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Federal Court Construction of the Jenks Case

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RECENT DECISIONS

Federal Court Construction of the Jenks Case—In the recent case of *United States v. Consolidated Laundries Corporation*,[1] a request by defense counsel for the disclosure of grand jury testimony of government witnesses without prior scrutiny by the trial judge was denied. The court in this case held that grand jury proceedings were of their nature secret, and therefore should be disclosed only where a clear inconsistency between the testimony of government witnesses at the time of the trial and during the grand jury proceedings is shown.

The argument of the defense counsel in the *Consolidated* case was based upon the decision in *Jenks v. United States*.[2] Their claim was that the ruling in *Jenks* made it quite clear that the defense has a right to see grand jury testimony without prior scrutiny by any other party. The *Jenks* case concerned two union officials who were on trial for allegedly falsely swearing to non-communist affidavits which were required by the Taft-Hartley Act.[3] The F.B.I. had made use of the informers to gather evidence against the petitioners. At the time of their testimony the defense counsel (for petitioners) demanded to see the prior recorded statements of the informers made to the F.B.I. agents. This was for the purpose of impeaching the witnesses' testimony. The trial court refused this request because there was no showing of inconsistency between the testimony of the witnesses at the trial and their prior statements to F.B.I. agents.

On appeal, the Supreme Court reversed. The majority opinion, delivered by Justice Brennan, rejected the two alternative practices formerly used by lower courts, that either (1) the defense must show some inconsistency between the witnesses' statements at the trial and those previously made to the F.B.I. agent or (2) that the court should determine *in camera*[4] whether the documents are material and relevant to the cross examination. Justice Brennan ordered all reports of the informers in the hands of the government to be delivered to counsel for the petitioners. The reason for this, the Court held, was that only the defense is adequately equipped to inspect the reports to determine whether to use them in defense. Order of treatment in the prior reports, omissions, differences of emphasis must all be ascer-

[1] 159 F. Supp. 860 (S.D. N.Y. 1958).
[2] 353 U.S. 657 (1957).
[3] 61 STAT. 143 (1947), as amended 65 STAT. 601 (1951); 29 U.S.C. 159 (h) (1952) provides that ". . . processes of the National Labor Relations Board will be unavailable to a labor organization unless there is on file with the Board, an affidavit executed by each officer of such labor organization that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in and is not a member of and does not support any organization that believes in or teaches the overthrow of the government by force or by an illegal or unconstitutional means."
[4] In chambers or, in other words, in the presence of the judge alone, BLACK'S LAW DICTIONARY 929 (3rd Ed. 1933).

tained by the defense counsel in seeking to impeach the witnesses' testimony.[5] Brennan laid stress upon the fact that the interest of the United States is a criminal prosecution is not that it shall win its case but that justice shall be done.[6] For this reason the Court felt that secrecy of Government files must yield to the high standards of justice required in the enforcement of Federal law.

Basing its reasoning upon the wording of Justice Brennan's opinion, the defense counsel in the *Consolidated* case[7] claimed that justice emphatically required that they be permitted to examine the testimony of government witnesses made before the grand jury to see if there be an inconsistency between this testimony and the testimony of these witnesses at the trial.

The District Court refused their request and distinguished the *Jenks* case from the case at hand. *Jenks* dealt with the statements made to F.B.I. investigators outside of court. But the present case was concerned with grand jury testimony which, the Court stated, has always been considered secret. The Court said that grand jury testimony may only be divulged when the interests of justice require it. The Court cites *United States v. Socony Vacuum*[8] where this rule is stated. The Supreme Court in *Socony Vacuum* upheld the trial court's refusal to let the defendant see the prior statement made by the witness at the grand jury proceedings, thus allowing the discretion of the judge to control the point. In the case of *United States v. Johnson,*[9] the Supreme Court uses the word "indispensable" in referring to the secrecy of grand jury proceedings. For these reasons, and because the Supreme Court did not refer to grand jury testimony in the *Jenks* decision, the court ruled that grand jury minutes will only be disclosed to defense counsel when some inconsistency with the testimony at the trial arises from a reading of the minutes of the grand jury.[10] The Court held that the judge must decide whether this inconsistency exists.

