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CRIMINAL PROCEDURE—EVIDENCE—Composite Drawing Not Producible Under Jencks Act—*United States v. Zurita**

Following a bank robbery, the bank manager and his wife provided descriptions enabling an agent of the Federal Bureau of Investigation to compose drawings of the robbers which were then "approved" by each of these witnesses as being substantially accurate.[1] At the defendant's trial four years later, he was identified by the manager and his wife as one of the robbers.[2] The defendant, in an attempt to impeach their testimony,[3] requested that the government be compelled under the Jencks Act[4] to produce the original composite drawings.[5] The trial court denied this request, stating that the production of these drawings was not required by the Act. On appeal to the Court of Appeals for the Seventh Circuit, *held*, affirmed, one judge dissenting. A composite drawing is not a producible "statement" within the terms of the Jencks Act.

The Jencks Act provides that in criminal prosecutions by the federal government a court shall, on motion of the defendant, order the United States to produce any "statement" of a witness which relates to the subject matter of his testimony.[6] Subsection (e) of the Act defines a "statement" as:

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
> (2) a stenographic, mechanical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.[7]

The defendant in the principal case argued that a composite drawing is within the definition, either as a "written statement" adopted

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* 369 F.2d 474 (7th Cir. 1966), *cert. denied*, 386 U.S. 1023 (1967) [hereinafter cited as principal case].

1. Principal case at 480 (dissenting opinion); *see* Brief for Appellee in the principal case at 12; Brief for Appellant in the principal case at 3-5, 8, 19-21.

2. Principal case at 480 (dissenting opinion). The four-year delay in identification of the defendant magnifies the importance to the defendant of using the drawing as a means of testing the witnesses' recollection.

3. Obviously the defendant thought that the picture might not look anything like him.

4. 18 U.S.C. § 3500 (1964).

5. This Note will deal only with the question of a defendant's right under the Jencks Act to inspect a composite drawing. It will not analyze issues related to the admissibility of such a drawing or its value as impeachment evidence. However, there does not seem to be any evidentiary bar against the use of a drawing for impeachment purposes. 3 J. WIGMORE, EVIDENCE § 1040, at 727 (3d ed. 1940).

6. 18 U.S.C. § 3500(b) (1964). Since the witnesses in the principal case testified regarding the defendant's description, there is no question that the drawing relates to subject matter about which the witness testified. *See* Brief for Appellee in the principal case at 12; Brief for Appellant in the principal case at 3-5, 8, 19-21.

7. 18 U.S.C. § 3500(e) (1964).

by a witness under clause (1) or as a type of "recording" which is substantially a verbatim recital of a witness' oral statement under clause (2).[8] The Seventh Circuit rejected both interpretations: the former because a drawing is not a "written statement"; the latter because a composite drawing necessarily involves an agent's subjective interpretation and thus cannot be considered a verbatim recital of the witness' oral statement.[9] It is submitted that the court's interpretation of clause (1) was not required by existing authority and was, as a policy matter, unnecessarily restrictive.

In *Jencks v. United States*,[10] which led to the passage of the Jencks Act, the Supreme Court held that when the federal government initiated a criminal prosecution it waived the privilege to protect government reports to the extent that such reports were relevant to the accused's defense. The waiver extended even to reports of confidential nature;[11] the only restrictions imposed by the Court were that the request for production be for a specific document[12] which is competent, relevant, and not shielded from discovery by any other exclusionary rule.[13] Obviously concerned that this holding might endanger the national security, dry up the government's sources of information, and destroy the private character of confidential documents,[14] Congress reacted immediately[15] by passing the

8. *See* principal case at 475; Petition for Rehearing in the principal case at 2-4. For the view that a composite drawing ought to be admissible under clause (2), *see* Note, *Composite Drawings Are Not "Statements" Within the Jencks Act*, 5 HOUSTON L. REV. 178 (1967).

9. Principal case at 477. This Note will focus on the propriety of permitting production of composite drawings over defendant's motion under clause (1).

10. 353 U.S. 657 (1957).

11. In the *Jencks* case, the Court stated:

> [T]he Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes the accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense . . . .

Id. at 671 [quoting from United States v. Reynolds, 345 U.S. 1, 12 (1952)].

12. 353 U.S. at 667. *See generally* Orfield, *Discovery During Trial in Federal Criminal Cases: The Jencks Act*, 18 SW. L.J. 212, 214 (1964) (discussing former federal practice); Comment, *The Jencks Right: Judicial and Legislative Modifications, the States and the Future*, 50 VA. L. REV. 535 (1964) (discussing present state practice).

