



Office of the Attorney General
Robert J. Del Tufo, Attorney General

News

FOR IMMEDIATE RELEASE
October 11, 1991

FOR FURTHER INFORMATION CONTACT:
Ann Crawford (609)292-4791

Attached is the report of Attorney General Robert J. Del Tufo
on the COMSERV case in Atlantic City.

-30-

New Jersey State Library

Report of the Attorney General -
COMSERV

1.

Introduction

Following the recent trial in Mays Landing of Messrs. Harris, Dorn, McCurdy, Shabazz, Colette, Mosee, Orsatti and Wolf, which resulted in the conviction of only Mr. Dorn, I commissioned an internal review of the case record. Review of a trial, investigation or other matter that fails to achieve expectations is a normal and usual procedure. It is the best means of ascertaining what event or events caused the unsatisfactory result and what corrective measures, if any, should be implemented.

The review went beyond the ordinary because of the heated and emotional reaction that the results generated. Though comparatively infrequent,¹ prosecutions have reached unsuccessful results in the past and have not evoked such constant and prolonged attacks, including apparent assaults upon the integrity of law enforcement. The nature and intensity of the reaction triggered a decision on my part to go somewhat beyond what might be considered the routine. Accordingly, in addition to

1. For example, since 1986 there have been 134 convictions and 25 acquittals in corruption matters prosecuted by the Division of Criminal Justice.

soliciting and receiving reports and information from management and staff personnel familiar with the case, I also requested and received a report and information from the current Superintendent of State Police concerning the matter; and, further, I assigned senior attorneys and investigators who had not been involved in the investigation or trial to conduct their own inquiry into the handling of the case, to evaluate what had occurred and to report to me. That effort -- which included an analysis of consensual recording authorizations, consensual recordings and transcripts, State Police reports, investigative and prosecution memoranda, grand jury transcripts, and those portions of the trial record which were available -- has been completed.

Ordinarily there would not be comment forthcoming from me or from my office concerning the results of an internal review and/or evaluation. As stated above, the process is undertaken for internal management purposes. Moreover, I consider it generally inappropriate to debate the merits of a case in public after it has been decided by a judge or a jury. After all, it is truly irrelevant whether or not one believes the evidence was sufficient or insufficient or whether or not one believes the court's rulings were correct or incorrect. And usually it just does not seem appropriate or fair to rehash the allegations and the proofs and the events leading to the result that was reached.

The present matter constitutes an exception to this rule.

Certain defendants and their attorneys have seen fit to make extensive, bold and sweepingly disparaging comments about the trial, about the investigation and about state law enforcement in general. In essence they have charged that the prosecution was tainted by misconduct and incompetence, specifically alleging, among other things, lack of supervision of the undercover witness, insufficient evidence to support the charges, and a racially biased motivation and cast to the investigation and the prosecution. These charges have commanded media attention and have, in turn, triggered both criticism of law enforcement and various outcries and requests by some media and some public officials for special inquiries and for other forms of relief. In these circumstances, a response is appropriate and necessary. Law enforcement institutions that have functioned effectively and professionally for decades have been assaulted. Public confidence demands an objective review as well as a candid and public evaluation. I shall do so responsibly with regard to the fact that an appeal is pending from determinative rulings of the trial judge made during the course of the trial, that there are other cases related to the investigation under scrutiny awaiting trial and that, at this juncture anyway, seven defendants stand acquitted. These facts alone require me to eschew a detailed summary of the evidence and thus to treat the subject in general terms. I am, however, confident that this approach will be more than adequate to satisfy the task.

Summary of Conclusions

Based upon the reports submitted to me and my review of them, I offer the following summary of conclusions reached:

The refusal of the then leadership of the Division of State Police to work cooperatively with Division of Criminal Justice management to give focus and direction to the inquiry prevented the full development and maximization of investigative opportunities.

The manner in which the arrests of the defendants were effectuated, and the orchestrated publicity attending the events, were outrageous, improper, and unprofessional. The arrests and the widespread publicity about the case had a deleterious effect upon further pursuit of the investigation and upon the development of further evidence for presentation to both a grand jury and a trial jury.

