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DISCOVERY DURING TRIAL IN FEDERAL CRIMINAL CASES: THE JENCKS ACT*

by

Lester B. Orfield**

I. DISCOVERY BEFORE THE JENCKS ACT

IN FEDERAL criminal cases the defendant may use previous statements made out of court by a government witness that are inconsistent with his trial testimony to impeach the credibility of the witness.¹ It logically follows that all prior statements of a witness relating to his trial testimony may have possible impeachment value. In many cases the statements were made to a government agent and are in the possession of the Government. Is the defendant now entitled to production and inspection of the statements at the trial for use in cross-examination? This Article is addressed to this narrow question.

Case law pertaining to the production of prior statements made by government witnesses to government agents is of relatively recent vintage. Although the earliest decisions held that the defendant could not compel such production,² the Fourth Circuit, as well as the Second Circuit³ in dictum, refused to follow these decisions in 1932.⁴ However, during the next two decades the Supreme Court and several courts of appeals held that the defendant had no absolute right to production and that production was within the discretion of the trial court.⁵

* This Article is dedicated to a leading teacher and writer in the field of evidence, Professor Roy R. Ray, School of Law, Southern Methodist University. Professor Ray and I were classmates at the University of Michigan Law School.

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¹ See Orfield, *Impeachment and Support of Witnesses in Federal Criminal Cases*, 11 Kan. L. Rev. 447, at 447-57 (1963).

² *Lennon v. United States*, 20 F.2d 490, 494 (8th Cir. 1927); *Arnstein v. United States*, 296 Fed. 946, 950 (D.C. Cir.), *cert. denied*, 264 U.S. 595 (1924). In *Arnstein* the statement was in the possession of a state prosecutor.

³ See *United States v. Rosenfeld*, 57 F.2d 74, 76 (2d Cir.), *cert. denied sub. nom.*, *Nachman v. United States*, 286 U.S. 556 (1932).

⁴ *Asgill v. United States*, 60 F.2d 776, 779 (4th Cir. 1932) (letter). The Second Circuit stated, in dictum, that the defendant might have a right to production under the proper circumstances. *United States v. Rosenfeld*, 57 F.2d 74, 76 (2d Cir.), *cert. denied sub. nom.*, *Nachman v. United States*, 286 U.S. 556 (1932).

⁵ *Goldman v. United States*, 316 U.S. 129, 132 (1942); *Simmons v. United States*, 220 F.2d 377 (D.C. Cir. 1954); *Neal v. United States*, 203 F.2d 111, 118 (5th Cir.), *cert. denied*, 345 U.S. 996 (1953); *Iva Ikuko Toguri D'Aquino v. United States*, 192 F.2d

The Second Circuit, adhering to its earlier dictum favoring production, held that refusal of the defendant's demand at the trial to inspect a signed statement exonerating the defendant made by a government witness before the trial was reversible error even though the witness had admitted on cross-examination that the statement was entirely false.⁶ However, even the Second Circuit limited the doctrine of production. For example, if the trial court examined the testimony of a witness taken before a grand jury or written statements made by a witness which were given to the prosecutor and found that they had no impeaching value, refusal to allow the defendant to examine such matter was not reversible error.⁷ Production was refused if there was no evidence of contradiction.⁸ For example, if a government witness had given a statement in question and answer form to the Government but did not use such statement to refresh his recollection while testifying and there was no discrepancy between the statement and the witness' testimony, the trial judge may refuse to require delivery of the statement to defendant's counsel for purposes of cross-examination.⁹ Furthermore, if the statement contained merely minor contradictions of unimportant testimony, the trial court was not reversed in the absence of prejudicial error.¹⁰

Following the liberal approach taken by the Second Circuit, the Supreme Court was more receptive to production in 1953. In *Gordon*

338, 375 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952); *Kaufman v. United States*, 163 F.2d 404, 409 (6th Cir. 1947), *cert. denied*, 333 U.S. 857 (1948); *Boehm v. United States*, 123 F.2d 791, 805 (8th Cir. 1941), *cert. denied*, 315 U.S. 800 (1942); *Little v. United States*, 93 F.2d 401, 406 (8th Cir. 1937); *United States v. Toner*, 77 F. Supp. 908, 917 (E.D. Pa. 1948), *rev'd on other grounds*, 173 F.2d 140 (3d Cir. 1949). *But see* *United States v. Schneiderman*, 106 F. Supp. 731, 735 (S.D. Cal. 1952), *rev'd on other grounds sub. nom.*, *Yates v. United States*, 354 U.S. 298 (1957). In *Boehm* and *United States v. Muraskin*, 99 F.2d 815, 816 (2d Cir. 1938), refusal to order production was treated as harmless error. See Annot., 156 A.L.R. 354-55 (1945). In *Krulewitch v. United States*, 145 F.2d 76, 78 (1944), Judge C. E. Clark argued for discretion in the trial court. In 1943 the Supreme Court did not review the denial by the trial court of defendant's motion to inspect his entire selective service file because the issue was not presented in the petition for certiorari. *Bowles v. United States*, 319 U.S. 33, 36 (1943). Mr. Justice Jackson and Mr. Justice Reed, dissenting, thought such procedure was reversible error. The trial judge was not required to permit the defendant to examine the notes although counsel stated that he noticed the Government had an additional set of notes as to the jurors and that he thought that the Government had made an FBI examination of the jury. *Christoffel v. United States*, 171 F.2d 1004, 1006 (D.C. Cir. 1948), *rev'd on other grounds*, 338 U.S. 84 (1949).

⁶ *United States v. Krulewitch*, 145 F.2d 76, 78 (2d Cir. 1944), noted in 45 Colo. L. Rev. 461 (1945), 98 U. Pa. L. Rev. 719, 731 (1950); see also Morgan, *The Law of Evidence, 1941-1945*, 59 Harv. L. Rev. 481, 514-19 (1946).

⁷ *United States v. Cohen*, 145 F.2d 82, 92 (2d Cir. 1944), *cert. denied*, 323 U.S. 797 (1945); see also *United States v. Ebeling*, 146 F.2d 254, 256 (2d Cir. 1944).

⁸ *United States v. Walker*, 190 F.2d 481, 483 (2d Cir. 1951).

⁹ *United States v. Simonds*, 148 F.2d 177, 179 (2d Cir. 1945).

¹⁰ *United States v. De Normand*, 149 F.2d 622, 625 (2d Cir.), *cert. denied*, 326 U.S. 756 (1945).

*v. United States*¹¹ the Court held that the trial court was bound under its common-law powers to order, at the request of the defendant, production of a government witness' prior inconsistent statement in the Government's hands.¹² Production may be required though inspection may show that the document properly could be excluded if offered in evidence. The Court stated that the question of discovery of documents at the trial for impeachment purposes is one to be decided by the courts in the "absence of specific legislation."¹³ It was not clear from the decision, however, whether the Court also adopted the limitations laid down by the Second Circuit. The first case to apply the holding in *Gordon* construed the decision as meaning that the defendant could compel production merely by making certain that his demand was for specific documents in the possession of the Government.¹⁴ However, later cases held that the defendant must lay a foundation of inconsistency before production would be compelled.¹⁵

Although the authorities were not in agreement, the better view was that the defendant was not required to make a showing of inconsistency or contradiction. For example, in the trial of Aaron Burr, Mr. Chief Justice Marshall held that it was necessary to aver only that it "may be material" in order to compel production of a letter to the President in the hands of the Government.¹⁶ Other cases held that contradiction was unnecessary, but either refused a new trial because an examination by the trial judge disclosed no relevant material¹⁷ or denied the motion for production because no specific material was demanded.¹⁸ A few cases, however, did require a showing of inconsistency.¹⁹

If the defendant does not show the materiality of the report

¹¹ 344 U.S. 414 (1953).

¹² *Id.* at 416-17, 421-22. The witness admitted the conflict.

¹³ *Id.* at 418.

¹⁴ *United States v. Mesarosh*, 116 F. Supp. 345, 350 (W.D. Pa. 1953).

¹⁵ *United States v. Fontana*, 231 F.2d 807, 809 (3d Cir. 1956); *United States v. Bookie*, 229 F.2d 130, 133 (7th Cir. 1956); *United States v. Lightfoot*, 228 F.2d 861, 868 (7th Cir. 1956); *Scanlon v. United States*, 223 F.2d 382, 385 (1st Cir. 1955); *Simmons v. United States*, 220 F.2d 377 (D.C. Cir. 1954); *Shelton v. United States*, 205 F.2d 806, 814 (5th Cir. 1953). *But see* *United States v. Lebron*, 222 F.2d 531, 536 (2d Cir. 1955), holding that the trial judge should compel production if he finds anything contradictory in the prior statement.

