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Legislation - Federal Criminal Procedure - Modification of Jencks Decision

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RECENT LEGISLATION

LEGISLATION—FEDERAL CRIMINAL PROCEDURE—MODIFICATION OF JENCKS DECISION—Defendant was convicted of a violation of 18 U.S.C. §1001.¹ During the trial, the court denied defendant's motion to order the government to produce for defendant's inspection reports submitted by government witnesses to government agents. The reports dealt with the same subject about which these witnesses later testified. The court of appeals affirmed the decision.² On certiorari to the United States Supreme Court, *held*, reversed, one justice dissenting. The government has a privilege to refuse to surrender statements made by its prospective witnesses, but it may claim the privilege only at the expense of a dismissal of its case against the defendant. *Jencks v. United States*, 353 U.S. 657 (1957).

Before examining the scope and effect of the legislative response to this decision, it will be helpful to consider the earlier practice in the lower federal courts which was condemned by the Supreme Court in the *Jencks* decision. Following the direct testimony of a government witness and upon demand of the defense, the government delivered to the court for inspection, *in camera*, pre-trial statements made by the witness to a government agent.³ If there were inconsistencies between the witness' testimony and the prior statements, the court, having excised non-relevant portions, would order the particular document turned over to the defense to be used to impeach the credibility of the witness. If the government refused, the witness' testimony was stricken from the record.⁴ In expressly disapproving this practice, the Supreme Court in the principal case held that: (a) the defense, in order to obtain the reports, need not establish any inconsistency between the statement and the direct testimony⁵ but

¹ Defendant falsely swore that he was not a Communist Party member or affiliated with the Communist Party.

² *Jencks v. United States*, (5th Cir. 1955) 226 F. (2d) 540.

³ *United States v. Krulewitch*, (2d Cir. 1944) 145 F. (2d) 76; *United States v. Beekman*, (2d Cir. 1946) 155 F. (2d) 580. The Court had earlier noted this practice with apparent approval. *United States v. Reynolds*, 345 U.S. 1 (1953). See also *Goldman v. United States*, 316 U.S. 129 (1942), a case which presented a more appealing claim for relief than did the principal case, as the government witness there had admittedly used the reports to refresh his recollection before the trial. The Court there held (at 132) that "where a witness does not use his notes or memoranda in court, a party has no absolute right to have them produced and to inspect them" and "a large discretion must be allowed the trial judge." Justice Clark in his dissenting opinion in the principal case felt that logically the majority opinion should have expressly overruled *United States v. Goldman* in the interests of proper judicial administration.

⁴ *Wilson v. United States*, (3d Cir. 1932) 59 F. (2d) 390; *United States v. Schneiderman*, (S.D. Cal. 1952) 106 F. Supp. 731.

⁵ Failure of the defendant to prove inconsistency was the ground on which the government had opposed defendant's motion for the production of the documents and was the basis for the affirmance by the court of appeals. See principal case at 666. See also *Scanlon v. United States*, (1st Cir. 1955) 223 F. (2d) 382. It is immediately apparent that

has only to show that the reports "relate to the testimony of the witness"; (b) it is only after the defense has seen the reports that the court is to rule on questions of relevancy and admissibility; (c) it is the responsibility of the government, not the judge, to balance the alternatives of exercising its privilege, thus letting the defendant go free, or of releasing to him the information contained in the reports; (d) if the government claims its privilege, the case will be dismissed.⁶