13. For the purpose of production and inspection, "relevancy" is established when the reports are shown to relate to the testimony of the witness. The requirement of being outside of any other exclusionary rule indicates that the government might still exclude such things as the "work-product" of an agent. The government cannot, however, exclude statements by invoking the governmental secrecy privilege.

14. In his dissenting opinion in *Jencks*, Justice Clark aroused great public concern when he stated:

> Unless the Congress changes the rule announced by the Court today, those intelligence agencies of our Government engaged in law enforcement may as well close up shop, for the Court has opened their files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information as well as national vital secrets.

353 U.S. at 681-82 (1957). Upcoming communist spy trials also induced Congress to act promptly in order to eliminate the dilemma of either having to divulge national

Jencks Act, which established a procedure designed to secure certain discovery rights for defendants in federal criminal trials while at the same time preventing needless disclosure of confidential or sensitive information.[16] If the government contests a defendant's motion for production of a witness' prior statement, the Act provides for *in camera* court inspection of the statement and delivery to the defendant of only the parts of the statement deemed related to the particular witness' testimony.[17] Should the government refuse to produce any related statement, the Act requires that the court strike that witness' testimony or, if justice dictates, declare a mistrial.[18]

Although the issue of the applicability of the Act to composite drawings was one of first impression,[19] the scope of subsection(e)(1) has been the subject of litigation. In *Palermo v. United States*,[20] the Supreme Court indicated that the word "statement" was *not* to be interpreted broadly[21] and upheld a trial court's conclusion that an agent's 600-word summary of a three-and-one-half-hour conference with a witness was not producible under the terms of the Act.[22] The

secrets or free spies without a trial. *See generally* S. REP. No. 981, 85th Cong., 1st Sess. app. 7-12 (1957); H.R. REP. No. 700, 85th Cong., 1st Sess. 2-3, 7-14 (1957) (including statements by Herbert Brownell, Jr., Attorney General of the United States; David W. Kendall, Assistant Secretary of the Treasury; and Abe McGregor Goff of the Post Office Dept.). Finally, Congress was concerned about misapplication of the *Jencks* rule because the government had no right to appeal a lower court's dismissal for noncompliance with a production order. 103 CONG. REC. 15,941 (1957) (remarks of Senator O'Mahoney).

15. H.R. 7915, 85th Cong., 1st Sess. (1957), was introduced the day after the Supreme Court decision, and was the first of eleven House bills designed to alter the rule of the *Jencks* case.

16. S. REP. No. 981, 85th Cong., 1st Sess. 2-3 (1957); H.R. REP. No. 700, 85th Cong., 1st Sess. 2-4 (1957).

17. *See* 18 U.S.C. § 3500(c) (1964). Under the *Jencks* decision the prosecution had to turn over to defense counsel *all* prior statements of witnesses which were logically related to their testimony so that counsel could determine whether any of the statements would be useful for impeachment purposes.

18. *See* 18 U.S.C. § 3500(d) (1964). The *Jencks* decision had provided for dismissal of the case and contempt proceedings for failure to produce statements. *See generally* Everett, *Discovery in Criminal Cases—In Search of a Standard*, 1964 DUKE L.J. 477, 485-90 (1964); Comment, *The Jencks Legislation: Problems in Prospect*, 67 YALE L.J. 674, 697 (1958).

19. Principal case at 476.

20. 360 U.S. 343 (1959). The *Palermo* case is noted in Casenote, *Jencks Act Construed —Palermo v. United States*, 21 MD. L. REV. 153 (1961); Comment, *Constitutional Law—Due Process and Right of Confrontation—Jencks Act*, 58 MICH. L. REV. 888 (1960); Comment, *The Jencks Act: After Six Years*, 38 N.Y.U.L. REV. 1133, 1134 (1963).

21. 360 U.S. at 353, 360. *See also* Comment, *The Jencks Act: After Six Years*, *supra* note 20, at 1134; Casenote, *supra* note 20.

22. 360 U.S. at 353, 360; *accord*, United States v. Aviles, 337 F.2d 552, 557 (2d Cir. 1964); United States v. Yetman, 196 F. Supp. 473, 475 (D. Conn. 1961). *Contra*, Papworth v. United States, 256 F.2d 125, 129-30 (5th Cir. 1958) (defendant entitled to relevant portions of original notebook in which the FBI agent recorded highlights of a conversation which, according to the court, were substantially verbatim statements). The importance of a ruling as to whether a drawing is within the requirements of the Act is emphasized by the fact that the Act is the *exclusive* remedy for the production of a government witness' statement for impeachment purposes. Palermo v. United States, 360 U.S. 343, 349, 356, app. A (1959).

