UNITED STATES GOVERNMENT

Memorandum

TO : Benjamin R. Civiletti
Deputy Attorney General

DATE: November 28, 1978
PBH:PNG:es

FROM : Philip B. Heymann
Assistant Attorney General
Criminal Division

SUBJECT: Select Committee on Assassinations - United States House of Representatives; John Ray; Perjury

Your memorandum of October 13, 1978, asked that I review the question of the materiality of John Ray's allegedly false testimony before the House Select Committee concerning his participation in five bank robberies from October 1969 to October 1970. Of particular concern is the materiality of Ray's denials of participation in the Meredosia, Illinois robbery and the Laddonia, Missouri robbery, since those are the two instances (other than the St. Peters robbery for which Ray was convicted) where we will be able to satisfy the "two-witness" rule for perjury prosecutions.

My overall conclusion is that the government probably would succeed in demonstrating sufficient materiality to satisfy the materiality requirement of 18 U.S.C. §1621, despite the unfavorable case law in this District. (Reduced to odds, I'd say a slim 50 to 55 percent chance of winning.) The materiality question is close enough that I still have some substantial doubts about going ahead with further grand jury proceedings. As Earl Silbert has observed, we ordinarily don't prosecute perjury cases arising from grand jury or

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trial proceedings unless they're open and shut affairs. That policy is in part simply a question of resource allocation, but I would approach any variance from it cautiously, even in the different context of Congressional hearings where the materiality standard may be looser. The deference that may be generally due a Congressional committee's own evaluation of the importance of testimony to its inquiry is counterbalanced in this case by the troubling indications we have had from Committee Counsel Blakey that the perjury referral may have been motivated in part by the hope of inducing James Earl Ray to cooperate with the Select Committee, a purpose that raises serious due process problems, cf. Bordenkircher v. Hayes, slip op. at p. 7 n.8. Because of the problem of clarifying motive I would apply our usual standard for materiality, and I think, if the decision were mine alone, would elect not to go ahead. The question is a close one, however. A judgment call made the opposite way can muster worthy arguments and would of course have my full support.

1. The Select Committee's Three Theories of Materiality.

The bank robberies on which a perjury prosecution would be founded all occurred after James Earl Ray was recaptured in June 1968. Nonetheless, the Select Committee has suggested three possible issues to which John Ray's false denials of

participation in the bank robberies occurring in 1969 and 1970 were material. Those issues are:

a. John Ray's possible participation in a July, 1967 robbery of the Bank of Alton, Alton, Illinois. Such participation, occurring only a few months after James Earl Ray's April 1967 escape from the Missouri State Penitentiary, would provide a possible explanation of how James Ray financed his 14-month fugitivity;

b. John Ray's general credibility as a witness;

c. The adequacy of the earlier investigations by the FBI and Department of Justice into the assassination of Dr. King.

In my estimate, the first theory of materiality (participation in the Bank of Alton robbery) is the strongest.

The credibility theory is shaky for two reasons. A Congressional committee's assessment of a witness' character for truthfulness would not likely be much affected by whether the witness was a one-time bank robber (St. Peters, for which John Ray stood convicted) or a three-time bank robber (St. Peters, Meredosia, Laddonia). More important, the Committee members here seemed independently convinced at an early stage of the proceeding that John Ray's testimony and feigned lack of memory on other issues was incredible. Strenuous

doubts about the truthfulness of John Ray's testimony on various issues were expressed as follows: transcript of April 17, 1978 testimony, p. 68 (Cong. McKinney), 104-105 (Cong. Fithian); transcript of April 18, 1978 testimony, p. 91 (Cong. Dodd), 110-110a (Cong. Fithian), 112-113 (Cong. Edgar), 113-114 (Cong. Fauntroy). Though I fully concur with Earl Silbert's observation that a Committee's receipt of even abundant independent information on an issue (such as credibility) does not alone prevent a finding of materiality as to cumulative information (on this, I disagree with my General Crimes Section), nonetheless the Judge Keech opinions in United States v. Icardi, 140 F. Supp. 383 (D.D.C. 1956) and United States v. Cross, 170 Supp. 303 (D.D.C. 1959), and also the opinion in United States v. Provinzano, 333 F. Supp. 255 (E.D. Wis. 1971) support the compatible and not unsensible conclusion that, at the limit, materiality cannot be found if an inquiring body has in fact already reached its ultimate conclusions about the issue absent the perjurious testimony. Unlike Earl, I do not read Weinheimer v. United States, 283 F.2d 510, 512 (D.C. Cir. 1960) as disavowing this earlier Keech case law, since in Weinheimer the court noted that the challenged questions might be relevant not only to the already established violations of Interstate Commerce Commission reporting rules, but also to largely unexplored Taft-Hartley and racketeering offenses. Given this Keech/Provinzano

case law, the "credibility" theory of materiality could face tough sledding, given the Committee's early expressions of disbelief of John Ray's testimony.

