended to permit punishment as separate offenses of both the substantive crime and a conspiracy to commit it. 364 U.S. at 594-595. There is no such language here, in either the statute 77 or legislative history. 78

B.

Turning to the second proposition, the language of the statute seems unambiguous. The offense defined is an act of travel or use of an interstate facility, with the requisite intent, plus subsequent performance of another act of the kind specified in the statute. Appellants argue, however, that the legislative history indicates that section 1952 was directed at a 'course of conduct,' and therefore various acts of travel in furtherance of a single 'unlawful activity,' 18 U.S.C. 1952(b), should be held to

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constitute only one crime. But 'the 'course of conduct' referred to in the . . . legislative history of Section 1952 refers to the nature of the business promoted or facilitated-- and not to the essence of the federal offense, which is 'travel." United States v. Teemer, 214 F.Supp. 952, 958 (N.D.W.Va.1963), 79 quoted with approval in Katz v. United States, 369 F.2d 130, 135 (9th Cir. 1966).

No appellate court appears to have discussed the proper unit of prosecution under section 1952, 80 but similar federal statutes making it a crime to use interstate transportation or communications facilities in aid of illegal purposes have been construed to permit prosecution of each use of such facilities as a separate offense. See, e.g., Sanders v. United States, 415 F.2d 621, 626-627 (5th Cir. 1969); Katz v. United States, supra; Mitchell v. United States, 142 F.2d 480 (10th Cir. 1944). The cases upon which appellants rely (Braverman v. United States, 317 U.S. 49, 63 S.Ct. 99, 87 L.Ed. 23 (1942); United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 73 S.Ct. 227, 97 L.Ed. 260 (1952); Bell v. United States, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955), and Rewis v. United States, 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971)) are inapposite. 81

In view of the plain import of the language of section 1952, the absence of any contrary indication in the legislative history, 82 and the construction

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given comparable statutes over the years, we conclude that each act of travel may be treated as a separate violation of section 1952.

XII. Venue

Appellants raise two venue-related claims. They contend venue was improperly laid in the Central District of California as to some of the substantive counts. 83 They also contend the trial court abused its discretion by denying motions under Federal Rule of Criminal

Procedure 21(b) to transfer the proceedings to Detroit or Las Vegas.

A.

Appellants argue venue was improperly laid as to certain substantive counts for two reasons. First, relying on United States v. Bozza, 365 F.2d 206 (2d Cir. 1966), they argue that the act of carrying on, or distributing the proceeds of, unlawful activity, required to complete an offense under section 1952, did not occur in the Central District of California, though travel with the requisite intent did. Second, they argue that some of the defendants in each count were charged not with themselves traveling but with aiding and abetting the travel of others. Again, appellants rely on Bozza: 'Congress seems to have been content with venue where the defendants' own accessorial acts were committed or where the crime occurred, without providing still another where the accessorial acts of agents took place.' 365 F.2d at 221.

But in Bozza, the offense related to the offense of receiving stolen stamps. As the Bozza court pointed out, this is not 'a continuing offense which is 'held, for venue purposes to have been committed wherever the wrongdoer roamed' . . .', (quoting Travis v. United States, 364 U.S. 631, 634, 81 S.Ct. 358, 5 L.Ed.2d 340 (1961)) but rather is a "single act which occurs at one time and at one place in which only it may be tried, although preparation for its commission may take place elsewhere" (quoting Reass v. United States, 99 F.2d 752, 754 (4th Cir. 1938)). 365 F.2d at 220.

In contrast, the offense under section 1952 is one 'involving . . . transportation in interstate . . . commerce,' which by express provision of the general venue statute, 'is a continuing offense and . . . may be . . . prosecuted in any district from, through, or into which such commerce . . . moves.' 18 U.S.C. 3237(a). See United States v. Guinn, 454 F.2d 29, 33 (5th Cir. 1972); cf. United States v. Barnard, 490 F.2d 907, 911 (9th Cir. 1973).

Thus, a defendant can be prosecuted for traveling in violation of section 1952, or for aiding and abetting such travel, in any district in which the travel occurred.

B.

Whether the proceedings should have been transferred is an entirely separate question. Rule 21(b), Federal Rules of Criminal Procedure, permits transfers 'for the convenience of parties and witnesses, and in the interest of justice.' Since the decision as to whether to grant such a transfer 'must largely rest in the sound judicial discretion of the trial judge,' Wagner v. United States, 416 F.2d 558, 562 (9th Cir. 1969), our review is limited to whether that discretion was abused. We conclude it was not.

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Appellants' first motion requested a transfer to Detroit; Las Vegas was also mentioned as a proper venue for trial, but the motion did not request transfer there. In support of their motion, appellants pointed out that most of the appellants and many of the anticipated defense witnesses lived in the Detroit area, and that much of the conduct relevant to the charges occurred there. But relevant conduct had occurred in many places, including the Los Angeles area and nearby Las Vegas, where the business enterprise that defendants allegedly sought to control was located. Nevada law was important to the case, as appellants argued. The relevance of this circumstance is obscure; in any event, it scarcely favored trial in Detroit as against Los Angeles. Both government and defense witnesses were widely dispersed, but 10 of the 31 persons on the government's list of anticipated witnesses resided in the Los Angeles area. The criminal calendar in the federal district court in Detroit was seriously delayed; the Los Angeles calendar, on the other hand, would permit the early trial for which appellants had repeatedly called. This consideration, admittedly relevant, see Platt v. Minnesota Mining & Manufacturing Company, 376 U.S. 240, 243-244, 84 S.Ct. 769, 11 L.Ed.2d 674 (1964), appears to have swung the balance.

On the basis of the information before the trial court, the decision on the first motion

seems entirely reasonable. Appellants' residence was a factor to be considered, but was not controlling. Platt v. Minnesota Mining & Manufacturing Company, supra, 376 U.S. at 245-246; Jones v. Gasch, 131 U.S.App.D.C. 254, 404 F.2d 1231, 1240 n.43 (1967). The considerations for and against a transfer seemed fairly balanced, or at least not so clearly weighted against Los Angeles as the trial forum as to overcome the substantial interest in avoiding the delay that would have followed transfer to Detroit's congested calendar.

Appellants' main argument is not that the court abused its discretion in the balance it struck on the facts before it on the first motion. Rather, appellants assert that 'the prosecution misrepresented to the court that numerous of its witnesses would be Los Angeles area residents, and that Detroit witnesses desired by appellants would be called by the prosecution itself, thereby obviating some of the prejudice to the defense of a distant trial.'

The trial judge was under no misapprehension regarding the Detroit witnesses when he ruled against the initial motion to transfer; the government had advised the court it did not intend to call more than one or two witnesses from Detroit. It is true that many of the Los Angeles witnesses on the government's first list disappeared from the second list, filed several months later. But it is hardly surprising that the prosecution's plans with respect to witnesses changed in the course of preparing this complex case for trial, particularly since government counsel who prepared the first list had been replaced by new government counsel. 84 Appellants' forecasts regarding the number and residence of their witnesses turned out to be no more reliable than the government's.

Several months after denial of the initial transfer motion, both sides filed new witness lists. The prosecution

dropped most of its Los Angeles witnesses and added a number from Las Vegas. The defense renewed its motion for change of venue, this time pressing for transfer to Las Vegas. It appeared, however, that the condition of the criminal docket in Las Vegas was such that a reasonably speedy trial could not be obtained, whereas trial in Los Angeles was imminent. The trial court denied the renewed motion both on this ground and because the witnesses then expected to be called resided throughout the country.

This was not an abuse of discretion. It is proper to require a greater showing of inconvenience when a change of venue is sought late in proceedings. 85 As the trial court observed, there was no 'ideal place for the holding of this trial.' Wherever the trial was held, both sides would bear significant transportation and lodging expenses. Moreover, most of the Las Vegas witnesses were government witnesses; since the government appeared willing to pay the expense of transporting them, it is hard to see how defendants would be more inconvenienced by trial in Los Angeles than in Las Vegas. The improbability of a speedy trial in Las Vegas was a factor entitled to great weight, especially since one defendant had already moved for dismissal on speedy trial grounds.

The motion for change of venue was renewed a third time, after yet another set of witness lists was filed. The trial judge reiterated his belief that only compelling reasons could justify transfer when trial was imminent. For the reasons stated, this final denial was not an abuse of discretion.

XIII. Giordano's Severance Motions

Appellant Giordano complains that the trial court abused its discretion in denying his motions for severance under Rule 14, Federal Rules of Criminal Procedure, submitted both before and during trial.

Denial of Giordano's pretrial severance motion was clearly correct. Although Giordano was indicted on only one count, that count charged conspiracy. For obvious reasons, a joint trial is particularly appropriate where conspiracy is charged. Davenport v. United States,

260 F.2d 591, 594 (9th Cir. 1958). See American Bar Association, Standards Related to Joinder and Severance 39 (Approved Draft 1968).

The government represented that Giordano was among the 'leaders' in the unlawful scheme and furnished the court with a summary of the evidence it expected to offer linking Giordano to the conspiracy. Moreover, the government stated that a separate trial would be substantially as long as a joint one, since a full exposition of the entire scheme was necessary to establish the significance of Giordano's separate conduct. On this record the advantages and economy of a joint trial clearly outweighed the remote possibility of unwarranted prejudice. See United States v. Donaway, 447 F.2d 940, 943 (9th Cir. 1971).

The balance may not have been so clear when Giordano moved for severance during trial. Although there is no suggestion of bad faith, the evidence against Giordano did not entirely justify government counsel's optimistic forecast. Nonetheless, there was sufficient evidence other than acts and statements of co-conspirators to show that Giordano participated in the conspiracy. Since this is so, it is difficult to understand how Giordano could have benefited from severance, for evidence of the acts and statements of the other defendants pursuant

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to and in furtherance of the conspiracy would have been admissible against Giordano if tried alone. 86 United States v. Kenny, 462 F.2d 1205, 1218 (3d Cir. 1972); see also United States v. Roselli, 432 F.2d 879, 901 (9th Cir. 1970). Moreover, as the government asserted, all or substantially all such evidence probably would have been introduced in a separate trial. It is possible that the government might have considered the time and effort required for a separate trial too great a price to pay for the conviction of Giordano alone, but loss of that possibility hardly demonstrates that Giordano was 'prejudiced by a joinder' within the meaning of Rule 14.

The trial judge took great pains to protect Giordano's right to an independent evaluation by the jury of the evidence against him. Twice during voir dire the court admonished the jury that each defendant-- naming them, including Giordano-- was entitled to be judged as an individual. No less than six times during instructions to the jury the court stressed the importance of separate determinations of each defendant's guilt or innocence on the basis of the evidence pertaining to the particular defendant. Several times the court warned that association with participants in a conspiracy does not prove that a defendant was a member of the conspiracy. This jury's ability and determination to make discriminating judgments is evidenced by the fact that it did not convict one of the most active participants in the conspiracy, defendant Polizzi, on one of the nine substantive counts on which he was charged. Obviously, this jury did not render a mass judgment. United States v. Berlin, 472 F.2d 13, 15 (9th Cir. 1973). There may be cases in which even careful jury instructions cannot cure the possibility of prejudice by association inherent in conspiracy trials, 87 but this was not one of them.

Giving due recognition to the somewhat stricter showing required to justify severance when the trial has been partially or wholly completed, 88 we conclude that Giordano's motions for severance during trial were properly denied.

XIV. Giordano's Requested Instruction

Giordano rested at the close of the government's case-in-chief. He asked for a jury instruction that no evidence introduced thereafter could be considered against him. The request was denied. Giordano's co-defendants then testified in their own defense. In arguing the case to the jury, the government

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drew implications from this testimony adverse to Giordano.

Giordano's decision not to offer evidence in his own behalf preserved his right to a

review of the denial of his motion for acquittal on the basis of the government's evidence alone. See United States v. Figueroa-Paz, 468 F.2d 1055, 1058 (9th Cir. 1972). But this is not to say, if denial of the motion to acquit was proper, that the jury was not entitled to consider all of the evidence, including that presented by Giordano's co-defendants, in determining Giordano's guilt.

