THE JENCKS ACT AND RULE 26.2: EFFECTIVELY USING DISCOVERY TOOLS DURING HEARINGS AND TRIALS TO INCREASE THE LIKELIHOOD OF PREVAILING IN HEARINGS AND TRIALS OR ON APPEAL

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In Federalist Paper No. 83, Alexander Hamilton wrote:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them, it consists in this, the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.[1]

The jury trial is an "inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[2] More recently, the Supreme Court of the United States (SCOTUS) noted that although voting ensures that the governed control the legislative and executive branches, serving on a jury ensures that the governed control the judiciary.[3] The National Association of Criminal Defense Lawyers and the Foundation for Criminal Justice recently published the results of comprehensive study that concluded that despite the vital role jury trials serve in our criminal justice system, less than 3 percent of all federal criminal cases proceed to trial.[4] This year the Pew Research Center concluded only 2 percent of federal criminal cases proceeded to trial in 2018.[5] While the Federal Bar Association has dedicated this entire issue to trials, hearings, and appeals, this article addresses issues often found in criminal hearings and trials.

Whether your practice involves representing clients predominantly in hearings, trial, or appeals, what lawyers do is as much an art as a science. The purpose of this article is to focus more on the science, specifically perfecting a particular issue on the record during hearings and trial to increase the likelihood of prevailing on appeal should the client be convicted. Federal Rules of Criminal Procedure 5.1(h), 26.2, 32(i)(2), and 46(j) and 18 U.S.C. § 3500 command the government to provide evidence to the defense in the midst of hearings and trials, but are regularly ignored in substance during federal criminal hearings and trials. The government, as outlined below, routinely asserts in court that "we already complied with *Jencks*." With the lack of meaningful pre-trial discovery in the federal criminal justice system, Rule 26.2 and § 3500 are among the few tools defense lawyers can use during hearings and trial to ensure the government did not abridge a client's rights.

Requirement to Produce a Statement

In a federal prosecution, the government is generally required to disclose discoverable information pursuant to Rules 16 and 26.2, 18 U.S.C. § 3500 (Jencks Act), *Brady v. Maryland*,[6] *Giglio v. United States*,[7] and appropriate Department of Justice policies that have been promulgated pursuant to these authorities. While *Brady*, *Giglio*, and Rule 16 receive the most scholarly attention, the Jencks Act and Rule 26.2 are equally important but do not receive the same level of attention.

The Jencks Act and Rule 26.2 did not exist before 1957. Before they became law, the government might submit to the trial judge written statements witness made, or adopted, for the judge to determine whether the statements should be disclosed to the defense.

This procedure required the trial judge, who obviously did not prepare the case for trial with a defense in mind, to determine what defense counsel needed to effectively cross-examine the government's witnesses during trial.[8]

In *Jencks v. United States*,[9] the government prosecuted the defendant for making a false statement to an agency of the United States, in violation of 18 U.S.C. § 1001. During the trial, the government refused to produce reports FBI confidential informants wrote about people suspected of being involved with the communist party. The government took the position that the informants' testimonies were not inconsistent with reports the informants had authored, and the defense was not entitled to review the reports. The government did not contend that the reports were otherwise privileged, nor that the reports contained national security (i.e., classified) information. The trial judged refused to permit the defense to inspect the reports because the defense failed to show that any testimony was inconsistent with what was in the reports. Ultimately, the defendant was convicted based on entirely circumstantial evidence the informants presented to the jury.[10]

The Court of Appeals for the Third Circuit affirmed the defendant's conviction and found that he was not entitled to see the informants' reports because the defendant made no showing that the trial testimony was inconsistent with the reports. However, SCOTUS concluded that the district and circuit courts erred. "Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense." SCOTUS concluded that it is only appropriate to place upon the government the burden to decide in advance whether to disclose statements to the defense or to not use the witness as part of its proof rather than risk disclosing statements to the defense. The conviction was reversed.[11]

In response to the SCOTUS decision, Congress passed 18 U.S.C. § 3500, also known as the Jencks Act.[12] The act codified much of the holding in *Jencks*, and clarified when the government was required to produce statements in law enforcement's possession.[13] In relevant part, the act requires the government, upon motion by the defendant at the conclusion of the direct examination, to produce any statement the witness made or adopted that "relates to the subject matter as to which the witness has testified."[14] The act defines "statements" and exempts them from compelled production before the end of a direct examination.[15] The act provides a procedure for the court to review and redact statements if the government asserts portions of the statements do not relate to the testimony.[16] If the government refuses to produce the required statements or "elects not to comply with an order of the court … the court shall strike from the record the testimony … unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared."[17] The purpose of the act is to ensure the defense can meaningfully confront the government's witnesses.

