No.

IN THE SUPREME COURT OF THE UNITED STATES

DENISE ROBERTSON,
Petitioner,

vs.

UNITED STATES, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, when the defendant and government disagree as to whether a specifically identified document constitutes a "statement" under the Jencks Act, the defendant must make a showing with sufficient particularity that the document sought to be disclosed is a "statement" under that Act before a district court is required to review, in-camera, that specifically identified document to determine if it qualifies for disclosure under the Act.

PARTIES TO THE PROCEEDING

All parties to this appeal are listed in the caption, and the Petitioner is not a corporation.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Denise Robertson ("Ms. Robertson"), respectfully requests that a Writ of Certiorari be issued to review the Opinion of the United States Court of Appeals for the Ninth Circuit entered on July 20, 2018. This opinion held that when the government and defendant disagree as to whether a specifically identified document constitutes a "statement" under the Jencks Act, a defendant must make a "threshold showing with sufficient particularity" that the identified and requested documents are a Jencks Act statement subject to disclosure before the district court need even conduct an in-camera inspection of those documents. This decision conflicts with the guidance offered by this Court in *Palermo v. United States*, 360 U.S. 343, 354 (1959), and decisions of other circuit courts of appeal, such as *United States v. Smith*, 984 F.2d 1084, 1086 (10th Cir. 1993), and *United States v. Conroy*, 589 F.2d 1258, 1272-73 (5th Cir. 1979), that have considered this issue, so as to warrant exercise of this Court's discretion to grant certiorari, as fully explained below.

OPINION BELOW

On July 20, 2018, the United States Court of Appeals for the Ninth Circuit issued an Opinion in Ninth Circuit case number 16-10385, which affirmed Ms. Robertson's conviction. It denied a petition for panel and en banc rehearing on August 24, 2018. The relevant decisions and orders of the Ninth Circuit and the United States District Court for the District of Arizona are reproduced in the attached Appendix.

JURISDICTION

The United States District Court for the District of Arizona (Tuchi, D.J.) had jurisdiction over the federal criminal charges against Ms. Robertson pursuant to 18 U.S.C. § 3231. The district court entered its final judgment on August 25, 2016. [CR 203.][1] Ms. Robertson timely filed her notice of appeal on September 7, 2016. [FRAP 4(b)(1); C.A. Doc. 1; CR 204.] The Ninth Circuit had jurisdiction over Ms. Robertson's appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). Ms. Robertson filed a timely opening brief on March 3, 2017. C.A. Doc. 16, 19. On June 14, 2017, the government filed its response. C.A. Doc. 28, 31. Ms. Robertson replied on July 21, 2017. C.A. Doc. 36, 37. The Ninth Circuit held oral argument on the case on January 8, 2018. C.A. Doc. 47.

The Ninth Circuit issued its Opinion on July 20, 2018, affirming Ms. Robertson's conviction. C.A. Doc. 51. On July 30, 2018, Ms. Robertson filed a petition for panel and en banc rehearing. C.A. Doc. 52. The Ninth Circuit denied this request on August 24, 2018. C.A. Doc. 53. This Petition is thus being filed within 90 days entry of judgment, pursuant to Supreme Court Rules 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

1. "CR" refers to the District Court's Clerk's Record; "ER" refers to Appellant's Excerpt of Record; "RT" refers to the transcripts of the proceedings. "C.A. Doc" refers the Ninth Circuit Docket.

CONSTITUTIONAL AND OTHER PERTINENT PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part: Nor shall any person "be deprived of life, liberty, or property, without due process of law."

U.S. CONST. amend. V.

The Sixth Amendment to the United States Constitution states in pertinent part, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him, . . . and to have the assistance of counsel for his defense."

U.S. CONST. amend. VI.

18 U.S.C. § 3500: Demands for Production of Statements and Reports of Witnesses

(a) In any criminal prosecution brought by the United States, 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) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(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.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the

defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(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 portion 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.

(e) 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—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(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.A. § 3500 (West)

STATEMENT OF THE CASE

On November 5, 2014, the grand jury returned an indictment charging Ms. Robertson with embezzlement of mail by a postal employee (counts 1-7), in violation of 18 U.S.C. § 1709, and possession of stolen mail (counts 8-14), in violation of 18 U.S.C. § 1708. CR1, ER-V3 at 331. Ms. Robertson pleaded not guilty. CR 12; ER-V3 at 334.