Court stated that Congress intended to require the production of only those documents which contained the witness' own words or which could fairly be deemed to reflect fully and without distortion what the witness had said.[23] Therefore, the Court indicated that summaries of a witness' oral statements which evidence a substantial selection of material by the agent, which were prepared without the aid of complete notes, or which contain an agent's interpretations or impressions were not producible.[24]

However, four years later, in *Campbell v. United States*,[25] the Supreme Court seemed to shift away from this strict interpretation of "statement." In *Campbell*, an agent, upon completion of his interview with a witness, orally repeated the substance of the interview and secured the witness' approval of that summary. Seven hours later, the agent dictated an "interview report" relying primarily upon his notes but also upon memory. The Court upheld the trial court's determination that the report was producible under subsection (e)(1) of the Act as a written statement adopted by a witness.[26] Thus, a statement not written by the witness himself may nevertheless be producible if adopted by him; furthermore, approval of an oral statement rather than the writing itself can constitute adoption.[27]

These two cases may be reconcilable if considered in terms of appellate deference to trial judges' factual determinations in evidentiary matters; however, the result in *Campbell* seems to indicate a more liberal attitude toward producibility under the Jencks Act. Indeed, although the majority in *Campbell* relied on *Palermo* as definitive of the narrow role of appellate courts in reviewing lower court determinations as to producibility,[28] the dissent pointed out that the restrictive interpretation of subsection (e)(1) set forth in *Palermo* was undermined by extending that section of the Act to include an "investigator's selections, interpretations, and interpolations."[29] Nevertheless, the majority made it clear that their main

23. 360 U.S. at 353 n.11. The court did not feel that the statute, as interpreted, raised any constitutional issues, since Congress has the power to prescribe rules of procedure for the federal courts. *But see* notes 45-50 *infra* and accompanying text.

24. 360 U.S. at 352. *See generally* Williams v. United States, 338 F.2d 286, 288-89 (D.C. Cir. 1964) [listing six factors determining producibility under clause (2)].

25. 373 U.S. 487 (1963). *See generally* Comment, *supra* note 20, at 1142-46 (1963). The Court stated that the Act: " 'implies the duty in the trial judge affirmatively to administer the statute in such way as can best secure relevant and available evidence . . . .' " *Id.* at 493 [quoting from Campbell v. United States, 365 U.S. 85, 95 (1961)].

26. 373 U.S. at 495. The Court added: "It is settled, of course, that a written statement, to be producible under § 3500(e)(1), need not be signed by the witness . . . or written by him . . . or be a substantially verbatim recording of a prior oral statement . . . ." *Id.* at 492 n.6.

27. *See id.* at 492.

28. *Id.* at 493, 495.

29. *Id.* at 502 (Justice Clark, dissenting).

concern in interpreting the Act was to effectuate its primary purpose —securing fairness for defendants in federal criminal trials.[30]

In the principal case, the Seventh Circuit relied primarily on the strict interpretation given subsection (e)(1) in *Palermo* and gave only passing notice to the *Campbell* decision.[31] This reliance seems misplaced in view of the Supreme Court's apparent shift away from the *Palermo* standard in *Campbell*. Moreover, there are additional arguments for including composite drawings within the definition of "written statement" in subsection (e)(1).

Although composite drawings are not literally written statements, they are in effect only an alternative means of recording the descriptive statement of a witness. By using modern techniques and competent personnel, law enforcement officials can create drawings which accurately record descriptive statements.[32] In fact, a composite drawing may provide a more meaningful collation of the various aspects of the witness' description of the suspect's physical appearance than could a verbatim written report,[33] which would be producible even under *Palermo*. That such drawings subject the witness' statement to the interpretations of the artist-agent should no longer preclude their production. Despite language to the contrary in *Palermo*,[34] the agent's interview report in *Campbell* was held producible even

30. *Id.* at 496-97.

31. *See* principal case at 477. The conflict between *Palermo* and *Campbell* may be due to differences in the *quality* of the summaries involved, and thus this could provide a basis for reconciling the cases. Some support for this view is contained in the *Campbell* court's statement that a district judge is entitled to believe that an agent of the FBI "of some fifteen years of experience would record a potential witness' statement with sufficient accuracy." Campbell v. United States, 373 U.S. 487, 495 (1963).

32. Such drawings normally are created by using "image makers" and artists. It is common practice not to show the witness the composite until it is finished. At this time, corrections are made; if there is more than one witness, each of them is shown the drawing and given an opportunity to correct it until each is satisfied. The best results are achieved when (1) there is a good artist or machine operator who can respond correctly to the witnesses' descriptions; (2) a witness has seen the criminal for a significant length of time; and (3) good communication exists between witness and artist or operator. In addition to obtaining a general verbal description, there is an attempt to obtain peculiar features of the criminal. Thus, the hairline, type of nose, scars, etc. are stressed as most relevant. Telephone interview with Inspector Theodore Sienski, Robbery, "B. & E." Bureau, City of Detroit Police Department, November 13, 1967.

