

## WHITE-COLLAR CRIME

## Expert Analysis

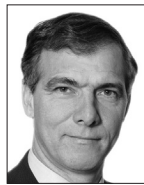
# Keeping the Indictment Out of the Jury Room

A recent decision by the U.S. Court of Appeals for the Second Circuit provides guidance against a practice that has evolved into a significant advantage for the prosecution in many criminal cases: providing a copy of the indictment to the jury during deliberations. This guidance is particularly apt in white-collar cases, where the filing of lengthy “speaking indictments” has become commonplace. Such speaking indictments have been known to contain titillating details—how John Edwards paid for his pricey haircuts, for example<sup>1</sup>—as well as expansive factual background, forceful advocacy and ultimate conclusions, all of which may go well beyond the elements of the crimes charged.

For the government, issuing a detailed, apparently persuasive speaking indictment at the outset of the case may have significant public relations and tactical benefits. But such indictments also provide an unwarranted benefit to the government when the jury is provided with a copy during deliberations, thereby receiving only one side’s version of the contested facts in written form. The Second Circuit’s suggestion in *United States v. Esso*<sup>2</sup> is that the better practice is to keep the indictment out of the jury room.

### The Indictment

Rule 7 of the Federal Rules of Criminal Procedure dictates that a federal indictment should contain “a plain, concise, and definite written statement of the essential facts constituting the offense charged.”<sup>3</sup> To pass constitutional muster, an indictment must “first, contain[] the elements of the offense charged and fairly inform[] a defendant of the charge against which he must defend, and, second, enable[] him to plead an acquittal or conviction in bar of future prosecutions for the same offense.”<sup>4</sup> In practice, perhaps motivated by a desire to include all arguable legal and factual theories, or perhaps to head off defense demands for bills of particulars providing additional specifics, federal prosecutors pursuing even moderately complex



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cases rarely prepare “concise” indictments.

When an indictment goes beyond its intended purposes, Rule 7(d) allows a defendant to seek a court order to strike extraneous information or surplusage. The standard for such motions is exacting, however, and they rarely are granted.<sup>5</sup> If the court determines that the “surplus” information is relevant and admissible, it will not be struck from the indictment even if prejudicial to the defendant.<sup>6</sup> Despite their authority, courts tend to be loath to grant motions to strike

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surplusage; one decision goes as far as to state that “[i]t has long been the policy of courts within the Southern District [of New York] to refrain from tampering with indictments.”<sup>7</sup>

Prosecutors have made creative use of their wide latitude in crafting indictments to achieve various ends. One that has been the subject of some commentary is to release information into the public arena that the government otherwise likely could not pursuant to Department of Justice no-comment rules or other ethical constraints.<sup>8</sup> Another practice that is particularly common in complex white-collar cases is to use a speaking indictment as an opportunity to engage in vigorous factual advocacy—to include within it a detailed explanation of the government’s view of the background and evolution of the conduct, and why it is worthy of sanction—so that the

indictment will function to help persuade the trier of fact, just as would any advocacy document in a litigation. The Second Circuit referred to this aspect of indictment drafting in the course of its decision in *Esso*.

### ‘United States v. Esso’

*Esso* was a mortgage fraud prosecution based on allegations that a mortgage brokerage submitted false information to lenders to obtain loans. The case was tried before Southern District of New York Judge Shira Scheindlin, and the main issue the Second Circuit addressed on appeal was the propriety of the jury being permitted to take home copies of the indictment overnight. The jury made this unusual request at the end of the first day of deliberations. Defense counsel objected, arguing in part that the indictment at issue “serves as the government summation.”

Scheindlin granted the jurors’ request and admonished them not to discuss the indictment with or show it to anyone. The court also reminded the jurors that they should not do any research on their own or look on the Internet for information related to the case. Finally, at the request of *Esso*’s counsel, the court reminded the jurors that “[a]n indictment is not evidence in any way. It’s just a charge by the government.” The next day, the jury returned a verdict convicting the defendant on all counts.