During trial, after an agent testified on direct examination for the government, Ms. Robertson requested production of specific notes that this agent made during his investigation as Jencks Act material. RT 11/3/15 at 788-89; ER-V2 at 83-84. After the court received assurances from the government that it had concluded the notes need not be disclosed, the district court denied the request for production of these notes without independently examining them. RT 11/3/15 at 789-790; ER-V2 at 84-85.

The jury convicted Ms. Robertson on all counts. RT 2295-96; ER-V2 at 22. The court sentenced Ms. Robertson to nine months in custody, followed by three years of supervised release.

Ms. Robertson timely filed her notice of appeal and opening brief. CR 204; ER-V2 at 19; Dkt#19. On appeal, she argued her convictions should be reversed because: (1) the district court erred in denying her motion to dismiss the indictment based on bad faith destruction of evidence; (2) the district court abused its discretion by failing to give a jury instruction on lost or destroyed evidence; (3) the district court erred in not imposing an appropriate sanction for the government's violation of the court's witness exclusion orders; (4) the district court erred in failing to conduct an in camera review of requested notes under the Jencks Act, 18 U.S.C. § 3500; and (5) the district court's jury instruction on theft of mail by a postal employee misstated the law.

On July 20, 2018, the Ninth Circuit Court of Appeals affirmed Ms. Robertson's convictions, concluding that the district court did not err in denying Ms.

Robertson's motion to dismiss based on bad faith destruction of evidence, the videotape of the parking area where the government alleged Ms. Robertson committed the crime by placing mail in her car. The Ninth Circuit held that the district court's conclusion that the agent had not acted in bad faith was not clearly erroneous and the exculpatory value of the video was "speculative."

Although the government's actions "may have been imperfect" and were "not entirely blameless," the Ninth Circuit found no abuse of discretion in refusing to instruct the jury regarding the lost evidence, based on its weighing of the quality of the government's actions against the prejudice to the defendant.

The Ninth Circuit held that the district court violated Federal Rule of Evidence 615 in allowing government witnesses to review transcripts of testimony presented at proceedings subject to a witness exclusion order. However, it determined that the district court was within its discretion to determine that the appropriate sanction for that violation was to allow the witnesses to be cross-examined on such review.

Similarly, the Ninth Circuit found no abuse of discretion in the district court's failure to independently determine whether the agent's requested handwritten notes were subject to disclosure pursuant to the Jencks Act, 18 U.S.C. § 3500. The court concluded that it had been "unclear" when it held, consistent with the mandate of 18 U.S.C. § 3500 in *United States v. Johnson*, 521 F.2d 1318 (9th Cir. 1975), that "[i]t is the function of the trial court to determine the issue of producibility, i.e., to decide whether the notes in question constitute a 'statement'

within the meaning of the Act." Instead, the court found that because Ms. Robertson had failed to meet the threshold showing it articulated for the first time in this case, the district court was under no obligation to review and determine "whether the notes in question constitute a 'statement within the meaning of the Act."

Finally, in affirming Ms. Robertson's convictions, it rejected her argument that it amounted to plain error for the district court to instruct as it did on the required elements of embezzlement.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT THE WRIT BECAUSE THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE GUIDANCE OF THIS COURT IN *PALERMO V. UNITED STATES*, 360 U.S. 343, 354 (1959), AS WELL AS THE DECISIONS OF THE FIFTH AND TENTH CIRCUITS IN *UNITED STATES V. CONROY*, 589 F.3D 1258 (5TH CIR. 1979) AND *UNITED STATES V. SMITH*, 984 F.3D 1084 (10TH CIR. 1993), AS TO WHETHER A DEFENDANT MUST MAKE A THRESHOLD SHOWING 'WITH REASONABLE PARTICULARITY' THAT IDENTIFIED DOCUMENTS ARE "STATEMENTS" SUBJECT TO DISCLOSURE UNDER THE JENCKS ACT BEFORE THE DISTRICT COURT IS REQUIRED TO CONDUCT AN IN-CAMERA REVIEW OF THOSE IDENTIFIED DOCUMENTS.

Title 18 U.S.C. § 3500 (hereinafter, the "Jencks Act") mandates that after a government witness testifies on direct examination, upon motion by a defendant, the court shall

> 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.