Important also in the consideration of this case is the insight it gives into the recent statute which was passed to modify the *Jenks* decision.[11] This statute defines the type of statement to be governed by *Jenks* as "a statement signed by the witness himself or a statement made to an F.B.I. agent and transcribed by him verbatim or nearly verbatim."[12] It is quite clear from a reading of the statute that grand jury testimony is not included within the definition. Because the Con-

[5] *Supra* note 2, at 667.
[6] *Ibid,* at 668.
[7] *Supra* note 1.
[8] 310 U.S. 150, at 233-234 (1940).
[9] 319 U.S. 503, at 513 (1943).
[10] *Supra* note 1 at 868.
[11] 71 STAT. 595 (1957), 18 U.S.C. 3500, Supp. V (1958).
[12] *Ibid,* Subsection (e).

gressional intent seemed clear in this respect, the Court concluded that from the language of Congress, *Jenks* was not meant to extend to disclosure of grand jury testimony.

A cloud has been placed over the *Consolidated* case by the recent Supreme Court decision, *United States v. Proctor and Gamble.*[13] Justice Douglas, in writing the majority decision in this case, cited *United States v. Socony Vacuum*[14] approvingly, when discussing the question of the use of proper discretion by a trial judge in allowing defense counsel to see the grand jury transcript. But he also made this statement.

> We do not reach in this case problems concerning the use of the grand jury transcript at the trial to impeach a witness, to refresh recollections, to test his credibility and the like. Those are cases of particularized need where the secrecy of the proceedings is lifted discretely and limitedly.[15]

This case was decided by a divided Court and Justice Douglas was joined in his opinion by only four of his brethren. It is questionable whether the statement requires the inference that the trial judge may not scrutinize the testimony before handing it over to defense counsel. It is even more questionable whether Justice Whittaker who concurred or the three dissenting Justices would join Douglas in his *dictum.* However, as it stands the statement seems to bode ill for the *Consolidated* case and a good deal of appellate activity can be expected in the particular fact area which it represents.

Consolidated Laundries is only one of the many recent cases interpreting the *Jenks* decision which have been handed down by U.S. district and appellate courts. From these decisions the scope of *Jenks* has become more clear and it is now possible to make a few generalizations concerning its application in modern practice.

The one point that seems clear from recent cases is that the *Jenks* decision refers only to requests for disclosure of testimony after the witness has taken the stand. In short *Jenks* does not apply to pretrial disclosure of F.B.I. witnesses' testimony.

In *United States v. Benson,*[16] Judge Palmieri, the author of the *Consolidated* decision, discussed the rule which has been followed by most district and appellate courts.[17]

> As I read the Supreme Court majority and concurring opinions, I find no language which would justify its application

[13] 356 U.S. 677 (1958).
[14] 310 U.S. 150, at 233-234 (1940).
[15] *Supra* note 13, at 683.
[16] 20 F.R.D. 602 (S.D. N.Y. 1957).
[17] Followed by United States v. Grossman, 154 F. Supp. 813 (D. N.J. 1957); United States v. Anderson, 154 F. Supp. 374 (E.D. Mo. 1957); United States v. Grado approves and cites the opinion, United States v. Grado, 154 F. Supp. 878, at 880 (W.D. Mo. 1957); *Contra*: United States v. Hall, 153 F. Supp. 661, at 664 (N.D. Ky. 1957).

to pre-trial procedure. Close scrutiny of the opinions in the *Jenks* case reveals no reference to Rule 16 or Rule 17 or to disclosure in advance of trial. Moreover it appears from the briefs before the Supreme Court that they contain no arguments urging pre-trial disclosure of statements of potential Government witnesses. Indeed the very touchstone of the *Jenks* decision is the issue of credibility of witnesses at the trial.

Before the defense is entitled to disclosure of any statements made by a Government witness for the purpose of discrediting him the credibility of the witness whose prior statements are sought must be in issue.[18]

The case of *United States v. Grossman*[19] adopts the rule of Justice Palmieri above and gives an additional reason for its decision. The Court states that to allow pre-trial disclosure of witnesses' testimony is to give the defense a list of the Government witnesses before trial, a procedure which it holds is unfair since it is quite possible that the Government may never use these witnesses.[20]

The extension of the *Jenks* decision in this regard is outlined by Judge Moore in *United States v. Anderson*:[21]

1. Before the defendant in a criminal cause is entitled to production and inspection of a statement made by a person other than himself in the possession of the United States, (a) such person must have been called as a witness by the United States, (b) the defendant must establish on cross-examination that a statement was made by such witness, (c) that such statement is in the possession of the United States and (d) that such statement touches the events and activities related in his direct examination.