33. While no cases have previously dealt with the production of drawings under the Jencks Act, a drawing does seem to satisfy the requirements of being a "statement" in other contexts. *See generally* United States v. Molin, 244 F. Supp. 1015, 1020 (D. Mass. 1965) (holding that a "statement" can take any form, including any kind of appropriate marking which would be understood by the person looking at it); Bailey v. State, 365 S.W.2d 170, 172 (Tex. Crim. App. 1963) (treating a photograph as a statement or document). A narrow construction of "statement" under the Act would appear to result in numerous loopholes by which the government could avoid discovery, yet still preserve the meaning of what was said. Everett, *supra* note 18, at 516; Comment, *supra* note 20, at 891, 901; Comment, *The Jencks Legislation: The Status of the Accused's Federal Discovery Rights*, 38 TEXAS L. REV. 595, 612 (1960). *See also* Palermo v. United States, 360 U.S. 343, 361-63, 365 (1959) (concurring opinion).

34. *See* note 24 *supra* and accompanying text.

though its preparation had involved selection of portions of the witness' statement and was to that extent an "interpretation."

In addition, the court in the principal case stated that the purpose of subsection (e) of the Act is to insure "substantial fidelity of recordation or reproduction" of the witness' statements.[35] If a witness "adopts" a composite drawing upon its completion, as did the witnesses in the principal case, the "substantial fidelity" of the recordation would seem to be established.[36] Therefore, an interpretation of subsection (e) which would include composite drawings within the term "written statement" would not thwart the purpose of the subsection.

Furthermore, compelling production of such drawings would not frustrate the Jencks Act's broader purpose of permitting discovery of relevant statements[37] while foreclosing unnecessary disclosures of confidential information and potentially harmful fishing expeditions through government files.[38] In the principal case, the drawing was totally unrelated to national security and its production would not have been harmful to the public interest.[39] More important, the

35. Principal case at 477.

36. The witness in the principal case approved of the pictures as being substantially similar to the robber's appearance. Brief for Appellant in the principal case at 3-5, 8.

37. 103 CONG. REC. 15,782 (remarks of Senator Ervin), 15,783 (remarks of Senator O'Mahoney), 16,123 (remarks of Representatives O'Hara and Metcalf), 16,489 (remarks of Senator Cooper) (1957). *But cf.* Jencks v. United States, 353 U.S. 657, 668 (1957); H.R. REP. NO. 700, 85th Cong., 1st Sess. 4 (1957); Comment, *supra* note 20, at 901; Comment, *The Aftermath of the Jencks Case*, 11 STAN. L. REV. 297, 313 (1959). *See also* 103 CONG. REC. 15,921 (remarks of Senator Dirksen), 16,739 (remarks of Representative Keating) (1957).

38. The bill was to set standards of interpretation "(1) for safeguarding the needless disclosure of confidential information in government files and at the same time (2) assuring defendants access to the material in those files which is pertinent to the testimony of government witnesses." H.R. REP. NO. 700, 85th Cong., 1st Sess. 2 (1957).

39. Moreover, the rush to get essential protective legislation passed before Congress adjourned, the mentioning of a possible need for language revision in following sessions, and the expression of lack of sufficient time for comprehensive thought and consideration, provide some support for the view that the courts should construe the statutory language broadly. 103 CONG. REC. 14,913 (remarks of Senator Clark), 16,113-14 (remarks of Representative Curtis) (1957); Keefe, *Jinks and Jencks, a Study of Jencks* (remarks of Senator O'Mahoney), 16,124 (remarks of Representative Coffin), 16,742 (remarks of Representative Curtis) (1957); Keefe, *Jinks and Jencks, a Study of Jencks Versus United States in Depth*, 7 CATHOLIC U.L. REV. 91, 94 (1958). Final formation of subsection (e) of the Act occurred during a Joint Conference only two days prior to passage of the Act and to adjournment of Congress.