¹⁶ *United States v. Burr*, 25 Fed. Cas. 187, 191 (No. 14694) (C.C.D. Va. 1807).

¹⁷ *Boehm v. United States*, 123 F.2d 791, 807 (8th Cir. 1941).

¹⁸ *United States v. Mesarosh*, 116 F. Supp. 345, 350 (W.D. Pa. 1953), *aff'd*, 223 F.2d 449 (3d Cir. 1955), *rev'd on other grounds*, 352 U.S. 1 (1956). For other cases see Note, 67 Yale L.J. 674, 677 n.13 (1958).

¹⁹ *United States v. Dilliard*, 101 F.2d 829, 837 (2d Cir. 1938), *cert. denied*, 306 U.S. 635 (1939); *United States v. Rosenfeld*, 57 F.2d 74, 76 (2d Cir.), *cert. denied sub. nom.*, *Nachman v. United States*, 286 U.S. 556 (1932).

sought, there is no right of discovery at the trial.²⁰ Moreover, the defendant must give a specific description or designation of the statement, document, or report.²¹ If the Government elected not to comply with an order to produce on the ground of privilege, it could not proceed with the prosecution.²² However, one decision²³ suggested that the witness' testimony should be stricken instead of dismissing the case.

Initial inspection was usually by the trial court if production was allowed.²⁴ However, some decisions held that the defendant might directly inspect the requested statements provided a preliminary showing of inconsistency was made in order to obtain production.²⁵ Obviously, it was extremely difficult to lay such a foundation without first inspecting the statements. If the witness admitted inconsistency, production was allowed.²⁶

The defendant had a right to inspect any notes or memoranda used to refresh the government witness' recollection *while* testifying.²⁷ In cases involving government witnesses who admitted using their notes or memoranda in the government's possession to refresh their recollection *before* testifying,²⁸ the question naturally arose whether the defendant had the same right. The Supreme Court denied any such absolute right in the defendant and ruled that such was within

²⁰ *United States v. Roviato*, 229 F.2d 812, 815 (7th Cir. 1956); *United States v. Bookie*, 229 F.2d 130, 133 (7th Cir. 1956).

²¹ *United States v. Muraskin*, 99 F.2d 815, 816 (2d Cir. 1938); *United States v. Mesarosh*, 116 F. Supp. 345, 350 (W.D. Pa. 1953).

²² *United States v. Reynolds*, 345 U.S. 1, 12 (1953) (dictum); *United States v. Beekman*, 155 F.2d 580, 584 (2d Cir. 1946); *United States v. Krulewitch*, 145 F.2d 76, 78 (2d Cir. 1944); *United States v. Andolschek*, 142 F.2d 503, 506 (2d Cir. 1944). For an earlier contrary case see *Arnstein v. United States*, 296 Fed. 946, 950 (D.C. Cir. 1924).

²³ *United States v. Schneiderman*, 106 F. Supp. 731, 738 (S.D. Cal. 1952), *rev'd on other grounds sub. nom.*, *Yates v. United States*, 354 U.S. 298 (1957).

²⁴ *United States v. Lebron*, 222 F.2d 531, 536 (2d Cir. 1955); *Shelton v. United States*, 205 F.2d 806, 814 (5th Cir. 1953); *United States v. Krulewitch*, 145 F.2d 76, 78 (2d Cir. 1944); *Boehm v. United States*, 123 F.2d 791, 806 (8th Cir. 1941); *United States v. Schneiderman*, *supra* note 23.

²⁵ *Scanlon v. United States*, 223 F.2d 382, 385 (1st Cir. 1955); *United States v. Rosenfeld*, 57 F.2d 74, 76 (2d Cir.), *cert. denied sub. nom.*, *Nachman v. United States*, 286 U.S. 556 (1932); *Arnstein v. United States*, 296 Fed. 946, 950 (D.C. Cir.), *cert. denied*, 264 U.S. 595 (1924).

²⁶ *Gordon v. United States*, 344 U.S. 414, 416 (1953); *Burton v. United States*, 175 F.2d 960, 965 (5th Cir. 1949), *cert. denied*, 338 U.S. 909 (1950); *United States v. Krulewitch*, 145 F.2d 76, 78 (2d Cir. 1944); *Asgill v. United States*, 60 F.2d 776, 778 (4th Cir. 1932).

²⁷ *Montgomery v. United States*, 203 F.2d 887, 893 (5th Cir. 1953); *Little v. United States*, 93 F.2d 401, 406 (8th Cir. 1937); *Morris v. United States*, 149 Fed. 123, 126 (5th Cir. 1906). For a long period this was virtually the only discovery allowed. See Note, 67 Yale L.J. 674, 679 n.19 (1958).

²⁸ See Orfield, *Examination of Witnesses in Federal Criminal Cases*, 4 Ariz. L. Rev. 215, 229-33 (1963).

the discretion of the trial court.²⁹ Writers have criticized this approach.³⁰

In 1957, the Court laid down a broad rule protecting the defendant's rights to discovery during trial. In *Jencks v. United States*³¹ the practice of producing government documents for the trial judge's determination of relevancy and materiality without hearing the defendant was disapproved. Furthermore, the necessity of the defendant laying a preliminary foundation showing inconsistency between the contents of the reports and the testimony of the government agents was obviated.³² The Court discarded the conflict test which necessitated that the defendant know the content of the reports. Relevancy and materiality for the purpose of production and inspection, with a view to use in cross-examination, are established if the reports are shown to relate to the testimony of a witness. The right to discovery was made absolute, provided the reports related to previous statements of the government's witness.

After the *Jencks* decision a federal district court issued the following test as to discovery at the trial: Before the defendant may have production and inspection of a statement made by a person other than himself, (1) such other person must have been called as a witness by the Government; (2) the defendant must have established on cross-examination that the statement was made by such witness; (3) the statement must be in the possession of the United States; and (4) the statement must touch events and activities related in direct examination.³³ This decision was relied upon substantially when the *Jencks* statute was passed.³⁴

²⁹ *Goldman v. United States*, 316 U.S. 129, 132 (1942). *Accord*, *Tillman v. United States*, 268 F.2d 422, 424 (5th Cir. 1959); *United States v. Roviato*, 229 F.2d 812, 815 (7th Cir. 1956); *Iva Ikuko Toguri D'Aquino v. United States*, 192 F.2d 338, 375 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952).

³⁰ *McCormick*, Evidence § 9, at 17 (1954); 3 *Wigmore*, Evidence § 762, at 111 (3d ed. 1940); *Orfield*, *supra* note 28, at 232; *Note*, 45 *Colo. L. Rev.* 461, 464 n.22 (1945).

³¹ *Jencks v. United States*, 353 U.S. 657, 666 (1957), noted in 71 *Harv. L. Rev.* 87, 87-88, 112-17 (1957), 18 *La. L. Rev.* 345 (1958), 56 *Mich. L. Rev.* 314 (1957), 36 *N.C.L. Rev.* 210 (1958), 31 *So. Cal. L. Rev.* 78 (1957), 5 *U.C.L.A.L. Rev.* 147 (1958), 106 *U. Pa. L. Rev.* 110 (1957).

³² This was the basis for refusing production and inspection in the court of appeals. 226 F.2d 540, 553 (5th Cir. 1955).

³³ *United States v. Anderson*, 154 F. Supp. 374, 375 (E.D. Mo. 1957); see also *United States v. Carr*, 21 F.R.D. 7, 8 (S.D. Cal. 1957); *United States v. Palermo*, 21 F.R.D. 11, 13 (S.D.N.Y. 1957), *aff'd*, 258 F.2d 397 (2d Cir. 1958), *aff'd*, 360 U.S. 343 (1959); *United States v. Brockington*, 21 F.R.D. 104, 106 (E.D. Va. 1957).