In response to this decision and to many lower court decisions⁷ variously interpreting it, Congress enacted on September 2, 1957, 18 U.S.C. §3500, entitled "Demands for production of statements and reports of witnesses." This enactment upholds the basic premise of the *Jencks* decision, that the government must produce for defendant's inspection statements made by its own witnesses to government agents, which may aid the defendant in contradicting the witness' direct testimony.⁸ The government's alternative is to claim its privilege, thereby losing the testimony of that witness. The legislation also follows the principal case inasmuch as no prior foundation of inconsistency between statement and testimony need be laid. If the statement relates to the testimony, it is admissible.⁹ The impact of the statute is upon the mechanics by which the defendant is to be furnished the necessary statements. It is in this respect that the principal case is overruled.¹⁰ Upon motion of the defendant and refusal of the government to produce the statements, they are to be delivered for inspection, *in camera*, by the trial judge, who will rule upon them concerning the relevancy of the matter in question. If he finds nothing which relates to the witness' direct testimony he will deny the defendant's motion.¹¹

a defendant would find it virtually impossible to lay such a preliminary foundation without prior access to the statement unless, as in *Gordon v. United States*, 344 U.S. 414 (1953), the witness himself brings out the fact in his testimony.

⁶ Principal case at 672.

⁷ See *Simms v. United States*, (D.C. Cir. 1957) 26 U.S. LAW WEEK 2028; *United States v. Benson*, (S.D. N.Y. 1957) 20 F.R.D. 602; *United States v. Grossman*, (D.C. N.J. 1957) 154 F. Supp. 813; *United States v. Anderson*, (E.D. Mo. 1957) 154 F. Supp. 374; *United States v. Rosenberg*, (3d Cir. 1957) 245 F. (2d) 870; *United States v. Hall*, (W.D. Ky. 1957) 153 F. Supp. 661. See also cases cited 103 CONG. REC. 14552 (August 26, 1957). Respondents before administrative agencies had also demanded, and been refused, statements of third parties submitted to the government. *Great Atlantic and Pacific Tea Co.*, (N.L.R.B. 1957) 26 U.S. LAW WEEK 1035; *In re Kosuga*, (C.E.A. 1957) 26 U.S. LAW WEEK 2083.

⁸ P.L. 85-269, 85th Cong. (Sept. 2, 1957), hereinafter cited as 18 U.S.C. §3500 (b) and (c). See also 103 CONG. REC. 14551 (August 26, 1957).

⁹ 18 U.S.C. §3500 (b), (c) and (d).

¹⁰ 18 U.S.C. §3500 (c). See also 103 CONG. REC. 15249 (August 30, 1957).

¹¹ If the defendant objects to a denial of his motion and is later found guilty, the government must preserve the statement and submit it to the appellate court for a review of the correctness of the holding of the trial court. See 18 U.S.C. §3500 (c). The provision requiring the defendant to object in order to preserve his rights on appeal is a meaningless formality since he cannot make an intelligent objection without having access to the statement. It is probable that most defendants will object to the withholding of any information from them.

If it should be relevant, the trial judge will excise any non-pertinent portion and direct the government to deliver the statement to the defendant. If the government refuses, the witness' direct testimony will be stricken or a mistrial directed.¹² In addition, the statute very carefully spells out two limitations which were implicit in the facts of the *Jencks* decision, but which have been unheeded in a number of the lower federal decisions.¹³ The first of these emphasizes that the *Jencks* case decided only a narrow issue, that these reports must be given to the defendant in order to impeach the credibility of the witness.¹⁴ Thus they need be produced only *after* he has testified. Secondly, the statute contains a definition of "statement" as used in the act and limits the documents which the defendant may obtain to those made by the witness in writing, or, if oral, which are contemporaneously recorded by the government agent.¹⁵

Doubts were expressed on the floors of both houses of Congress as to the constitutionality of the proposed legislation.¹⁶ It is doubtful that the *Jencks* case was decided on a constitutional ground or that the former practice of the lower courts would be found to be a violation of procedural due process. The majority opinion in holding that the defendant must be the first to see the reports states that "Justice requires no less."¹⁷ If this were intended to mean "due process requires no less," it is submitted that the Court would have more clearly defined the constitutional basis.¹⁸ Viewing the case as a whole, the decision appears to

¹² It is to be noted that this is an important departure from the rule of the *Jencks* case where failure to produce the witness' statement resulted in a dismissal. 353 U.S. 657 at 672 (1957). See also cases cited 103 CONG. REC. 14552 (August 26, 1957). In one case purporting to follow the *Jencks* decision, when the government agent declined to produce a potential witness' statement in advance of trial, the trial judge refused to dismiss but, instead, held the agent in contempt. The court stated that "a criminal prosecution should be entirely devoid of any possibility of surprise to the defendant at the time of the trial." *United States v. Hall*, note 7 *supra*, at 663.