While the full development of evidence was hampered by the lack of cooperation mentioned above and by the timing and manner of the arrests, the investigation was nonetheless properly commenced, legally supportable, and was conducted without any racial motivation or prejudice.

The grand jury presentation was fair and proper. It included an opportunity for each defendant, through his attorney, to identify exculpatory evidence for submission to the Grand Jury. All evidence so identified was in fact presented to the Grand Jury. The use of the racketeering statute to frame charges was proper and appropriate.

Notwithstanding all of the problems which plagued the investigation, evidence was developed which supported pursuit of the prosecutions and which could have supported conviction of the defendants on the stated charges.

Had the trial court not made what I believe were erroneous and untimely legal rulings concerning the bribery statute, and had the State better prepared itself and its witnesses for trial, the results of the trial could have been different.

3.

Discussion

(A) Problems in The Investigative Process: The blend of legal, factual, tactical and strategic questions and considerations which attend virtually every complicated investigation, particularly those involving undercover operatives in a corruption, white collar crime or organized crime context, insists upon investigators and attorneys performing in concert.

Among other things, such cooperation is essential in order to maximize investigative opportunities and to both recognize and respond to as many directly incriminating words and actions as possible from potential defendants. Prompt investigator/attorney review and analysis of undercover investigative developments, coupled with firm and effective direction of the undercover witnesses, can lead to a well structured investigative plan that will bolster previous incriminatory conversations and conduct. Firm and effective direction to the undercover witness is essential.

Effective cooperation was often lacking here. The full potential of investigative opportunities was not realized because of the failure of State Police and Criminal Justice personnel, particularly at the management level, to work together. The problem was caused by the attitudes of the then State Police leadership -- particularly the then Superintendent -- who regarded it as their exclusive prerogative to conduct and oversee the investigation without attorney input. They resisted virtually every entreaty by Criminal Justice management and every order by the Attorney General to act differently.² Attorney

2. Complicating the problem was the fact that the case investigator who had primary responsibility for the handling of evidence and for the coordination of surveillances and recordings did not have primary informant contact and supervision. Such contact and supervision were mainly provided by the supervising Lieutenant of the Casino Intelligence Unit who was somewhat removed from the day to day scene. Follow-up on leads would often not be decided in timely fashion and often without the input of those in the field who were more closely attuned to

personnel did not have adequate access to information needed to participate meaningfully in shaping the course and substance of the covert investigation. This made it inevitable that direction and control of the undercover witness would be -- and was -- both less efficient and more unfocused than desirable. Such realities also virtually insured that review and analysis of breaking developments in the matter would sometimes not be meaningfully exploited. Indeed, authorization to record potential future encounters generated by such case developments was often untimely sought and then without a plan capable of fully developing investigative opportunities. Such problems could have been minimized had briefings and debriefings of the undercover witness been conducted both before and after investigative events by investigative and legal personnel (and tapes quickly reviewed and transcribed) so that investigative strategies could have been discussed meaningfully with their superiors and a plan of action better developed and more effectively implemented.³

Beyond this, it is clear that the undercover witness,

(Footnote 2 continued from previous page)
events. These people included the Supervisor and his superiors -- the Major in charge of Intelligence, the Lt. Colonel who served as chief executive officer and the then Superintendent. Further, the Criminal Justice Deputy Attorney General assigned to the investigation was not as assertive as he should have been in insisting on first hand, timely access to information and on participating in management of the case.

3. Many of the tapes were generated by transmitter and so law enforcement field personnel were at least able to listen contemporaneously to what was occurring.

while a person of long-standing ties to Atlantic City who was gainfully employed and who, unlike many cooperating witnesses, had neither a criminal background nor was receiving any payment or other consideration in exchange for his cooperation, had the makings of a vulnerable witness for a case of this type. His recordings portray a person who talks too much, who interrupts the targets' responses and who occasionally unwittingly diverts targets from continuing to discuss incriminatory topics. All of these factors, which could have been minimized with proper oversight, gave ammunition to the defense when the cooperating witness took the stand and the skillful assault of defense counsel was effective in undermining Mr. Black's standing and credibility with the jury. Assuredly, law enforcement is often not provided with the luxury of choosing its undercover witnesses and must work with what circumstances dictate; but a more direct and active role in witness preparation, and overall cooperative management by the Divisions of Criminal Justice and State Police, would have lessened many of the problems.