2. Such statement must either have been written by the witness or recorded verbatim or nearly so.[22]

The new *Jenks* statute[23] seems to bear out the conclusions that Judge Palmieri and Judge Moore reached concerning pre-trial disclosure. It reads:

. . . no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness other than the defendant, to an agent of the Government shall be subject to subpoena, discovery or inspection until said witness has testified on direct examination in the trial of the case.[24]

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[18] 20 F.R.D. 602, at 604 (S.D. N.Y. 1957).
[19] 154 F. Supp. 813 (D. N.J. 1957).
[20] *Ibid*, at 815.
[21] 154 F. Supp. 374 (E.D. Mo. 1957).
[22] *Ibid*, at 375.
[23] 71 STAT. 595 (1957), 18 U.S.C. 3500 (1958).
[24] *Ibid*, subsection (b). In United States v. Papworth, 156 F. Supp. 842, at 851 and 853 (N.D. Tex. 1957), the Court applies the statute here cited and also accepts Judge Moore's interpretation of the *Jenks* decision.

The statute makes clear the fact that the *Jenks* decision does not refer to pre-trial disclosure of F.B.I. witnesses' testimony; but Rule 17(c) of the Federal Rules of Criminal Procedure[25] still applies to disclosure in such cases. However, persuasive authority holds that the use of Rule 17(c) will be subject to broad discretion by the trial court.[26]

There have been many cases dealing with the procedures to be used in applying *Jenks*. For example, in *Stanley v. United States*[27] the court held that defendant's counsel must demand the written testimony of the Government witnesses during the time of trial and not after sentence has been imposed. If defense counsel waives his right to see the testimony and asks the court to determine whether there is anything material and relevant in the testimony, he cannot later assert a right to see the testimony.[28] *Franken v. United States*[29] held that a duplicate copy of the witnesses' testimony *would serve* the purposes of justice and the original is not required. Finally the recent case of *United States v. Waldman*[30] held that though the *Jenks* statute does not refer to statements taken down in longhand but rather to statements taken down in shorthand or by some mechanical device, the court felt that longhand statements were obviously included in the definition.[31]

Quite a number of recent decisions have dealt with the effect of the *Jenks* decision on the conscientious objector cases. In these cases the person claiming conscientious objector status files a sworn statement to the effect that he cannot serve in the armed forces because of religious or moral suasions he holds. He is then classified by the local Selective Service Board which makes a judgment as to his sincerity. If he disagrees with the decision of the Board, he may appeal his case to the Appeal Board. On his appeal an F.B.I. agent will interview numerous acquaintances of the petitioner to determine the nature of his "sincerity." The F.B.I. agent will submit his report and a resume to a local hearing officer and to the F.B.I. also. Only

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[25] Fed. R. Crim. P. 17 (c). "Discovery and Inspection: Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect the copy or photograph, designated books, papers, documents, or tangible objects obtained from or belinging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the presentation of his defense and that the request is reasonable."

[26] In United States v. Carter, 15 F.R.D. 367, at 371 (D. D.C. 1954), Judge Holtzoff gives as his view the rule that an application under this rule will be subject to the sound discretion of the trial judge. See also 56 Mich. L. Rev. 314, at 317 (1957). For an excellent treatment of this subject of pretrial devices, see Note, 67 Harv. L. Rev. 492, at 494-495 (1954).

[27] 249 F. 2nd 64, at 66 (6th Cir. 1957).

[28] United States v. Volkell, 251 F. 2d 333, at 337 (2nd Cir. 1957).

[29] 248 F. 2d 789, at 790 (3rd Cir. 1957).

[30] 159 F. Supp. 747 (D. N.J. 1958).

[31] *Ibid,* at 749.

a resume will be given to the petitioner. Both the hearing officer and the F.B.I. will submit a recommendation to the Appeal Board. The Appeal Board will also be given the resume, but they will not see the original report of the F.B.I. agent.[32]

The United States Supreme Court in *Nugent v. United States*[33] held that as long as the Appeal Board is shown a fair resume, the requirements of due process as to the resume will have been fulfilled.[34] Nevertheless, the contention of the defendant in *Blalock v. United States*[35] was that today under the *Jenks* rule the conscientious objector has a right to demand that the whole report be submitted to the Appeal Board, or if not to the Appeal Board then to the District Judge who will impose sentence if the defendant cannot show cause why the Appeal Board's ruling should not be reversed. The contention was that the whole basis of *Jenks* is that no official should arbitrarily be allowed to decide what testimony is material and relevant to the investigation. The accused, it is said, has a right to have all of the testimony presented to the defense counsel so that any contradictions in the testimony may be exposed in open court by defense counsel.[36] The Court in *Blalock*[37] admitted that the reasoning was appealing but stated that the *Nugent*[38] case still rules the conscientious objector problem.

