Notre Dame Law Review

Volume 55 | Issue 4 Article 8

4-1-1980

Criminal Procedure--The Defendant Must Show That the Prosecutor's Failure to Record Grand Jury Testimonies Amounted to a Prosecutorial Misconduct in Order to Give the Trial Court Cause to Dismiss the Indictment or Bar the Trial Testimonies of the Unrecorded Witnesses

Sandra M. Molley

Criminal Procedure—The Defendant Must Show That the Prosecutor's Failure to Record Grand Jury Testimonies Amounted to a Prosecutorial Misconduct in Order to Give the Trial Court Cause to Dismiss the Indictment or Bar the Trial Testimonies of the Unrecorded Witnesses

*United States v. Head**

I. Introduction

In *United States v. Head,*[1] the United States Court of Appeals for the Fifth Circuit considered whether the conduct of the prosecutor, in preventing the recording of grand jury testimonies of prosecution witnesses, created an unfair tactical advantage warranting either a dismissal of the indictment or striking of the trial testimonies of the unrecorded witnesses. The Fifth Circuit recognized that a failure to record grand jury statements of the prosecution's key witnesses denied the defendant his right to seek production of them under the Jencks Act.[2] The court held:

> [T]he prosecutor should not have selectively recorded the testimony of grand jury witnesses, but that defendant . . . wholly failed to show this mistake amounted to a prosecutorial misconduct warranting dismissal of the indictment or a bar of the use of the testimony of the witnesses whose testimony [had] not [been] recorded.[3]

In 1979, rule 6(e) of the Federal Rules of Criminal Procedure was amended to require that all grand jury statements be recorded.[4] Notwithstanding this amendment, the decision in *Head* remains important because it provides a standard for determining whether a failure to record would amount to misconduct warranting a dismissal of the indictment or striking of the trial testimonies of the unrecorded witnesses. Furthermore, the decision in *Head* is

---

* 586 F.2d 508 (5th Cir. 1978).

1 *Id.*

2 18 U.S.C. § 3500(b) (1976), provides in relevant part:

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

3 586 F.2d at 512.

4 FED. R. CRIM. P. 6(e)(1) provides:

> (e) RECORDING AND DISCLOSURE OF PROCEEDINGS.
>
> (1) Recording of Proceedings. All proceedings, except when the grand jury is deliberating or voting shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

consistent with the current judicial trend in dealing with criminal discovery procedures.[5] Although in recent years requirements have been established to provide for criminal discovery of grand jury statements upon a showing by the defendant of "particularized need,"[6] courts have narrowly interpreted the "particularized need" requirement.[7] They have been reluctant to reverse an otherwise valid conviction because of a failure to produce grand jury statements. Similarly, the court in *Head* recognized the need to record grand jury statements but concluded that a failure to record would not automatically warrant strict judicial relief.

II. Statement of the Facts

John Leslie Head, Jr., was brought before a grand jury on charges of conspiring to import marijuana in violation of the Comprehensive Drug Abuse Prevention and Control Act of 1970.[8] The defendant had knowingly conspired to rent boats for use in smuggling marijuana into the United States.[9] He had arranged meetings between two of the smugglers and two men from whom the boats were to be rented. He did not know, however, that the boat owners were also government informants, who were tape recording many of their conversations with the defendant and the other conspirators. A court reporter was present at the grand jury hearing and recorded the testimonies of the defendant and his three supporting witnesses. At the request of the prosecutor, no recordings were made by the court reporter of the informants' grand jury testimonies. The grand jury indicted the defendant as charged and the case was tried before the United States District Court for the Middle District of Florida.