Finally, it should be noted that the decision to arrest the defendants exacerbated the above problems. An orderly grand jury presentation, without arrests and the publicity that attended them, might well have given the State significant further advantage. Such an approach would have afforded the opportunity to confront potential targets and to solicit and receive their cooperation. Such opportunities were lost because of the arrests. Moreover, the content and extent of the

publicity surrounding the arrests, and the affidavit submitted in support of the issuance of the complaints and arrest warrants, revealed the entire case and therefore had a debilitating impact upon any meaningful continuing grand jury investigation. Indeed, there were instances in which potential witnesses showed knowledge of the factual underpinning of the State's proofs simply by virtue of having "read the newspapers". The deputy attorney general presenting the case was thus often deprived of the opportunity to elicit the unalloyed testimony of these witnesses and thus possibly to elicit further incriminating evidence.

(B) The Arrests: Aside from their negative impact upon the content and effectiveness of the State's investigation, the arrests warrant further discussion.

Preliminarily, it must be noted that it is somewhat unfair to evaluate the decision to proceed with arrests from the luxurious perspective of hindsight. One truly does not know how circumstances appeared at the time and what information had been presented to justify the arrest procedure.

Arrest warrants were sought and issued for the

defendants in this case on July 26, 1989.⁴ The quest for warrants rather than the use of summonses finds but marginal justification under the guidelines set down in Court Rule 3:3-1(b). But it was the execution of the warrants, not their quest, which truly created significant problems. The manner of execution was outrageous and unprofessional, involving daybreak raids of defendants' homes in a circus-like atmosphere complete with parading the shackled targets before cameras and reporters into the armory for processing. These events, coupled with the advance notice which the press had about the upcoming display, are in my view unacceptable and reprehensible. The thrust and impetus not only to make arrests but to undertake them in this fashion must be laid largely at the door of the former State Police leadership, particularly at the feet of the then Superintendent.⁵ Indeed, in a grotesque turn to the theatrical, the then Superintendent even pressed to undertake the arrest of Mayor Usry himself and had to be specifically deterred by the Attorney General.⁶

4. The probable cause was provided by the information contained in an affidavit executed by Detective Kirvay on July 26, 1989. Analysis of the facts contained in this affidavit show that it contained no statements which were known or believed to be false at the time, though of course the facts were attacked at trial by cross-examination of witnesses.

5. Criminal Justice management must bear part of the responsibility because they failed to persist in their initial opposition to the idea of arrests at all.

6. As it turned out, the Executive Lt. Colonel took part in the arrests.

(C) The Conduct of the Investigation: All this having been said, it is still clear that the investigation was properly commenced and proceeded upon a legally supported basis without any racial or other extraneous influence to distort it. The allegations that Mr. Black selected his own targets and did so along racial lines are not true.

The investigation began after Mr. Black, the State's key witness, reported to the New Jersey State Police that he had been approached on November 28, 1988 by two of the defendants -- Messrs. Harris and McCurdy -- who claimed they could influence Zoning Board members to favorably reconsider his previously rejected application to refurbish and operate a gas station in Atlantic City.

It should be emphasized again here that Mr. Black was a gainfully employed individual, with roots in Atlantic City and without a criminal background and who was not seeking any recompense in exchange for his cooperation.

Moreover, the credibility of his report was bolstered by the fact that Mr. Harris, among others, was already under investigation for an unrelated but similar scheme involving influence peddling on other Atlantic City zoning matters. Mr. Harris was subsequently indicted and convicted of bribery and conspiracy for his part in this scheme and has been sentenced to a prison term of 8 years. Parenthetically, the trial judge in

this case interpreted the bribery statute differently and, in my view, correctly, thereby permitting the prosecution to proceed to jury conclusion. The interpretation was directly opposite to the rulings of the trial judge in this case.