³⁴ *United States v. Palermo*, 258 F.2d 397, 400 n.6 (2d Cir. 1958), *aff'd*, 360 U.S. 343, 359 (1959). Although the *Jencks* decision attracted much criticism, one writer has pointed out that the rule of the case "has been in effect for trials by courts martial since 1921." *Kent, The Jencks Case: The Viewpoint of a Military Lawyer*, 45 *A.B.A.J.* 819 (1959). The statute or the *Jencks* decision has been followed in California. *People v. Chapman*, 52 *Cal. App. 2d* 95, 338 *P.2d* 428, 430 (Sup. Ct. 1959). See also *People v. Wolff*, 18 *Ill. App. 2d* 318, 167 *N.E.2d* 197, 201 (1960); *People v. Rosario*, 9 *N.Y.S.2d* 286, 173 *N.E.2d*

II. THE STATUTE³⁵

A. *The Purpose*

Judge Pickett has stated that the purpose of the statute "was to fix standards by which statements and reports of a witness in the possession of the Government shall be made available to a defendant in a criminal prosecution after the witness has testified."³⁶ Judge Lumbard quoted favorably the words of Senator O'Mahoney: "The purpose of the bill is to protect the files of the Government against unwarranted disclosure and at the same time to preserve due process of law for defendants in criminal cases."³⁷

The statute carries out the basic premise of the *Jencks* decision, *viz.*, the Government must produce for the defendant's inspection statements made by government witnesses to government agents that may aid the defendant in contradicting the direct testimony of the witness. If the Government is unwilling to produce the statement, the testimony of that witness is lost, whereas under the rule of the *Jencks* case the defendant got a new trial if the Government did not produce. The statute also follows the *Jencks* decision in providing that no prior foundation of inconsistency between statement and testimony need be laid if the statement relates to the testimony. However, the statute makes important changes in the method by which the defendant is furnished the statement. The statements are to be delivered for inspection, *in camera*, by the trial judge. The trial judge will determine if any of the statement relates to the testimony. If so, any nonpertinent portions will be excised. Furthermore, the statute makes it clear that the statement need be produced only after the witness has testified. A definition of "statement" as well as a procedure for correcting errors by the trial judge on appeal is also provided by the statute. If the Government elects not to produce privileged documents, it is reasonably clear that the testimony of the witness will be stricken or that a mistrial will be declared.³⁸

881, 883 (Ct. App. 1961); *State v. Hunt*, 25 N.J. 514, 138 A.2d 1, 7 (1958); *Taitano v. Guam*, 187 F. Supp. 75, 78 (District Ct. App. 1960) (Guam). Either the statute or the decision has been rejected in Iowa: *State v. Kelly*, 91 N.W.2d 562, 563-64 (Iowa 1958); Missouri: *State v. Simon*, 375 S.W.2d 102, 104 (Mo. 1964); and, in part, in Indiana: *Anderson v. State*, 239 Ind. 372, 156 N.E.2d 384, 385 (1959). See 8 Wigmore, Evidence § 2224 (McNaughton Rev. 1961).

³⁵ The statute is set out in the appendix at the end of this Article.

³⁶ *United States v. Palermo*, 258 F.2d 397, 398 n.2 (2d Cir. 1958), *aff'd*, 360 U.S. 343 (1959).

³⁷ *United States v. McKeever*, 271 F.2d 669, 674 (2d Cir. 1959); see 103 Cong. Rec. 16487 (1957).

³⁸ Note, 106 U. Pa. L. Rev. 110, 114-15 (1957); Note, 71 Harv. L. Rev. 87, 112, 116-17 (1957). But many prior cases had laid down the same view. Note, 67 Yale L.J. 674, 677 n.14 (1958).

The statute as interpreted by the Court "does not reach any constitutional barrier."³⁹ Being procedural in nature, the Jencks Act applies to offenses committed prior to enactment.⁴⁰ When reviewing a decision of a trial court, a court of appeals will apply the law in effect at the time of review, and on the granting of a new trial, the statute also will be applied.⁴¹ However, under the statute the defendant must demand the statement in order to preserve his right to production. Prior to both the *Jencks* decision and the statute, only a few circuits permitted production; hence, there would have been no occasion for demand in many circuits. In practice, therefore, instances of retroactive application will be rare.

B. Scope

The statute applies only to discovery in criminal cases.⁴² It allows discovery pursuant to a motion to vacate.⁴³ If the Government refuses to make such discovery, the proper procedure is for the trial court to strike from the record all testimony given by the witness sought to be impeached and proceed with the hearing; no new trial should be granted to the moving party merely because of the refusal.⁴⁴ Although the statute applies only in criminal cases, there is some authority that the rule of the *Jencks* case is applicable in administrative proceedings.⁴⁵

The Supreme Court has made it clear that the statute is the sole and exclusive means of obtaining statements of government witnesses. The Court said: "[S]tatements of a government witness made to an agent of the government which cannot be produced under the terms

³⁹ *Palermo v. United States*, 360 U.S. 343, 353 n.11 (1959). Congress has the power to prescribe rules of procedure for the federal courts. The Supreme Court may prescribe rules of procedure and evidence "only in the absence of a relevant act of Congress." *Ibid.* In 1961 Mr. Justice Harlan stated: "That the procedure set forth in the statute does not violate the Constitution and that the procedure required by the decision of this Court in *Jencks* was not required by the Constitution was assumed by us in *Palermo v. United States*. . . ." *Scales v. United States*, 367 U.S. 203, 257 (1961). *Scales* was followed in *Peek v. United States*, 321 F.2d 934, 940 (9th Cir. 1963); see Comment, 38 Texas L. Rev. 595 (1960); Note, 58 Mich. L. Rev. 888 (1960); Note, 31 So. Cal. L. Rev. 78 (1957).

⁴⁰ *United States v. Simmons*, 281 F.2d 354, 359 (2d Cir. 1960); *United States v. Papworth*, 156 F. Supp. 842, 851 (N.D. Tex. 1957), *aff'd*, 256 F.2d 125, 130 (5th Cir.), *cert. denied*, 358 U.S. 854 (1958); see Note, 67 Yale L.J. 674, 687 n.48 (1958).

⁴¹ *Lohman v. United States*, 251 F.2d 951, 953 (6th Cir. 1958).

⁴² *Campbell v. Eastland*, 307 F.2d 478, 486 (5th Cir. 1962).

⁴³ 28 U.S.C. § 2255 (1958). This is so even though hearing on the motion technically involves a civil proceeding.

⁴⁴ *United States v. Kelly*, 269 F.2d 448, 451 (10th Cir.), *cert. denied*, 362 U.S. 904 (1959).

⁴⁵ Note, 34 Ind. L.J. 441 (1959); Note, 11 Stan. L. Rev. 297, 326-32 (1959); Note, 4 Vill. L. Rev. 366 (1959); Note, 68 Yale L.J. 1409 (1959).

of [the Jenks Act] cannot be produced at all."⁴⁶ However, a more reasonable approach would seem to be that the statute is the exclusive means of production as of right and that in other cases the trial judge in his discretion may order production.⁴⁷

The statute does not give a right to discovery of grand jury minutes.⁴⁸ The right to disclosure of grand jury minutes remains as it was before the statute,⁴⁹ viz., Rule 6(e) of the Federal Rules of Criminal Procedure governs.⁵⁰

C. Relation To The Federal Rules Of Criminal Procedure

Prior to the *Jencks* case the courts construed Rule 17(c) to mean that a defendant who was unable to establish definitely that a specified person would be called as a witness could not obtain discovery prior to trial.⁵¹ Moreover, the defendant could not obtain FBI reports under Rule 16.⁵² It has been held that the rule of the *Jencks* decision did not apply to pre-trial procedure because the opinions made no references to Rules 16 and 17.⁵³

⁴⁶ *Palermo v. United States*, 360 U.S. 343, 351 (1959), noted in 73 Harv. L. Rev. 179 (1959), 21 Md. L. Rev. 153 (1961), 39 Ore. L. Rev. 196 (1960), 108 U. Pa. L. Rev. 141 (1959). See criticism in Borillo, *Section 3500; Justice on a Tightrope*, 45 Marq. L. Rev. 205, 218-20 (1959).

⁴⁷ Note, 108 U. Pa. L. Rev. 141, 145 (1959); Note, 58 Mich. L. Rev. 888, 890-93 (1960); Note, 67 Yale L.J. 674, 688-89 (1958).