At trial, the defendant moved to bar the testimonies of the informants because he had not been able to inspect their grand jury statements as provided in the Jencks Act.[10] In support of his motion, he called to the stand the Assistant United States Attorney who had presented the case to the grand jury. The Assistant United States Attorney testifed that there were up to fifty tape recordings made by the informants and that he did not want to create any more. He also reasoned that the transcript of their grand jury testimonies would not be new testimony because the informants would not, under the circumstances, be in a position "to recant or to change or to fabricate their testimon[ies]."[11] The conversations recorded by the informants had been received into evidence and played to the trial jury, after having been authen-

5 *See* text accompanying notes 26-52 *infra.*

6 *See* text accompanying notes 42-49 *infra.*

7 *See, e.g.,* Menendez v. United States, 393 F.2d 312 (5th Cir. 1968), *cert. denied,* 393 U.S. 1029 (1969); United States v. Allegretti, 340 F.2d 254 (7th Cir. 1964); Ogden v. United States, 303 F.2d 724 (9th Cir. 1962), *cert. denied,* 376 U.S. 973 (1964); Brilliant v. United States, 297 F.2d 385 (8th Cir.), *cert. denied,* 369 U.S. 871 (1962).

8 21 U.S.C. §§ 952(a), 960, 963 (1976).

9 The defendant admitted to these facts at trial. *See* 586 F.2d at 509.

10 18 U.S.C. § 3500(d) (1976), provides in relevant part:

> (d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portions thereof as the court may direct, 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.

11 586 F.2d at 510.

ticated by the informants. In addition, the defendant had been furnished with copies of written statements made by the informants. Based on these facts, the trial court dismissed the motion to bar the informants' testimonies. The defendant appealed to the United States Court of Appeals for the Fifth Circuit.

The appellate court concluded that the prosecutor should not have selectively recorded the testimonies of the grand jury witnesses. It said, however, that the defendant failed to show that this mistake amounted to prosecutorial misconduct sufficient to warrant judicial relief. He failed to show that the unrecorded statements would have provided additional information either to aid him in preparing and conducting his cross-examination or to establish that a witness had made a secret, contrary statement. The court concluded, therefore, that the effect of the prosecutor's conduct did not warrant dismissal of the indictment or striking of the trial testimonies of the unrecorded witnesses. The court said that, in order to establish prosecutorial misconduct warranting such judicial remedies, the defendant must offer some indication that the prosecutor's actions prejudiced him in making his defense.[12]

III. The Opinion in *Head*

In *Head,* the Fifth Circuit recognized that, although rule 6(d) of the Federal Rules of Criminal Procedure[13] permitted the recording of grand jury testimonies, there was no statutory requirement that all grand jury proceedings be recorded. At the same time, however, it commented that it was a "far better practice" to make such recordings.[14] Indeed, as some commentators have recognized, a failure to record could be interpreted as an attempt, on the part of the prosecutor, to restrict the discovery privileges otherwise available to the defense under the Jencks Act.[15]

Although the court, in *Head,* recommended that all grand jury proceedings be recorded, it refused to hold that a failure to record automatically amounted to prosecutorial misconduct warranting judicial relief. This decision is consistent with prior Fifth Circuit decisions. As an example, the Fifth Circuit, in *Head,* cited *United States v. Cruz*[16] in which it rejected a claim that the Government was bound to call its best available witnesses before the grand jury, so that their testimonies could be recorded and become statements available to the defense under the Jencks Act. In *Cruz,* the court stated, "no part of the Jencks Act has ever been construed to require the [G]overnment to

12 *Id.* at 512.

13 FED. R. CRIM. P. 6(d) provides:

> (d) Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

14 586 F.2d at 511. *See also* United States v. Rubin, 559 F.2d 975 (5th Cir. 1977), *vacated,* 99 S. Ct. 67 (1978), in which the Fifth Circuit held that there was no constitutional or statutory requirement that all grand jury proceedings be recorded.

15 *See, e.g.,* Comment, *Secrecy in Grand Jury Proceedings: A Proposal for a New Federal Rule of Criminal Procedure 6(e),* 38 FORDHAM L. REV. 307 (1969).

16 478 F.2d 408 (5th Cir.), *cert. denied,* 414 U.S. 910 (1973).

develop potential Jencks Act statements so that such materials could be combed in the hopes of obtaining impeaching inconsistencies."[17]

The court recognized that the situation in *Head* more closely resembled a situation in which a prosecutor, who possessed several Jencks Act statements of a single witness, destroyed one of them but delivered the remaining statements to the defendant.[18] The court found that such action would be improper even though the prosecutor believed that the statement destroyed was duplicated by the information in the remaining statements. It concluded, however, that the prosecutor's action would not constitute misconduct which would abort the prosecution or bar jury access to the witness' trial testimony in the absence of some indication of "particularized prejudice."[19] In addition, it developed a standard for determining the existence of "particularized prejudice."