Evidence offered in defense in the trial of a single defendant is available for all purposes, and the rule is the same in a joint trial of multiple defendants-- evidence offered by one may support the conviction of the others. See Rickey v. United States, 242 F.2d 583, 586 (5th Cir. 1957); Maupin v. United States, 225 F.2d 680, 682 (10th Cir. 1955). This court has held that the same rule is applicable even to a defendant who has rested at the close of the government's case, and an instruction of the kind sought by Giordano is therefore properly refused. Brown v. United States, 56 F.2d 997, 999-1000 (9th Cir. 1932). 89

There is a substantial reason for the rule. One purpose of a joint trial of defendants allegedly involved in a single scheme is to facilitate evaluation by the jury of the evidence against each defendant in light of the entire course of conduct. 'Such procedure not only increases the speed and efficiency of the administration of justice but also serves to give the jury a complete overall view of the whole scheme and helps them to see how each piece fits into the pattern.' Rakes v. United States, 169 F.2d 739, 744 (4th Cir. 1948). See ABA Standards Relating to Joinder and Severance 39 (Approved Draft 1968). This purpose of joinder would be frustrated as to a particular defendant if he could bar consideration as to him of some of the relevant evidence by resting before that evidence was introduced.

As we emphasized in Brown, a defendant who rests his case may nonetheless cross-examine or introduce evidence to impeach or contradict a co-defendant who testifies thereafter. See also United States v. Zambrano, 421 F.2d 761, 763 (3d Cir. 1970). In the present case, as in Brown, there was no request to cross-examine the co-defendants or to admit rebuttal evidence. It is even clearer here than in Brown that 'if such request had been made, it would have been granted,' 56 F.2d 1000, since the trial judge asked Giordano's attorney after each defense witness whether he had any questions to ask by way of cross-examination. 90

XV. Sufficiency of the Evidence-- Giordano

We consider Giordano's contention that the evidence was insufficient as to him separately from the same contention as to other defendants. The case

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against Giordano was the weakest; and, unlike other defendants, Giordano did not waive his right to review of the motion to acquit made at the close of the government's case. For the latter reason, we consider only the evidence produced against Giordano in the prosecution's case-in-chief.

As Giordano points out, the government offered no direct evidence of his participation in the conspiracy. 91 But 'circumstantial evidence is not inherently less probative than direct evidence,' United States v. Nelson, 419 F.2d 1237, 1239 (9th Cir. 1969), and, in many conspiracy cases, is the only kind of evidence available. White v. United States, 394 F.2d 49, 51 (9th Cir. 1968). Thus, denial of the motion to acquit is subject to the same standard on review as it would be if there were direct evidence of guilt: whether 'jurors reasonably could decide that they would not hesitate to act in their own serious affairs upon factual assumptions as probable as the conclusion' that Giordano participated in the conspiracy. United States v. Nelson, supra, 419 F.2d at 1245.

The government's theory was that at Zerilli's solicitation Giordano arranged for the investment of $150,000 in VFI when the enterprise was in critical need of funds; that the investment was made through Sansone, a St. Louis real estate investor and bank director, acting as a 'front'; and that following the investment Giordano participated at various

critical stages in the illegal enterprise.

Some of the government's circumstantial evidence is described briefly in the margin. 92 Possibly the series of events disclosed by the evidence could be explained

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as coincidence, or as normal contacts among friends. On the other hand, 'the jury undoubtedly could have found these events too interlocked to constitute coincidence' (United States v. White, supra, 394 F.2d at 53); it could have drawn from the events the inferences suggested by the prosecution-- that Giordano was brought into the conspiracy at least as early as June; that he arranged for the investment of $150,000 in VFI through Sansone; and that the purpose of Giordano's five trips to Las Vegas in 1967 was to watch over this hidden interest in VFI and participate in various key decisions. There comes a point when the innocent explanation is so much less likely than the culpable one that jurors properly could decide that a defendant in fact was acting in furtherance of the conspiracy and shared its illegal purpose. We believe that point was reached here as to Giordano.

Three legal arguments subsidiary to Giordano's challenge to the sufficiency of the evidence should be mentioned.

1. The government called Cusumano and Sansone as witnesses. Both denied that Giordano was involved in a Cusumano loan to Sansone. Giordano argues that the government is bound by this testimony. But the notion that a party is bound by the testimony of every witness it calls is 'long discredited,' Rodgers v. United States 402 F.2d 830, 833 (9th Cir. 1968), and is clearly not the law of this circuit. See cases cited in Rodgers, 402 F.2d at 833, n. 1.

Rodgers does hold that the government cannot rely on an inference when the only evidence presented by the government is inconsistent with the inference the government wishes drawn. However, Rodgers itself acknowledges that this does not 'mean that in every case where some of the government's evidence is arguably contrary to an inference that it wishes to have the jury draw from other evidence, the inference may not be drawn.' 402 F.2d at 834. See also United States v. Payne, 467 F.2d 828, 831 (5th Cir. 1972). Further, in Rodgers the evidence inconsistent with the desired inference was presented by a disinterested witness and was embodied in an uncontested document. Here, Cusumano and Sansone were interested witnesses with motives to dissemble about Giordano's role, and the prosecution presented a great deal of other evidence, albeit circumstantial, connecting Giordano with the loan. It may be reasonable to require the prosecution to do more than rely on a general inference to counteract its own uncontested documentary evidence, but an inference specifically supported by other evidence is not barred simply because it is inconsistent with testimony of witnesses who were called by the government but have every reason to protect the defense.

2. Giordano argues that telephone company records showing calls between telephone numbers assigned to Giordano and Zerilli were inadmissible because there was no direct evidence as to who participated or what was said, citing Laughlin v. United States, 226 F.Supp. 112, 113 (D.D.C.1964). But this case held only that such records were insufficient corroboration in a perjury case, where 'direct and positive evidence of falsity of defendant's sworn statement' is required, and 'circumstantial evidence thereof is insufficient, no matter how persuasive.' 226 F.Supp. at 114. The Court of Appeals held such records admissible in a conspiracy case, distinguishing the district Court's ruling

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in the earlier perjury case because of the high degree of corroboration necessary in a perjury case. Laughlin v. United States, 128 U.S.App.D.C. 27, 385 F.2d 287, 293 (1967). 93

Giordano also contends the government cannot rely upon inference to establish the contents of the telephone calls, citing Osborne v. United States 371 F.2d 913, 927-929 (9th

Cir. 1967). But in Osborne, each telephone call was the subject of a separate count charging a separate violation of 18 U.S.C. 1343, 'Fraud by wire, radio, or television.' Proof of the contents of the particular telephone call was therefore crucial to conviction on the particular count. In the present case, the exact content of each telephone call is not crucial to conviction; the telephone calls themselves are not the subject of the charge. Proof of their occurrence, especially their timing and frequency, is merely circumstantial evidence tending, with other circumstantial evidence, to show Giordano's participation in the conspiracy.

3. Giordano makes the same contention with respect to proof regarding his trips to Las Vegas-- that no inference can be drawn from the fact that they occurred-- and we reject it for the same reasons. He also argues that hotel records evidencing his stays at the Dunes Hotel in Las Vegas in 1967 should not have been admitted because other contemporaneous hotel records were destroyed 'in accordance with routine hotel policy' prior to the return of the indictment in 1971. The argument is that if the indictment had been returned earlier the records might have been in existence and might have contained exculpatory or explanatory evidence demonstrating that Giordano's visit had an innocent purpose. Giordano cites United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

The contention is frivolous. The Sixth Amendment does not apply to pre- indictment delay, 404 U.S. at 313, and Giordano has not shown that the delay involved here violated the Due Process Clause. 404 U.S. at 324-326. We need not consider, therefore, whether suppression of evidence would be a proper remedy if a due process violation had occurred. Cf. Strunk v. United States, 412 U.S. 434, 93 S.Ct. 2260, 37 L.Ed.2d 56 (1973).

DUNIWAY, Circuit Judge:

I concur in the portions of this opinion prepared by Judges Renfrew and Browning.

XVI. Criminal Liability of Emprise Corporation.

Appellant Emprise Corporation argues that it is not liable for any criminal acts committed by its predecessor in interest. The facts are these: Before March 1, 1970, there was a New York corporation called High Park Corporation, which owned all of the shares of another New York corporation, Emprise Corporation (Old Emprise). On March 1, 1970, Old Emprise merged into its parent, High Park Corporation. On March 17, 1970, High Park Corporation amended its corporate name to Emprise Corporation (New Emprise).

The February 26, 1971, indictment in this case charged 'Emprise Corporation' as a defendant. In July, 1971, it became clear that this meant Old Emprise, and, on September 9, 1971, the district court dismissed as to Old Emprise for want of personal jurisdiction over it. The government filed an information against New Emprise. New Emprise moved to dismiss, but this motion was denied, and New Emprise was convicted of violating 18 U.S.C. 371 and 1952 and was fined $10,000. The charged offense was committed by Old Emprise, before the merger.

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The question is whether the surviving corporation of a merger, here New Emprise, can be held criminally liable for acts committed by a former subsidiary constituent corporation (Old Emprise) which later merged into the survivor.

Appellants argue that in this federal case we must apply federal law, regardless of what the state law may be, and that under federal law only the constituent corporation, not the surviving corporation, can be prosecuted. Of course we apply federal law. That, however, does not answer the question. Federal courts, in deciding federal cases, often borrow otherwise applicable state law as the federal law to be applied in a federal case when doing so is reasonable and there is no contrary federal policy. Here, Old Emprise and New Emprise are New York corporations. We can think of no federal policy that would prohibit our borrowing New York law in deciding whether New Emprise is liable for a crime

committed by Old Emprise. Neither can appellants, beyond mere assertion.

Under the Constitution, the federal government is not expressly granted the power to form corporations; it may do so only under the necessary and proper clause. 94 See, e.g., McCulloch v. Maryland, 1819, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579. The result is that nearly all corporations in the United States are creatures of state law. This also means that when Federal statutes refer to 'corporations' they necessarily include within that word corporations created under state law. Some Federal statutes are expressly applicable to state created corporations. See, e.g., 15 U.S.C. 7; Melrose Distillers v. United States, 1959, 359 U.S. 271, 272, 79 S.Ct. 763, 3 L.Ed.2d 800. In this case New Emprise was convicted of violations of 18 U.S.C. 371 and 1952. 371 refers to 'persons' and 1952 to 'whoever.' Under the Federal Rules of Construction, 1, U.S.C. 1.

'In determining the meaning of any Act of Congress, unless the context indicates otherwise--

the words 'person' and 'whoever' include corporations * * * as well as individuals; * * * *' p

The term 'corporations' as used in 1 U.S.C. 1 clearly includes corporations formed under state law. See Alamo Fence Company of Houston v. United States, 5 Cir., 1957, 240 F.2d 179, 181. Nothing in the contexts of 371 and 1952 indicates meanings for the terms 'persons' and 'whover' other than those of 1 U.S.C. 1. Therefore, the existence and status of corporations charged under 371 and 1952 should be determined by reference to the law of the state of their incorporation, unless the application of that law would conflict with federal policy. Cf. Melrose Distillers v. United States, supra, 359 U.S. at 274. In this case, no such conflict exists, and New York law, therefore, will be applied.

Convenience and common sense also point to the adoption of New York law as the federal law in this case, for the purpose of determining whether New Emprise is criminally liable. Both Old and New Emprise are artificial creations, wholly dependent on New York law for their existence. New York law defines their powers, rights and liabilities, prescribes their procedures, governs their continued existence, and defines the terms upon which mergers may occur and the effect to be given to mergers. These corporations were created under New York law by people, however, and any penalty imposed on them is, indirectly, a penalty imposed upon the people who own and control them. If New York law provides for the imposition of such a penalty for acts for which those people bear the ultimate responsibility, there is no good reason for relieving them of the penalty because it arises

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from federal law. See Alamo Fence Company of Houston v. United States, supra, 240 F.2d at 183.

Under modern state corporation laws, a corporation once formed, in the absence of a provision limiting its juristic life, exists perpetually unless it is dissolved or its corporate character is annulled. 95 It is often said that the merger of a corporation into another is similar to the death of an individual, in that all current or future litigation by or against it is abated except insofar as the state of incorporation may continue its juristic life. Melrose Distillers v. United States, 1959, 359 U.S. 271, 272, 79 S.Ct. 763, 3 L.Ed.2d 800; Oklahoma Natural Gas Co. v. Oklahoma, 1927,273 U.S. 257, 259-260, 47 S.Ct. 391, 71 L.Ed. 634; United States v. Safeway Stores, Inc., 10 Cir., 1944, 140 F.2d 834, 836; United States v. Brakes, Inc., 157 F.Supp. 916, 918-919 (S.D.N.Y.1958); United States v. Cigarette Merchandisers Ass'n, 136 F.Supp. 214, 215 (S.D.N.Y.1955) (and cases cited therein at 215, n. 4). We turn to the New Yrok law to determine the effect of the merger in this case.