The case of *Bouziden v. United States*[39] indicates many of the reasons for the court's reluctance to accept the reasoning of the conscientious objectors. In the first place the conscientious objector is seeking a legislative exemption to which he has no asolute right. Therefore, as long as the legislative procedure is followed, the court will not interfere unless due process has been violated. Secondly, the *Jenks* case involves a statement concerning an alleged crime, whereas in this case the 'resume' only contains the statement of witnesses which attest to the sincerity or insincerity of the applicant's beliefs. Hence, if the 'resume' gives a fair account of the adverse evidence, and the Appeal Board has based its decision on some credible evidence, the courts will not interfere and the conscientious objector will have to state his case without the original report of the F.B.I. agent.[40]

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[32] 50 U.S.C. Appendix 456j (1952). The procedure is explained in United States v. Gordon, 158 F. Supp. 207, at 209 (N.D. Ill. 1958).
[33] 346 U.S. 1, at 8 (1953).
[34] *Ibid,* at 8.
[35] 247 F. 2d 615 (4th Cir. 1957).
[36] *Ibid,* at 620.
[37] *Ibid.*
[38] *Supra* note 33.
[39] 251 F. 2d 728, at 731-732 (10th Cir. 1957).
[40] Simmons v. United States, 348 U.S. 397, at 405 (1955) gives a definition of a fair resume. "A fair resume is one which will permit the registrant to defend against the adverse evidence, to explain it, rebut it, or otherwise detract from its damaging force."

These cases will seemingly be upset by the Supreme Court only if it finds that the *Jenks* decision was founded upon the principles of fundamental justice.[41] If the Court should find that the *Jenks* decision states a rule which is the very fiber of due process and not merely a new rule for the federal judiciary,[42] the conscientious objector cases will meet with the Court's displeasure. Quite possibly the *Jenks* statute will be called unconstitutional since it restricts a ruling which is an expression of due process. If such a result should occur, it is quite possible that the *Jenks* ruling would be extended to pretrial disclosure and to disclosure of grand jury testimony. The better opinion seems to be that since the Supreme Court did not mention due process, it was merely exercising its rule-making power.[43] If this opinion is correct, the cases discussed here will probably not be overruled. Nevertheless, the *Jenks* decision has not been relegated to the history books by the new statute and it will continue to arouse a great deal of discussion and controversy.

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Contracts—Insurer's Breach—Application of Rest. of Contracts §318—Plaintiff was the beneficiary under a fifteen year endowment policy with family income provisions taken out by her deceased spouse. On the original application, insured received a 20-year endowment policy with family income provisions for a twenty year term, dated February 1, 1939. A few months after receipt of this policy, insured made application to convert the policy to the 15-year endowment with the income provisions for fifteen years. The

[41] United States v. Consolidated Laundries Corp., 159 F. Supp. 860, at 868 (S.D. N.Y. 1958). See also 56 Mich. L. Rev. 314, at 316 (1957).

[42] In United States v. Consolidated Laundries Corp., 159 F. Supp. 860, at 868 (S.D. N.Y. 1958), Judge Palmieri states: "The constitutionality of 18 U.S.-C.A. 3500 (Supp. V.) has been implicitly recognized by the Second Circuit in United States v. Miller, 248 F. 2d 163, *cert. denied,* 355 U.S. 905 (1957), in which the Court held that upon remand the procedure to be followed in producing documents would be that established by the statute." In footnote 15, the Judge states: "There is no indication that either the *Jenks* or *Gordon* decisions rested on a constitutional basis."

[43] *Supra* note 41.

[44] In a recent decision, Scales v. United States, 260 F. 2d 21 (4th Cir. 1958) which appeared subsequent to the writing of this article, the 4th Circuit Court of Appeals passed upon the question of the constitutionality of subsection (c) of the new statute. The Court stated that the procedure to be followed under subsection (c) of the statute does not violate due process of law. but is merely a procedural regulation within the power of Congress to enact. The Court seems to withdraw somewhat from the language of the *Jenks* case. It says: "The standard set by *Jenks,* 353 U.S. at 669, that justice requires no less than that the defense be entitled to see the reports to determine what use may be made of them *is satisfied [by the new statute] and justice requires no more.*" [Italics ours]. The rest of the *Jenks* statute has not been passed upon but from the language of the Court in this case, it seems probable that the statute will weather attacks on the grounds of its constitutionality, providing the United States Supreme Court agrees with the lower courts.