To establish "particularized prejudice," the defendant must show not merely that he was denied specific grand jury statements, but more significantly that the denial of the statements "thwarted" one of the two goals of the Jencks Act.[20] The court defined those goals to be: to enable the defense to conduct its cross-examination in light of the facts known to the prosecution and to assure the defense that a witness had made no secret, contrary statement.

The court concluded that the defense had failed to show that either of these goals was "thwarted" by the prosecutor's failure to record. It found that the defense had been able to conduct its cross-examination in light of all the information available to the prosecution because numerous other tape recordings and written statements by the informants, which duplicated the information contained in the unrecorded statements, were available to the defense. In addition, it found that the defense had been assured that the informants had made no secret, contrary statements. The court said that the recordings made by the informants during their conversations with the defendant provided the best evidence of the events. At trial, the informants were completely "cabined" by these recordings when they recounted the events leading to the arrest.[21] The defendant and the trial jury were able to hear the tape recordings and determine whether the informants' trial accounts were consistent with them.

The court noted that a similar standard for determining the existence of prejudice was endorsed in the Fifth Circuit case of *Calley v. Callaway*.[22] In *Calley,* a congressional committee released the names of the witnesses it had examined in executive session but refused to provide the court with a transcript of their testimonies. The defendant, however, was furnished with other statements by each of the witnesses named. Without reaching a Jencks Act issue, the court held that nondisclosure did not necessarily deprive Calley of due process. It required Calley to establish some indication that disclosure "would have enabled [him] significantly to alter the quantum of proof in his

17 *Id.* at 411. The court recognized that the situation in *Head* is distinguishable. The witnesses in *Head* actually appeared before the grand jury but, at the request of the prosecutor, their statements were not recorded.

18 *See, e.g.,* United States v. Clemones, 577 F.2d 1247 (5th Cir. 1978).

19 586 F.2d at 512.

20 *Id.*

21 *Id.*

22 519 F.2d 184 (5th Cir. 1975), *cert. denied,* 425 U.S. 911 (1976).

favor."[23] Similarly, in *Head,* the court required an indication that the grand jury testimonies of the informants differed substantially from their testimonies at trial, in order to find error in the trial court's refusal to bar the testimonies. The court found that, because the informants' prior disclosures were completely consistent with their trial testimonies and "totally incriminating of Head,"[24] the defendant did not even come close to making the required showing.

IV. The Development of the Jencks Act and the Recording Requirement of Rule 6(e)

A. *The Development of the Jencks Act and the Trend in Criminal Discovery Rules*

In *Head,* the Fifth Circuit stated that the purpose of the Jencks Act is "to reinforce the credibility of the criminal justice process"[25] by requiring the prosecution to furnish the statements of any witness it calls to testify at trial so that the defense can conduct its cross-examination in light of all the facts known to the prosecutor. This interpretation of the Jencks Act is consistent with the general view of the Act as, in part, a statutory attempt to balance the need for criminal discovery against the need to maintain the traditional secrecy of the grand jury. The Jencks Act has played a major role in the movement toward more liberal procedures governing the disclosure of grand jury statements.[26] This movement does not endorse the wholesale disclosure of such statements; rather, it attempts to promote the "proper administration of justice"[27] by allowing the discovery only of certain, relevant statements in the Government's possession which would enable the defendant to prepare his case. Failure to produce grand jury statements would not automatically reverse an otherwise valid conviction unless the defendant could show that a "particularized need" existed for the statements.

Federal courts have always guarded the secrecy of grand jury proceedings.[28] Whereas the prosecutor has enjoyed the use of grand jury minutes in preparing his case, the defendant has rarely been given access to them.[29] Judicial resistance to criminal discovery of grand jury minutes has been based on the premise that liberalizing discovery would give the defendant a disproportionate advantage over the prosecution in preparing his case.[30]

---

23 *Id.* at 222.

24 586 F.2d at 512.