As explained in *Kimoto*:

> The act requires the government, upon the defendant's motion, to produce statements made by any of its witnesses which the particular witnesses signed, adopted, or approved, and which pertain to their testimony at trial. The hope is that these statements will afford the defense a basis for effective cross-examination of government witnesses and the possible impeachment of their testimony without overly burdening the government with a duty to disclose all of its investigative material.[18]

The act remained the exclusive means to obtain statements from government witnesses until 1980, when Rule 26.2 was adopted. Rule 26.2 incorporates the Jencks Act requirements into preliminary, detention, suppression, sentencing hearings, hearings about revoking supervised release, and hearings conducted pursuant to 28 U.S.C. § 2255. A significant difference between the Jencks Act and Rule 26.2 is that Rule 26.2 imposes a reciprocal obligation upon the defense after a defense witness, other than the defendant, testifies on direct examination. The Rule reads:

> After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the government or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony.

The term statement, as used in the Jencks Act, is a legal term of art.[19] For example, the reports agents write are not statements of the interviewee. They may be "statements" of the agents depending on the scope of the agent's testimony.[20]

The U.S. Department of Justice (DOJ) regularly issues guidance to federal prosecutors. Two memoranda—one dated Jan. 4, 2010, by then Deputy Attorney General David W. Ogden[21] and one dated March 30, 2011, by then Deputy Attorney General James M. Cole[22]—have dealt with discovery obligations and specifically with Jencks Act issues. Part of the Ogden memo instructed federal prosecutors where to search for discoverable information.

The investigative agency's entire investigative file, including documents such as FBI Electronic Communications (ECs), inserts, emails, etc. should be reviewed for discoverable information. If such information is contained in a document that the agency deems to be an "internal" document such as an email, an insert, an administrative document, or an EC, it may not be necessary to produce the internal document, but it will be necessary to produce all of the discoverable information contained in it.

The Cole memo was titled "Guidance on the Use, Preservation, and Disclosure of Electronic Communications in Federal Criminal Cases." It made clear that it is the prosecutor's sole responsibility to coordinate gathering, reviewing, and producing discovery. The Cole memo specifically noted that it was intended to supplement the Ogden memo. As will be demonstrated later, an EC might need be disclosed pursuant to the Jencks Act, but prosecutors may not even review those statements before calling an agent as a witness.

If the defense fails to make a motion pursuant to the act or Rule 26.2, the failure to produce witness statements cannot be complained of on appeal.[23] Once an appropriate motion has been made, the various authorities make it clear that the burden is on a federal prosecutor to identify statements that qualify as Jencks Act material and to disclose them as appropriate.[24] While several district courts encourage the prosecution to disclose Jencks Act material early to avoid unnecessary delays during trial, an order to produce witness statements early is unenforceable.[25] However, the rules advisory committee notes reflect that Rule 26.2 was "not intended to discour-

age the practice of voluntary disclosure at an earlier time so as to avoid delays at trial."[26]

A Motion is Just not Enough

Despite the obvious requirement for federal prosecutors to obtain and disclose Jencks Act material, upon appropriate motion, the requirement is frequently ignored. If defense counsel bothers to make a Jencks Act or Rule 26.2 motion, the government routinely replies that all materials have been provided. Defense counsel will often confirm on the record that they received various documents that qualify as statements, and begin the cross examination without a thought about undisclosed material that qualified as statements. What follows are examples of prosecutors deliberately or inadvertently ignoring the mandates of the Jencks Act or Rule 26.2, case law, and DOJ policies.

Preliminary Hearing

In September 2016, during a preliminary hearing the defense began the cross-examination of the FBI case agent with a Rule 26.2 motion.[27] The assistant U.S. attorney (AUSA), a former criminal chief in the district, replied, "[Yes], your honor. Prior to this proceeding, I did provide [defense counsel] with a copy of [the agent's] statements." Before the hearing, the AUSA provided defense counsel with two reports that the agent had authored, which defense counsel placed on the record. Defense counsel accepted the court's invitation to conduct a voir dire on the matter and learned the agent had authored several search warrant affidavits and relevant ECs, which had not been disclosed to the defense. The AUSA advised the court that the government did not disclose the affidavits to defense counsel because they were sealed by the court. In response, the court said, "It doesn't matter. It's still Jencks." Further, the AUSA admitted to not having reviewed the ECs prior to the hearing and attempted to conflate the production of statements pursuant to Rule 26.2 to the court for an *in camera* review with a federal prosecutor's obligation to make a determination of whether to disclose the statements. After refusing a court order to produce the documents, the agent's testimony was stricken.