As to the third materiality theory, the connection between John Ray's participation in bank robberies and the adequacy of earlier DOJ/FBI investigations into the assassination, I disagree with Earl's conclusion that only an exploration of "who was questioned" and the "questions asked" was germane to the Committee's evaluation. The answers that might have been yielded by omitted lines of inquiry, even though evaluated in hindsight, certainly are useful in judging how important the omissions were. Thus, the apparent failure of the original FBI investigation to look into John Ray's 1969 - 1970 bank robbery activity would be more important or less important according to what that bank robbery activity consisted of and what it was probative of. However it is likewise apparent that this third materiality theory is not really independent of the first materiality theory: John Ray's participation in 1969 - 1970 bank robberies was an important omission in earlier FBI inquiries only if those post-fugitivity robberies could shed light on the question of James Earl Ray's financial support via the Bank of Alton robbery.

2. The Bank of Alton Theory

The first theory of materiality -- the attempt to use the later robberies to show John Ray's possible participation in

the earlier Bank of Alton robbery -- has serious problems, but in the end might be viable.

(a) Inapplicability of Rule 404. I agree with Bob Blakey that a Congressional committee is not confined to the strict standards of Federal Rule of Evidence 404[1/] in drawing connections between an individual's later episodes of misconduct and an earlier disputed episode. Hence, even if there is no common modus operandi between the Alton robbery and the later robberies, nor any possibility of developing one, the later robberies are still conceivably material. Rule 404 by its terms applies only to trial proceedings. One of the main reasons for the rule is the fear of prejudice -- of subtly inducing the fact-finder, be it jury or judge, "'to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.'" Advisory Committee Note on Rule 404. The problem of prejudice is not operative to the same degree in a legislative investigation where no civil or criminal liability hangs in the balance. Introspection will reveal that in everyday life we often use circumstantial "character evidence" in our commonsense evaluations. If

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1/ Rule 404 provides in pertinent part:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

someone has frequently robbed banks in a later time period, even without a common modus operandi we are likelier to conclude that he committed an earlier robbery than we would be absent such frequent activity. That commonsense deviation from Rule 404 has some real force in this setting, for the information developed about the later bank robberies not only reflects on John Ray's individual propensity for bank robbery activity, but on the social milieu of the Grapevine Tavern operated by John Ray. Rogers -- who says he participated in the Liberty, Meredosia, Laddonia, and Hawthorne robberies along with John Ray and others -- rented a second-floor apartment from Ray above the Tavern and frequented the Tavern. Haines -- who says he took part in the Laddonia robbery along with Rogers and John Ray -- was a sometime employee of the Tavern. Equally revealing is that Goldenstein -- who says he took part in the Meredosia robbery along with John Ray, Jerry Ray, and Rogers, and took part in St. Peters with John Ray, Benny, and Miller -- indicated that John Ray was the moving force in each robbery, proposing the idea of the robbery and laying plans for it as well as supplying the firearms. This "moving force" portrait of John Ray is echoed by Rogers and Haines in regard to their respective robberies.

Nonetheless, I would hesitate to proceed on this non-modus operandi theory alone, for even the "commonsense relevance" of character evidence is controversial. The Advisory Committee

Note observes that "circumstantial use of character evidence raises questions of relevancy as well as questions of allowable methods of proof," and the California Law Revision Commission has similarly observed that character evidence is "of slight probative value," see Cal. Law Revision Comm'n, Rep.; Rec. & Studies 657-658 (1964). Given a trial court's usual Rule 404 constraints, a district judge is likely to be reluctant to stray too far from the requirements of Rule 404 in construing the materiality requirement of §1621.

(b) Modus Operandi. The alternative theory of relevance of John Ray's denials of the 1969 - 1970 bank robberies is their bearing on the Committee's attempt to show a similarity in the modus operandi between the later robberies and the Alton robbery. I have taken note of Earl's question whether "the evidence of lack of modus operandi based on facts not subject to change was so clear when John Ray testified that even his admission of all the [post-Alton] robberies could not establish a modus operandi." From my own review of the Committee's submission to us [consisting of Ray's 3 days of testimony; the May 22, 1978 and June 14, 1978 Committee memos; James Rogers' June 8, 1978 testimony; the May and June 1978 field interview summaries for Goldenstein and Haines, and the 4-column and 6-column comparative charts], I don't think this is the case. There are certainly no "remarkable" resemblances among the robberies, contrary to the Committee's June 14, 1978 memo. But there are some limited resemblances

that are slightly enhanced insofar as the perjury prosecution would focus on the Meredosia and Laddonia robberies in comparison to Alton:

1. All the robberies (except Hawthorne, Florida) took place within 100 miles north or northwest of St. Louis;

2. Two subjects entered the bank in each robbery except St. Peters, despite a varying total number of participants;

3. A single revolver and sawed-off shotgun were used in Alton, Liberty, Meredosia, and Laddonia;

4. Stocking masks with hats or caps were used as the disguise in all robberies;

5. A cloth bag was the receptacle for the loot in all robberies except Alton, where a cloth or paper bag was reported;

6. An attempt to burn the discarded evidence was made in the Alton, Liberty, Meredosia, and Laddonia robberies. 2/

The variations among the post-Alton robberies are not of particular concern, in my view -- one needn't find exact identity among all six robberies to conclude that there are probative family resemblances between Alton and some of the later robberies. The only singular disparities between Alton and the later robberies are the failure to use any getaway

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2/ The attempted burning of the discarded evidence in the Meredosia robbery is not reflected on the 6 column chart, but was noted by Goldenstein in his June 8, 1978 interview statement.

car in Alton and the absence in Alton of subjects with the "large noses" reported in Liberty, Meredosia, and Laddonia. Neither of those is by itself fatal to an attempted modus operandi. (For instance, Rogers explains that Ray decided not to act as an inside triggerman in Meredosia and Laddonia because of his speech impediment.)

Given the limited resemblances, however, the modus operandi theory of materiality would probably have to be that the denials of participation were material to a reasonable attempt by the Select Committee to explore modus operandi, rather than that they were material to a later established resemblance. The potential obstacle in the way of this "attempt" theory is not, I think, Earl's thought that there was a known disparity among the robberies, but rather that there was a lack of any significant detail about the Alton robbery. So far as the charts indicate, even if every known characteristic of Alton matched the later robberies, there would hardly be a set of "unusual and distinctive facts" per the requirement of Drew v. United States, 331 F.2d 85, 90 (D.C. Cir. 1964). The Committee may have had some hope of developing additional facts about the Alton robbery for matching with later robberies, but a demonstration of that possibility would seem prerequisite to any strong probability of success with the modus operandi theory.

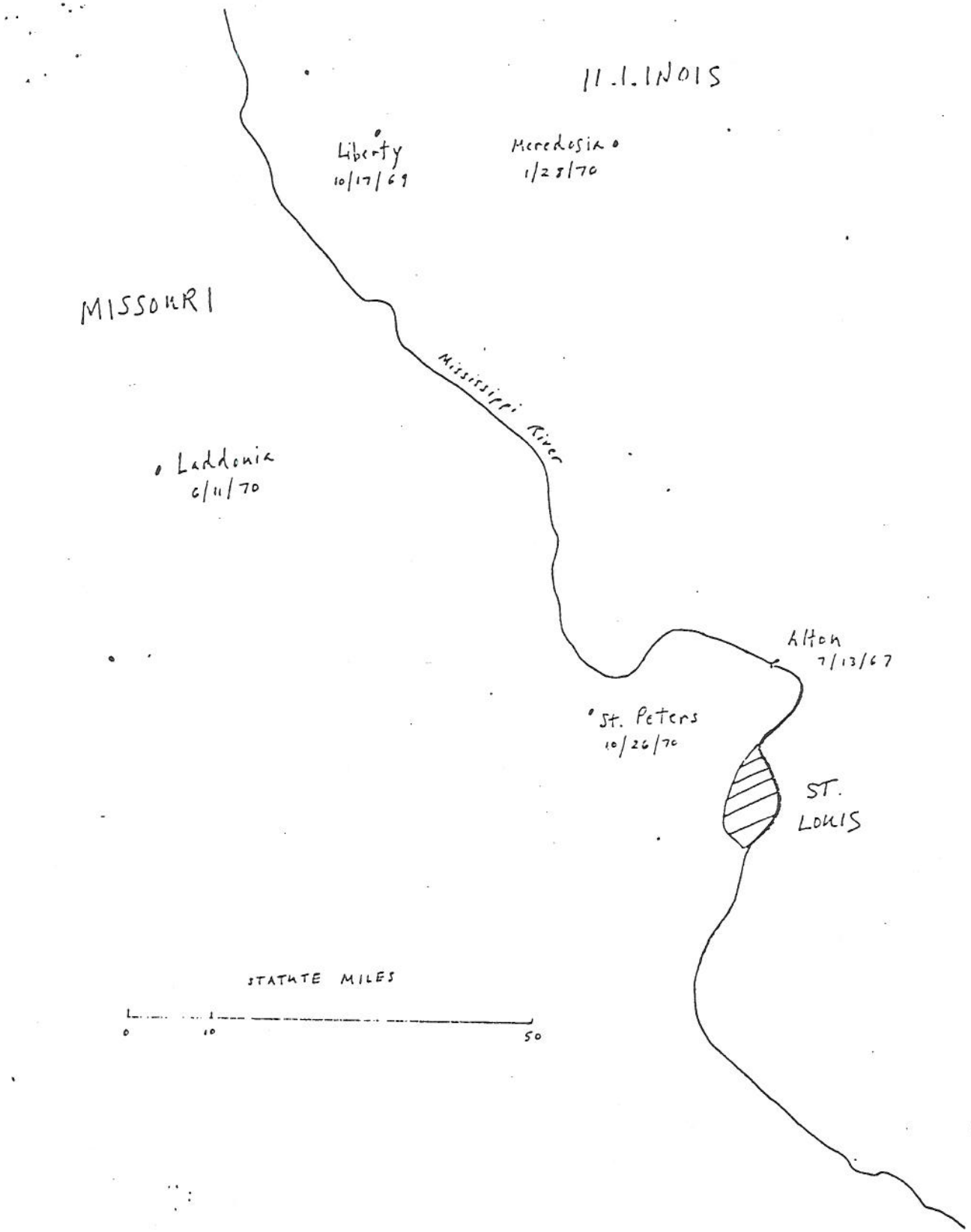
I do not discount the independent information that led the Committee to originally focus its inquiry on the Ray family's possible participation in the Bank of Alton robbery. This information was indeed suggestive (though less so as to John's participation), including (1) a 1968 statement by Jack Gowren, common law husband of the Ray brothers' mother, that James Earl had taken part in Alton; (2) the Ray brothers' acquaintance with the town of Alton through an uncle who resided there; (3) James Earl's purchase of a car within 20 miles of Alton for $200 cash the day after the robbery; (4) testimony expected from Walter Rife that John had once told Rife that he and James Earl took part in bank robberies together in 1967 - 1968 (Rife has refused to give a deposition voluntarily and, according to what Bob Blakey told me of the field interview statement, now will only testify that James Earl was said to have performed bank robberies in 1967 - 1968); and (5) John Ray's continued implausible insistence that he did not know until after the King assassination that his brother James Earl had escaped from prison 12 months earlier, despite a sudden interruption in John's pattern of visiting James Earl at the Missouri penitentiary after the escape, despite John's contact during 1967 - 1968 with his brother Jerry and sister Carol Pepper, each of whom knew of James Earl's escape; and despite James Earl's use in summer 1967 of a social security card in the name of John Rayns originally obtained by John.