25 *Id.*

26 For a discussion of the movement toward more liberal procedures governing the disclosure of grand jury statements, see Knudsen, *Pretrial Disclosure of Federal Grand Jury Testimony,* 48 WASH. L. REV. 423 (1973).

27 *See* text accompanying note 49 *infra.*

28 Knudsen, *supra* note 26, at 430. For a general, historical discussion of grand jury secrecy, see Calkins, *Grand Jury Secrecy,* 63 MICH. L. REV. 455 (1964); Comment, *Grand Jury Secrecy: Should Witnesses Have Access to Their Grand Jury Testimonies as a Matter of Right?,* 20 U.C.L.A. L. REV. 804 (1973).

29 Comment, *supra* note 15, at 308.

30 Judicial reaction to criminal discovery of grand jury transcripts was exemplified by Judge Learned Hand who stated:

> Under our criminal procedure, the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see.

United States v. Garson, 291 F. 646, 649 (S.D.N.Y. 1923).

In spite of judicial resistance, the veil of secrecy has been lifted in certain situations "when the ends of justice requir[ed] it."[31] Early case law concerning limitations on grand jury secrecy was codified with the enactment of the Federal Rules of Criminal Procedure.[32] Rule 6(e)[33] provided disclosure in instances when the defendant was able to show that "grounds [might have existed] for a motion to dismiss the indictment because of matters occurring before the grand jury" or "when so directed by a court preliminary to or in connection with a judicial proceeding."[34] Although this rule attempted to provide federal courts with a uniform requirement for handling matters of grand jury secrecy, it did not include standards for determining when disclosure of statements would be appropriate. Often the courts narrowly interpreted the situations in which disclosure would be granted. They were reluctant to grant discovery in the absence of any showing of inconsistency between a witness' trial testimony and his pretrial statements.[35]

In 1957, the Supreme Court took a giant step toward liberal criminal discovery rules by allowing disclosure of pretrial reports without a showing of inconsistency. In *Jencks v. United States,*[36] the Court held that the defendant was entitled to inspect pretrial reports given to the F.B.I. by the prosecution's witnesses in order to decide whether to use the reports in his defense. The Court specified that no preliminary foundation of inconsistency between the witnesses' reports to the F.B.I. and their testimonies at trial needed to be shown.[37] Under *Jencks*, there were only two requirements for production: (1) the witnesses whose statements were requested must have already testified on direct; and (2) the requested statements must appear relevant, competent, and

31 United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940).

32 18 U.S.C. §§ 1-60 (1976).

33 FED. R. CRIM. P. 6(e) (1946), as originally enacted, provided:

> (e) Secrecy of proceedings and disclosure.—Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

Rule 6(e) was amended in 1977 to provide in relevant part:

> (2)(c) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—
>
> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or
>
> (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

Rule 6(e) was also amended in 1979. *See* text accompanying note 4 *supra.*

34 FED. R. CRIM. P. 6(e)(c).

35 *See* Gordon v. United States, 344 U.S. 414, 418 (1953), in which the Court stated that, in order to find error in the lower court's refusal to permit disclosure, the defendant must show that the requested documents "were contradictory of [the witness'] present testimony, and that the contradiction was as to relevant, important and material matters which bore directly on the main issue being tried." *See also* Shelton v. United States, 205 F.2d 806 (5th Cir.), *cert. dismissed,* 346 U.S. 892 (1953), applying the decision in *Gordon.*

36 353 U.S. 657 (1957).

37 *Id.* at 666.

outside the scope of any exclusionary rule.[38] The Court suggested that these requirements would prevent "any broad or blind fishing expedition among documents possessed by the Government on the chance that something might turn up."[39]

At first, it was unclear whether the Court's decision in *Jencks* applied to statements made by prosecution witnesses before a grand jury.[40] In 1958, however, an attempt was made to end the confusion with the enactment of the Jencks Act which limited the holding in *Jencks* to discovery of pretrial statements and reports made by testifying witnesses to government agents. It omitted any reference to grand jury proceedings.[41] In the same year, the Supreme Court restricted discovery of grand jury statements to situations in which a "particularized need" for the material had been shown. In *United States v. Procter & Gamble,*[42] the Court stated that the " 'indispensible [*sic*] secrecy of grand jury proceedings' . . . must not be broken except where there is a compelling necessity. There are instances when that need will outweigh the countervailing policy. But they must be shown with particularity."[43]