The relevant state statute governing the question here is N.Y.Bus.Corp. 906(b) (3) (McKinney 1963, Consol.Laws, c. 4), which provides that after a certificate of merger or consolidation has been filed,

The surviving or consolidated corporation shall assume and be liable for all of the liabilities, obligations and penalties of each of the constituent corporations. No liability or obligation due or to become due, claim or demand for any cause existing against any such corporation, or any shareholder, officer or director thereof, shall be released or impaired by such merger or consolidation. No action or proceeding, whether civil or criminal, then pending by or against any such constituent corporation, or any shareholder, officer or director thereof, shall abate or be discontinued by such merger or consolidation, but may be enforced, prosecuted, settled or compromised as if such merger or consolidation had not occurred, or such surviving or consolidated corporation may be substituted in such action or special proceeding in place of any constituent corporation.

The first sentence of 906(b)(3) states that the surviving corporation is liable for its constituents' 'liabilities, obligations and penalties . . ..' While no court has decided whether 'liabilities' and 'obligations' as used in 906(b)(3) refer to criminal liabilities and obligations, two courts have held that these words, as used in other provisions of New York's corporation laws, do refer to criminal liability. United States v. Cigarette Merchandisers Ass'n., supra (construing 90 of the New York Stock Corporation Law); People v. Bankers' Capital Corp., 1930, 137 Misc. 293, 241 N.Y.S. 693 (construing 216(1)(e) of the New York General Corporation Law). We note, too, that 906(b)(3) also uses the word 'penalties.' We therefore hold that the first sentence of 906(b)(3) permits the maintenance of a prosecution against the surviving corporation for crimes allegedly committed by a constituent corporation.

Such a construction of New York's corporation law is not unique. New York courts have held that civil causes of action arising before a merger or consolidation may be instituted against the surviving or the consolidated corporation.

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O'Brien v. New York Edison Co., et al. (two cases). 19 F.Supp. 968 (S.D.N.Y.1937); Cameron v. United Traction Co., 1902, 67 App.Div. 557, 73 N.Y.S. 981; Lee v. Stillwater and Mechanicville St. Ry. Co., 1910, 140 App.Div. 779, 125 N.Y.S. 840. Appellants cite numerous cases which hold that a constituent corporation 96 or a dissolved corporation 97 remains subject to criminal prosecution. None of these cases, however, holds that a surviving corporation (in the cvase of a merger or consolidation) may not be prosecuted. These cases therefore do not conflict with our holding. We adopt, as to the liability of New Emprise, the New York law as the federal law in this case. We leave to another day the question whether we would borrow applicable state law if that law were to purport to relieve both the constituent corporation and the surviving corporation of liability for crimes of the constituent corporation.

XVII. Sufficiency of the Evidence.

Appellants argue that the evidence is insufficient to sustain their convictions. Except as to appellant Giordano, whose arguments we have discussed above (see part XV, supra), their arguments lack substance. It would serve no useful purpose to set out the evidence in detail. We have examined it, and we find it more than sufficient.

XVIII. The Taint of Illegal Electronic Surveillance.

Appellants claim that the trial was materially tainted by leads from unlawful electronic surveillance.

Between 1962 and 1965, the government conducted electronic surveillance against appellants Zerilli, Polizzi and Giordano.' The product of this surveillance is embodied in typewritten transcriptions or 'logs' of the intercepted conversations. The government concedes that the electronic surveillance was conducted illegally.

The prosecutors were initially unaware of this surveillance, but on June 3, 1971, they were informed of it by the Justice Department. On September 8, 1971, the district court

ruled that there would be a post-trial Alderman hearing. 98 An in camera hearing was held on November 13, 1971, at which the court ruled that pretrial access to the logs would be limited to appellants Zerilli, Polizzi, Giordano, and their respective attorneys. At the post-trial Alderman hearing, which commenced on June 12, 1972, and continued on June 13, June 14, June 15, June 23, and July 7, 1972, the court concluded that 'the evidence in this case came from an independent source and was not tainted by the illegal electronic surveillance.'

Appellants argue that the evidence accumulated from the unlawful surveillance was used in their prosecution and fatally contaminated their trial. Alternatively, they ask that we remand for a more complete Alderman hearing.

a. Standing.

Only Zerilli, Polizzi and Giordano were subjected to electronic surveillance and the court ordered that only these three appellants and their attorneys be given access to the logs. On appeal, appellants Shapiro and Bellanca assert that they, as coconspirators, should also have been given access to these logs.

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This same argument was made by petitioners in Alderman v. United States, supra, and was rejected. 394 U.S. at 171-176. See also Mancusi v. DeForte, 1968, 392 U.S. 364, 88 S.Ct. 2120, 20 L.E.2d 1154; Simmons v. United States, 1968, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247; Jones v. United States, 1960, 362 U.S. 257, 261, 80 S.Ct. 725, 4 L.Ed.2d 697; Wong Sun v. United States, 1963, 371 U.S. 471, 491-492, 83 S.Ct. 407, 9 L.Ed.2d 441; Goldstein v. United States, 1942, 316 U.S. 114, 121, 62 S.Ct. 1000, 86 L.Ed. 1312. The court's ruling as to standing was correct.

b. The Existence of Taint.

$102, 103$ At an Alderman hearing, the court must determine whether the prosecution used unconstitutionally seized material directly or indirectly to develop the evidence it produced at trial, or obtained its trial evidence from an independent and untainted source. Alderman v. United States, supra, 394 U.S. at 183. A defendant who shows that he was the victim of an unconstitutional search 'must go forward with specific evidence demonstrating taint.' 394 U.S. at 183. Then the burden shifts to the government to show that it acquired its evidence from an independent source. 99

Appellants make numerous arguments to show that their trial was tainted by the use of the logs. We consider them seriatim.

1. The benchside conference of March 28, 1972.

Polizzi testified on direct examination that he was unable to obtain a Nevada gambling license in March, 1966, because he had a 'problem.' (R.T. 5391, 5398, 5402.) On cross-examination, the prosecutor asked the nature of Polizzi's problem. Polizzi then stated that his 'problem' was that in 1963 he had been placed on the Attorney General's list of Mafia figures. (R.T. 5466.)

On redirect examination, Polizzi's attorney returned to the subject of the Mafia. Polizzi testified:

'It was Mr. George Edwards who was the police commissioner of the City of Detroit that made his testimony before the Senate Committee, and he was the one that was directly responsible for putting my anme on this chart.

. . . I was very disturbed and felt that I was falsely accused. I wrote a letter to the Mayor of Detroit and felt that it was unjust that for no rhyme or reason to just be put on there and be falsely accused of these things . . ..' (R.T. 5576-77.)

At this point, Mr. Kotoske, the prosecutor, approached the bench and, outside of the jury's hearing, told the court that Polizzi was perjuring himself and threatened to introduce the surveillance logs showing Polizzi's ties with organized crime in Detroit:

'Mr. Kotoske: . . . If (Mr. Murphy, Polizzi's attorney) read those logs at all he understands

that this man on the witness stand (Polizzi) and Tony Zerilli laid out the whole Mafia organization in Detroit, how they cut up black money--

. . . .e:

They laid out the whole organization, who is on this payoff, who is running the rackets, how the money is transferred, all discussion about black money, who it is that they have to eliminate from the organization, who they are going to-- the whole complete thing, the complete structure is laid out there.

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I have sat by for about six weeks and let this nonsense go on. If he continues to persist in this, I have no alternative but to confront this witness with his own transcription of his voice and make him out a crown liar right in this courtroom.

I don't want to do that . . ..

We had better draw the line and abandon the topic or I am telling counsel I will come forward with those logs . . ..

The Court: Mr. Murphy, let me say this: . . . This thing has gone far enough. You have the ability to have your client make the explanation that he has made, but my suggestion to you-- I am not ordering it at all, but my suggestion to you is that you ought not go much further with that, because it may open a wider door than you want to have opened. And I do not want this trial to get into a public accusation of who is or is not a member of the Mafia . . ..' (R.T. 5578-80.)

The line of questioning about the Mafia was dropped by Polizzi's counsel and the government never introduced the logs to impeach Polizzi's testimony.

Appellants contend that the incident was a use of the surveillance logs at the trial and tainted the entire case. We cannot agree although it was indeed a 'use.' First, no evidence from the logs was actually introduced. The prosecutor only threatened to use the logs to impeach Polizzi's character. Second, the government's threat came only after Polizzi at least twice testified to his own lack of Mafia connections, once on direct and again on cross. It cannot be said that the prosecutor's threat hindered the defense from making its point to the jury. Third, the threat to use the tapes did not form part of the government's case; it related solely to impeachment, after Polizzi had testified to his own lack of Mafia ties. Walder v. United States, 1954, 347 U.S. 62, 65, 74 S.Ct. 354, 98 L.Ed. 503, cf. Harris v. New York, 1971, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1. Such use would not be an unlawful taint.

2. The leak to the press.

On March 29, 1972, the day after the benchside conference, one Gene Blake, a Los Angeles Times reporter, was seen reading the government's copy of the previous day's transcript. (R.T. 5786.) Defendants' counsel accused the prosecutor of deliberately providing Mr. Blake with the transcript; the prosecutor denied this charge. 100 Defendant4s counsel then asked the court to order the Times not to report on the March 28 benchside conference, but the court refused.

The next day a Times article was headlined 'Transcript Shows U.S. Bugged Vegas Defendants' Mafia Talks.' The article contained direct quotes from the March 28 benchside conference concerning the surveillance logs. Appellants assume that the jury saw this article and took it into account in reaching its verdict, and that therefore the trial was tainted by information from the logs. We cannot agree. There was no evidence that any juror read this article, nor were the logs used by the jury in their deliberations. Thus there was no 'relevance to (appellants' convictions) of any conversations which may have been overheard through . . . surveillance.' Alderman v. United States, supra, 394 U.S. at 186.

3. The Friedman sentencing memorandum.

One of the major sources of the prosecutor's case was the Friedman sentencing memorandum, a document prepared

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in connection with the sentencing of Maurice Friedman on February 3, 1969, in another case. Appellants claim that this document was tainted by information from the surveillance logs.

Looking at the evidence in the light most favorable to the government, the following testimony was produced concerning the sentencing memorandum: U.S. Attorney, David Nissen, who wrote this memorandum, relied on three sources for its preparation: (1) information he received from FBI agent Wayne Hill, (2) a tape supplied to him by one Dr. Victor Lands in connection with another trial (the Lands transcript), and (3) information he received from (then) U.S. Attorney William Matthew Byrne, Jr. (R.T. 10,029-31.)

$106, 107$ Appellants do not claim that the Lands transcript or Byrne's information is tainted; their only objection concerns agent Hill's information. Hill testified that all the information he received, which he subsequently passed on to Nissen, came from either 'live Bureau informants' (civilian informants) or from the Intelligence Division of the Los Angeles Police Department. (R.T. 9421-24.) He was then asked:

'Q. Now do you know, Mr. Hill, that any of the information you provided Mr. Nissen that found its way into this sentencing memorandum was the result or can in any way be attributed to the surveillance logs in this case?

A. No, it could not.' (R.T. 9425.)

On cross-examination, Hill said that these live Bureau informants gave information to various FBI agents around the country, who passed the material on to Hill, who, in turn, passed the information on to Nissen, who wrote the memorandum. (R.T. 9522-23, 9563-65.) Although the names of the informants were not revealed (R.T. 9523), agent Hill did provide the names of two FBI agents who received such information. (R.T. 9524, 9531, 9563-64.) The appellants did not produce any evidence to refute Hill's testimony. The court properly concluded that the Friedman sentencing memorandum was not tainted. 101

4. Lack of FBI monitors at the Alderman hearing.

Appellants argue that they did not receive a fair Alderman hearing because only one of the FBI personnel who conducted electronic surveillance was called as a witness.