¹³ E.g., *United States v. Rosenberg* and *United States v. Hall*, note 7 *supra*.

¹⁴ 18 U.S.C. §3500 (a). Provision was also made to recess the trial in order to allow the defense to read the statements and to make use of them in the trial, 18 U.S.C. §3500 (c).

¹⁵ This definition was inserted as a separate paragraph to express the congressional intent that reports other than those made by the witness to an agent of the government should not come within the scope of the act. It was particularly designed to overrule cases wherein the court had ordered entire governmental files, names of prospective witnesses and grand jury reports to be given to the defendant. See cases cited 103 CONG. REC. 14552 (August 26, 1957).

¹⁶ 103 CONG. REC. 15249 (August 30, 1957) and 103 CONG. REC. 14538 (August 26, 1957).

¹⁷ Principal case at 669. See *State v. Thompson*, (Del. 1957) 134 A. (2d) 266, and *State v. Williams*, (N.J. 1957) 134 A. (2d) 39.

¹⁸ The court cites no cases to indicate that the decision is based on constitutional grounds. Instead, the majority opinion speaks of "the value of the reports for impeachment purposes" and of "our standards for the administration of criminal justice in the federal courts." The concurring opinion likewise alludes to "administration of criminal justice in the federal courts," while the dissent refers to the majority as "fashion[ing] a new rule of evidence."

represent only the exercise of authority by the Supreme Court over the procedure to be observed in the lower federal courts.

Congressional discussions emphasize that the enactment was not intended in any way to modify or affect the Federal Rules of Criminal Procedure.¹⁹ It was felt that since the *Jencks* opinion did not make reference to the rules and since the legislation was intended to affect only the decision of the *Jencks* case, the legislation must likewise avoid disturbance of the rules. Whether the policy of the legislation and that of the rules can be reconciled in every case is questionable, however. The recent legislation is emphatic in providing that the defendant may order a witness' prior statement produced only *after* the witness has testified;²⁰ yet, in a 1953 decision, *Fryer v. United States*,²¹ the District of Columbia Circuit seized on language of a Supreme Court case, *Bowman Dairy v. United States*,²² to hold that under the subpoena provisions of federal rule 17(c) a defendant might obtain a statement of a prospective government witness *in advance* of trial. The language of the rule²³ and the interpretation of it by the Supreme Court in the *Bowman* case are such that it would be quite logical for a court to permit pre-trial discovery under rule 17(c) of possible impeaching documents,²⁴ despite the new legislation which

¹⁹ 103 CONG. REC. 14534 and 14537 (August 26, 1957) and 14727 to 14730 (August 27, 1957). See also 103 CONG. REC. 15249 (August 30, 1957).

²⁰ 18 U.S.C. §3500 (a).

²¹ *Fryer v. United States*, (D.C. Cir. 1953) 207 F. (2d) 134. It is perhaps unwise to project the holding of this case upon the subject generally. It involved a capital case and, under a federal statute, the defendant was provided with a list of the government witnesses to be called. Thus, the case is distinguishable from the problem now under consideration wherein it is uncertain which witnesses the government will call, so that a pre-trial inspection would very likely be deemed a "fishing expedition." See *Gordon v. United States*, 344 U.S. 414 (1953).

²² *Bowman Dairy v. United States*, 341 U.S. 214 (1951), had stated (at 220-221) that "the plain words of the Rule [17(c)] are not to be ignored. They must be given their ordinary meaning to carry out the purpose of establishing a more liberal policy for the production, inspection and use of materials at the trial. There was no intention to exclude from the reach of process of the defendant any material that had been used before the grand jury or could be used at the trial. In short, any document or other materials, admissible as evidence, obtained by the government by solicitation or voluntarily from third persons is subject to subpoena."

