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SOUTHERN DISTRICT OF CALIFORNIA
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Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Criminal Case No. 84-1022-E
)
Plaintiff,) DATE: February 12, 1985
) TIME: 9:00 a.m.
v.)
) TRIAL MEMORANDUM AND
HILMA MARIE WITTE,) PROPOSED GOVERNMENT
ERIC AUGUST WITTE,) JURY INSTRUCTIONS
)
Defendants.)

COMES NOW the plaintiff, United States of America, by and through its attorneys, Peter K. Nunez, United States Attorney, and Phillip L.B. Halpern, Assistant United States Attorney, and hereby files the attached trial memorandum of facts and law relating to this case together with the attached jury instructions and edited statement of Eric Witte.

DATED: February 11, 1985

Respectfully submitted,
PETER K. NUNEZ
United States Attorney

PLBH
PHILLIP L.B. HALPERN
Assistant U.S. Attorney

PLBH:bas
2/9/85

STATEMENT OF THE CASE

A. The Indictment

On November 16, 1984, an eight-count indictment was returned by the grand jury charging Hilma Marie Witte and Eric August Witte with one count of conspiracy to forge United States Treasury checks in violation of 18 U.S.C. §§ 371 and 510(a)(1), three counts of forging United States Treasury checks in violation of 18 U.S.C. § 510(a)(1), one count of conspiracy to utter forged United States Treasury checks in violation of 15 U.S.C. §§ 371 and 510(a)(7) and three counts of uttering forged United States Treasury checks in violation of 15 U.S.C. § 510(a)(2).

B. Trial Status

Trial is scheduled before the Honorable William B. Enright on February 12, 1985, at 9:00 a.m. The estimated length of the Government's case is, at least, three to four days.

C. Custody Status

Defendants are being held at the Metropolitan Correctional Center on \$50,000 bond.

D. Interpreter

An interpreter will not be needed.

E. Pretrial Motions

Defendants filed motions seeking: (1) suppression of Eric Witte's statement on November 6, 1984; (2) suppression of any evidence obtained in the searches; and (3) severance based upon

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(1)

A Miranda hearing has been scheduled for February 11, 1985, at 2:00 p.m. It should be noted, though, that the defendants have only contested the propriety of Eric Witte's written statement to Sergeant Arland Boyd on November 6, 1984.

(2)

Although the Government has supplied the defense with copies of the affidavits supporting the Indiana search warrants, it does not intend to introduce any evidence seized thereon. It may, however, introduce evidence obtained in the consent search of Marcie O'Donnell's home, the inventory search of defendant's Ford truck and the search pursuant to warrant of their mobile home. The Government will be prepared to argue the propriety of these searches on the February 11 hearing date.

(3)

On January 21, 1985, the Court denied defendants' severance motion and directed the Government to comply with the dictates of Bruton v. United States, 391 U.S. 123 (1968). The Government, therefore, redacted Eric Witte's written statement of November 6, 1984, so that it did not impermissibly infringe upon his co-defendant's constitutional rights. Indeed, as can be seen from the attached edited version (Exhibit 1), the Government far exceeded the demands of Bruton in an effort to guarantee a fair trial.

II

STATEMENT OF FACTS

In the latter part of 1983, defendant Hilma Marie Witte began to purloin proceeds from one of Elaine Witte's bank

1 accounts. Elaine, who was Hilma Marie's "step mother-in-law,"^{1/}
2 had previously invited Hilma Marie and her two children, Eric
3 and John David, aka Butch, to live with her at 320 Johnson Road
4 in Trail Creek, Indiana. The four Wittes had been living
5 together at that address until Eric went to the Naval Training
6 Center at Great Lakes in December.

7 On or about January 10, 1984, during the early morning
8 hours, Hilma Marie woke John David and instructed him that it
9 was necessary to kill Elaine. She informed her youngest son
10 that this killing was necessary because of the money she had
11 stolen. Moreover, she told John David that both of them would
12 go to jail if the police found out about the missing monies.

13 As a result of this conversation, John David shot Elaine
14 with a cross bow as she lay sleeping. Hilma Marie then sought
15 the advice of Eric as to how they could dispose of the body.
16 Hilma Marie thought it was imperative that nobody find out that
17 Elaine had died, although they might convince people it was an
18 accident. Eric told her to freeze the body.