The Joint Conference was agreed to on August 27, 1957, and the bill was passed by the Senate on August 29, 1957. 103 CONG. REC. 16,083, 16,488 (remarks of Senators Mundt and Clark) 16,489-90 (1957). The fact the senators relied on the broad interpretation of the Act presented by Senator O'Mahoney, a sponsor of the legislation and a Senate conferee, is further reason to construe the word "statement" broadly. 103 CONG. REC. 16,489 (remarks of Senators Clark & O'Mahoney) (1957). Senator O'Mahoney, in answering a question regarding a requirement that certain photostats of records or of pictures be submitted for examination by the defendant or his counsel, stated: "If the pictures have anything to do with the statement of the witness—with either the written statement or the oral statement—of course that would be part of it; but whatever is produced must be related to the evidence of the witness who has testified

defendant's request was for production of a single document and thus could not be characterized as a fishing expedition.

In relation to the latter point, the court in the principal case seemed to rely improperly on *Ahlstedt v. United States.*[40] In that case the Court of Appeals for the Fifth Circuit denied defendant's motion for production of a large number of photographs which had been shown to witnesses in an attempt to identify the participants in a robbery.[41] However, this denial did not seem to be based on the fact that photographs rather than written statements were involved. The court in *Ahlstedt* based its decision primarily on the notion that it was preventing a fishing expedition through the prosecutor's "entire investigative files." *Ahlstedt* is thus not direct authority for banning discovery of pictures under the Jencks Act. Indeed, it can be inferred from the opinion that if the defendant's request had been for a *specific* photograph it would have been granted.[42] Admittedly, the Court of Appeals for the Seventh Circuit recently refused to adopt such an inference. In *United States v. Garrett,*[43] the Seventh Circuit cited *Ahlstedt* as authority for its denial of defendant's motion to produce one photograph which had been shown to witnesses for identification purposes. However, the *Garrett* opinion indicates that the witnesses had never "adopted" the photograph, and this factor alone could have been a reason for precluding its production under subsection (e)(1).[44] Therefore, *Garrett* may be distinguished from the principal case and should not foreclose a favorable ruling on a motion for production of a composite drawing which has been adopted by a witness.

Finally, there are some indications that a narrow interpretation of subsection (e)(1) of the Act may raise constitutional problems. Although the *Jencks* case itself was based on the Supreme Court's power to act in matters of procedure,[45] some recent cases suggest that denial of a defendant's request for evidence material to his defense violates due process. In *Brady v. Maryland,*[46] the Supreme

before the court in the criminal case." Following Senator O'Mahoney's remarks, the Act was passed in the Senate by a vote of seventy-four to two. 103 CONG. REC. 16,489-90 (1957).

40. 325 F.2d 257 (5th Cir.), *cert. denied,* 377 U.S. 968 (1963).

41. *Id.* at 259.

42. After noting that the defendant's motion sought to compel production of *all* relevant documents and photographs used in the investigation, the court went on to state that, "the District Court ruled, and we think correctly, that the Jencks Statute does not apply to *miscellaneous* photographs." Id. at 259 (emphasis added).

43. 371 F.2d 296 (7th Cir. 1966).

44. *Id.* at 300.

45. *See* Jencks v. United States, 353 U.S. 657, 668 (1957). *See also* Comment, *supra* note 20, at 898-903 (1960); Comment, *The Jencks Legislation: The Status of the Accused's Federal Discovery Rights,* 38 TEXAS L. REV. 595 (1960).

46. 373 U.S. 83 (1963). *See also* Levin v. Katzenbach, 363 F.2d 287, 291 (1966); Wexler, *The Constitutional Disclosure Duty and the Jencks Act,* 40 ST. JOHN'S L. REV. 206, 209 (1966).

Court stated generally "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution."[47] More specifically, the four concurring justices in *Palermo* suggested that a restricted interpretation of the Jencks Act could possibly give rise to a sixth amendment right of confrontation issue.[48] They posed the case in which a defendant is kept from inspecting criminal evidence because it does not "meet the definition of statement in subsection (e) of the statute."[49]

These potential constitutional overtones provide additional support for a broad interpretation of "written statement" in subsection (e)(1) of the Jencks Act. A broad construction, in addition to avoiding potential constitutional issues,[50] would seem to be consistent with recent authority on the scope of subsection (e)(1) and in accord with the purposes of the Jencks Act. If a request for production is confined to specific composite drawings and the fidelity of the recordation is established by a witness' "adoption," the drawings should be producible.

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47. 373 U.S. at 87.

48. Palermo v. United States, 360 U.S. 343, 362 (1959) (concurring opinion). *See generally* Everett, *supra* note 18, at 516; Wexler, *supra* note 46, at 411; Comment, *supra* note 20, at 891, 893; Comment, *The Jencks Legislation: The Status of the Accused's Federal Discovery Rights*, 38 TEXAS L. REV. 595, 612 (1960).

49. 360 U.S. at 362.

50. Siler v. Louisville & N.R.R., 213 U.S. 175, 191 (1909).