18 U.S.C.S. § 3500 (LexisNexis, Lexis Advance through PL 114-327, approved 12/16/16). The Jencks Act was the congressional response to *Jencks v. United States*, 353 U.S. 657 (1957), which held that statements made by witnesses to an investigative agency must be produced, on motion of the defendant, if those statements relate to the subject matter as to which the witness has testified. This Court has made clear that the Jencks Act "reaffirms" rather than limits the *Jencks* decision. *Goldberg v. United States*, 425 U.S. 94, 104 (1976) (citations omitted).

The question presented in this appeal addressed whether the district court erred in not complying with the requirements of 18 U.S.C. § 3500, in failing to conduct the required in camera review of the specifically identified and requested notes when there was a dispute between the government and a defendant as to whether something qualified as a "statement" subject to disclosure under the Jencks Act. The *Jencks*' decision itself explained what foundational burden was required, namely that:

> '(t)he demand [must be] for production of * * * specific documents and. . . not propose any broad or blind fishing expedition among documents possessed by the Government on the chance that something impeaching might turn up. Nor [can it be] a demand for statements taken from persons or informants not offered as witnesses.' (citations omitted).

Jencks, 353 U.S. at 666-67.

Until its decision in this case, the decisions of the Ninth Circuit followed this holding, affirming that "[i]t is the function of the trial court to determine the issue of producibility, i.e., to decide whether the notes in question constitute a "statement" within the meaning of the Act." *United States v. Johnson*, 521 F.2d

1318, 1319-20 (9th Cir. 1975), citing *Ogden v. United States*, 303 F.2d 724, 737 (9th Cir. 1962); *Lewis v. United States*, 340 F.2d 678, 682 (8th Cir. 1965). In contravention of this long-standing precedent, in its ruling in this case, the Ninth Circuit has shifted the burden to the defendant to demonstrate "with reasonable particularity" that the requested and contested document, qualifies as a "statement" under the Jencks Act before the district court need do anything.

This conclusion contradicts the statute, the holdings of other circuits on this issue and the holdings of this Court. In *Johnson*, the Ninth Circuit cited two prior decisions in support of its holding.

The first case cited in *Johnson* is the Eighth Circuit decision in *Lewis*, 340 F.2d at 682. There, the Eight Circuit explained:

> The function of the trial court under § 3500, Title 18, U.S.C.A., is limited purely to the question of producibility, i.e. * * * is the document a 'statement' under the Act? Does it relate to the subject matter of the witness' testimony? The use of extrinsic evidence to determine that matter is permissible, and generally the Court should determine the same at a hearing out of the presence of the jury. (citations omitted).

Id.

Neither *Johnson* nor *Lewis* sought to amend into the statute the burden now imposed which has no basis in the law as enacted by Congress nor the rulings of this Court.

The second case referenced in *Johnson* is *Ogden*, 303 F.2d at 737, where the Ninth Circuit did discuss what showing a defendant must make to invoke the obligations of the district court under the Jencks Act. It explained,

> it remains true that the burden rests upon the defendant to invoke the statute at the appropriate time. The Act provides that the Court shall order the production of statements to which the defendant is entitled 'on motion of the defendant.' 'No ritual of words' is required, but the defendant must plainly tender to the Court the question of the producibility of the document at a time when it is possible for the Court to order it produced, or to make an appropriate inquiry. . . . The responsibility for fairly directing the attention of the Court to the precise demand submitted for the Court's determination is appropriately placed upon the Defendant, who seeks the statute's benefits.

Id. at 733 (citations omitted); *see also United States v. Wallace*, 848 F.2d 1464, 1471 (9th Cir. 1988) ("the defendant must "fairly" direct the attention of the district court to the Jencks Act production issue at an appropriate time and with a demand sufficiently precise to identify the statements requested").

Thus, the opinion issued in Ms. Robertson's case contravenes prior decisions of the Ninth Circuit on the burden a defendant must meet in order to invoke the obligations of the district court under the Jencks Act. The defendant must make a timely request for specific documents, nothing more. Indeed, *Ogden* recognized why the burden on the defendant is so limited: at that point, neither the defendant nor the trial court will know what is in the government's file:

> The Court and the defendant must grope; only the government knows the content of its own files. When the question of Jencks Act production is properly raised by the defendant, it is incumbent upon the government to make the fullest disclosure to the Court withholding nothing from the Court which might conceivably come within the Act.