19 Following Elaine's death, Hilma Marie, Eric, and John
20 David went to great lengths to conceal the body of Elaine Witte.
21 They stored the body in a freezer and over a period of months
22 used a garbage disposal, a trash compacter, acid and other
23 methods to dispose of Elaine's remains. Finally, whatever
24 remained was placed in a "cooler" and transported to San Diego
25

26 1/ Hilma married Paul Witte, the father of her two
27 children, Eric and John David Witte. Paul's father, Leonard
28 Witte, married Elaine after divorcing Paul's mother, Mary Ost.
Paul was, therefore, Elaine's step-son.

1 by Eric. Eric stored the "cooler" with two self-storage
2 companies prior to its being placed in the Otay landfill.

3 Even though Hilma Marie maintained that Elaine's death was
4 an accident, it was vital to conceal her body because Hilma
5 Marie began to intercept all of Elaine's United States Treasury
6 checks.^{2/} She then simulated Elaine's signature and either
7 cashed or deposited these checks in various bank accounts.
8 Hilma Marie was aided in the forging and cashing of these checks
9 by Eric Witte, when he returned from the Naval Training Center.

10 In addition to the presenting of Elaine Witte's United
11 States Treasury checks, Hilma Marie systematically depleted
12 Elaine's checking and two savings accounts over the next few
13 months. This was accomplished by several methods, including
14 cash machine withdrawals, and deposits into a personal checking
15 account and a joint account she and Eric had with the Chesterton
16 State Bank. These activities were continued until September
17 1984, when Hilma Marie and John David followed Eric to
18 California.

19 During the months subsequent to Elaine's death, Hilma
20 Marie continually informed neighbors, friends, and the police
21 that Elaine was on vacation. Indeed, when the summer approached
22 and Elaine had still not been seen, she specifically informed
23 all questioners that Elaine was now going to visit Eric in San
24 Diego. Eric corroborated this story, and related to the police
25 what he and Elaine had done while she was visiting.

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27 _____
28 ^{2/} These checks amounted to almost \$1,000 per month, and
would, of course, cease upon Elaine's death becoming a matter
of record.

1 His mother, Hilma Marie, and his brother, John David, accompanied
2 him. At that location, the three were arrested by San Diego
3 County Sheriff's officers.

4 Sergeant Linda Fulton placed Hilma Marie under arrest. At
5 this time, Mrs. Witte asked Sergeant Fulton whether she could
6 give her medication that was contained in her pocketbook,
7 located in the pick-up. Sergeant Fulton complied, and there-
8 after removed the pocketbook to the police station pursuant to
9 official procedure. In addition, Sergeant Fulton received
10 checks and other documents that Hilma Marie Witte had just
11 presented at the Pacific Commerce Bank. These items were given
12 to her by the bank manager.

13 Following his arrest by the Sheriff's officers, Eric Witte
14 was interviewed by Special Agent Steven Davis. Agent Davis
15 verbally advised Eric of his rights pursuant to Secret Service
16 Form 1737. Following an acknowledgement and waiver by the
17 defendant, Agent Davis questioned him regarding United States
18 Treasury checks payable to Elaine Witte.

19 Defendant stated, inter alia, that Elaine was dead, but
20 his mother received, signed and negotiated her checks. Eric
21 also stated that he had received proceeds from these checks and
22 had assisted in the scheme by renting a post office box in Chula
23 Vista under the name of E. Witte. Eric would not comment on the
24 murder of Elaine, but indicated that the Wittes had hidden a car
25 to avoid police detection.