Alderman provides a flexible standard as to what witnesses must be examined in a taint hearing:

'Armed with the specified records of overheard conversations and with the right to cross-examine the appropriate officials in regard to the connection between those records and the case made against him, a defendant may need or be entitled to nothing else. Whether this is the case or not must be left to the informed discretion, good sense, and fairness of the trial judge.' Alderman, supra, 394 U.S. at 185.

The district court adopted the following procedure to govern the taint hearing: There were numerous government officials throughout the country who had had access to the surveillance logs. The critical issue at the taint hearing, however, was not whether these officials had had access to the logs but whether any knowledge of the contents of the logs was imparted by these officials to the United States prosecutors in Los Angeles. Thus, instead of bringing all the government officials to the hearing, the court ordered the government to provide
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the defense with the names of all of them so that the defendants could ask each government prosecutor, on the witness stand, whether he had received any information about the logs from the named officials. 102 (Clerk's Transcript (hereinafter referred to as C.T.) 3321.)

At the taint hearing, three members of the prosecution team testified that the source of this case was the Friedman interview and sentencing memorandum. 103 Two members of the team testified that they were not even aware of the existence of the logs when the

indictments in this case were handed down on February 26, 1971. 104 Judge Byrne, who left the United States Attorney's office in May, 1970, testified that he did not know that the logs existed in February, 1970, when he interviewed Mr. Friedman. (R.T. 9225.) U.S. Attorney Hornbeck knew of the existence of the logs, but had not read them and therefore did not use any information from the logs to assist him before the grand jury. (R.T. 10,262.) In addition, three members of the team testified that they did not contact any government officials who had access to the logs. 105 Two other attorneys did contact one of these officials, James Ritchie, 106 but none of the information received from Ritchie related to the logs. This information, which consisted of some bank records, audits, and IRS personal interviews, was the result of subpoenas served on banks or of personal interviews.

The picture which thus emerges from the taint hearing is that no member of the prosecution team had read the logs or had any information derived from them when the indictments were handed down. Only two attorneys had contacted a government official who had access to these logs, and the information received from him was not derived from the logs. Moreover, by the time the indictments were handed down the evidence gathering process was complete, and no other significant evidence was produced at the trial. Counsel for appellants did not produce any witnesses to refute this testimony.

$108, 109$ While FBI monitors have testified at some taint hearings, 107 there is no rule that they must testify. The issues raised in cases in which the court has ordered FBI personnel to testify 108 are obviated here as a result of the prosecution team's undisputed testimony that they received no information related to the logs from any government officials who had access to the logs.

The district court concluded that the government met its 'ultimate burden of persuasion to show that its evidence is untainted.' Alderman, supra, 394 U.S. at 183. Having carefully examined the evidence produced at the taint hearing, we agree with the district court's finding.

Affirmed.

** The Honorable Charles B. Renfrew, United District Judge, Northern District of California, sitting by designation.*

1 There were 48 days of trial reported in 11,022 pages of reporter's transcript (including post-trial motions), and 321 exhibits were received in evidence.

2 18 U.S.C. 1952 provides in part:

'(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to--

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

*(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling * * * offenses in violation of the laws of the State in which they are committed or of the United States * * *.'*

2A In the indictment, appellant's name was spelled Giardano. His true name is Giordano.

3 The indictment names the six individual appellants and the information names appellant Emprise Corporation, the successor in interest to a merged corporation of the same name which had been dismissed from the indictment for lack of personal jurisdiction prior to trial.

4 Both the information and indictment contain the following language charging appellants with traveling 'in interstate commerce and (using) facilities in interstate commerce with intent to:

'1. Distribute the proceeds of unlawful activity, namely: the ownership, operation of, and receipt of profits from a Las Vegas, Nevada gaming casino by persons who were not licensed and whose

interest in the gaming casino had been concealed from agencies of the State of Nevada in violation of Nevada law; and

*'2. Promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of unlawful activity, namely: the ownership, operation of, and receipt of profits from a Las Vegas, Nevada gaming casino by persons who were not licensed by and whose interest in the gaming casino had been concealed from agencies of the State of Nevada in violation of Nevada law * * *.'*

The court's instructions to the jury were also couched in terms of the failure to disclose the interests of Zerilli and Polizzi in VFI.

5 Nevada Revised Statutes (N.R.S.) 463.160 lays down the basic law requiring a license for gambling operations:

'1. It is unlawful for any person, either as owner, lessee or employee, whether for hire or not, either solely or in conjunction with others:

'(a) To deal, operate, carry on, conduct, maintain or expose for play in the State of Nevada any game or slot machine as defined in this chapter, or to operate, carry on, conduct or maintain any horserace book or sports pool; or

*'(c) To receive, directly or indirectly, any compensation or reward or any percentage or share of the money or property played, for keeping, running, carrying on or permitting the same to be carried on, without having first procured, and thereafter maintaining in full force and effect, all federal, state, county and municipal gaming licenses as required by statute or ordinance * * *.'*

N.R.S. 463.170 then indicates what information must be disclosed if a license is to be obtained by a corporation:

*'2. No corporation * * * shall be eligible to receive or hold any license under this chapter unless all persons having any direct or indirect interest therein of any nature whatsoever, whether financial, administrative, policy making or supervisory, are individually qualified to be licensed under the provisions of this chapter.'*

(Appellants contend that the revised N.R.S. 463.170(2), effective July 1, 1967, should have been applied. In footnote 11, infra, we point out the error in that contention.)

The statute governing the disclosures to be made in an application for a license provides:

'2. The application shall include:

'(d) The names of all persons directly or indirectly interested in the business and the nature of such interest.' N.R.S. 463.200.

The forms supplied for an application by a corporation indicate that corporate officers and stockholders are to be listed as those persons interested in the business.

6 'Since in this case a license was issued to the corporation VFI, any gambling conducted by or through VFI would not be illegal and would not be in violation of this statute (N.R.S. 463.160).' Reporter's Transcript, Vol. 43, p. 8798.

7 See footnote 13, infra.

8 See footnote 5, supra, for the language of the statute.

9 'It is hereby declared to be the policy of this state that all establishments where gambling games are conducted or operated or where gambling devices are operated in the State of Nevada shall be licensed and controlled so as to better protect the public health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada.' N.R.S. 463.130(1).

The Nevada Supreme Court, in a decision handed down two years prior to the enactment of the statutes here in question, gave a strong policy basis for the licensing requirement:

'Nevada gambling, if it is to succeed as a lawful enterprise, must be free from the criminal and corruptive taint acquired by gambling beyond our borders. It this is to be accomlished not only must the operation of gambling be carefully controlled, but the character and background of those who would engage in gambling in this state must be carefully scrutnized.

' * * The risks to which the public is subjected by the legalizing of this otherwise unlawful activity are met solely by the manner in which licensing and control are carried out.' Nevada Tax Commission v. Hicks, 73 Nev. 115, 119-120, 310 P.2d 852, 854 (1957). See also Berman v. Riverside Casino Corporation, 247 F.Supp. 243, 250 (D.Nev.1964), aff'd, 354 F.2d 43 (9 Cir. 1965).*

This statement of policy was not qualified but rather reaffirmed by N.R.S. 463.130(1), supra.

10 See Huddleston v. United States, 415 U.S. 814, 819-823, 94 S.Ct. 1262, 39 L.Ed.2d 782 (1974); cf.

Rewis v. United States, 401 U.S. 808, 811-812, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971).

11 Appellants have contended in their briefs that the revision of this section effective July 1, 1967, should be applied. They did not press this point at oral argument. We find their contention untenable. Although VFI's license was not issued until July 5, 1967, to be effective July 27, 1967, the Chairman of the Nevada Gaming Commission during the time in question testified that VFI had completed all the formal requirements for a license by June 28, 1967, and that it had a right to a license on that date. VFI itself had requested that the license be effective as of July 27, 1967. There is no indication that appellants made any attempt to comply with the new, revised statute, which included reporting requirements in many ways more stringent than those in the old statute. See N.R.S. 463.520. Nor is there any indication that the Board sought to require appellants to comply with the new statute. Thus the Board necessarily interpreted the statutes to mean that the old statute rather than the new statute governed applications completed before the new statute went into effect. Such an administrative interpretation is entitled to great weight. See footnote 12, infra. Moreover, appellants apparently acquiesced in this interpretation. In these circumstances, the trial court applied the correct statute.

12 The record reveals that the Nevada authorities sought in this case to go 'behind' the nominal officers and shareholders and conducted a vigorous investigation to ascertain who controlled VFI. The Court gives weight to the manner in which the Nevada gaming authorities have construed the statutes under which they operate.

13 Two other theories put forward by the government fail. One involves 'piercing the corporate veil.' The government argues in its brief that the Nevada statutes 'provide the gaming authorities with the necessary authority to go behind the corporate license to determine who in fact is controlling the corporation which was granted the gaming license.' That argument is foreclosed by the trial court's instruction, to which the government did not object, quoted in footnote, 6, supra. Although that interpretation of N.R.S. 463.160(1)(a) was not the only one possible, it is not an unreasonable construction. This Court accepts it as the law of this case.

The other theory is that N.R.S. 463.160 (1) requires that anyone with a direct or indirect interest in a gambling enterprise must be licensed. That statute, however, requires only that licenses must be procured as required by the law. N.R.S. 463.170(2) indicates that a corporation can receive and held a license itself and that those persons with interests in the corporation must only be qualified to be licensed. See also Berman v. Riverside Casino Corporation, 354 F.2d 43 (9 Cir. 1965).

14 See footnote 13, supra.

15 'The violation of any of the provisions of this chapter, the penalty for which is not herein specifically fixed, shall be deemed a gross misdemeanor, and shall be punished by a fine of not less than $1,000, or by imprisonment in the county jail for not less than 6 months, or by both fine and imprisonment.'

16 The Chairman of the Nevada Gaming Commission during the time in question testified that under the law then in effect, 'any violation' of that law by individuals would mean that those individuals were guilty of gross misdemeanors where no specific penalty was provided. Reporter's Transcript, Vol. 15, pp. 3028-3029.

Indeed, other than conducting a casino without a license, which is exceedingly unlikely, it is difficult to imagine what N.R.S. 463.360(2) would cover if it did not cover conduct such as that proved in this case.

17 Once a violation of a state criminal statute has been proved it is irrelevant whether that violation is classified as a felony or misdemeanor. United States v. Karigiannis, 430 F.2d 148, 150 (7 Cir. 1970) (Clark, J.), cert. denied, 400 U.S. 904, 91 S.Ct. 143, 27 L.Ed.2d 141 (1970).

18 Appellants rely heavily upon the statements of Assistant Attorney General Herbert J. Miller, Jr., of the Justice Department's Criminal Division that:

*'(The Travel Act) bans unlawful businesses-- not incidental illegal acts done in the course of lawful businesses.' ('Legislation Relating to Organized Crime,' Hearings on H.R. 468 et al., Before Subcommittee No. 5 of the House Committee on the Judiciary, 87th Cong., 1st Sess., p. 336 (1961).) 'Under this bill we would have to show a business enterprise which was unlawful under the laws of the State * * *.' ('The Attorney General's Program to Curb Organized Crime and Racketeering,' Hearings on S. 1653 et al., Before the Senate Committee on the Judiciary, 87th Congress, 1st Sess., p. 260 (1961).)*

In a law review article, the Assistant Attorney General explained the impact of the statutory intention

thusly:

*'To turn a gambling * * * scheme into an 'unlawful activity' within the meaning of the 'Travel Act' * * * the 'business enterprise' must involve illegal conduct. A program to establish a gambling casino in Las Vegas, Nevada, would not amount to 'unlawful activity." (Miller, The 'Travel Act': A New Statutory Approach to Organized Crime in the United States, 1 Duquesne L.Rev. 181, 194 (1963).)*

19 This history is outlined in some detail in United States v. Roselli, 432 F.2d 879, 884-888 (9 Cir. 1970).

20 Membership in an organized criminal group is not, of course, an element of an offense under 1952. United States v. Roselli, 432 F.2d 879, 885 (9 Cir. 1970), cert. denied, 401 U.S. 924, 91 S.Ct. 883, 27 L.Ed.2d 828 (1971), rehearing denied, 402 U.S. 924, 91 S.Ct. 1366, 28 L.Ed.2d 665 (1971). It rests with the courts to determine the reach of 1952 in a case-by-case manner.

