UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	)	
	)	Case No. 97-0853-CR-Middlebrooks
v.	)	
	)	Magistrate Dubé
ATLAS IRON PROCESSORS, INC., et al.,	)	(Amended order of reference dated May 7, 1998)
	)	
Defendants.	)	**MEMORANDUM OF THE UNITED STATES OPPOSING DEFENDANTS' JOINT MOTION FOR EARLY RELEASE OF JENCKS ACT MATERIAL**

I

INTRODUCTION

The United States opposes the Defendants' Joint Motion for Early Release of Jencks Act Material. The Jencks Act provides that the United States cannot be compelled to disclose the Jencks Act statements of government witnesses prior to their testimony on direct examination at trial. The relative simplicity of this case and the extensive discovery already provided to the defendants do not justify any deviation from the proscriptions of the Jencks Act. The United States will, however, disclose Jencks Act statements of it witnesses twenty-four hours prior to their testimony on direct examination.

II

THE COURT SHOULD NOT COMPEL THE UNITED STATES TO PRODUCE JENCKS ACT MATERIAL EARLY

The Jencks Act provides that the United States cannot be compelled to produce statements of its witnesses prior to the conclusion of their testimony on direct examination at trial. United States v. Blasco, 702 F. 2d 1315, 1328 (11th Cir. 1983); United States v. Campagnuolo, 592 F.2d 852, 861, 864 (5th Cir. 1979), *cert. denied sub nom.* Galvan v. United States, 464 U.S. 914 (1983) and

Jamardo v. United States, 464 U.S. 914 (1983); United States v. White, 750 F.2d 726, 728-29 (8th Cir. 1984); United States v. Algie, 667 F.2d 569 (6th Cir. 1982). The Jencks Act has been invoked to prohibit the pretrial disclosure of such statements in antitrust cases. See United States v. Greater Syracuse Board of Realtors, 438 F. Supp 376, 383 (N.D.N.Y. 1977).

The Jencks Act represents a congressional determination that a federal district court should not have the power, over the objection of the United States, to order disclosure of the statements of government witnesses prior to their direct examination. United States v. Percevault, 490 F. 2d 126, 128-29 (2d Cir. 1974). Consistent with this determination, the Courts of Appeals have repeatedly held that trial courts have erred when ordering the United States, over its objection, to disclose Jencks material in a way inconsistent with the Jencks Act. Algie, 667 F.2d at 571; Percevault, 490 F.2d at 128-29. In reversing a trial court which had ordered early production of Jencks Act statements in order to effectively manage its docket, the court in Algie stated,

> It is, however, our manifest duty as we see it to say that the exigencies of court administration which the District Judge has cited do not authorize us to sanction any amendment of the mandatory language of the Jencks Act, nor do we find on Rules 102 and 403 of the Federal rules of Evidence any intention on the part of Congress to amend the Jencks Act or to authorize a District Judge to require a United States Attorney to deviate from its terms against his judge.

Algie, 667 F.2d at 571. The defendants here have asked the Court to do what the Jencks Act and the Courts of Appeals have specifically held that it cannot do.

Moreover, this is not an appropriate case for early disclosure of Jencks Act statements. Despite the attempts by the defendants to complicate the issues, this is a relatively simple case. There are two principal witnesses who will testify about first-hand knowledge of a conspiracy to fix prices on scrap purchases in the Miami area. The "thousands of documents" that the defendants refer to are purchase records of defendants Atlas and Sunshine which demonstrate that the conspiracy was carried out and which will be presented, to the extent possible, in summary form.

The cases cited by the defendants do not provide sufficient support for early disclosure of Jencks Act material in this case. None of the cases is controlling. Most of the cases involve agreements by the government to disclose Jencks material early. The facts of the other cases are

inappropriate to this case. For example, in United States v. Krebs, 788 F.2d 1166 (6th Cir. 1986), *cert. denied*, 479 U.S. 930 (1986), the order of the trial court disclosing Jencks Act material early was not an issue. In United States v. Narciso, 446 F. Supp 252, 263-264, 270 (E.D. Mich 1977), the court faced a "truly extraordinary" case involving a capital crime, a lengthy list of complex, novel issues, a staggering amount of factual information, and a trial estimated to run four to six months. The court's order in Narciso was not reviewed at the appellate level and was based upon the court's notion of due process and effective assistance of counsel. Narciso, 446 F. Supp at 270-271. In United States v. Labovitz, 1996 U.S. Dist. LEXIS 10498 (D. Mass 1996), the issue of the court's authority to order early disclosure of Jencks Act material was mooted by the government's offer to disclose such material early. Moreover, in Labovitz it appears the government intended to introduce at trial extensive Jencks Act statements through an electronic form. In the instant case, the United States does not plan to introduce extensive Jencks Act statements through its Trial Director program. Rather, the government intends to use Trial Director to present Atlas and Sunshine business records, namely, invoices, showing the conspiracy was implemented.[1]

The discovery already provided to the defendants has been in no sense "limited" as the defendants characterize. The defendants have been provided with a detailed Bill of Particulars and have already been provided, pursuant to Rule 16, with the grand jury testimony and other statements of Shelia McConnell, one of the government's key witnesses, concerning the Miami conspiracy, as well as key documents relating to McConnell's grand jury testimony and other statements. See Response of the United States opposing Defendants Joint Motion to Suppress the Government's Introduction of Documentary Evidence and Tangible Things at pp. 4-7.

None of the reasons cited by defendants for early disclosure have any more relevance to this case than any other case. This is not a particularly complex case and its trial will probably be shorter than most white-collar cases tried by this Court. The discovery in this case has been so extensive that relevant Jencks Act statements relating to Sheila McConnell have already been disclosed to the

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[1] If the defendants are concerned about conserving scarce resources, they should stipulate to the authenticity of business records submitted by Atlas and Sunshine pursuant to subpoenas duces tecum. These pricing documents indisputably are routine business records of the defendants Atlas and Sunshine.

defendants. The defendants assertion that their clients have not been formally charged with intimidating witness is not a requirement for the operation of the Jencks Act.[2]

III

THE UNITED STATES WILL DISCLOSE
JENCKS ACT MATERIAL TWENTY-FOUR HOURS
IN ADVANCE OF ITS WITNESSES DIRECT TESTIMONY

The United States will disclose the Jencks Act statements for its witnesses who testify in its case-in-chief twenty-four hours in advance of their direct testimony. This will provide sufficient time for the defendants to prepare for their cross-examination. Accordingly, the defendants' motion for early disclosure of Jencks Act material should be denied.

Respectfully submitted,

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[2] In fact, one of the government's main witnesses, Shelia McConnell, was threatened by defendant Anthony J. Giordano, Sr., shortly after her grand jury testimony. An affidavit relating this incident in more detail can be submitted if the Court believes it appropriate to do so. Though the defendants suggest otherwise, witness intimidation is a valid concern in this case. As always, it is the character of the defendants charged with a crime, not the nature of the crime charged, which is controlling.

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