Trial

In January 2018, during a trial, a DOJ Fraud Section trial attorney called a Department of Defense employee to the stand.[28] Defense counsel made a Jencks Act motion before beginning cross-examination, and the trial attorney replied: "There's no Jencks material to produce." Later that night, to the trial attorney's credit, emails between the witness and others, which were authored before trial and were about the substance of the witness's testimony, were disclosed to defense counsel. The statements were inadvertently not disclosed prior to trial. The following morning the trial attorney took the position that they should not have to bring the witness back because the disclosed statements made no difference. The court said, "Let me simplify this just a little bit. I'm sorry. For purposes of your appellate record, do you really want to be standing in front of the … Court of Appeals saying that cross-examination was not completed when Jencks was not produced, because you believe it wasn't relevant?"

Later, in this same trial, defense counsel commenced cross-examination with a Jencks Act motion. Again, the same trial attorney advised the court that no Jencks Act statements were withheld. Again, defense counsel exposed that the FBI agent wrote several ECs about information testified to during direct examination that the prosecutors had not reviewed. Again, a recess was necessary to review the ECs. Again, in an effort to circumvent the requirements of the Jencks Act, a second trial attorney (three represented the government during trial) stepped up to the podium and asked the court "Are we on a fishing expedition here or is counsel able to identify the subject matter?" The court rightfully replied, "How can [defense counsel] if you didn't give it to him…? I mean, that's the purpose of—I know you know this, but that's the purpose of Jencks so opposing counsel can read it to see if there's anything of merit." During a recess, the trial attorneys admitted they had never heard of ECs.

Post-trial Revelation

In some districts, like the Southern District of New York, the government agrees to provide Jencks Act material "in advance of trial, rather than waiting until after the testimony of the relevant witness, as required by the statute."[29] However, Jencks Act violations also happen there. On May 4, 2018, a district judge granted a Rule 33 motion for a new trial based on a Jencks Act violation. Post-trial the AUSAs realized the government failed to disclose notes from proffer sessions with a material witness. When they disclosed those notes to defense counsel, the government argued that the failure to disclose the Jencks Act material did not warrant a new trial. The Second Circuit requires the defendant to prove "a significant chance" the inadvertently withheld Jencks Act material "would instill a reasonable doubt in a reasonable juror." Although the Second Circuit imposes a high standard, the trial judge concluded the defense easily carried its burden. While the defendant pointed to several inconsistences, the trial judge needed to address only three before concluding the defendant was prevented from conducting a thorough cross-examination that would, or could, have instilled a reasonable doubt in a reasonable juror's mind. "The information contained in the inadvertently withheld proffer notes could have been used to effectively impeach the testimony of [the government's key witness]—and to undermine that substantial pillar of the government's case." While the early Jencks Act disclosure without need of a motion is common practice in the Southern District of New York, one could easily envision a trial court finding that by failing to make an appropriate Jencks Act motion, defense counsel had waived the issue.

The Relief is not so Obvious

At first blush, the Jencks Act and Rule 26.2 plainly state the available remedies for violations. The Jencks Act reads: "The court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared." The Rule reads: "The court must strike the witness's testimony from the record. If an attorney for the government disobeys the order, the court must declare a mistrial if justice so requires." Much like law enforcement relies on the *Leon* good faith exception[30] when relying on defective warrants, trial courts have rarely found striking testimony or declaring a mistrial appropriate for inadvertently failing to disclose Jencks material.[31] In practice, as in the examples noted above, trial courts permit prosecutors to recess, to bring the witness back to court, or to call other witnesses.

The practical problem arises when the failure to disclose Jencks Act material is discovered in the middle of cross-examination during a complicated trial. The material belatedly produced could have

aided in the cross-examination of a witness who has already testified. While the court might permit the previous witness to be recalled, the interruption to the trial and flow of information to the jury could disrupt an otherwise carefully planned defense presentation. It might not be possible for defense counsel to properly determine whether the belatedly disclosed material also constitutes *Brady* or *Giglio* information. Prosecutors must disclose impeachment evidence sufficiently in advance of the witness testifying for the defense to use the information effectively during cross-examination.[32] That may not always be possible where the information is disclosed only after a proper Jencks Act motion has been made. It is important to explain, as best you can on the record, why you cannot effectively use the information, even with a short break in the proceedings.