In *Pittsburgh Plate Glass Co. v. United States,*[44] the Supreme Court confirmed the "particularized need" standard as the guide to the exercise of judicial discretion under rule 6(e). The Court, in a five-four decision, rejected the proposed extension of the Jencks Act to grand jury testimony and held that rule 6(e) continued to cover these proceedings.[45] It remained the defendant's burden to show that a "particularized need" existed for the statements which outweighed the need for secrecy.[46]

Whereas in *Procter & Gamble,* the Supreme Court developed the "particularized need" standard to curb the defendant's request for "wholesale"[47] discovery; in *Dennis v. United States,*[48] the Court was forced to consider the implications of the standard in dealing with a limited request for discovery. It said that recent developments making grand jury testimony available to defendants were "entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of justice."[49] A showing of "particularized need" must be bal-

38 *Id.* at 667.
39 *Id.*
40 Comment, *The Impact of* Jencks v. United States *and Subsequent Legislation on the Secrecy of Grand Jury Minutes,* 27 FORDHAM L. REV. 244 (1958).
41 From the legislative history of the Act, it is clear the Congress intended to exclude grand jury proceedings from the operation of the statute. The appendix to Senate Report No. 981 states that the Jencks Act was not intended to affect the disclosure of grand jury testimony:

> It should be noted that grand jury testimony is protected from disclosure by a Federal Rule of Criminal Procedure, 6(e), and it is within the discretion of the trial judge to decide when grand jury testimony is to be revealed to the defense after a proper foundation is laid. Jencks makes no reference to this rule and such a disclosure was not mentioned directly or indirectly in the opinion.

S. REP. No. 981, 85th Cong., 1st Sess. 10, *reprinted in* [1957] U.S. CODE CONG. & AD. NEWS 1861, 1868.
42 356 U.S. 677 (1958).
43 *Id.* at 682, *citing* United States v. Johnson, 319 U.S. 503, 513 (1943).
44 360 U.S. 395 (1959).
45 Justice Clark, in the majority opinion, wrote: "[T]he federal trial courts as well as the Courts of Appeals have been nearly unanimous in regarding disclosure as committed to the discretion of the trial judge. Our cases announce the same principle, and Rule 6(e) is but declaratory of it." *Id.* at 399.
46 *Id.* at 400.
47 356 U.S. at 683.
48 384 U.S. 855 (1966).
49 *Id.* at 870.

anced against the need for maintaining secrecy. When it is conceded that the need to preserve grand jury secrecy is minimal, the balance is clearly tipped in favor of disclosure.[50]

In 1970, the balance was again tipped in favor of disclosure. A provision was added to the Organized Crime Control Act of 1970[51] which amended the Jencks Act to include grand jury testimony.[52] This amendment granted the defense the right to grand jury testimony provided that the witness whose statement was requested had already testified on direct examination and that the requested statement was related to the subject matter of the witness' trial testimony.

Although the Jencks Act, the Federal Rules of Criminal Procedure, and these several Supreme Court decisions announced a defendant's right to disclosure of grand jury statements, they have not endorsed wholesale disclosure of such statements. The language of the standards established in these cases and statutes has allowed for broad judicial discretion in determining when the need for criminal discovery has been properly balanced against the need to maintain traditional grand jury secrecy. Such judicial discretion protects against abuses in the discovery privilege and assures that the defense will not have a disproportionate advantage over the prosecution.

B. *The Recording Requirement of Rule 6(e)*[53]

Although the Jencks Act has allowed discovery of grand jury statements, until recently there was no requirement that grand jury statements be recorded to ensure the availability of Jencks Act materials. For a number of years, courts have recognized that the "better practice" is to record grand jury statements.[54] Finally, after several legislative attempts to adopt such a requirement,[55] an

---

50 Comment, 54 NOTRE DAME LAW. 438, 452 (1979). *See* 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 108, at 183 (1969), which states:

> It seems to be a fair reading of *Dennis* that defendant should always have access to the grand jury testimony of witnesses who testified against him at trial, at least to the extent that the grand jury testimony is related to the subject matter of the trial testimony. Anything less would be inconsistent with the statements in *Dennis* that it is for the advocate, not the trial judge, to decide what may be useful for impeachment. . . .