21 See pages 869-873 supra.

22 See page 872, supra.

23 While appellants contend that the instructions on specific intent were erroneous, we find no such error. See page 877, infra.

*24 The question of vagueness was considered before Congress enacted 1952. Assistant Attorney General Herbert J. Miller, Jr., testified before the House Subcommittee that: 'It can hardly be contended that the average American citizen does not know if he is engaged, for example, in 'any business enterprise involving gambling, liquor, narcotics, or prostitution offenses' * * *. Since the bill in addition would require proof the requisite intent before a violation would be made out, I believe that the scope of H.R. 6572 in no way threatens the activities or rights of any persons other than the organized criminals at whom it is aimed.' 'Legislation Relating to Organized Crime,' Hearings on H.R. 468 et al., Before Subcommittee No. 5 of the House Committee on the Judiciary, 87th Cong., 1st Sess., p. 336 (1961).*

25 See footnote 9, supra.

26 The indictment was first read on February 16, 1972, and re-read on April 19, 1972, an interval of more than two months.

27 The court instructed the jury as to the indictment and information: 'An Indictment or Information is but a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused.' Reporter's Transcript, Vol. 43, pp. 8736-8737.

28 In United States v. Steed, 465 F.2d 1310, 1316 (9 Cir. 1972), cert. denied, 409 U.S. 1078, 93 S.Ct. 697, 34 L.Ed.2d 667 (1972), the trial court sent the indictment to the jury room upon the request of the jury during its deliberations. Despite the objections of both counsel, the court held that decision was within its discretion. Counsel stipulated that a cautionary instruction could be affixed to the indictment that was to be sent to the jury. We do not read the case to require affixing such an instruction in all cases in which an indictment is sent to the jury.

29 'It is not necessary that the Government prove that the defendants knew that they were violating Nevada law. The specific intent which the Government must show is the intent to facilitate the carrying on of a business enterprise involving gambling in violation of Nevada law.' Reporter's Transcript, Vol. 43, p. 8802. See also pages 8755-8757.

30 446 F.2d at 494.

31 See Reporter's Transcript, Vol. 35, pp. 6944-6948.

32 The issue of attorney-client privilege arose during the testimony of Virgil Wedge. The court instructed the jury that: 'There exists what is known as an attorney-client privilege and it says, in short substance, that when a man goes to a lawyer and tells him sometimes confidential matters that he would want to discuss with a professional man, that that lawyer has the duty of preserving those matters inviolate to public notice and to keep them confidential as long as his client wants him to do so.' Reporter's Transcript, Vol. 13, p. 2511.

33 'The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his previous testimony.' Reporter's Transcript, Vol. 43, p. 8749.

34 'The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest, or by prejudice against any of the defendants.' Reporter's Transcript, Vol. 43, p. 8751.

35 'Skimming' appears to mean misappropriation of casino funds through falsification of accounts by underreporting the funds flowing into the cashier's office and by unrecorded payments from the cashier's office.

36 Appellants also cite the book, The Godfather, as a factor, since its storyline includes the infiltration of Las Vegas gambling by Mafia figures.

37 The newspaper apparently learned of the ruling when a reporter, without the government's authorization or knowledge, read its copy of the reporter's daily transcript in which the conference outside the presence of the jury was reported. Thereafter the government took action to prevent recurrence of such an event.

38 'The Court: Have any of you heard anything about the facts of this case except what you have heard in this courtroom today?

'Prospective Jurors: No.

'The Court: I take it when you say you haven't heard of it that means you haven't read anything about it either. Is that correct?

'Prospective Jurors: That's right.' Reporter's Transcript of Proceedings of February 15, 1972, p. J-87.

39 'The Court: Have you heard anything about this case in the newspaper or radio?

'Prospective Juror Schadick: No.

'The Court: If you are a juror and you do hear something about it will you put aside whatever news that should attract your attention as quickly as you could without consuming it?

'Prospective Juror Schadick: Yes.' Reporter's Transcript of Proceedings of February 15, 1972, pp. J-126-- J-127.

*40 A trial judge in a noteworthy and controtroversial case cannot be expected to impanel jurors who have not heard about the case. 'In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. * * * To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' Irvin v. Dowd, 366 U.S. 717, 722-723, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961).*

41 'The Court: I am not so sure that this will happen, but it may. There may be some newspaper attention given this case, or there may be some talk about it on the radio or television. If you are selected as a juror in this case I am going to admonish you that when you leave here and go to your home and pick up the paper, if you should pick it up and see something about this case I am going to admonish you to put the paper down right away and to read no more of that article, because I don't want anything coming to your attention other than that which is directed to you through the rules of evidence that we have and that will come from this court room.

'I will also tell you to blind yourself to the subject on TV and to deafen yourself to the subject on radio if it should happen.

'Are there any of you who if you were a member of the jury in this case would feel that you shouldn't have to obey such admonition at all, and 'I am going to read what I please and listen to what I want to'-- would any of you be inclined to do that?

'Prospective Jurors: No.

'The Court: Would you understand that there is a compelling reason for this Court to ask you to insulate yourselves from other information that may come to you through newspapers or through other media about this case, you understand that there is a reason for my doing so?

'Prospective Jurors: Yes.' Reporter's Transcript of Proceedings of February 15, 1972, pp. J-87-- J-88.

42 Cases cited by appellants are readily distinguishable from this case.

In United States v. Rattenni, 480 F.2d 195, 196 (2 Cir. 1973) (Clark, J.), a juror admitted 'her prejudice against Rattenni on the remaining open charges against him as well as on all of the charges against his co-defendants'. In United States v. Thomas, 463 F.2d 1061, 1062-1063 (7 Cir. 1972), a juror disclosed that certain jurors had 'argued from' a newspaper article which they displayed during their deliberations and that several votes were required before all jurors decided to vote for conviction. In Mares v. United States, 383 F.2d 805, 809 (10 Cir. 1967), cert. denied, 394 U.S. 963,

89 S.Ct. 1314, 22 L.Ed.2d 564 (1969), an article reported a withdrawn guilty plea and an excluded confession, probably the most conclusively prejudicial publicity possible, and the court took no steps to determine the jury's exposure to it.

43 'May I remind the jury once again about the earlier admonition about reading any publicity that may be in the newspapers about this case, or watching any news concerning this case on TV or radio. Please be mindful of the importance of the admonition that I have told you about concerning that.' Reporter's Transcript, Vol. 6, p. 1319.

44 The court gave a fair and complete report of the interrogation to the parties and counsel:

'One juror indicated that several days ago he heard on the Long Beach radio station that a jury had been selected in this case, but that he had heard nothing else on radio. All the other jurors indicated that they had heard nothing on radio or on TV about the case.

'Mr. Dewey said that he saw the Los Angeles Times in the jury room this morning, but as soon as he saw it he pushed it aside and did not read the paper at all.

'Mr. Ford stated that he had not read either of the articles, but that four or five days ago he saw an article in the paper saying that a jury had been selected in the case.

'Mr. Foss said that he saw the headline in last night's Herald Examiner, but that he did not read the article, and that he did not read the article in the Times.

'Each of the other jurors indicated that he or she had not read either of the articles and had heard nothing on radio or TV. This inquiry includes the alternates.

'I admonished each against reading any future articles and received the promise of each that he would not read any newspaper articles about this case or listen to any account of it on radio or TV.

'Each person was asked if anything had happened to this point to prejudice him or her against any defendant, and each indicated that nothing had.

'I see no reason at this point to declare a mistrial, but if any counsel desires to be orally heard on such a motion I will hear it at a later time in the day.' Reporter's Transcript, Vol. 7, pp. 1348-1349.

45 'Now wouldn't you think that if you were on this jury and every second day I came to you and said, now you are not reading any newspapers, are you, wouldn't you think that I had little enough trust in the integrity of these jurors?' Reporter's Transcript, Vol. 16, p. 3152.

46 'My concern is with this jury and my concern is that your clients and the Government will get a fair trial in this case, and I have gone to the efforts that you have just described to admonish the jury time and again and to talk with them individually about their responsibility not to read the newspapers or any accounts of this trial from the newspapers, and I have reason to believe that they are going to obey that admonition because I have impressed upon them the importance of doing so.' Reporter's Transcript, Vol. 24, p. 4711.

47 Reporter's Transcript, Vol. 31, pp. 6008-6024.

48 The court's questions and each juror's response relating to the 'Mafia' issue were as follows:

'The Court: Now has anything, any mention of the word 'Mafia' or 'Cosa Nostra' or anything like that that may have happened during this trial brought about anything in your thinking that in your opinion led to these verdicts?

'Juror Dewey: No. We threw that out the first day we were in because, we brought it up in our minds whether anybody thought about it, I don't think they are on trial here for that, that is not the question of what we heard, the fact that somebody mentioned the name in there or something like that, there was no evidence to substantiate anything like that anyway, and that isn't what we looked at in there.'

'The Court: All right. You said that on the first day you were in deliberation, as I understood you to say, that the jurors asked each other, did they?

'Juror Dewey: No, I think it was just an informal thing, that we just said, we are going to go by the evidence and forget the statements that were made that didn't have any bearing on the case.

'The Court: And that would have included any reference to Mafia, or Cosa Nostra?

'Juror Dewey: I don't think we got down and said the words, just to the effect that we will stick to the evidence and that was all.'

'The Court: Do you know that any mention during the trial of the words 'mafia' or any related term had any effect upon the verdicts that were reached?

'Juror Ford: No, I don't think that that influenced anybody. I think a lot of times these people just think it is really fictional to a great degree, they think it is a bogeyman word and that it is not anything

real, that it is exaggerated.

'The Court: Mr. Dewey tells me that at the outset during the deliberations there was some informal talk about whether any of these terms have influenced anybody or brought any trouble to this trial, and he seems to say that there was some general discussion about it so that you could kind of clear the decks on that right away, is that true?

'Juror Ford: Yes. They had, you know, some of them didn't even know what the term meant, what it was all about, some weren't familar with it, some had heard of it but only in something that they had seen or heard.'

'The Court: I am told that there was some discussion at the outset in the jury room by the jurors about these terms 'Mafia' and related terms and that you decided you were just going to have a discussion about it and get it out of the way.

'Juror Foss: I don't think that that had anything to do with the verdicts.

'The Court: There was the question I was going to ask, whether you think that any of these terms inflamed the jury members in any way. Do you think so?

'Juror Foss: No, I am sure they did not.'

(For the entire transcript of the interrogation of Juror Palmer, see footnote 50, infra.)

'The Court: Do you think any mention of the words 'Mafia' or related terms had any influence at all on any of these jurors?

'Juror Beth: No, I don't think anybody even though anything about it. I know I didn't. It didn't bother me a bit.'

*'The Court: * * * Now there was some discussion during the trial of the word 'Mafia' and related terms.*

'Juror Daniels: Sure.

'The Court: Do you think that any discussion of that word adversely affected any of these defendants?

'Juror Daniels: No, your Honor, because we didn't even during the time of our deliberations, we never did, even the word 'Mafia' was not even entertained or brought forth.'

*'Juror Mirick: * * * We threw out when we first went in there any talk of Mafia * * *.*

*'The Court: * * * Now do you think that the use of these words 'Mafia' and related words at all influenced any of these jurors?*

'Juror Mirick: No, I am sure not.'

'The Court: The word 'Mafia' and related terms were bandied about a little bit during the time of the trial. Do you think that that inflamed the jury in any way?

'Juror Hoeffler: No.

'The Court: Do you think that it had any adverse effect at all on any of these defendants?

'Juror Hoeffler: Would you say that again?

'The Court: Do you think that the use of that term 'Mafia' and so forth had any adverse effect on these defendants? Did any of you use it, we will say, against any of these defendants or use it in reaching your verdicts?

'Juror Hoeffler: No, sir.'

'The Court: Now what about during the deliberations, during the course of the trial the word 'Mafia' came up and related terms to that also. Do you think that any mention of that had any adverse effect upon any of these defendants?

*'Juror Stroops: No, sir. I don't think we-- I know we didn't pay any attention. I think it was just in one thing, it was in Mr. Friedman's just one time, I think in his testimony it was just one time we seen it in the testimony. * * *'*

'The Court: There was during the trial the mention of the word 'Mafia' and some related terms. Do you think that that adversely affected any of these defendants?