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1 III

2 WITNESSES

3 At the present, the Government intends to call the
4 following witnesses:

- 5 (1) Special Agent Larry Ziegler, Secret Service
6 (2) Special Agent Coy Burns, Secret Service
7 (3) Special Agent Steven Davis, Secret Service
8 (4) Sergeant Linda Fulton, San Diego Sheriff's Office
9 (5) Deputy Brian Sheets, San Diego Sheriff's Office
10 (6) Deputy Sergeant Arland Boyd, Indiana State Police
11 (7) Sergeant Eugene Pierce, Trail Creek Police Department
12 (8) Perry Radatz, Regal Recovery
13 (9) Terry Grissom, Do-It-Urself Storage
14 (10) Ruth Talley, Chula Vista Self Storage
15 (11) Roberto Valandia, Pacific Commerce Bank
16 (12) Steven McAdams, Pacific Commerce Bank
17 (13) Donna Russel, Pacific Commerce Bank
18 (14) James Wall, Postal Service
19 (15) David Payne, First Bank
20 (16) Mindy Epley, First Bank
21 (17) David Rose, First Bank
22 (18) Ron Oberg, Citizens Bank
23 (19) Ed Rich, Chesterton Bank
24 (20) Barbara Valencia
25 (21) Jerry Gallion
26 (22) Dorothy Gallion
27 (23) Ellen Erickson, Bordergate Recreational Vehicle Park
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1 (24) Douglas Alan Menkel

2 (25) John David Witte

3 Additional witnesses may be called, if necessary.

4 IV

5 EXHIBITS

6 The Government intends to utilize several hundred exhibits
7 during its case-in-chief. A detailed exhibit list accompanied
8 by copies of all exhibits will be provided to the defense prior
9 to trial. In addition, the defense has been notified that it
10 can examine prior to trial any, and all, Government exhibits or
11 other documents recently obtained pursuant to subpoenas.

12 V

13 DISCOVERY

14 The Government has turned over several hundred pages of
15 discovery to date. However, after the last hearing on
16 January 21, 1985, it became clear that certain documents, as
17 well as the reports of the Government experts, would not be
18 available until immediately prior to trial. The defense was
19 promptly informed of this fact, but nevertheless repeated their
20 desire to proceed to trial on the 12th of February. This
21 decision was made by the defense with full knowledge that the
22 Government had to schedule many out-of-state witnesses. These
23 witnesses began arriving on February 8, 1985.

24 It should also be noted that the grand jury testimony of
25 Special Agent Davis was inadvertently not provided to the
26 defense. This mistake will be rectified prior to trial.

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VI

LEGAL ISSUES

A. Charts

The Government intends to utilize charts and summaries during trial, including its opening statements. These charts will be based upon evidence admissible at trial, see United States v. Gardner, 611 F.2d 770, 776 (9th Cir. 1950), and opposing counsel will have the opportunity to challenge the facts represented. See United States v. Krasn, 614 F.2d 1229 (9th Cir. 1950); United States v. Abbas, 504 F.2d 123, 124-125 (9th Cir. 1974). See also United States v. Churchill, 483 F.2d 268, 274 (1st Cir. 1973), and United States v. Rubino, 431 F.2d 284, 289-290 (6th Cir. 1970), specifically sanctioning the use of demonstrative evidence in opening statements.

B. Conspiracy

Although these issues were not specifically raised during pretrial motions, the Government feels constrained to note that this is a conspiracy case and, accordingly, we intend to offer, inter alia, the following evidence:

(1) Statements made by Hilma Marie and Eric prior to their arrest, indicative that Elaine was alive and well. These statements were made to friends, bank employees and police officers. The Government will limit such statements to those made during the course and in furtherance of the conspiracy. See Rule 801(d)(2)(e), Federal Rules of Evidence; United States v. McCoull, 711 F.2d 1441, 1449 (9th Cir. 1983); United States v. Federico, 658 F.2d 1337, 1342 (9th Cir. 1981).

1 (2) Actions of the coconspirators done in furtherance
2 of the conspiracy. See United States v. Giese, 587 F.2d 1170,
3 1197 (9th Cir. 1979), cert. denied, 444 U.S. 979 (1980). In
4 this regard, we note that although the indictment lists 23
5 overt acts, we do not intend to limit our case thereby. Indeed,
6 the Government will introduce evidence from four different banks
7 to show how the defendants carried out their conspiracy. This
8 evidence will, by necessity, document the monies flowing in and
9 out of these accounts for approximately one year prior to and
10 one year following Elaine Witte's death.