On appeal, the Second Circuit noted that the question whether a jury should be permitted to take home an indictment was one of first impression, and concluded that although the practice was neither unconstitutional nor erroneous, it should not become common practice. “Though we have doubts about the wisdom of the practice, and urge caution on district courts considering it, we conclude that, so long as jury deliberations have begun and appropriate cautionary instructions are provided, permitting the jury to take the indictment home overnight does not deprive a defendant of a fair trial.”<sup>9</sup>

The court rejected *Esso*’s primary argument that allowing the jury to take its work home effectively disrupted collective deliberations, denying him his right to a fair jury trial under the Fifth and Sixth Amendments. Acknowledging that jury deliberations are intended to be a collective process, the Second Circuit nevertheless observed that a trial court cannot prevent individual jurors from thinking about the case on their own time.

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The court saw no harm in “private ‘deliberations,’ which may in fact enable jurors to participate more thoughtfully in the collective process of reaching a verdict.”<sup>10</sup>

The Second Circuit acknowledged the risks of sending any trial materials home with jurors, noting that it increases the possibility that jurors may be exposed to outside influences in violation of a defendant’s due process right to have the jury decide his case solely on the evidence before it. The court observed that a significant risk already existed that jurors would conduct research or discuss the case with others, and found that the “marginal additional risk created by allowing jurors to take home a copy of the indictment seems to us small compared to the risks that already exist due to modern technologies and the persistent features of human nature.”<sup>11</sup>

Turning to the indictment’s role as a piece of advocacy, the Second Circuit then addressed whether “allowing the jurors to take the indictment home may ‘overemphasize[] its significance, since it is a one-sided presentation of the prosecution’s view of the case.’” In the course of discussing this issue, the court spoke to the more common practice of sending the indictment into the jury room. The court noted that although the practice is permissible, many trial judges do not follow it, “particularly when the indictment does not merely state the statutory charges against the defendant, but additionally contains a running narrative of the government’s version of the facts of the case, including detailed allegations of facts not necessary for the jury to find in order to address the elements of the charged offenses,” that is, particularly in the case of a speaking indictment.

The court provided the following guidance regarding best practices for the future: “In most cases, the judge’s instructions regarding the issues to be addressed by the jury and the elements of the offenses charged, which may include a reading of the legally effective portions of the indictment, will more than suffice to apprise the jury of the charges before them.”<sup>12</sup>

In the particular circumstances in *Esso*, however, the court opined that because the jury initiated the request for the indictment in an effort to save time the next morning, and the trial court renewed the instruction that indictments were not evidence, it was unlikely that the jury would interpret Scheindlin’s decision as a signal to place particular weight on the document.

Recognizing the “great discretion accorded trial judges to manage their own courtrooms” and the “desirability of allowing a measure of careful experimentation” with non-traditional trial management procedures, the court declined to find a constitutional violation given the absence of evidence that the jurors failed to follow Scheindlin’s limiting instructions. The court nevertheless “hasten[ed] to add that the better practice weighs against the experiment undertaken here,” which it found to “leave[] the deliberative process needlessly vulnerable to a variety of potential problems....”<sup>13</sup>

### Support for ‘Esso’s’ Guidance

The *Esso* court’s guidance against the general practice of submitting the indictment to the jury

is amply supported by the realities of modern trial practice, and by concerns expressed by the courts in addressing repeated jury exposure to one side’s advocacy. Although the Second Circuit previously has recognized that trial courts may use their discretion to permit jurors to take copies of the indictment into the jury room as long as the jury is instructed that it is not evidence, these decisions do not explain the basis for this rule.<sup>14</sup> The only apparent rationale is that referring to an organized written statement of the charges can be useful to the jury’s deliberations. That basis evaporates when the jury receives a written copy of the jury charge, as has become more common in recent years in the era of computer word-processors.