As a result of the approach and offer of Messrs. Harris and McCurdy, Mr. Black was authorized to record conversations with these men only. Recorded conversations included discussions of a cash \$25,000 payment to them in exchange for their assistance with the Zoning Board application. In other early recorded conversations, Messrs. Harris and McCurdy introduced the names of other individuals who would be influential in furthering the scheme. This led to meetings with these individuals and to authorized recorded conversations with them as well. Each of the individuals who was ultimately charged as a result of this investigation either approached Mr. Black directly or was introduced to him by the other defendants under circumstances which were corroborative of their involvement in the criminal enterprise. Thus, it is not accurate to state that Mr. Black was allowed to pick his own targets. Nor is there any evidence to suggest that he may have targeted or entrapped any of the defendants because of racial bias. Individuals became involved by their own initiative or through that of other targets, all in accord with the flow and development of the investigation. Moreover, defendants were both black and white as were several other individuals who were subject to the investigation but were never charged.

Nor is it accurate to state that Mr. Black was unsupervised. While the lack of cooperation and other matters noted above impeded the fullest and best development of investigative strategies and incriminatory evidence, the State Police personnel assigned to the investigation were aware of and approved all recorded meetings between Black and the defendants. While some chance encounters and conversations were not approved or recorded, such occurrences are unavoidable in an investigation in which a cooperating witness is operating undercover for a lengthy time period and dealing with many people. Black's capacity to turn his recorder on and off was necessary since he was only authorized to record conversations with specific individuals after it had been determined that there was reasonable suspicion to believe that they might be involved in criminal activity. Parenthetically, the record confirms that each of the consensual recordings was properly authorized based upon legally sufficient information which was set forth in each of the applications for such approval.

Some criticism has been directed at the use of Mr. Black to gather evidence rather than use of an undercover State Police officer. All those involved with this investigation would have preferred that the evidence gathering role be conducted by a police officer or that an undercover police operative be injected into the scheme to work along with Mr. Black. Both alternatives would have enhanced investigative strategy and would have

undercut fertile ground for cross-examination at trial. But neither was feasible. At the time of the investigation, Mr. Harris and others were the targets of a separate Grand Jury probe concerning influence peddling with this same Atlantic City Zoning Board. That Grand Jury investigation and the fact that tape recordings were made by an undercover State Police detective were widely publicized by the local press in late 1988 and early 1989. In fact, several of the defendants commented about that Grand Jury investigation and the undercover police officer on the tapes in this case. It was clear that these defendants would never have trusted a new personality in this atmosphere and, indeed, showed a distinct preference for dealing with Mr. Black whom they had known for years.

(D) The State of the Evidence: The investigation lasted for several months and led to the acquisition of a considerable body of evidence which justified charging the defendants with criminal acts and which could have supported their convictions. There were numerous meetings, numerous recorded conversations of an incriminating nature and several cash payments by Mr. Black totaling more than \$32,000. Mr. Black's application to operate a gas station, which had been previously rejected, was in fact reconsidered and approved. Although some of the conversations and transactions were arguably subject to differing interpretations, it is common that individuals who are acting illegally are intentionally vague in their criminal conversations. In this case, there is substantial

evidence that certain defendants were apprehensive about the investigation and tailored their remarks to avoid clear incrimination.

One should also bear the following points in mind when assessing the weight and quality of the evidence:

(1) A detailed affidavit summarizing the evidence against each defendant was prepared in support of the complaints and of the issuance of warrants and was found sufficient by a Superior Court judge to establish probable cause to believe that the defendants had committed the offenses which were alleged.

(2) The evidence was reviewed by a State Grand Jury during a fair and objective presentation which included the introduction of exculpatory evidence known at the time.⁷ The Grand Jury found probable cause as well and voted to return the indictments against the defendants. The action was deliberate and selective. There were other potential defendants, both black and white, whom the Grand Jury decided not to indict.