11 Courts have consistently allowed such evidence:

12 There is general agreement that the Government
13 is not limited in its proof at trial to those overt
14 acts alleged in the indictment. E.g., United States v. Quesada, 512 F.2d 1043, 1046 (5th Cir.
15 1975), U.S. appeal pending; United States v. Clay,
16 495 F.2d 700, 706 (7th Cir.), cert. denied, 419
U.S. 937, 95 S.Ct. 207, 42 L.Ed.2d 164 (1974);
Napolitano v. United States, 340 F.2d 313, 314
(1st Cir. 1965).

17 Adano v. Kearney, 534 F.2d 31, 38 (3d Cir. 1976). As similarly
18 stated:

19 We have held before that the government is not
20 limited to overt acts pleaded in proving a
21 conspiracy. It may show other acts of the con-
spiracy occurring during the life of the conspiracy.

22 United States v. Quesada, 512 F.2d 1043, 1046 (5th Cir. 1975).

23 Moreover, such evidence need not in itself be criminal where,
24 as here, its function is to demonstrate that the conspiracy is
25 operative. United States v. Andreen, 628 F.2d 1236, 1245 (9th
26 Cir. 1980); United States v. Buckner, 610 F.2d 570 (9th Cir.
27 1979), cert. denied, 445 U.S. 961 (1980).

1 C. Prior Similar Acts

2 Due to the fact that all financial transactions are
3 admissible as acts in furtherance of the conspiracy, see
4 Andreen, supra, at 1248, the Government need not introduce prior
5 similar act evidence. We do note, parenthetically, that
6 defendants' financial transactions prior to their arrival in
7 California would also be admissible as prior similar acts. Such
8 evidence is admissible within the discretion of the trial court
9 so long as the probative value outweighs the prejudice and it is
10 relevant. United States v. Marshall, 526 F.2d 1349, 1360-1361
11 (9th Cir. 1972); People of Territory of Guam v. Camacho, 470
12 F.2d 919 (9th Cir. 1972). Moreover, in a conspiracy prosecution,
13 the Government is afforded considerable leeway regarding
14 evidence of other offenses. United States v. Bonanno, 467 F.2d
15 14, 17 (9th Cir. 1972).

16 Rule 404(b) is not a rule of exclusion, and evidence should
17 be admitted unless it is relevant only to bad character and for
18 no other purpose. United States v. Riggins, 539 F.2d 682, 683
19 (9th Cir. 1976) (holding that relevant evidence is not to be
20 excluded because it fails to meet a similarity requirement).

21 The law is also well settled that evidence of acts ante-
22 dating the conspiracy is generally admissible if it bears "on
23 the existence and purpose of the conspiracy and the significance
24 of later behavior." United States v. Crockett, 514 F.2d 64,
25 72 (5th Cir. 1975); United States v. Fino, 478 F.2d 35, 38 (2d
26 Cir. 1973), cert. denied, 417 U.S. 918 (1974). The Ninth
27 Circuit has specifically allowed such evidence, over charges
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1 that it was prejudicial, when it was relevant in showing a
2 defendant's motive for arranging a future false transaction.

3 See United States v. Kenny, 645 F.2d 1323 (9th Cir. 1981).

4 Further, defendant's action, if prior to the conspiracy, would
5 also be admissible as showing a pattern, i.e., modus operandi.

6 United States v. Hasley, 465 F.2d 968 (9th Cir. 1972).

7 D. Case Agent

8 Pursuant to Rule 615(1) and (2), Federal Rules of
9 Evidence, the Government will designate Detective Sergeant
10 Arland Boyd as its case agent, and therefore objects to any
11 motion to exclude him. See generally Powell v. United States,
12 208 F.2d 618 (6th Cir. 1953) (where Cincinnati police officer
13 was Government case agent). Although not necessarily mandated
14 to do so, he shall be the only governmental agent to serve in
15 this capacity. See United States v. Causey, 609 F.2d 777, 778
16 (5th Cir. 1980).

17 VII

18 JURY INSTRUCTIONS

19 The Government's proposed jury instructions are attached
20 herewith. The Government submits these special instructions
21 with the understanding that the Court will instruct the jury
22 on general matters such as reasonable doubt and the province of
23 the court and jury.