'Juror Montejano: No, your Honor. I think if anything it might have helped us to even try to be really applying ourselves and just go by the facts.

'The Court: Now some have said that at the outset of your deliberations that there was some discussion of the effect of these terms, 'Mafia,' and so forth in the jury room, and you decided to clear the decks concerning it in that manner.

'Juror Montejano: That is right.'

'The Court: Do you think that the mention during the trial of the word 'Mafia' or any related such term did it have any adverse influence upon any member of this jury to your knowledge against any of these defendants?

'Juror McDonald: No, sir, absolutely not.'
'The Court: There was a mention during the trial of the word 'Mafia' and some related terms. Do you think that anybody on this jury related any of these terms to any of these defendants?
'Juror Plant: No, sir.
'The Court: Did it in your opinion have any effect at all in the verdicts that were reached?
'Juror Plant: No, sir.'
Reporter's Transcript, Vol. 46, pp. 8997-8998, 9000-9001, 9003, 9009, 9011, 9013, 9015, 9018, 9020, 9023, 9026.
49 Counsel for appellant Zerilli submitted the following affidavit, dated June 16, 1972:
'The Court: Mr. Palmer, there is a picture sworn, deposes and says:
'On June 12, 1972, prior to the commencement of the court proceedings in the morning on the motions for new trial, I saw Alfred
'Juror Palmer: No, sir. In fact, I never the above case, in the hallway outside the courtroom. We said 'hello' to each other, and I then talked to Agnar Wahlberg, one of the court reporters.
'A few minutes later I went into the courtroom. Mr. Palmer was then sitting in the courtroom. I said 'hello' to him again, and I remarked that the five days of deliberation of the jury indicated the dedicated work of the jury.
'I was about to walk to the counsel table, but before I could do so Mr. Palmer made substantially the following statement:
"We tried to be conscientious. But the newspaper publicity of the trial was devastating to the defendants. You can't keep those jurors from reading the newspapers.'
'I then stopped and inquired about this, and I asked Mr. Palmer if he was referring to the Hoffa story.
'His reply was substantially as follows:
"More than that. The jury was reading about the case every day.'
'Mr. Palmer further stated that he himself had not read the newspaper articles concerning the case during the trial, but that he had read them after the trial, and that he could now understand how many of the other jurors felt during the trial. He said he felt that the Los Angeles Herald-Examiner was more damaging than the Los Angeles Times.
'Mr. Palmer also stated that the people in his office work hard and then go to Las Vegas and lose their money, and that he thought this was wrong. I then asked him how he felt about horse racing, and he said he thought that horse racing was the same.'
50 In his first interrogation of the jurors, the trial judge asked Palmer about his own exposure to the media. Palmer answered that he had not read, seen, or heard anything about the case. Reporter's Transcript, Vol. 7, pp. 1330-1332. During the second voir dire, Palmer again failed to mention any problem with the publicity. Reporter's Transcript, Vol. 31, pp. 6011-6012. The post-trial interrogation of juror Palmer is set out in full below:
'The Court: Come in, Mr. Palmer.
'Juror Palmer: Thank you, sir. 'I owe you an apology for being the black sheep, the only one that said yes when I should have said no.
'The Court: No apology needed at all.
'Juror Palmer: The count was seven to five and I still feel that if we had had another session we could have come out on it. (This reference is to the jury's failure to reach a verdict as to defendant Polizzi on Count 3 of the indictment. See p. 8987.)
'The Court: My purpose here now is to ask you some questions about the case. Do you think that anything happened outside of this courtroom during the trial of this case that in any way influenced the verdict in the case?
'Juror Palmer: Well, I will put it this way, not that I know of. As far as myself is concerned, no, but as to others I am not too sure.
'The Court: Yes. Now is there anything about that, the leads you to suspect that anything happened?
'Juror Palmer: Well, I would rather hesitatingly say no.
'The Court: Read that answer to me.
'(Record read.)
'Juror Palmer: I think you well know in your experience that when folks get together outside, going to lunch or something like that, you can't very well stop them from taking about it among themselves, you know what I mean, just among ourselves, and I think some of that was done but I don't want to

accuse anybody of it.
'The Court: Yes. All right. Now do you think that anybody reached any decisions about the case before the case was turned over to the jury?
'Juror Palmer: I don't think so. None were expressed to me, no, sir. $510'The Court: Mr. Palmer, there is a picture called The Godfather. Have you seen that picture?
'Juror Palmer: No, sir, I have not.
'The Court: Have you read the book by the same name?
'Juror Palmer: No, sir, I have not. heard of it until you mentioned it.
'The Court: Was there any discussion of either the picture or the book in that jury room?
'Juror Palmer: No, sir, not that I know of, not that I heard.
'The Court: Do you think that the mention during this trial of any of the terms such as 'Mafia' or related terms had any unfavorable influence on the verdicts that were reached?
'Juror Palmer: Well, to be frank and honest with you, I hope I won't get into trouble by doing so, I think some of that was mentioned during the lunch hour between some of the members of the jury.
'The Court: In what respect?
'Juror Palmer: Well, it was just the fact that it came up during the trial, the Chief of Police of Detroit accused some of our defendants of being members of it, they threatened him with suit and the suit was never filed because they thought they couldn't win it, the defendants I mean. Do I make myself clear?
'The Court: Yes, I think so. What you are saying is that during a lunch hour that there was some discussion of the evidence, is that correct?
'Juror Palmer: I was told somewhere that that come out in the local papers during the trial, and I think that was discussed during the lunch hour between some of the members. I don't want to hold up my right hand and swear to that, your Honor.
'The Court: Did you hear it yourself?
'Juror Palmer: Indirectly, yes.
'The Court: What do you mean by 'indirectly'?
Juror Palmer: Well, they were some distance away from me, that is what I think they were talking about, but I couldn't convict them of it, I heard the word 'Mafia' mentioned and that kind of thing, and that was all, but I don't think there was any prejudice to it as far as that is concerned because it was admitted it was not to be considered in the trial. It was, shall I say, outlawed.
'The Court: Do you think that anybody did consider that in the deliberations in this case?
'Juror Palmer: I don't believe so, no, sir.
'The Court: Any comment or any discussion about it in the deliberations?
'Juror Palmer: No, sir, nothing. I never heard the word mentioned during the deliberation time, no, sir.
'The Court: All right. I think those are the questions that I wanted to ask you. And thank you again.
'Juror Palmer: Let me say it has been a pleasure to work with you. I hope I get a chance to do it again.
'The Court: It has been a pleasure working with you.
'Juror Palmer: Thank you.'
Reporter's Transcript, Vol. 46, pp. 9005-9008.

51 A case cited by appellants in support of their contention that juror Palmer's revelations indicate jury bias is easily distinguished from this case. United States v. Thomas, 463 F.2d 1061, 1062 (7 Cir. 1972), involved the disclosure by a juror the morning after the jury had deliberated, and reached a verdict that jurors 'who chose to vote for conviction argued from (a newspaper) article which they displayed and to which they repeatedly referred.' Here Palmer's disclosure as reported by appellants' counsel came approximately six weeks after the verdict had been reached, and there were good reasons for disbelieving that disclosure.

52 The Honorable W. Matthew Byrne, Jr., United States District Judge, and who was United States Attorney in Los Angeles during the initial stages of this case, testified that interviews with Maurice Friedman were 'the basis for the commencement of the investigation and the commencement of grand jury investigation regarding the Frontier case.' Reporter's Transcript, Vol. 48, p. 9224. He did not recall having ever seen the 'Mafia list.' Reporter's Transcript, Vol. 51, pp. 9824-9825. David Nissen, chief of special prosecutions in the organized crime and racketeering section of the United States Attorney's office in Los Angeles at the time, also testified that Friedman's information was the basis for the decision to convene a grand jury. Reporter's Transcript, Vol. 51, p. 10,031. He

denied that the 'Mafia list' played any role in developing his interest in beginning the prosecution. Reporter's Transcript, Vol. 52, p. 10,220. Wayne W. Hill, a special agent with the F.B.I., also testified that the Friedman interviews provided the basis for initiating the prosecution. Reporter's Transcript, Vol. 49, pp. 9412-9418. He too denied ever having seen the 'Mafia list.' Reporter's Transcript, Vol. 50, p. 9714.

53 The recent decision cited by appellants, United States v. Estepa, 471 F.2d 1132, 1137 (2 Cir. 1972), condemns the needless use of hearsay testimony before the grand jury and is irrelevant to appellants' claims.

54 References to 'Mafia' and 'Italians' are certainly not per se prejudicial. Cf. United States v. Lazarus, 425 F.2d 638, 640-641 (9 Cir. 1970), cert. denied, 400 U.S. 869, 91 S.Ct. 102, 27 L.Ed.2d 108 (1970), rehearing denied, 400 U.S. 954, 91 S.Ct. 233, 27 L.Ed.2d 261 (1970).

55 Those cases upon which appellants rely concerned prosecutor misconduct in arguments to the petit jury. Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935); United States v. Cummings, 468 F.2d 274, 277-278 (9 Cir. 1972); Hall v. United States, 419 F.2d 582 (5 Cir. 1969). This distinction does not justify, of course, prosecutor misconduct before the grand jury. See A.B.A. Standards Relating to the Prosecution Function, Approved Draft, 1971, 3.5(b). It does mean that it takes very substantial evidence of grand jury bias for an appellate court to reverse a conviction because of an indictment returned by an allegedly biased grand jury.

56 'I think I told you at the outset that this is nothing more than sophisticated robbery, sophisticated theft. And these businessmen have learned it is better to use a corporate resolution than a pistol.' Reporter's Transcript, Vol. 43, p. 8683.

*'In short * * * the principals have learned that a corporate resolution is more deadly and more effective than a pistol, and the chances of apprehension and proof are considerably more difficult.' Reporter's Transcript, Vol. 39, p. 7995.*

57 Those points not discusesd are appellants' contentions that the prosecutor misstated facts and evidence throughout the trial; that the court delayed too long in giving appellants' counsel opportunities to argue their objections to the prosecutor's conduct; that the prosecutor was allowed to argue law, and misrepresent the law, in his arguments to the jury; that the prosecutor improperly asked witnesses to 'square' their testimony with that of other witnesses; that the prosecutor intentionally misrepresented to the court what he expected the testimony of a witness would be; that the exhibits were mishandled and that the jury may have had in the jury room exhibits not admitted into evidence; that side-bar conferences were audible to the jury mainly through the fault of the prosecutor; and that the trial judge changed certain 'ground rules' to the prejudice of appellants. We have, however, carefully considered each of these points and, based upon our review of the entire record, find them to be without merit.

58 'That is the good old fashioned Chicago type extortion.' Reporter's Transcript, Vol. 39, p. 7983. This particular reference was to testimony in the record which indicated perhaps some potential for violence during the events in question in this case. See witness Friedman's testimony of his mysterious and rather frightening trip to Toledo, Ohio. Reporter's Transcript, Vol. 5, pp. 1084-1098. The comment was not proper, however. See also the comments quoted in footnote 56, supra.

59 See pages 882-885, supra.

60 Defense counsel had argued: 'The thing that impressed me and rather frightened me was the display of overwhelming power of the Federal Government if one of their prosecutors gets a theory and takes after you.' Reporter's Transcript, Vol. 42, p. 8391.

The prosecutor then argued: ' * * But Mr. Ball has made a statement that I must make one remark to. He says he is worried because a prosecutor gets you on a theory and a statute and he goes after you.*

'Not true. Never has been true in the legal system in this country or the body of criminal law that has only been around for 550 years. Never has been true and it is not true during this trial.

'A grand jury passed on this indictment. Not Kotoske. When it is read to you, the judge will read, 'The Grand Jury charges'. Not Tom Kotoske.' Reporter's Transcript, Vol. 43, p. 8692.

Earlier in his argument, the prosecutor had also referred to the indictment in trying to show that the government had been consistent in asserting a legal theory under 1952. See Reporter's Transcript, Vol. 43, p. 8680.

61 'The Court: I understand what you are trying to show, but I don't know how you can show it by

establishing-- you are not able to establish the foundation for this document by this witness, as I see it. You may be able to establish it by some other witness, or if your brother takes the stand and testifies you can establish his whereabouts by his testimony.