In addition, it is well to recollect that a Congressional committee need not reach its conclusions by a preponderance of evidence, but can confine its task to estimating which among several competing theories is best supported by the available evidence. Even so, aided by both palliatives, the development of a reasonably distinctive modus operandi common to the Alton robbery and to the 1969 - 1970 John Ray robberies seems to have been unlikely enough even in the spring of 1978, unless an additional potential source of information about Alton is demonstrated, as to leave this a very close case under §1621.

The Committee is correct in observing that information sought in testimony can be quite distant from the center of an investigation and still qualify as material under §1621. The test is whether the testimony, given falsely, has "a natural effect or tendency to influence, impede or dissuade the investigating body from pursuing its investigation, United States v. Moran, 194 F.2d 623 (2d Cir. 1952). Materiality need only be established as of the time the answers were given, United States v. Gremillian, 464 F.2d 901, 905 (CA 5 1972), and the false answers need not actually have impeded the investigation, id., Vitello v. United States, 425 F.2d 416 (9th Cir. 1970). It is sufficient if the false answer, if believed, would have impeded the inquiry and that a minimum

of additional fruitful investigation would not have been forthcoming. United States v. Freedman, 445 F.2d 1220 (2d Cir. 1971). As the Committee notes, if the statement has an ultimate tendency to prove or disprove any material fact in a chain of evidence, it is material even though in itself it might be insufficient to establish the principal issue in the case. Doan v. United States, 202 F.2d 674 (9th Cir. 1953). It suffices if it is "a link in a chain of circumstantial evidence." People v. Perna, 20 App. Div. 2d 323, 246 N.Y.S. 2d 920 (1964). Any false statement that "detracts from or adds weight and force to testimony as to matters that are directly material" is itself material. Blackmon v. United States, 108 F.2d 572, 574 (5th Cir. 1970). The question remains in this case whether the circumstances of John Ray's later participation in the 1969 - 1970 robberies had the requisite probative bearing, or potential bearing, on the matter more directly material to the Committee's inquiry, namely, John Ray's possible participation in the Alton robbery, itself linked by a chain of materiality, still missing some links, to the principal question of how James Earl Ray obtained financing during his period of fugitivity. Because the modus operandi of the Alton robbery and the later John Ray robberies shows little likelihood of fitting a distinctive pattern, and because a fit would itself at best have tertiary

significance to the Committee's immediate focus on James Ray's finances, I would recommend, even on reconsideration, that we forego prosecution in this case.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