Ogden, 303 F.2d at 733.

Here, Ms. Robertson met that requirement. After Agent Longton testified on direct examination and after he confirmed that he had notes of his investigation and witness interviews, Ms. Robertson expressly requested the production of those

notes. RT 11/3/15 at 788-89; ER-V2 at 83-84. In response, the government asserted that it had reviewed the notes and they were not subject to disclosure. RT 11/3/15 at 789; ER-V2 at 84. Rather than order their production for in camera review, the district court simply deferred to the government and denied the request for production, stating,

> Well, the notes -- it is incumbent upon the United States Attorney's Office to review the notes to see if there's anything disclosable in them, i.e, if they are materially different in any way from the other material or otherwise would be material to the defense under any Brady theory. If, on that review, they are not, then the United States Attorney's Office isn't required to turn it over. . .

Id.

To get around this preserved and obvious error, the Ninth Circuit sub silentio "overruled" *Ogden* by changing the burden on the defendant and making it more onerous than is lawfully required. Prior controlling case law held that,

> to agree with the government that the defendant must show, as a necessary foundation for a motion that the Court hear extrinsic evidence, that a "statement" producible under the Act is in fact in existence at the time of trial would be to hold that a hearing could not be had except on proof which, if available, would make the hearing unnecessary.

Ogden, 303 F.2d at 737.

The decision here not only violates Ninth Circuit precedent, it also conflicts with practices approved of by the this honorable Court, and with rulings from other circuits. For example, in *Palermo v. United States*, 360 U.S. 343, 354 (1959), this Court stated,

> (W)hen it is doubtful whether the production of a particular statement is compelled by the statute, we approve the practice of having the Government submit the statement to the trial judge for an In camera determination.

Indeed, any other procedure would be destructive of the statutory purpose. *Id.*

Importantly here, the decision affirming Ms. Robertson's convictions also conflicts with the decisions of other circuits. *See e.g.*, *United States v. Smith*, 984 F.2d 1084, 1086 (10th Cir. 1993), *United States v. Conroy*, 589 F.2d 1258, 1272-73 (5th Cir. 1979). For example, in *Smith*, the Tenth Circuit held that where a defendant "makes a prima facie showing that a statement of the witness existed which may have been producible under the Jencks Act, it was error for the court to deny his demand without a hearing or in camera review of the statement." *Smith*, 984 F. 3d at 1086. Similarly, it conflicts with the Fifth Circuit decision in *Conroy*, where the court recognized

> [t]he task of determining whether statements relate to prosecution testimony is thus vested in the trial court, not in the government. Scales v. United States, 1961, 367 U.S. 203, 258, 81 S.Ct. 1469, 1501, 6 L.Ed.2d 782, 817. The duty may be onerous and unpleasant, but so, indeed, are many of the duties that judges assume. The Act does not, of course, mandate that the trial judge examine voluminous material without assistance from government counsel. The court need only review those sections that the government seeks to withhold; but it should accomplish this by studying the portions proposed to be expunged in their proper context as parts of the complete document. If the court then determines that the government's expurgation is proper, the defense has no further cause for complaint. See, e. g., Holmes v. United States, 4 Cir. 1960, 284 F.2d 716, 720. But where the court fails even to look at the complete materials, thereby abdicating its responsibility to government counsel, the reviewing court has no choice but to vacate the judgment and remand for an appropriate examination.

Conroy, 589 F.2d at 1272-73.

Here, rather than require the district court to conduct its duty to review in camera the specifically identified documents, the Ninth Circuit affirmed a

procedure that allowed the government to determine whether the specifically requested documents were subject to disclosure under the Jencks Act because it concluded that Ms. Robertson failed to meet the newly identified burden of making a threshold showing with sufficient particularity that the requested documents were actually subject to disclosure.

Because the decision of the Ninth Circuit conflicted with this Court's guidance in *Palermo,* as well as the decisions of the Fifth and Tenth Circuit courts of appeal, this Court should exercise its discretion to grant the requested writ. Supreme Court Rule 10. Therefore, Ms. Robertson respectfully requests this Court to grant the writ, and reverse the Ninth Circuit, and remand this matter for further proceedings.

CONCLUSION

For the reasons stated above, this Court should grant the Writ.

Respectfully submitted: October 6, 2018.

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