'Mr. James Bellanca: Then I will withdraw it and save it until then, your Honor.' Reporter's Transcript, Vol. 9, p. 1678.

62 See also United States v. Biondo, 483 F.2d 635, 644-645 (8 Cir. 1973); United States v. Mahanna, 461 F.2d 1110, 1113-1115 (8 Cir. 1972); United States v. Porter, 441 F.2d 1204, 1216 (8 Cir. 1971), cert. denied, 404 U.S. 911, 92 S.Ct. 238, 30 L.Ed.2d 184 (1971); Davis v. United States, 357 F.2d 438, 440-441 (5 Cir. 1966), cert. denied, 385 U.S. 927, 87 S.Ct. 284, 17 L.Ed.2d 210 (1966).

63 We disagree with the government's view that appellants' objection to admitting the deposition was withdrawn when it was agreed that another deposition of Reisman would be taken. The court had made its ruling, and defense counsel then asked about the possibility of taking another deposition.

64 'Q Did you hear the reading of the Ben Reisman deposition that that happened in the spring?

'A No, I don't recall hearing that.' Reporter's Transcript, Vol. 24, p. 4602.

65 'Q Mr. Zerilli, does that refresh your recollection whether or not you went up to Emprise or Sportservice to speak with either Mr. Lou Jacobs or Ben Reisman about the Rooks and Kachinko loan, prior to April 4, 1966?

'A It does not refresh my recollection. I did not go to Buffalo and talk to them about the Alex Kachinko and Art Rooks loan.

'Q Do you recall the testimony, Mr. Zerilli, of Mr. Friedman during this trial indicating that you were there on that occasion?

'A I recall the testimony, yes.

'Q Are you saying that it was inaccurate and not true?

'A Yes, sir, much of it.

'Q How about this point, was it not true?

'A This point was not true, no, sir.' Reporter's Transcript, Vol. 26, p. 5211.

66 Prior to 1970, the Lands transcript would clearly not have been within the Jencks Act. 18 U.S.C. 3500(e)(2) then included only statements made 'to an agent of the Government.' The 1970 amendment eliminated that phrase, but the brief legislative history gives no hint of the Congressional intention behind the change. 2 U.S.Code Cong. & Admin.News p. 4017 (1970).

67 Thus appellants' additional complaint of prejudicial surprise with respect to one of Friedman's answers on cross-examination, that he had told someone several years before of hidden interests in VFI, has no merit under the Jencks Act since that Act was not intended to protect against surprise but rather for impeachment purposes.

68 See pages 894-896, infra.

69 'The Court: Now, Mr. Friedman, it is my purpose to avoid your use of either of those terms ('Mafia' and 'Cosa Nostra') in the hearing of the jury.

'Mr. Friedman: I understand, sir.

'The Court: Because of the possible prejudices that might result.

'The Witness: Yes, sir.

'The Court: Do you understand that you are not to use either of those terms in any reference that you are called upon to make when referring to this document?

'The Witness: I understand, sir.

'The Court: Is there a manner that you can state names that you intended referring to at the time you were speaking in this document for those offensive words?

'The Witness: The gentlemen that I understood were Mr. Shapiro's associates, yes, sir.' Reporters Transcript, Vol. 10, pp. 1981-1982.

70 'Q Isn't it a fact that you told Dr. Lands on that date that certain hidden interests in that casino were going to come out?

'A Words to that effect, yes, sir.

'Q When you used the phrase 'hidden interests,' talking to Dr. Lands, to whom did you refer?

'A To Mr. Shapiro's partners from Detroit.

'Q Who?

'A Mr. Zerilli and Mr. Polizzi.' Reporter's Transcript, Vol. 10, p. 2000.

71 'Q So that to put it right on the line, Mr. Freidman, you weren't trying to tell Dr. Lands that there

was a hidden interest in the Frontier Hotel, were you?
'A No, I was trying to tell Dr. Lands why I was investigated in the Friars Club case.
'Q And you weren't trying to tell Dr. Lands, were you, that either Mr. Polizzi or Mr. Zerilli had any hidden interest in the Frontier Hotel, were you?
'A No, I wasn't.
'Q And, in fact, you did not mention hidden interest or Mr. Polizzi's name or Mr. Zerilli's name or Mr. Shapiro's name or any of those defendants' names in your conversation with Dr. Lands, is that correct?
'A No, I didn't sir.
'Q And you didn't intend to mention any of their names to Dr. Lands, did you?
'A No, sir.' Reporter's Transcript, Vol. 10, p. 2036.

72 The court did not deny the jury's request. The jury did not renew its request after the court gave its cautionary remarks:

'Before I agree to having it reread to you, I want to be certain that a rereading of any testimony is deemed important by the jury at this time to assist you in your deliberations. The reason for that is that we like very much to have you depend upon your own memory of the evidence and testimony in this case and not to have any testimony reread. We feel that to pick out certain portions of the testimony is very probably to unduly emphasize that testimony. At the same time I can conceive that a situation may have arisen during your deliberations that makes you feel rather compelled that the testimony on certain portions of the testimony ought to be reread to you, and if you feel that you would be assisted in your deliberations by a rereading of the testimony I will order that it be done.

'On the other hand, if you feel that you can continue with your deliberations successfuly without a rereading of any of the testimony and depending upon your memory of it, I would prefer that, and I think counsel would too.' Reporter's Transcript, Vol. 46, pp. 8963-8964.

Appellants' counsel also object to the implication arising from the court's statement that defense counsel concurred in the court's preference. That the court's comment could have had some profound impact on the jury is frivolous speculation.

*73 Appellants contend that the federal judges who modified Friedman's sentences violated Rule 35 of the Federal Rules of Criminal Procedure. Appellants' position is unmeritorious. This Court, in a decision construing Rule 35 in its form prior to amendment in 1966, ruled that it required a motion for reduction to be made within 60 days and not final action on the motion within that time. Leyvas v. United States, 371 F.2d 714, 719 (9 Cir. 1967). The 1966 amendment increased the time limit to 120 days. There is authority for appellants' position that the 120-day limit also applies to judicial action. Cf. 8A J. Moore, Federal Practice P35.02(2), pp. 35-6, n. 10.1 (2d ed. 1973). We do not feel, however, that the amendment necessitates a change in the Leyvas ruling. See Irizzary v. United States, 58 F.R.D. 65, 67 (D.Mass.1972): 'The 120 day period is technically not the time within which the motion may be made, but is rather the time within which the court may act. * * * as a matter of practice, the requirement has been interpreted to permit a court to act upon a motion as long as the motion is made within that period.'*

74 The evidence consists of the government's stipulations in continuing the motions for modification and the modifications after appellants' convictions, a statement during a posttrial hearing in this case by Assistant U.S. Attorney Nissen that he had told Friedman's attorney that Friedman's cooperation would be called to the attention of 'the court or whatever appropriate authority it would be' (Reporter's Transcript, Vol. 51, p. 10,173), and the affidavit of Friedman's former custodian that Friedman had told him that the government had said that Friedman would be released after testifying in this case.

75 See footnote 34, supra.

76 The argument does not apply to Emprise Corporation, Rooks, or Giordano, who were each charged and convicted only of conspiracy. The other four defendants were each convicted and sentenced for conspiracy and more than one substantive count. The jail terms were concurrent, but separate fines were imposed on each defendant on the conspiracy count and at least one substantive count. Therefore, each of these defendants was affected adversely by the separate convictions, and the current sentence doctrine is not applicable. See Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); United States v. Tucker, 435 F.2d 1017 (9th Cir. 1970).

77 See pages 869-871 supra for a discussion of the statute.

78 There is no constitutional bar to separate convictions and sentences for the substantive offenses defined by 1952 and for conspiracy to commit that offense. Nolan v. United States, 423 F.2d 1031, 1047-1048 (10th Cir. 1970). 'Only if the substantive offense and the conspiracy are identical does a conviction for both constitute double jeopardy.' Pereira v. United States, 347 U.S. 1, 11, 74 S.Ct. 358, 364, 98 L.Ed. 435 (1954). An agreement or common course of conduct among two or more persons is not an essential element of the substantive offense under 1952: The travel required by 1952(a) might be accomplished by only one person, and the 'business enterprise' required by 1952(b)(1) also might be conducted by an individual. True, both the legislative history (see United States v. Roselli, 432 F.2d 879, 886 n. 8 (9th Cir. 1970)), and case law (see, e.g., United States v. Donaway, 447 F.2d 940, 944 (9th Cir. 1971)) indicate that 1952 is not directed against casual and isolated instances of illegal conduct. But neither suggests that the substantive crime requires the participation of a group of people.

Further, the conspiracy alleged here is not merely an agreement to violate state law but an agreement to travel interstate with the intent to promote certain violations of state law. It is distinct from the joint activity that might be involved in running the business enterprise mentioned in 1952 even if the 'business enterprise' language were construed to require more than a sole proprietorship.

Nor is there any constitutional bar to conviction for both conspiracy and 18 U.S.C. 2, the aiding and abetting statute underlying the conviction of some of the defendants on some of the substantive counts. United States v. Valencia, 492 F.2d 1071 (9th Cir. 1974); Pereira v. United States, 347 U.S. 1, 11-12, 74 S.Ct. 358, 98 L.Ed. 435 (1954).

79 Judge Paul Continued, 214 F.Supp. at 958: The phrase seems to refer to the fact that the Act was designed to attack an entrenched operation rather than a sporadic poker game or a floating crap grame. No act of travel is to be deemed unlawful unless the enterprise is a continuing one; but once the continuity of the enterprise is established, any act of travel, with the requisite intent and the subsequent participation, would seem to be a separae offense, even if the travel is a daily or regular event, and thus, perhaps, a 'continuing' activity. If this is the plain and literal meaning of the Act, it is within the power of Congress to make each act of travel a unit of prosecution. See, e.g., Mitchell v. United States, 142 F.2d 480 (10th Cir., 1944); and this, in spite of the distinguishable cases of United States v. Universal CIT Credit Corp., 344 U.S. 218, 73 S.Ct. 227, 97 L.Ed. 260 (1952), and Bell v. United States, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955).

80 Separate convictions and sentences for individual acts of travel in violation of 18 U.S.C. 1952 have been affirmed without discussion of the issue raised here. See, e.g., United States v. McGowan, 423 F.2d 413, 416 (4th Cir. 1970).

81 The issue in Braverman was whether a single agreement to commit several criminal acts constituted one or several conspiracies. In the present case only one conspiracy was charged. Bell held that a single act of transporting two women interstate at the same time was one violation of the Mann Act. In the instant case, each substantive charge involved a separate act of travel on a different day. There was no attempt to carve several offenses out of a single transaction.

Universal C.I.T. is somewhat closer on its facts. As the Court pointed out, however, there was specific evidence in the legislative history of the Fair Labor Standards Act that that Congress did not intend each breach of the statutory duty with respect to minimum wages and overtime owed to each employee during each work week to be treated as a separate crime, 344 U.S. at 222-224. Also, the language of the Act was ambiguous as to the proper unit of prosecution. If not construed to limit prosecution to an entire course of conduct, no limit at all was imposed on the number of crimes that could be charged. Here, the statute is unambiguous; it is explicitly directed at acts of travel and use of interstate facilities, and the prosecution can charge only as many separate crimes as there were separate acts of travel or use of interstate facilities. Where the command of the statute as to the unit of the offense is clear, there is no room for application of the so-called 'rule of lenity' of the Bell case. See Callanan v. United States, 364 U.S. 587, 596, 81 S.Ct. 321, 5 L.Ed.2d 312 (1961). It is true, as appellants point out, that the Supreme Court applied the 'rule of lenity' to 1952 in support of the ruling in Rewis, 401 U.S. at 812, that interstate travel by patrons of a gambling establishment did not violate the Act. But the Court premised this application upon a determination that there was an ambiguity in the language of 1952 relating to persons covered. 401 U.S. at 811. There is no such ambiguity with respect to the unit of the offense.

82 Congress may well have concluded there was a separate social interest in deterring each act of travel in furtherance of an illegal enterprise: each successive trip may increase the success of the illegal activity, and a decision not to make a given trip for fear of additional penal consequences could therefore limit the harm to society 1952 is intended to prevent. Cf. Irby v. United States, 129 U.S.App.D.C. 17, 390 F.2d 432, 434 (1967) (en banc).