51 Pub. L. No. 91-452, § 102, 84 Stat. 922 (amending 18 U.S.C. § 3500 (1970)).

52 For legislative history, *see* H.R. REP. No. 91-1549, 91st Cong., 2d Sess. 41, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4007, 4017. The amended version of the Jencks Act provides, in relevant part: "The term 'statement,' as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means—(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury." 18 U.S.C. § 3500(e) (1976).

53 *See* note 4 *supra.*

54 *See, e.g.*, United States v. Cramer, 447 F.2d 210 (2d Cir. 1971), *cert. denied,* 404 U.S. 1024 (1972); United States v. Aloisio, 440 F.2d 705 (7th Cir.), *cert. denied,* 404 U.S. 824 (1971); Schlinsky v. United States, 379 F.2d 735 (1st Cir. 1967).

55 The 95th Congress was active in the area of grand jury reform. Specifically, H.R. 94, 95th Cong., 1st Sess., 123 CONG. REC. 81 (1977), introduced by Representative Joshua Eilberg, and S. 3405, 95th Cong., 2d Sess., 124 CONG. REC. 13257 (1978), introduced by Senator James Abourezk, contained provisions to amend the Federal Rules to include a recording requirement. The bills were referred to the House and Senate Committees on the Judiciary, respectively, but the Congress adjourned before action was taken on either bill.

For a number of years, the American Bar Association also urged that rule 6(e) be amended to require the recording of all accusatorial grand jury proceedings. In 1965, the ABA recommended that an amendment to the Federal Rules be enacted to provide for a court reporter to transcribe the minutes of all grand jury proceedings and for the cost of the transcript to be borne by the Government. It also recommended that similar action be taken in the states either by changes in the rules of court or by the enactment of necessary legislation. Finally, it recommended that a copy of the grand jury minutes be furnished to the defendant, as

amendment to rule 6(e) was enacted to require the recording of all grand jury statements.[56]

The amendment to rule 6(e) contains three provisions. First, it requires that all grand jury proceedings, except during deliberations and voting, be recorded stenographically or by an electronic recording device. Second, it states that an unintentional failure of any recording to reproduce all or any portion of a proceeding will not affect the validity of the prosecution. Third, it provides that the recording or reporter's notes or any transcript prepared therefrom will remain in the custody or control of the attorney for the Government unless otherwise ordered by the court in a particular case. The Advisory Committee Note to rule 6(e) indicates, however, that the amendment deals only with the recording requirement and, in no way, expands the circumstances in which disclosure of grand jury proceedings is permitted or required.[57] The matter of disclosure continues to be governed by other provisions such as rule 16(a),[58] the Jencks Act, and the remaining provisions of rule 6(e).

V. The Validity of *Head* in Light of the Recording Requirement of Rule 6(e)

In *Head,* the Fifth Circuit stated that it was the "better practice" to record all grand jury statements. With the recent amendment to rule 6(e), the "better practice" became law. Although the amendment established the black-letter requirement to record grand jury proceedings, it failed to address two related issues: (1) whether a failure to record would amount to misconduct sufficient to warrant a dismissal of the indictment or striking of the trial testimonies of the unrecorded witnesses, and (2) what other forms of judicial relief would be available for violations of the requirement. Even though *Head* predates the amendment, it supplements the amendment by offering a possible solution to the first issue.[59] Whereas the amendment established the recording requirement, the decision in *Head* provides a standard for measuring whether a failure to record would amount to misconduct warranting such strict judicial remedies. This standard requires the defendant to offer some indication that the prosecutor's actions prejudiced him in making his defense.

There are three possible situations in which the recording requirement could be violated. The amendment provides that an unintentional failure to record would not affect the validity of the prosecution. Judicial relief in such situations would not be warranted. Conversely, a failure to record with the

---

a matter of right, after an indictment has been returned against him. *Report of the ABA Special Committee on Federal Rules of Procedure,* 38 F.R.D. 106 (1965). The same recommendation was made six years later. *Report of the ABA Special Committee on Federal Rules of Procedure,* 52 F.R.D. 87, 95 (1971).