⁴⁸ *Pittsburg Plate Glass Co. v. United States*, 360 U.S. 395, 398 (1959), *affirming* 260 F.2d 397, 402 (4th Cir. 1958) (four Justices dissented), noted in 48 Calif. L. Rev. 160 (1960), 27 Fordham L. Rev. 244 (1958), 34 N.Y.U.L. Rev. 606 (1959), 13 Vand. L. Rev. 404 (1959); *Parr v. United States*, 265 F.2d 894, 902 (5th Cir. 1959); *United States v. Angelet*, 255 F.2d 383, 385 (2d Cir. 1958); *United States v. Spanglelet*, 258 F.2d 338, 340 (2d Cir. 1958); *United States v. West*, 170 F. Supp. 200, 209 (N.D. Ohio 1959); *United States v. Consolidated Laundries Corp.*, 159 F. Supp. 860, 863 (S.D.N.Y. 1958). Compare *United States v. Rosenberg*, 245 F.2d 870 (3d Cir. 1957) which applied the *Jencks* case to grand jury minutes.

The case was followed in *Hance v. United States*, 299 F.2d 389, 398 (8th Cir. 1962); *United States v. Santore*, 290 F.2d 51, 67 (2d Cir. 1959); *United States v. Killian*, 275 F.2d 561, 571 (7th Cir. 1960); *United States v. Kirby*, 273 F.2d 956 (2d Cir. 1960); *United States v. Zborowski*, 271 F.2d 661, 665 (2d Cir. 1959).

⁴⁹ See note 58 *infra*.

⁵⁰ Borillo, *supra* note 46, at 214, 216; Louisell, *Criminal Discovery: Dilemma Real or Apparent*, 49 Calif. L. Rev. 56, 68-71 (1961); see Note, 55 Nw. U.L. Rev. 482, 493-502 (1960); Note, 38 Texas L. Rev. 595, 605-08 (1960); Note, 11 Stan. L. Rev. 297, 319-26 (1959); see also Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 402-13, 447-60 (1959).

⁵¹ *United States v. Brown*, 17 F.R.D. 286, 287 (N.D. Ill. 1955); *United States v. Carter*, 15 F.R.D. 367, 369 (D.D.C. 1954); see also *Goldman v. United States*, 316 U.S. 129, 132 (1942).

⁵² *United States v. Brumfield*, 85 F. Supp. 696, 706 (W.D. La. 1949); *United States v. Black*, 6 F.R.D. 270, 271 (N.D. Ind. 1946). Furthermore, there were cases which regarded discovery, in general, as discretionary. See, e.g., *United States v. Schiller*, 187 F.2d 572, 575 (2d Cir. 1951).

⁵³ *United States v. Grossman*, 154 F. Supp. 813 (D.N.J. 1957); *United States v. Benson*, 20 F.R.D. 602, 604 (S.D.N.Y. 1957); see also *United States v. Carr*, 21 F.R.D. 7, 11 (S.D. Cal. 1957); *United States v. Palermo*, 21 F.R.D. 11, 14 (S.D.N.Y. 1957), *aff'd*, 258 F.2d 397 (2d Cir. 1958), *aff'd*, 360 U.S. 343 (1959); *United States v. Brockington*, 21 F.R.D. 104, 106 (E.D. Va. 1957). *But see* *United States v. Hall*, 153 F. Supp. 661, 663 (W.D. Ky. 1957).

The legislative history indicates that the Jencks Act was not intended to affect the Federal Rules of Criminal Procedure.⁵⁴ The courts generally have denied discovery of statements of witnesses under Rule 17(c).⁵⁵ Furthermore, the Supreme Court has pointed out that the discovery provided by Rule 16 is more narrow than that under Rule 34 of the Federal Rules of Civil Procedure.⁵⁶ In the proposed amendments to Rule 16, which would allow the defendant discovery as to his own statements, the Advisory Committee on Rules of Criminal Procedure tacitly recognizes that the Jencks statute did not affect the Federal Rules of Criminal Procedure.⁵⁷ Moreover, the proposed amendment expressly recognizes that the Jencks statute is not otherwise affected in providing: "This rule does not authorize the discovery or inspection of statements or reports made by Government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in [the Jencks Act]."⁵⁸ The Sixth Circuit has held that the Jencks statute "expressly prohibits pre-trial discovery of such reports."⁵⁹ In another instance the Fifth Circuit stated that section 3500(a) "defeats the appellant's assertion of right to discovery before the trial."⁶⁰ Moreover, it has been stated broadly that the statute "does away with any pre-trial discovery of statements of a government witness."⁶¹ The discovery rules in the Federal Rules of Civil Procedure may not be used to circumvent the statute.⁶² In light of the Supreme Court's pronouncement that "statements of a government witness made to an agent of the Government which cannot be produced under the terms of [the Jencks Act] cannot be produced at all,"⁶³ it reasonably

⁵⁴ Note, 56 Mich. L. Rev. 314, 317 (1957); see also Borillo, *supra* note 46, at 219 n.88; Keefe, *Jinks and Jencks*, 7 Catholic U.L. Rev. 91, 100-01, 108-09 (1958); Note, 58 Mich. L. Rev. 888, 893 (1960); Note, 31 So. Cal. L. Rev. 78, 81-82 (1957); Note, 11 Stan. L. Rev. 297, 315-19 (1959); Note, 38 Texas L. Rev. 595, 598 n.21 (1960); Note, 67 Yale L.J. 674, 690-93 (1958).

⁵⁵ Kaufman, *Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts*, 57 Col. L. Rev. 1113, 1116-17 (1957); Orfield, *Subpoena in Federal Criminal Procedure*, 13 Ala. L. Rev. 1, 74-92 (1960); Orfield, *Discovery and Inspection in Federal Criminal Procedure*, 59 W. Va. L. Rev. 312, 318-21 (1957).

Compare, however, *Fryer v. United States*, 207 F.2d 134 (D.C. Cir.), *cert. denied*, 346 U.S. 885 (1953); 4 Barron & Holtzoff, *Federal Practice & Procedure* § 2183.1, at 186 (Supp. 1962); Goldstein, *The State and the Accused, Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149, 1181-82 (1960); Note, 67 Yale L.J. 674, 693 (1958).

⁵⁶ *Gordon v. United States*, 344 U.S. 414, 419, n.9 (1953); see also Orfield, *supra* note 55, at 248-57; Note, 67 Yale L.J. 674, 692 (1958).

⁵⁷ 31 F.R.D. 671, 675 (1963).

⁵⁸ *Ibid.*

⁵⁹ *Bullock v. United States*, 265 F.2d 683, 693 (6th Cir.), *cert. denied*, 360 U.S. 909 (1959).

⁶⁰ *Casados v. United States*, 300 F.2d 845, 848 (5th Cir. 1962), citing 73 Harv. L. Rev. 179-86 (1959).

⁶¹ *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962).

⁶² *Id.* at 492 (concurring opinion).

⁶³ *Palermo v. United States*, 360 U.S. 343, 351 (1959).

follows that statements cannot be produced under Rule 16 of the Federal Rules of Criminal Procedure.⁶⁴

Statements or reports in the possession of the Government that were made by government witnesses or prospective government witnesses other than the defendant to an agent of the Government do not embrace existing records obtained by the Government from third parties by seizure or process.⁶⁵ Hence, the Jencks statute does not bar the defendant from obtaining such records before trial under Rule 16 of the Federal Rules of Criminal Procedure.

In general the statements producible under the statute are not producible before trial. But as has been pointed out:

There may be cases in which the witness is almost certain to testify and in which adequate preparation for impeachment would because of the length and complexity of the statement, necessitate serious delay in the trial if there is no opportunity for pretrial inspection. In this situation, if other means for discovering the facts are not available it would seem that some inspection of the statements should be allowed.⁶⁶

Professor Louisell has suggested that in *Campbell v. United States*, which went to the Supreme Court twice, the proliferation of collateral issues might have been avoided by pre-trial discovery.⁶⁷ The Uniform Rules of Criminal Procedure drafted by the National Conference of Commissioners on Uniform State Laws provided, as an optional provision, for pre-trial discovery of "written statements of witnesses."⁶⁸ However, the Advisory Committee on Rules of Criminal Procedure of the Judicial Conference of the United States did not move in this direction; in fact it expressly made Rule 16 subject to the statute.⁶⁹ The Committee may well have felt that there was little likelihood that a rule reducing the scope of the statute would secure acceptance.

III. STAGE AT WHICH PRODUCTION ALLOWED

Discovery under the statute may not be obtained before trial by

⁶⁴ *Peek v. United States*, 321 F.2d 934, 941 (9th Cir. 1963).

