

Standards Relating to Discovery and Procedure Before Trial, ABA Project on Minimum Standards for Criminal Justice.

Carrasco, supra, requires the DEA to turn over to defendant an informer's diary; Goldberg requires the United States Attorney to turn over his witness interview notes, provided the witness adopts them as his own statement. The only issue left open is at what stage in the trial this Court will require production of "Jencks" material. Defendant contends that notions of fair trial guaranteed by the Sixth Amendment and due process of law guaranteed by the Fifth Amendment (in order to avoid "trial by ambush"),¹ as well as the orderly administration of justice, require this production, now, prior to the beginning of the trial, in order that defendant can adequately prepare his defense. The Fifth Circuit Court of Appeals has recognized that it is within the Court's discretion to order early disclosure, United States v. Bullock, 551 F.2d 1377 (5th Cir. 1977) (emphasis supplied), although ordinarily "Jencks" material is not subject to pretrial discovery. United States v. Nabrit, 554 F.2d 247 (5th Cir. 1977); United States v. Dotson, 546 F.2d 1151 (5th Cir. 1977).

2. As to witnesses not testifying at trial, to limit defendant's access to sworn testimony on which this indictment was based to just those persons who testify at trial may well prohibit

¹ United States v. Herberman, 583 F.2d 222 (5th Cir. 1978) and United States v. Kelly, 420 F.2d 26 (2d Cir. 1969).

the defendant's right to effective assistance of counsel in terms of anticipated cross examination (in an effort to establish inconsistencies in facts and evidence) and will also impose and impair the defendant's ability to plan trial strategy, as well as evaluate the likelihood of a successful affirmative defense (such as entrapment), which may well implicate defendant's right to be tried fairly, impartially, and consistent with fundamental notions of due process of law.

3. Moreover, precluding the defendant from access to sworn testimony of a witness, unless called by the government, creates a situation whereby the government has at least an indirect ability to limit (and possibly even control) the defendant's attorney in his pretrial preparation and the development of trial strategy.

4. There is not a single policy, reason, legal conclusion or justification to not grant defendant's motion ---

- (a) Defendant has made the appropriate showing of particularized need;
- (b) The indictment is not sealed;
- (c) The Grand Jury has completed its deliberations on this matter; and
- (d) There is no fear of interference by defendant with the witnesses.

As stated by the United States Supreme Court in Dennis v. United States, 384 U.S. 855 (1966), in reversing those defendants' convictions where the trial court failed to grant their motions for production of grand jury proceedings:

This Court has recognized the "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts." United States v. Gamble Co., 356 U.S. 677, 681, 78 S. Ct. 983, 986, 2 L. Ed. 2d 1077. And it has ruled that, when disclosure is permitted, it is done "discreetly and limitedly." Id. at 683, 78 S. Ct. at 987. Accordingly, the Court has refused in a civil case to permit pretrial disclosure of an entire grand jury transcript where the sole basis for discovery was that the transcript had been available to the government in preparation of its case. Proctor & Gamble, supra. And in Pittsburgh Plate Glass Co. v. United States, supra, the Court sustained a trial court's refusal to order disclosure of a witness' grand jury testimony where the defense made no showing of need, but insisted upon production of the minutes as a matter of right, and where there was "overwhelming" proof of the offense charged without reference to the witness' trial testimony.

In general, however, the Court has confirmed the trial court's power under Rule 6(e) of the Federal Rules of Criminal Procedure to direct disclosure of grand jury testimony "preliminarily to or in connection with a judicial proceeding." In United States v. Socony Vacuum Oil Co., 310 U.S. 150, 234, 60 S. Ct. 811, 849, 84 L.E. 1129, the Court acknowledged that "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." In Proctor & Gamble, supra, the Court stated that "problems concerning the use of grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility . . ." are "cases of particularized need where the secrecy of the proceedings is lifted discreetly and limitedly." 356 U.S. at 683, 78 S. Ct. at 987. And in Pittsburgh Plate Glass, supra, where four members of the Court concluded that even on the special facts of that case the witness' grand jury testimony should have been supplied to the defense, the entire Court was agreed that upon a showing of "particularized need" defense counsel might have access to relevant

portions of the grand jury testimony of a trial witness, 360 U.S. at 400, 405, 79 S. Ct. at 1241, 1244. In a variety of circumstances, the lower federal courts, too, have made grand jury testimony available to defendants. These developments are entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice. This realization is reflected in the enactment of the so-called Jencks Act, 18 U.S.C. § 3500 (1964 ed.), responding to this Court's decision in Jencks v. United States, 353 U.S. 657, which makes available to the defense a trial witness' pretrial statements insofar as they relate to his trial testimony. It is also reflected in the expanding body of materials Judicial and otherwise, favoring disclosure in criminal cases analogous to the civil practice. 86 S. Ct. at 1848-1850 (footnotes omitted) (emphasis added).

Wherefore, the defendant prays that this Honorable Court enter its order directing the government to prepare the grand jury testimony of all witnesses who appeared before the grand jury which resulted in an indictment in this case, and thereafter to produce to defendant's counsel well in advance of trial, and on such terms and conditions as are just and proper in order to insure the integrity of the Grand Jury Secrecy Rule, but at the same time permit the defendant to receive effective assistance of counsel in defending himself from the serious charges herein.

Respectfully submitted, this _____ day of _____, 1998.



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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing on the below-mentioned attorney by mailing a copy of the same to the following address:

M
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This, the _____ day of _____, 1998.

[REDACTED]
First Assistant Federal Public Defender