But even if the jury does not receive a written copy of the charge, the indictment hardly seems to be a good substitute for use during deliberations. By its nature, the indictment is one party’s—the government’s—account of the disputed events. It thus merits comparison in this context to other non-evidentiary advocacy statements by counsel—opening statements and summations—to which giving the jury repeated access is highly disfavored.<sup>15</sup> Indeed, recognizing that “[w]hen the deliberative process is interrupted by the jury’s re-exposure to one party’s view of the evidence and how it should be applied, its function is in some sense inevitably skewed,” the Second Circuit has previously joined a number of other courts in holding that “[i]n most cases permitting one side a read-back of a summation will exceed the bounds of a trial court’s discretion.”<sup>16</sup>

### Conclusion

Even if a particular indictment does not raise all the concerns arising from some speaking indictments, having a written statement of its views in the jury room is a significant procedural advantage available only to the government. The prosecution already gets the benefit of a second summation and the last word through its rebuttal following the defense summation. It is difficult to justify it getting what often may amount to a third, transmitted in written form directly into the jury room, by means of the indictment. As the Second Circuit suggests in *Esso*, the presumption should be against the indictment crossing the threshold of the jury room.

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1. Indictment, *United States v. Edwards*, 1:11CR161-1 at p. 8 (M.D.N.C. June 3, 2011).

2. \_\_\_ F.3d \_\_\_, 2012 WL 2401639 (2d Cir. June 27, 2012).

3. Fed.R.Crim.P. 7(c)(1).

4. *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007) (internal citations omitted).

5. *United States v. Napolitano*, 552 F.Supp. 465, 480 (S.D.N.Y. 1982).

6. *United States v. Griffin*, 1996 WL 140073, \*3 (S.D.N.Y. March 27, 1996) (citing *United States v. Scarpa*, 913 F.2d 993, 1013 (2d Cir. 1990)).

7. *United States v. Bin Laden*, 91 F.Supp.2d 600, 621 (S.D.N.Y. 2000) (internal citations omitted). Defendants may have further opportunity to address surplusage in the indictment during the course of trial. See *United States v. Griffin*, 1996 WL 140073, \*3 (S.D.N.Y. March 27, 1996) (although Rule 7(d) motion denied, defendant can argue during trial that government failed to introduce evidence supporting the alleged surplusage and seek to have it struck at that time); *United States v. Bruno*, 2009 WL 2601249, \*6 (N.D.N.Y. Aug. 21, 2009) (decision whether to provide indictment in its entirety

or in some redacted form depends upon the nature of trial evidence).

8. Anthony S. Barkow and Beth George, “Prosecuting Political Defendants,” 44 Ga. L. Rev. 953, 1004 (Spring 2010); see Press Conference, Attorney General Ashcroft Announces Results of Operation Great Basin (Dec. 10, 2001) (available at: [http://www.justice.gov/archive/ag/speeches/2001/agcrisisremarks12\\_10.htm](http://www.justice.gov/archive/ag/speeches/2001/agcrisisremarks12_10.htm)) (government statements note use of “speaking indictment”; acknowledging that the government is “circumscribed by our ability to answer any questions... beyond what’s in the four corners of that indictment”).

9. 2012 WL 2401639 at \*2.

10. *Id.* at \*3.

11. *Id.* at \*4.

12. *Id.* at \*3, n.5.

13. *Id.* at \*6 (citing *State v. Morgan*, 33 A.3d 527, 539 (2011) (jurors permitted to take jury instructions home)).

14. *United States v. Giampino*, 680 F.2d 898, 901 n.3 (2d Cir. 1982) (citing *United States v. Press*, 336 F.2d 1003, 1016 (2d Cir. 1964), cert. denied, 379 U.S. 965 (1965)).

15. See *United States v. Arboleda*, 20 F.3d 58 (2d Cir. 1994) (read-back of prosecutor’s rebuttal summation warranted reversal of conviction); *United States v. Guanti*, 421 F.2d 792, 801 (2d Cir. 1970) (trial court did not commit error by denying jury’s request for defense counsel summation).

16. *Arboleda*, 20 F.3d at 62 (2d Cir. 1994).