⁶⁵ *United States v. Fancher*, 195 F. Supp. 448, 450-51 (D. Conn. 1961); see Note, 67 *Yale L.J.* 674, 692 (1958).

⁶⁶ Note, 74 *Harv. L. Rev.* 940, 1058 (1961); see *Symposium—Discovery in Federal Criminal Cases*, 33 *F.R.D.* 47, 117-18, 121-22 (1963); Note, 38 *N.Y.U.L. Rev.* 1133, 1139-40 (1963). The California Supreme Court has permitted such pre-trial discovery. *Funk v. Superior Court*, 52 *Cal. App. 2d* 423, 340 *P.2d* 593 (Sup. Ct. 1959); see Louisell, *Criminal Discovery: Dilemma Real or Apparent*, 49 *Calif. L. Rev.* 56, 79 (1961).

⁶⁷ Louisell, *The Theory of Criminal Discovery and the Practice of Criminal Law*, 14 *Vand. L. Rev.* 921, 930-31 (1961).

⁶⁸ Orfield, *supra* note 55, at 338-39; see also Note, 60 *Yale L.J.* 626, 641-42 (1951), allowing discovery in the court's discretion; Note, 67 *Yale L.J.* 674, 695-97 (1958); Note, 11 *Stan. L. Rev.* 297, 315-19 (1959).

⁶⁹ 31 *F.R.D.* 671, 675 (1963).

motions for a bill of particulars or for discovery.⁷⁰ Such motions are premature. At the trial perhaps a foundation must be laid for the motion by asking on cross-examination whether the witness has made any statements or reports to a government agent regarding the subject matter of his direct testimony. In one case the court stated that the witness "was not asked whether he had made any statement or report. . . . In other words, there was a complete absence of any evidence which tended to show directly or indirectly that the secret files of the Government contained any statement or report made by the witness relating to the matter."⁷¹ However, it would seem that the defendant is entitled to any statement meeting the test of the statute, *i.e.*, if it touches on the subject matter of the testimony of the witness.

Subsection (a) manifests the general aim of the statute to restrict the use of statements of government witnesses to impeachment because the statement is not to be turned over to the defendant until the witness has testified on direct examination.⁷² The defendant has no right to the statement before the witness has testified.⁷³ The statement may be furnished the defendant as the witness is examined or immediately following his direct examination.⁷⁴ There may be a right to production even though the issue is raised on cross-examination of the witness rather than on direct examination.⁷⁵ A denial of discovery may be cured by permitting it later, provided that the delay does not prejudice the defendant in presenting his case to the jury.⁷⁶ However, it is better procedure to defer the cross-examination until the court has conducted an inquiry.⁷⁷

⁷⁰ *Odgen v. United States*, 303 F.2d 724, 734 (9th Cir. 1962); *Casados v. United States*, 300 F.2d 845, 847 (5th Cir. 1962); *Bullock v. United States*, 265 F.2d 683, 693 (6th Cir.), *cert. denied*, 360 U.S. 909 (1959); *Johnston v. United States*, 260 F.2d 345, 347 (10th Cir. 1958); *United States v. Bruce*, 33 F.R.D. 133, 136 (N.D. Miss. 1963); *United States v. Tane*, 29 F.R.D. 131, 133 (E.D.N.Y. 1962); *United States v. Abrams*, 29 F.R.D. 178, 183 (S.D.N.Y. 1961); *United States v. Stromberg*, 22 F.R.D. 513, 522 (S.D.N.Y. 1957).

⁷¹ *United States v. Kelly*, 269 F.2d 448, 452 (10th Cir. 1959), *cert. denied*, 362 U.S. 904 (1960).

⁷² *Palermo v. United States*, 360 U.S. 343, 349 (1959); *Kilgore v. United States*, 323 F.2d 369, 371 (8th Cir. 1963); *United States v. Bruce*, 33 F.R.D. 133, 136 (N.D. Miss. 1963); *United States v. Willis*, 33 F.R.D. 510, 512 (S.D.N.Y. 1963).

⁷³ *Roberson v. United States*, 282 F.2d 648, 650 (6th Cir. 1960). If the defendant has pled guilty and is awaiting sentence, he is not entitled to production of statements or reports in the possession of an investigating officer of the post office insofar as they were made by government witnesses or prospective government witnesses, other than the defendant, to the officer. *United States v. Greathouse*, 188 F. Supp. 765, 767 (N.D. Ala. 1960). A subpoena duces tecum for such production will be quashed on motion of the Government.

⁷⁴ *Robertson v. United States*, 263 F.2d 872, 874 (5th Cir. 1959).

⁷⁵ *United States v. Chapman*, 318 F.2d 912 (2d Cir. 1963).

⁷⁶ *Leach v. United States*, 320 F.2d 670, 672 (D.C. Cir. 1963); *Lohman v. United States*, 266 F.2d 3, 5 (6th Cir.), *cert. denied*, 361 U.S. 923 (1959).

⁷⁷ *Leach v. United States*, *supra* note 76, at 671.

Discovery under the statute may occur not only at the trial, but subsequently on a motion to vacate the sentence.⁷⁸ Under subsection (b) production is to be "on motion of the defendant." But the demand may be very informal, such as a question by defendant's counsel, "May I see it?"⁷⁹ The motion should not be made by a co-defendant.⁸⁰ The defendant's request to inspect documents used by a government witness to refresh his memory is not a proper demand under the statute.⁸¹ If the defendant's counsel knows that a memorandum is available to him, but makes no request for it, the defendant cannot complain on appeal that the memorandum was not turned over to him.⁸² Moreover, if the statements are furnished before trial and the request for them is not renewed at the trial, there is no error in failing to furnish the statements at the trial.⁸³ The abandonment of a request for production also precludes raising the issue on appeal.⁸⁴ In some cases it may be wise not to seek production,⁸⁵ and failure to make a demand for an available statement does not show incompetence of counsel.⁸⁶

A. Meaning Of "Statement"

The Jencks Act does not extend to statements in the possession of the Government that were made by the defendant.⁸⁷ In situations in which the defendant requests the production of his prior statements, the discretion of the trial judge controls, thus preserving the rule which existed before the statute.⁸⁸ Moreover, if the statement is not

⁷⁸ *United States v. Kelly*, 269 F.2d 448, 451 (10th Cir. 1959), *cert. denied*, 362 U.S. 904 (1960).

⁷⁹ *United States v. Aviles*, 315 F.2d 186, 190 (2d Cir. 1963); *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 493 (2d Cir. 1960); *Howard v. United States*, 278 F.2d 872, 874 (D.C. Cir. 1960).

⁸⁰ *Bowser v. United States*, 318 F.2d 273 (D.C. Cir. 1963) (but see opinion of J. Fahy); *United States v. Simmons*, 281 F.2d 354, 358 (2d Cir. 1960).

⁸¹ *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 493 (2d Cir. 1960).

⁸² *Harrison v. United States*, 318 F.2d 220 (D.C. Cir. 1963); *Odgen v. United States*, 303 F.2d 724, 733 (9th Cir. 1962); *United States v. Grabina*, 295 F.2d 792, 793 (2d Cir. 1961); *United States v. Annunziato*, 293 F.2d 373, 382 (2d Cir. 1961); *United States v. Farley*, 292 F.2d 789, 792 (2d Cir. 1961), *cert. denied*, 369 U.S. 857 (1962); *United States v. Simmons*, 281 F.2d 354, 358 (2d Cir. 1960); *Badon v. United States*, 269 F.2d 75, 82 (5th Cir.), *cert. denied*, 361 U.S. 894 (1959); *Johnston v. United States*, 260 F.2d 345, 347 (10th Cir. 1958); *United States v. Tellier*, 255 F.2d 441, 449 (2d Cir.), *cert. denied*, 358 U.S. 821 (1958).

⁸³ *Rich v. United States*, 261 F.2d 536, 537 (4th Cir. 1958).

⁸⁴ *United States v. Paroutian*, 319 F.2d 661, 664 (2d Cir. 1963).

⁸⁵ *United States v. Annunziato*, 293 F.2d 373, 382 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961).

⁸⁶ *United States v. Rush*, 215 F. Supp. 882, 884 (E.D. La. 1963).

⁸⁷ 18 U.S.C. § 3500(a); *De Freese v. United States*, 270 F.2d 737, 740 (5th Cir. 1959); *United States v. David*, 168 F. Supp. 269, 271 (N.D. Ohio 1958), *aff'd*, 264 F.2d 248 (6th Cir.), *cert. denied*, 359 U.S. 967 (1959); *United States v. Malizia*, 154 F. Supp. 511, 514 n.2 (S.D.N.Y. 1957).