83 Appellants do not attack venue on the conspiracy count. 'An overt act committed in the course of a conspiracy which occurs in a district gives rise to jurisdiction to prosecute the conspirators in that district.' United States v. Barnard, 490 F.2d 907, 910 (9th Cir. 1973). Several consequential overt acts are alleged to have occurred in the Central District of California.

84 A situation could arise where the prosecution's representations to the judge were so far from the mark that they could only be treated as submitted in bad faith to improperly prevent a change of venue. In such a situation, we would look beyond the information presented to the trial judge in determining whether denial of transfer was within the judge's discretion, since the trial judge has a responsibility to pierce the prosecution's representations and assure that they are made in good faith. And, if the transfer were initially denied on the basis of prosecution information later shown to have been submitted in bad faith, the trial judge would be obligated to view a renewed motion as if it were an original one, without requiring the especially strong showing that may be required to support a later motion. See note 10 infra.

85 Rule 22, Fed.R.Crim.Pr., provides that '(a) motion to transfer under these rules may be made at or before arraignment or at such other times as the court or these rules may prescribe,' suggesting that the court may decline to entertain a late motion. See United States v. Tremont, 351 F.2d 144, 146 (6th Cir. 1965); Cagnina v. United States, 223 F.2d 149, 154 (5th Cir. 1955). Here, there has been a change in the situation since the initial venue decision. Nonetheless, to avoid the obvious opportunity for abuse it was proper to require a greater showing of inconvenience when trial was imminent.

86 Giordano stresses the fact that a very small proportion of the trial transcript relates directly to him; the government engages in elaborate analyses which, it claims, show that Giordano was not as peripheral to the proceedings as he claims. We do not consider, however, that the exact quantity of evidence relating to a conspiracy defendant personally is important in determining whether severance should have been granted. Although there are some cases which take this factor into account (see United States v. Branker, 395 F.2d 881, 888 (2d Cir. 1968); United States v. Donaway, 447 F.2d 940, 943 (9th Cir. 1971)), they concern defendants against whom conspiracy charges were dismissed during trial. Dismissal of a conspiracy charge does not mean that severance is required. Schaffer v. United States, 362 U.S. 511, 516, 80 S.Ct. 945, 4 L.Ed.2d 921 (1960). It does, however, shift the balance of factors to be considered, see Schaffer, supra; a separate trial would not entail a replay of the joint conspiracy trial, and much of the evidence admitted in the joint trial could not be considered against the defendant no longer charged with conspiracy. In the instant case, most of the evidence not directed to Giordano personally was nonetheless admissible against him, so that the proportion of personally oriented evidence is not important.

87 See Krulewitch v. United States, 336 U.S. 440, 454, 69 S.Ct. 716, 93 L.Ed. 790 (1949) (Jackson, J., concurring); United States v. Donaway, 447 F.2d 940, 943 (9th Cir. 1971). But see United States v. Cozzetti, 441 F.2d 344, 349 (9th Cir. 1971); United States v. Patterson, 455 F.2d 264, 266-267 (9th Cir. 1972); United States v. Roselli, 432 F.2d 879, 902 (9th Cir. 1970), all holding that careful jury instructions can be sufficient to guard against this kind of possible prejudice from joinder.

88 ABA, Standards Relating to Joinder and Severance 33 (Approved Draft 1968).

89 Giordano cites one instance in which the instruction he requests was given, United States v. Schneiderman, 106 F.Supp. 906, 928 (S.D.Calif.1952), but there was no discussion in Schneiderman of the issue. See also United States v. Interstate Engineering Corp., 288 F.Supp. 402, 413-414 (D.N.H.1967); Devitt & Blackmar, Federal Jury Instructions 10.06 (1970). But see United States v. Zambrano, 421 F.2d 761, 763 (3d Cir. 1970), supporting the Brown holding by necessary implication.

90 Because Giordano neither cross-examined his co-defendants nor offered rebuttal evidence, we are not faced, either here or in the next section of this opinion dealing with Giordano's motion for acquittal, with the problem presented in Cephus v. United States, 117 U.S.App.D.C. 15, 324 F.2d 893, 897-898 (1963). In Cephus, the issue was whether a defendant waives his right to test the

government's case-in-chief on appeal if he offers evidence only to counter a co-defendant's incriminating evidence; the Court of Appeals for the District of Columbia held that there is no waiver. This court has never squarely accepted or rejected the Cephus rule. See United States v. Figuerora-Paz, 468 F.2d 1055, 1058 (9th Cir. 1972); Verdugo v. United States, 402 F.2d 599, 604 n. 4 (9th Cir. 1968).

91 Friedman, a co-conspirator who testified for the government, and Feil, another witness who testified directly to the illegal involvement of some defendants, offered no evidence implicating Giordano; none of the four government witnesses who might on the prosecution's theory, have known of Giordano's involvement in the conspiracy, directly implicated him.

92 Giordano and Zerilli were close friends. Giordano lived in St. Louis, Zerilli in Detroit. There were telephone calls between Giordano's home and office and Zerilli's, as well as other calls charged to Zerilli's credit card and placed to Giordano's numbers, at various key times in the course of events between June and November, 1967. Giordano knew the Cusumanos and the Sansones in St. Louis. The Sansones did not know Zerilli.

The need for additional money, which resulted in the issuance of the Class C debentures Sansone later bought, developed in early June. There were calls between telephones listed to Giordano and Zerilli at that time. Zerilli came to St. Louis for two days on June 8.

The Sansones began gathering money for their VFI investment after Zerilli visited St. Louis, but before the Class C debentures in which they invested were officially issued. They could have learned about the investment possibility only from a person having knowledge of the inner operations of VFI.

In early August, Giordano repaid an overdue loan to the Cusumano family trust. Less than three weeks later, Sansone took out a loan from the same trust. This loan was part of the money Sansone eventually invested in VFI. The Sansone loan was the only business transaction ever consummated between Sansone and the Cusumano family. It was unsecured. Although the VFI debentures in which Sansone invested yielded 4% Interest, the loan from Cusumano was at 7%, an anomaly for which Sansone had no convincing explanation.

The Sansone investment was withdrawn less than 60 days after it was made, after Sansone was told by the Nevada Gaming Commission that he would have to apply for a gaming license, disclose the source of the invested funds, and provide fingerpints. Sansone testified that he withdrew only because, 'I never anticipated that I would have to be classified as a gambler when I bought the debenture.' But from the outset the Sansones admittedly knew they were investing in a gambling casino.

Giordano made five trips to Las Vegas between July and November, 1967. The Giordanos have no business interests or relatives in Las Vegas, and Giordano was not a gambler. Each of these trips was closely preceded, or followed, or both, by telephone contact between Giordano telephones and Zerilli telephones or phone calls charged to Zerilli. Each trip coincided with an important event in the unlawful scheme. For example, trips in September and November coincided with the beginning and end of the $150,000 investment.

On September 12 there was a series of phone calls between Zerilli's home and Giordano's home and business. The next day, Sansone marshaled the entire $150,000. On that same day there was a call from a Zerilli telephone to Giordano's telephone. On September 14 Sansone flew to Las Vegas with the money to make the investment. He checked into the Frontier Hotel. Sixteen minutes later, Giordano checked into the Dunes Hotel. Four days later, Sansone deposited the $150,000 in VFI's account, received the debentures, and left Las Vegas. Giordano departed the following day. In November, a telephone call to Giordano was charged to Zerilli on the same day the Nevada Gaming Commission's letter was sent to Sansone. Giordano went to Las Vegas on November 9; Zerilli arrived and checked into the Frontier Hotel under an assumed name on November 10; and Sansone arrived on November 11 to complete the withdrawal of the $150,000 investment.

93 In the conspiracy case, there was evidence identifying the parties to the telephone calls (see 385 F.2d at 293), but the Court of Appeals did not rest admissibility upon this circumstance.

94 U.S.Const. art. I, 8.

95 'Neither bankruptcy . . . nor cessation of business . . . nor dispersion of stockholders, nor the absence of directors . . . nor all combined, will avail without more to stifle the breath of juristic personality. The corporation abides as an ideal creation, impervious to the shocks of these temporal vicissitudes. Not even the sequestration of the assets at the hands of a receiver will terminate its

being.' Petrogradsky Mejdunarodny Kommerchesky Bank v. Nat'l City Bank of New York, 1930, 253 N.Y. 23, 31-32, 170 N.E. 479, 482 (Cardozo, C.J.), reargument denied, 1930, 254 N.Y. 563, 173 N.E. 867, cert. denied, 1930, 282 U.S. 878, 51 S.Ct. 82, 75 L.Ed. 775.

96 United States v. Stone, 8 Cir. 1971, 452 F.2d 42; United States v. Anaconda American Brass Co., 210 F.Supp. 873 (D.Conn.1962); United States v. Maryland and Virginia Milk Producers, Inc., 145 F.Supp. 374 (D.D.C.1956); United States v. Cigarette Merchandisers Ass'n, Inc., supra; United States v. Union Carbide and Carbon Corp., 132 F.Supp. 388 (D.Colo.1955), modified, 10 Cir., 1956, 230 F.2d 646.

97 Melrose Distillers, Inc. v. United States, supra; United States v. BBF Liquidating, Inc., 9 Cir. 1971, 450 F.2d 938; Alamo Fence Co. of Houston v. United States, 5 Cir., 1957, 240 F.2d 179; United States v. P. F. Collier & Son Corp., 7 Cir., 1953, 208 F.2d 936; United States v. Globe Chemical Co., 311 F.Supp. 535 (S.D.Ohio 1969); United States v. Arcos Corp., 234 F.Supp. 355 (N.D.Ohio 1964); United States v. San Diego Grocers Ass'n, Inc., 177 F.Supp. 352 (S.D.Cal.1959); United States v. Brakes, Inc., supra.

98 Alderman v. United States, 1969, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176.

99 'The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established-- as was plainly done here-- the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin.' Nardone v. United States, 1939, 308 U.S. 338, 341, 60 S.Ct. 266, 268, 84 L.Ed. 307. See also Alderman, supra, 394 U.S. at 183.

100 'Mr. Kotoske: May I make a full and complete but short statement, your Honor?

About giving transcripts of the daily proceedings to any newspaperman, I never in my life have done that. I have never done that in this case. I did see Mr. Blake reading from the transcript and I personally took it upon myself to go over to him this morning and ask him to please not print anything that transpired at the side bar. That is the fact, that is not fantasy.' R.T. 5790-91.

101 Appellants claim that 'the court refused even to permit appellants, at their own expense to produce those agents to find out the names of the purported live informants who are the sources of the Friedman sentencing memorandum allegations (52 RT 10,474-76).' Electronic Surveillance Brief at 20. The court clearly acted within its discretion in refusing to allow the names of the informants to be revealed. Appellants, however, could have called these agents to ask other questions about how they gathered the information which was subsequently passed on to Hill. The court did not preclude the appellants from calling these agents.

102 The court did not preclude calling any of these officials as witnesses, but stated only that they should not be called 'unless there is some reason to believe that any of those persons communicated any information received from the tapes to any of the persons who had charge of the preparation of the evidence in this case.' C.T. 3321.

103 R.T. 9224 (U.S. Attorney Byrne), 9546-47 (agent Hill), 10,031 (U.S. Attorney Nissen).

104 R.T. 10,032-33 (U.S. Attorney Nissen), 9283 (U.S. Attorney Friedman).

105 R.T. 9282-84 (Friedman), 9428-29, 9437-39 (Hill), 10,033 (Nissen).

106 R.T. 10,245-46 (Hornbeck), 9751 (Uelmen).

107 See, e.g., United States v. Stassi, 5 Cir., 1970, 431 F.2d 353; Baker v. United States, 139 U.S.App.D.C. 126, 1970, 430 F.2d 499, cert. denied, 1970, 400 U.S. 956, 91 S.Ct. 367, 27 L.Ed.2d 384; United States v. Clay, 5 Cir., 1970, 430 F.2d 165, rev'd. on other grounds, 1971, 403 U.S. 698, 91 S.Ct. 2068, 29 L.Ed.2d 810; United States v. Ivanov, 342 F.Supp. 928 (D.N.J.1972).

108 See, e.g., United States v. Giordano, 6 Cir., 1971, 440 F.2d 449; United States v. Alderisio, 10 Cir., 1970, 424 F.2d 20.