7. Fair and objective grand jury presentations are required in this State by both law and policy. Indeed, judicial directives foreclose a prosecuting attorney from even stating an opinion to the grand jury concerning the case or the evidence and assuredly from attempting to influence the grand jurors' ultimate decision. The requirement that grand jury proceedings (except deliberations by the grand jurors alone) be stenographically recorded and transcribed and that copies of the transcript be given to defense counsel and to the court provide a comprehensive basis for scrutiny and oversight so as to insure the rules have been abided.

(3) Each defendant, through his attorney, was provided an opportunity to identify exculpatory evidence and to have it presented to the Grand Jury. All exculpatory evidence so identified and so requested by the defense to be presented to the Grand Jury was in fact presented.⁸

(4) After the return of the indictments, extensive and complete discovery was provided to the defendants. Pretrial motions to dismiss the racketeering charges against all the defendants were filed and dismissed after legal argument. Motions to dismiss all charges against two of the defendants (Messrs. Shabazz and Orsatti) on sufficiency of evidence grounds were also denied.⁹

(5) A petit jury -- notwithstanding the damage done to the case by the court's rulings concerning the bribery statute and by the skillful cross-examination and other work of all

8. This includes the letters related to defendant Orsatti.

9. It is important to note that other legal challenges to the indictment, which could have and should have been made at that time and which included the assault based upon the court's later interpretation of the bribery statute, were not made by the defendants. For that matter, the argument involving the bribery statute was never raised by the defendants but raised by the court on its own motion. The action occurred at the most inappropriate and prejudicial time of all -- the end of the State's case. Had the Court acted pretrial or after a jury verdict there would be no cloud whatsoever on the State's right to seek appellate redress without running afoul of double jeopardy strictures.

defense counsel -- did convict Mr. Dorn.

(E) The Racketeering Charges: The charges brought under the racketeering statute were in conformance with existing Department guidelines. Use of the racketeering statute was appropriate under the circumstances presented here. Four different schemes were alleged, each having a common thread -- namely that each required official action by the Atlantic City Council or the Atlantic City Zoning Board. Alleging that the defendants had used this "Council-Zoning Board" enterprise for a pattern of illegal activity was appropriate. And, notwithstanding the investigative problems mentioned above, the prosecution could have been more successful had the trial court not, in my view, incorrectly interpreted the bribery statute as it did, thereby eliminating some of the major predicate crimes charged in the case, and had the State's trial team performed in better fashion.

(F) Trial Court Rulings: At the conclusion of the State's case, the trial court raised, on its own motion, questions concerning the bribery and gift to public servant counts of the indictment.

The manner in which the Court ruled on these issues eliminated most of the fertile charges of specific crimes in the case and gutted the racketeering charge by vitiating the predicate offenses.

The Court reasoned that, to be guilty of bribery or of illegally receiving gifts, the defendant had to have actual legal authority to officially influence the decision or action for which he was bribed or for which he took a gift. Here, that theme translated into a requirement that a bribe or gift accepting defendant had to be a member of the Atlantic City Zoning Board.

In my opinion, the rulings were incorrect.

First, there is substantial authority in New Jersey and elsewhere that, in order to be convicted of bribery, a public official need not have legal jurisdiction over the events he has agreed to influence in return for money. State v. Begyn, 34 N.J. 35 (1961), decided under the similar 2A bribery predecessor to N.J.S. 2C:27-2, holds that the absence of jurisdiction or of other legal capacity on the part of a public official to accomplish a corrupt act by criminal means is no defense to a charge of bribery. This fundamental precept regarding bribery extends back to the 1800s. State v. Ellis, 33 N.J.L. 102 (Sup. Ct. 1868). And the very language of the statute itself (2C:27-2), points to this result as well:

"It is no defense to prosecution under this section that a person whom the actor sought to influence was not qualified to act in the desired way whether because he had not yet assumed office or lacked jurisdiction or for any other reason".