⁸⁸ *United States v. Malizia*, *supra* note 87, at 514 n.2.

made to a government agent, the statute does not apply.⁸⁹ The trial judge does not have to order production of exhibits attached to written reports of governmental agents if the exhibits contain statements of other witnesses.⁹⁰ Memoranda which might be used as a basis for cross-examination, although not producible for purposes of impeachment, are not covered by the statute.⁹¹ Furthermore, a government witness is not required by statute to produce notes which he had testified that he made on the case and from which he had read to refresh his recollection prior to appearance in court.⁹² Departmental pay records are not "statements" within the statute,⁹³ although such records are often important as evidence of contradiction or bias. The right to production of the criminal record of a co-conspirator who testifies for the Government is not guaranteed by the statute.⁹⁴ If trial is by the court upon waiver of a jury and if the defendant requests that a report of a government agent be produced, the defendant is precluded from obtaining a mistrial because the report contains a record of prior convictions.⁹⁵

The Supreme Court has stated that the statute does not provide that inconsistency between the statement and the witness' testimony is to be a relevant consideration or that the statement be admissible as evidence.⁹⁶ Under subsection (b)⁹⁷ only statements which relate to the subject matter about which the witness has testified need be produced.⁹⁸ A clear example of a situation in which the statute re-

⁸⁹ *United States v. Neverline*, 266 F.2d 180, 183 (3d Cir. 1959); *United States v. Garrison*, 168 F. Supp. 622, 625 (E.D. Wis. 1958).

⁹⁰ *United States v. Franklin*, 170 F. Supp. 503, 505 (N.D. Ohio 1959).

⁹¹ *Tillman v. United States*, 268 F.2d 422, 424, 426 (5th Cir. 1959).

⁹² *McGill v. United States*, 270 F.2d 329, 330 (D.C. Cir. 1959); see *Orfield*, *supra* note 28, at 232.

⁹³ *Communist Party of the United States v. Subversive Activities Control Bd.*, 254 F.2d 314 (D.C. Cir. 1958) (dictum). The court considered them to be "records of an executive department maintained in the course of carrying out its functions." *Id.* at 330. Prior to the statute, production of such records was granted. *Fisher v. United States*, 231 F.2d 99, 104 (9th Cir. 1956). The statute does not apply to miscellaneous photographs. *Ahlstedt v. United States*, 325 F.2d 257, 259 (5th Cir. 1963). In a prosecution for rape on a vessel on the high seas, the defendant was given discovery of memoranda which were part of the ship's log before trial. "Any such entries, reports, statements or memoranda were made and kept in the usual and regular course of business in the operation of the vessel, and do not come within the definition of 'statement' under the Jencks Act." *United States v. Willis*, 33 F.R.D. 510, 512 (S.D.N.Y. 1963).

⁹⁴ *Feyrer v. United States*, 314 F.2d 110, 113 (9th Cir. 1963).

⁹⁵ *United States v. Cimino*, 321 F.2d 509, 511 (2d Cir. 1963).

⁹⁶ *Palermo v. United States*, 360 U.S. 343, 353 n.10 (1959).

⁹⁷ See appendix at the end of this Article.

⁹⁸ *Rosenberg v. United States*, 360 U.S. 367, 370 (1959); *United States v. Bernard*, 287 F.2d 715, 724 (7th Cir. 1961). A letter written by the victim to an United States attorney, signed by her, and stating that her memory was poor as to the matters that she testified should be produced. *Rosenberg v. United States*, 360 U.S. 367, 370 (1959) (four justices dissenting). However, the error is harmless if the same information was revealed by the victim to the defendant's counsel under cross-examination and questioning by the trial judge.

quires production occurred in a case in which the witness gave the Government a statement prior to the trial denying any knowledge of a robbery. However, at the trial the witness testified in detail as to the plans for the robbery, as to her accompanying the defendant and another to the vicinity of the bank, and as to her seeing them come out of the bank with the money.⁹⁹

A statement in the form of a written memorandum pursuant to subsection (e) (1)¹⁰⁰ need not be made contemporaneously with the conversations and interviews reported therein.¹⁰¹ The requirement that the statement be contemporaneous applies only to "a substantially verbatim recital of an oral statement" made to a government agent under subsection (e) (2).¹⁰² A report by an FBI agent prepared from notes taken by two agents in an interview with the defendant five days after a bank robbery which was checked by the other agent who was a witness is a written statement signed or otherwise adopted by the witness within the statute.¹⁰³ Refusal to permit defense counsel to examine the report is reversible error if it affirmatively appears that the report could have been used advantageously by the defendant.¹⁰⁴ In 1963 the Supreme Court held that an interview report compiled by a federal agent from the agent's notes, which were in turn made during an oral interview of the government witness to whom the agent recited the substance of the account using his notes, was producible under the statute.¹⁰⁵ Applying subsection (e) (1), the Court held that a written statement to be producible need not be signed by the witness, written by him, or be a substantially verbatim recording of a prior oral statement. Adoption of an oral presentation of a written statement is a permissible mode of adopting the written statement. "As a copy . . . the report [was] admissible as independent evidence for impeachment purposes and not merely as secondary evidence of the notes which have been destroyed."¹⁰⁶

The statutory provision in subsection (e) (2) defines statement "as a stenographic, mechanical, electrical, or 'other' recording"; the word "other" refers "to other manual, as well as other mechanical or

⁹⁹ United States v. Tomaiolo, 286 F.2d 568 (2d Cir. 1961).

¹⁰⁰ 18 U.S.C. § 3500(3)(1) (1957). See appendix at the end of the Article.

¹⁰¹ Clancy v. United States, 365 U.S. 312, 314 (1961); see also United States v. Bernard, 287 F.2d 715, 724 (7th Cir. 1961); Note, 38 N.Y.U.L. Rev. 1133, 1142-44 (1963) (on subsection (e) (1)).

¹⁰² Clancy v. United States, *supra* note 101, at 314.

¹⁰³ 18 U.S.C. § 3500(e)(1) (1957). See appendix at the end of the Article. United States v. McCarthy, 301 F.2d 796, 797-98 (3d Cir. 1962).

¹⁰⁴ *Id.* at 799.

¹⁰⁵ Campbell v. United States, 373 U.S. 487 (1963), *reversing* 303 F.2d 747 (1st Cir. 1962) (Mr. Justices Clark, Harlan, and Stewart dissented).

¹⁰⁶ *Id.* at 495 n.11.

electrical recordings."¹⁰⁷ In *Papworth v. United States* the Second Circuit held that the defendant was entitled to relevant portions of the original notebook in which an FBI agent recorded substantially verbatim statements made by a government witness at the time of an interview with the witness and to an exact typed copy thereof.¹⁰⁸ However, he was not entitled to a report, which included a running summary of the investigation in the language of the agent, made two weeks after the interview by the FBI agents. The latter report was not a "substantially verbatim recital of an oral statement . . . recorded contemporaneously with the making of such oral statement" as required by the statute, nor was it a "report . . . orally made, as recorded by the F.B.I." under the *Jencks* decision.¹⁰⁹

Although the transcription of a pre-trial statement of a witness is not a written statement signed or otherwise adopted or approved by the witness under subsection (e) (1), it may be a recording or a transcription which is a substantially verbatim recital of an oral statement made by the witness to an agent of the Government and contemporaneously recorded under subsection (e) (2).¹¹⁰ In determining whether a document is "substantially verbatim," the court should consider the extent to which it conforms to the language of the interview¹¹¹ as well as the length of the document in comparison to the length of the interview.¹¹²

Pursuant to subsection (e) (2) the interview must be "contemporaneously recorded"; however, this does not mean simultaneous recordation.¹¹³ A summary report of an interview with a witness made ten or fifteen days thereafter is not a "statement."¹¹⁴ However, if contemporaneously recorded, the document is a "statement" even though transcribed at a later time.¹¹⁵ The statement should embrace the witness' own words; otherwise, it need not be produced.¹¹⁶ The

¹⁰⁷ *United States v. Waldman*, 159 F. Supp. 747, 749 (D.N.J. 1958); see Note, 38 N.Y.U.L. Rev. 1133, 1144-46 (1963) (on subparagraph (e) (2)). As to wiretapping and the Jencks statute, see 51 J. Crim. L. 441, 447 (1960).