56 [1979] 25 CRIM. L. REP. (BNA) 2255. The Supreme Court is given the authority to prescribe changes in the rules of practice and procedure governing criminal cases. "Such rules shall not take effect until they have been reported to Congress by the Chief Justice . . . , and until the expiration of ninety days after they have been thus reported." 18 U.S.C. § 3771 (1976).

57 FED. R. CRIM. P. 6(e), Adv. Comm. Note, H.R. Doc. No. 96-112, 96th Cong., 1st Sess. 70 (1979).

58 FED. R. CRIM. P. 16(a) provides for disclosure by the government of any relevant written or recorded statements made by the defendant, any prior criminal record of the defendant, any relevant documents and tangible objects, and any relevant reports of examinations and tests.

59 It should be noted, however, that violations of rule 6(e)(1) will probably be few. A prosecutor who knowingly violates a statutory requirement faces possible disciplinary action by his state bar association. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-13, DR 7-103 (1976).

specific intent to deny the defendant information not otherwise available to him would be a blatant violation of the requirement warranting strict judicial relief. The most difficult situation, however, would be one in which an intentional failure to record did not result in a denial of information to the defendant. The amendment fails to consider whether strict judicial relief would be warranted, for example, in a situation in which the prosecutor selectively recorded the grand jury testimonies knowing that the contents of the unrecorded statements were otherwise available to the defendant. The decision in *Head* provides an appropriate answer. *Head* states that strict judicial relief would not be warranted, even if the grand jury statements were deliberately unrecorded, absent a showing of "particularized prejudice" to the defendant's case.

Even though *Head* provides an answer to the first issue, the situation in *Head* is distinguishable from a violation of rule 6(e) because *Head* was decided without the benefit of the statutory recording requirement. An intentional violation of the statute regardless of the motive of the violator or the lack of prejudice to the case demands some form of judicial relief. Unlike the situation in *Head,* an intentional violation of the recording requirement involves two possible infringements: a possible infringement upon the rights of the defendant and a general infringement upon the public policy. The actions of the violator must therefore be judged not only in terms of their effect on the ability of the defendant to make his case but also in terms of their overall effect on the proper administration of justice. The decision in *Head* provides a possible solution to the first infringement: it denies strict judicial relief, such as a dismissal of the indictment or a barring of the trial use of the unrecorded statements, absent a showing of "particularized prejudice" to the defendant's case. *Head* does not, however, address the second issue of what other forms of judicial relief would be available to satisfy a violation of the statutory requirement.

Contempt of court might be appropriate form of relief for an intentional violation of the recording requirement. Under subsection (2) of rule 6(e), a knowing violation of the requirement of secrecy "may be punished as contempt of court."[60] The same form of relief might, therefore, be appropriate for an intentional violation of the recording requirement provided that there is no additional infringement upon the rights of the defendant.

VI. Conclusion

The decision in *Head* supplements the recording requirement of rule 6(e). It provides an answer to the question of whether a failure to record would amount to prosecutorial misconduct warranting either a dismissal of the indictment or striking of the trial testimonies of the unrecorded witnesses. *Head* was decided, however, prior to the enactment of the amendment to rule 6(e); therefore, *Head* does not address the second issue of what other forms of judicial relief would be appropriate for an intentional violation of the statute when there has been an infringement upon the public policy but not upon the rights of the defendant. An answer to this question will only be determined after

60 FED. R. CRIM. P. 6(e)(2).

judicial interpretation of the statute. The current trend in applying the Jencks Act and the discovery provisions of the Federal Rules has been one of restraint. The federal courts have been reluctant to reverse an otherwise valid conviction because of a failure to produce grand jury statements, unless the defendant has made a positive showing that a "particularized need" existed for the statements. It is therefore probable that the courts, in interpreting the recording requirement of rule 6(e), will act in a similar manner. Like the Fifth Circuit in *Head,* they will be reluctant to "thwart" the otherwise valid efforts of the prosecution, by applying strict judicial remedies, absent a showing of "particularized prejudice."

Sandra M. Molley