Conclusion

While an overwhelming number of federal prosecutors strive to comply with discovery obligations, omissions, whether intentional or not, occur. When defending someone against the might of the federal government, it is not enough to assume the prosecutors' bald allegations are sufficient proof that they adhered to their discovery obligations. As a result of lapses, several courts, lawyer advocacy groups, and law school professors have advocated altering the time of production of statements under the Jencks Act or Rule 26.2. As with all evolutions in the law, maybe it will evolve again and maybe it won't. Until then, make sure you start every cross-examination with a request for statements pursuant to the Jencks Act or 26.2, and follow it with questioning to ensure the prosecutor provided you all that was required to be produced. ⊙

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Endnotes

[1]*Neder v. United States*, 527 U.S. 1, 31 (1999).
[2]*Duncan v. Louisiana*, 391 U.S. 145, 152 (1968).
[3]*Blakely v. Washington*, 542 U.S. 296, 306 (2004).
[4]Nat'l Ass'n of Crim. Def. Law., The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It (2018), *available at* https://www.nacdl.org/trialpenaltyreport.
[5]John Gramlich, *Only 2 Percent of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, Pew Res. Ctr. (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty.
[6]*Brady v. Maryland*, 373 U.S. 83 (1963).
[7]*Giglio v. United States*, 405 U.S. 150 (1972).
[8]Ellen S. Podgor, *Criminal Discovery of Jencks Witness Statements: Timing Makes A Difference*, 15 Ga. St. U. L. Rev. 651, 658 (1999).
[9]*Jencks v. United States*, 353 U.S. 657 (1957).
[10]*Id.* at 666.
[11]*See id.* at 672.
[12]Ann K. Wooster, *Proper Procedure for Determining Whether Alleged Statement or Report of Government Witness Should Be Produced on Accused's Demand, Under Jencks Act (18 U.S.C.A. § 3500) and Fed. R. Crim. P. 26.2*, 9 A.L.R. Fed. 2d 193 (2006).
[13]Podgor, *supra* note 8, at 653 (citing S. Rep. 85-981, at 3 (1957)).
[14]18 U.S.C. § 3500(b).
[15]*Id.* §§ 3500(a) & (e).
[16]*Id.* § 3500(c).
[17]*Id.* § 3500(d).
[18]*United States v. Kimoto*, 588 F.3d 464, 475 (7th Cir. 2009) (citing *United States v. Johnson*, 200 F.3d 529, 534 (7th Cir. 2000)) (internal citations omitted).
[19]*United States v. Jordan*, 316 F.3d 1215, 1252 (11th Cir. 2003).
[20]*United States v. Reed*, 575 F.3d 900, 920-21 (9th Cir. 2009).
[21]Memorandum from David W. Ogden, Deputy Att'y Gen., Dep't of Justice, Guidance for Prosecutors Regarding Criminal Discovery (Jan. 4, 2010), https://www.justice.gov/archives/dag/memorandum-department-prosecutors.
[22]Memorandum from James M. Cole, Deputy Att'y Gen., Dep't of Justice, Guidance on the Use, Preservation, and Disclosure of Electronic Communications in Federal Criminal Cases (Mar. 30, 2011), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/electronic-communications.pdf.
[23]*United States v. Schier*, 438 F.3d 1104, 1112 (11th Cir 2006).
[24]*United States v. Acosta*, 357 F. Supp. 2d 1228, 1245 (D. Nev. 2005).
[25]*United States v. Algie*, 667 F.2d 569, 571 (6th Cir. 1982).
[26]*United States v. Valdez-Gutierrez*, 249 F.R.D. 368, 375 (D.N.M. 2007).
[27]Doc. 38, *United States v. Phillips*, No. 6:16-cr-198 (Sept. 20, 2016).
[28]Doc. 275, *United States v. Howard*, No. 6:17-cr-00143 (Jan. 12, 2018).
[29]Doc. 618, *United States v. Russell*, No. 16-cr-396 (May 4, 2018).
[30]*United States v. Leon*, 468 U.S. 897 (1984).
[31]Podgor, *supra* note 8, at 664.
[32]*Jordan*, 316 F.3d at 1253 (citations omitted).