¹⁰⁸ *Papworth v. United States*, 256 F.2d 125, 129 (5th Cir.), *cert. denied*, 358 U.S. 854 (1958), *affirming* 156 F. Supp. 842, 848 (N.D. Tex. 1957); see also *Clancy v. United States*, 276 F.2d 617, 634 (7th Cir. 1960).

¹⁰⁹ *Papworth v. United States*, *supra* note 108, at 130.

¹¹⁰ *United States v. Tomaiolo*, 280 F.2d 411, 413 (2d Cir. 1960).

¹¹¹ *United States v. Thomas*, 282 F.2d 191, 194 (2d Cir. 1960); *United States v. Stromberg*, 268 F.2d 256, 273 (2d Cir. 1959); *United States v. Waldman*, 159 F. Supp. 747, 749 (D.N.J. 1958); see Note, 38 N.Y.U.L. Rev. 1133, 1145-46 (1963).

¹¹² *Palermo v. United States*, 360 U.S. 343, 355 n.12 (1959).

¹¹³ *United States v. McKeever*, 271 F.2d 669, 675 (2d Cir. 1959); see Note, 38 N.Y.U.L. Rev. 1133, 1145 (1963).

¹¹⁴ *Borges v. United States*, 270 F.2d 332 (D.C. Cir. 1959).

¹¹⁵ *United States v. Waldman*, 159 F. Supp. 747, 749 (D.N.J. 1958).

¹¹⁶ *Palermo v. United States*, 360 U.S. 343, 350 (1959), *affirming* 258 F.2d 397 (2d Cir. 1958). Four Justices concurred only in the result. Use of the statement was sought

statute is silent as to nonverbatim, noncontemporaneous records of oral statements, and they need not be produced. A 600 word memorandum summarizing parts of a three and one-half hour interrogation of a witness by a government agent is not required to be produced by the statute.¹¹⁷ Moreover, reports of FBI investigators neither signed nor otherwise adopted by any witness at the trial are not "statements" producible under the statute.¹¹⁸ Since the passage of the statute, there is some evidence that agents destroy the original notes and rely primarily on subsequent summaries and memoranda.¹¹⁹

Judge Charles E. Clark referred to three doctrinal devices employed to prevent scrupulous application of the statute:¹²⁰ (1) it is only harmless error not to produce a statement that appears to corroborate a witness' testimony;¹²¹ (2) there is no right to statements relating to purely incidental or collateral aspects of a witness' testimony;¹²² and (3) there is no right to statements not sufficiently exact, even though the trial court regards them as probably verbatim recitals of the witness' oral testimony.¹²³ Conceding that the exceptions "are sufficiently entrenched," he concluded that "correction must come from the Supreme Court."¹²⁴

One writer has queried: "Will statements which would be of value to the defense in impeachment by showing bias; bad character for veracity; or lack of capacity to observe, recount, or remember be immune from discovery if they do not relate to the subject matter of

for purposes of cross-examining the informer, not the agent. But if the purpose is to cross-examine the agent, discovery should be given. *Holmes v. United States*, 271 F.2d 635, 638 (4th Cir. 1959).

¹¹⁷ *Palermo v. United States*, *supra* note 116, at 355.

¹¹⁸ *Rosenberg v. United States*, 360 U.S. 367, 369 (1959). The report of a committee of the House of Representatives is not producible if the report is an unsigned summary of evidence drawn from a variety of sources and only some of the evidence was attributed to the witness who testified. *Harney v. United States*, 306 F.2d 523, 532 (1st Cir. 1962); see Note, 38 N.Y.U.L. Rev. 1133, 1135 (1963). There is no right to production of reports or memoranda that contain merely the impressions or conclusions of agents of the Government or agents of the SEC. *Palermo v. United States*, 360 U.S. 343, 352-53 (1959); *Ogden v. United States*, 303 F.2d 724, 735 (9th Cir. 1962); *United States v. Yetman*, 196 F. Supp. 473, 475 (D. Conn. 1961); *United States v. Yetman*, 196 F. Supp. 569, 570 (D. Conn. 1961).

¹¹⁹ Cleary, *Hickman v. Jencks*, 14 Vand. L. Rev. 865, 875 (1961); Louisell, *The Theory of Criminal Discovery and the Practice of Criminal Law*, 14 Vand. L. Rev. 921, 928-29 (1961); Note, 75 Harv. L. Rev. 179, 181 n.575 (1961).

¹²⁰ *United States v. Cardillo*, 316 F.2d 606, 617 (2d Cir.), *cert. denied*, 375 U.S. 822 (1963).

¹²¹ *United States v. Annunziato*, 293 F.2d 373, 382 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961).

¹²² *United States v. Cardillo*, 316 F.2d 606, 615 (2d Cir.), *cert. denied*, 375 U.S. 822 (1963); *United States v. Simmons*, 281 F.2d 354, 357 (2d Cir. 1960).

¹²³ *United States v. Aviles*, 315 F.2d 186, 189 (2d Cir.), *vacated sub. nom.*, *Evola v. United States*, 375 U.S. 32 (1963).

¹²⁴ *United States v. Cardillo*, 316 F.2d 606, 617 (2d Cir.), *cert. denied*, 375 U.S. 822 (1963).

the witness' testimony, even though they otherwise conform to the statutory definition of 'statement'. . . .¹²⁵ There has been no clear answer from the Supreme Court. The Court has held that a statement by a witness expressing fear that her memory of the events in issue was dimmed related to "the subject matter as to which the witness has testified."¹²⁶ The statement would assist impeachment by showing want of capacity to remember. However, the statement referred specifically to the events to which the witness testified although it did not deal with the substance of the events. In some cases it appears that the trial court, out of excessive fairness to the defendant, has permitted the defendant to see statements to which he is not entitled by the statute.¹²⁷ It is certainly arguable that the defendant should have access to documents with impeachment value. Furthermore, due process of law under the fifth amendment may make this an element of a fair trial.¹²⁸ It may also be argued that there is a violation of the sixth amendment provisions in that the defendant has the right "to be confronted with the witnesses against him"¹²⁹ and "to have compulsory process for obtaining witnesses in his favor."¹³⁰

The Government must have possession of the statement before the court may order production.¹³¹ On principle it would seem that if the statements are in the possession of a United States attorney in another district, they should be made available to the defendant.¹³² However, it has been held otherwise.¹³³ The statute imposes no affirmative duties on an FBI agent to take notes while interviewing witnesses.¹³⁴ Although the better practice is to preserve written notes, good faith destruction of notes in the Government's possession is not the equivalent of noncompliance with the order to produce.¹³⁵

¹²⁵ Comment, 38 Texas L. Rev. 595, 602 (1960); see also Note, 67 Yale L.J. 674, 693-95 (1958).

¹²⁶ Rosenberg v. United States, 360 U.S. 367, 370 (1959).

¹²⁷ United States v. Bentvena, 319 F.2d 916, 940 (2d Cir. 1963); see Ogden v. United States, 303 F.2d 724, 734 (9th Cir. 1962); Symposium—Discovery in Federal Criminal Cases, 33 F.R.D. 47, 121-22 (1963).

¹²⁸ Carter, *Suppression of Evidence Favorable to the Accused*, 34 F.R.D. 87 (1964); Comment, 38 Texas L. Rev. 595, 608-11 (1960).

¹²⁹ Orfield, *Depositions in Federal Criminal Evidence*, 9 S.C.L.Q. 376, 392-98 (1957).

¹³⁰ Orfield, *Subpoena in Federal Criminal Procedure*, *supra* note 55, at 10-28 (1960); Comment, 58 Mich. L. Rev. 888, 893-98 (1960); Comment, 38 Texas L. Rev. 595, 609 (1960); Note, 108 U. Pa. L. Rev. 141, 147 (1959). Compare Note, 73 Harv. L. Rev. 84, 183 (1959).

¹³¹ De Freese v. United States, 270 F.2d 737, 740 (5th Cir. 1959).

¹³² Borillo, *supra* note 46, at 213-14.

¹³³ United States v. West, 170 F. Supp. 200, 209 (E.D. Ohio 1959), *aff'd*, 274 F.2d 885 (6th Cir. 1960), *cert. denied*, 365 U.S. 811 (1961).

¹³⁴ Campbell v. United States, 296 F.2d 527, 531 (1st Cir. 1961).