It is significant to emphasize again here that in the earlier and successful prosecution of Mr. Harris for engaging in a bribery scheme similar to the one involved here, a different trial judge ruled in opposite and correct fashion on the same issue.

Second, in my view the rulings were inappropriate in terms of timing. A motion to dismiss counts based on lack of capacity, authority or jurisdiction to accomplish the corrupt end should have been brought either pre-trial or post-trial. R. 3:10-3 advises that if an indictment fails to charge an offense, a motion to dismiss must be raised before trial or within ten days after the verdict. This process establishes a means that avoids any possible bar of double jeopardy. If the issue is raised and decided during the course of the trial, the State will undoubtedly face a double jeopardy argument if and when it pursues an appeal from the trial court's action.¹⁰ The timing of the court's action here was in my view both legally incorrect and otherwise unfortunate.

(G) Trial Preparation and Presentation: An attorney from the Trial Section of the Division of Criminal Justice was assigned to the case as lead counsel shortly after the return of the indictment. Because of the factual and legal complexities of the charges, largely framed as they were in a racketeering

10. The issue turns essentially upon whether the determination was legal in character or whether it was made on the factual merits.

statute setting, lead counsel was given an extensive period of time to ready the case for trial.¹¹ Notwithstanding the time and responsibility extended to him, lead counsel never came to comprehend fully the factual and legal underpinnings of the case. A variety of factors may have contributed to this result. Counsel had not participated in the investigation and was unfamiliar with the facts when he was assigned to the case. The complex racketeering context was something with which he (and, for that matter, other Trial Section attorneys) were generally not familiar. There also seems to have been a failure to invest the effort required in such a complex case to properly understand and organize the evidence. As a result, counsel was unable to provide guidance to the Court and jury as to the links and interrelationships of taped conversations and also failed to introduce important information into evidence. He was unable to help the trial judge when the court was struggling to understand fully and clearly the State's legal theory and the evidential parameters of the State's case. And he was unable to adequately prepare the State's witnesses -- particularly Messrs. Black and the case investigator¹² -- for both direct and cross-examination.

11. A supervising trial attorney was assigned as well a few months prior to trial to oversee lead counsel with respect to preparation and to gaining command of the subject matter. He was not able to effectively do so.

12. The case investigator was the State's first witness and was particularly harmed by the lack of preparation. He was called to sponsor into evidence composites of the tape recordings made by Albert Black during this investigation. His cross-examination was devastating and forms a basis for some of the criticism to which this report is addressed.

This failure assisted the skillful and resourceful defense counsel who were involved in the case in what proved to be most effective cross-examination in attacking the credibility of the State's witnesses. In short, lead counsel was unable to adequately or effectively present the State's case and to rise to defend the State and the charges when either or both were questioned and/or subjected to defense attorney assaults.

4.

Conclusion

Looking forward, good, working State Police/Criminal Justice management relationships have been restored through understanding, trust, respect and communication between current State Police leadership, the Attorney General, and leadership representatives of Criminal Justice. Moreover, the Division of

(Footnote 12 continued from previous page)

Primarily, the case investigator's testimony left the false impression that Albert Black acted as a "free agent" of the State Police and had constant and unsupervised access to recording equipment. The erroneous and damaging impression left with the court and jury was of a civilian free to choose the time, setting and content of recorded conversations. A prime example of this problem is the timely assessment and monitoring of recorded encounters. The record reveals that the vast majority of tapes were generated via transmitter; they were thus listened to contemporaneously by law enforcement. During his testimony this point was never clearly made. In sum, the case investigator appears to have ultimately adopted propositions (put forward during cross-examination) which were both damaging and incorrect. One cannot authoritatively say whether subsequent witnesses were able to counteract this terrible first impression but one also cannot help but conclude that the State's case began with a devastatingly negative impression.

Criminal Justice is converting to a format of vertical prosecution, a regimen in which the attorney in charge takes a case from beginning to end, from investigation to grand jury to trial. This facilitates absorption in the factual and legal circumstances and a better chance to achieve complete mastery of the subject matter.