²³ "The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence. . . ." For a discussion of the effects of this rule together with rule 16, see 67 HARV. L. REV. 492 (1954).

²⁴ It should be noted that the *Fryer* decision apparently stands alone on this interpretation of rule 17(c). It did, however, figure prominently in the discussion of the effects of the legislation in question on the Federal Rules of Criminal Procedure. See 103 CONG. REC. 14533 and 14537 to 14541 (August 26, 1957). The case has also been distinguished in a carefully written opinion by Judge Holtzoff, a member of the Advisory Committee which drafted the rules, on the ground that *Fryer* was a case involving a capital offense and, thus, the defense knew which witnesses would be called. The *Bowman* case requires that the statements subpoenaed be such as could be used as evidence in the trial. This would include use as impeaching evidence, but Judge Holtzoff would require that it be certain that the subpoenaed evidence could be so used and this

clearly was passed to avoid such a result. It is only the weight of lower court opinions restricting the sweep of rule 17(c)²⁵ and implications to be drawn from the recent legislation that would militate against such an interpretation.²⁶

In summary, the recently enacted legislation restores by statutory authority the practice previously followed in the lower federal courts. In so doing, it gives legislative approval to the concurring opinion in the *Jencks* case.²⁷ The result is to strike a balance between the demands and necessities of the defendant to have at his disposal all that he can to aid in his defense and the interests of the government to protect the sources of its information and to retain the private character of confidential documents.²⁸

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could not be ascertained unless (a) the defense knew, as in a capital case, which witnesses the government would call, or (b) the witness had already testified. See *United States v. Carter*, (D.C. D.C. 1954) 15 F.R.D. 367. See also *United States v. Malizia*, (S.D. N.Y. 1957) 154 F. Supp. 511.

²⁵ See *United States v. Maryland and Virginia Milk Producers Assn.*, (D.C. D.C. 1949) 9 F.R.D. 509; *United States v. Iozia*, (S.D. N.Y. 1952) 13 F.R.D. 335; *United States v. Carter*, note 24 supra; *United States v. Schneiderman*, (S.D. Cal. 1952) 104 F. Supp. 405. These opinions hold that rule 17(c) does not provide an additional discovery device but is intended only to expedite the trial by giving defendant certain limited materials in advance of trial.

²⁶ The effects of the legislation on this question are uncertain. It might be interpreted to be the clear congressional intent to forbid pre-trial discovery in a case which involves a situation similar to that of the *Jencks* case. On the other hand, a court could reason that it was the equally clear congressional purpose to refrain from modifying the rules, that the *Fryer* case was decided by interpretation of the rules; hence, that the legislation does not preclude another such decision under the rules. That this was the fear of the sponsors of the Administration-proposed amendment to the bill seems clear. See 103 CONG. REC. 14533 (August 26, 1957). At least one case has interpreted the legislation. In *United States v. Malizia*, (S.D. N.Y. 1957) 154 F. Supp. 511, the defendant demanded a pre-trial inspection of his own statements volunteered to the government. The court denied his motion, pointing out that Congress had excepted statements made by the defendant from the sweep of the statute, and that the ultimate decision was still within the discretion of the trial judge. The court was not certain why Congress had withheld such statements from defendants but felt that Congress had not considered them "as imbued with the same consequences as attach to statements made by third parties."

²⁷ Principal case at 672.

²⁸ See generally 8 WIGMORE, EVIDENCE, 3d ed., pp. 117-118 and 788-801 (1940) for the policy behind governmental privilege as to confidential statements and the function of the trial court in adjusting the rights and interests of the parties. Cf. Haydock, "Some Evidentiary Problems Posed by Atomic Energy Security Requirements," 61 HARV. L. REV. 468 (1948). See also *Roviaro v. United States*, 353 U.S. 53 (1957).