¹³⁵ United States v. Aviles, 197 F. Supp. 536, 555 (S.D.N.Y. 1961), *aff'd*, 315 F.2d 186 (2d Cir.), *vacated sub. nom.*, Evola v. United States, 375 U.S. 32 (1963).

It is not clear whether there is a duty to preserve records.¹³⁶ Although the Supreme Court initially appeared to have left the question unanswered,¹³⁷ later cases indicate that destruction of notes in accordance with normal administrative practice is not reversible error if the same information is made available to the defendant in a signed statement or interview report.¹³⁸

The Second Circuit has stated: "The legislative history strongly indicates that one evil Congress sought to remedy in passing the Jencks Act was the possible production of notes made by government attorneys in preparing their case."¹³⁹ However, the same court has pointed out that *Hickman v. Taylor*¹⁴⁰ "was concerned solely with discovery in civil proceedings"¹⁴¹ and also that the statute "makes no distinction among statements on the basis of the purpose for which they are recorded or the type of government agents to whom they were made."¹⁴² In *United States v. Aviles*¹⁴³ notes of an United States attorney taken from conversations with the Government's principal witness during the investigative stage of the case were producible under the statute because they were substantially verbatim, recorded contemporaneously, and relevant to the direct testimony of the witness.¹⁴⁴

Reports made by government agents may be encompassed by the

¹³⁶ *United States v. Greco*, 298 F.2d 247, 250 (2d Cir.), *cert. denied*, 369 U.S. 820 (1962).

¹³⁷ *Campbell v. United States*, 365 U.S. 85, 98 (1961). Mr. Justice Frankfurter in a separate opinion denied any duty. *Id.* at 102.

¹³⁸ *Campbell v. United States*, 373 U.S. 487 (1963); *Killian v. United States*, 368 U.S. 231, 242 (1961); *Ogden v. United States*, 323 F.2d 818, 821 (9th Cir. 1963); *United States v. Tomaiolo*, 317 F.2d 324, 327 (2d Cir. 1963); *United States v. Aviles*, 315 F.2d 186, 188 (2d Cir.), *vacated sub. nom.*, *Evola v. United States*, 375 U.S. 32 (1963); *United States v. Thomas*, 282 F.2d 191, 193 (2d Cir. 1960). The trial court need not strike the testimony of a witness because of the inability of the Government to produce, on defendant's motion, notes taken by an FBI agent while interviewing the witness if the notes had been previously destroyed without intent to suppress evidence and defendant's counsel was given a typewritten report that accurately reflected the story of the witness as outlined in the notes. *United States v. Thomas*, *supra* at 194; see also *United States v. Tomaiolo*, *supra*; Note, 38 N.Y.U.L. Rev. 1133, 1140-41 (1963).

On how much testimony of the witness may be stricken see *United States v. Kelly*, 269 F.2d 448, 451 (10th Cir.), *cert. denied*, 362 U.S. 904 (1959); *Great Lakes Airlines, Inc. v. CAB*, 291 F.2d 354, 365 (9th Cir.), *cert. denied*, 368 U.S. 890 (1961); Note, 38 N.Y.U.L. Rev. 1133, 1140-41 (1963).

¹³⁹ *United States v. Crosby*, 294 F.2d 928, 951 (2d Cir. 1961).

¹⁴⁰ *Hickman v. Taylor*, 329 U.S. 495 (1947).

¹⁴¹ *United States v. Aviles*, 315 F.2d 186, 191 (2d Cir.), *vacated sub. nom.*, *Evola v. United States*, 375 U.S. 32 (1963); see also *Saunders v. United States*, 316 F.2d 346, 349 (D.C. Cir. 1963), noted in 13 Am. U.L. Rev. 89 (1963).

¹⁴² *United States v. Aviles*, *supra* note 141.

¹⁴³ 200 F. Supp. 711 (S.D.N.Y. 1961), *aff'd*, 315 F.2d 186 (2d Cir.), *vacated sub. nom.*, *Evola v. United States*, 375 U.S. 32 (1963).

¹⁴⁴ *United States v. Aviles*, *supra* note 143, at 715.

statute.¹⁴⁵ Furthermore, the report of one agent to another covering an interview with the defendant may constitute a statement pursuant to the statute.¹⁴⁶ In an income tax prosecution in which the Government relied on the net worth method and based its testimony on agents' investigatory results, the defendant was entitled to production of the agents' reports relating to the defendant's assets, income, and expenditures during the entire tax period.¹⁴⁷ Although the statute "was intended to proscribe production of investigative reports *as such* . . . the government has chosen to base its case on the testimony of the agents as to the results of their investigations."¹⁴⁸ (Emphasis added.)

IV. DUTY OF THE TRIAL COURT

"The producibility of statements under the Jencks Act and their admissibility under the rules of evidence are separate questions . . . but obviously closely related."¹⁴⁹ It is the function of the trial judge to determine whether a statement or document must be produced under the statute.¹⁵⁰ If the defendant seeks production:

The district court has an affirmative duty to determine whether any such statement exists and is in the possession of the Government and, if so, to order the production of the statement. Because the defendant often does not and cannot know whether any such statement exists, the court must conduct any inquiry which is necessary to aid the judge to discharge the responsibility laid upon him to enforce the statute. . . . Such an inquiry may involve the interrogation of the witness or of the government agent, or an *in camera* examination of what is purported to be a statement under the statute.¹⁵¹

¹⁴⁵ *United States v. Sheer*, 278 F.2d 65, 67 (7th Cir. 1960); *United States v. Berry*, 277 F.2d 826, 829 (7th Cir. 1960); *United States v. O'Connor*, 273 F.2d 358, 360 (2d Cir. 1959) (revenue agent); *Holmes v. United States*, 271 F.2d 635 (4th Cir. 1959) (FBI agent); *United States v. Prince*, 264 F.2d 850 (3d Cir. 1959) (narcotics bureau agent); see Note, 38 N.Y.U.L. Rev. 1133, 1134-35 (1963).

¹⁴⁶ *Karp v. United States*, 277 F.2d 843, 848 (8th Cir.), *cert. denied*, 364 U.S. 842 (1960).

¹⁴⁷ *United States v. O'Connor*, 273 F.2d 358 (2d Cir. 1959).

¹⁴⁸ *Id.* at 360; see also *Burke v. United States*, 279 F.2d 824 (8th Cir. 1960); *Jacobs v. United States*, 279 F.2d 827, 832 (8th Cir. 1960).

¹⁴⁹ *Campbell v. United States*, 373 U.S. 487, 493 n.7 (1963).

¹⁵⁰ *United States v. Accardo*, 298 F.2d 133, 138 (7th Cir. 1962); *Bary v. United States*, 292 F.2d 53, 58 (10th Cir. 1961); see also *Scales v. United States*, 367 U.S. 203, 258 (1961); *Palermo v. United States*, 360 U.S. 343, 361 (1959). Even though numerous documents may be involved, the Government may not make the determination. *United States v. Accardo*, *supra*, and *Bary v. United States*, *supra*. There is no right to a jury trial in order to determine whether statements are producible under the statute. The hearing is considered only a procedural step. *Ogden v. United States*, 323 F.2d 818, 821 (9th Cir. 1963).

¹⁵¹ *Saunders v. United States*, 316 F.2d 346, 349 (D.C. Cir. 1963); see also *Williams v. United States*, 328 F.2d 178 (D.C. Cir. 1963).

In *Campbell v. United States*¹⁵² the defendants attempted to obtain production of an interview report which had been prepared by a government agent subsequent to an interview with the government witness.¹⁵³ The defendants contended that the report was a statement by the government witness. The trial judge conducted an inquiry outside the presence of the jury in order to hear testimony and counsel's argument on the motion.¹⁵⁴ To the defendants' suggestion that the government agent who had prepared the report be called,¹⁵⁵ the trial judge ruled that the defendants should subpoena the agent as their witness "if they believed his testimony would support their motions, and that he would not of his own motion summon [the agent] to testify, or require the Government to produce him."¹⁵⁶ The Court remanded the motion for redetermination because the agent's testimony might have indicated that the interview report was a statement pursuant to the statute;¹⁵⁷ moreover, the defendant's cross-examination of the government witness established a prima facie case of the right to examine the statement.¹⁵⁸ The defendants did not have the burden of proving facts peculiarly within the government's knowledge.¹⁵⁹ Requiring the defendant to call the government agent as his own witness would necessarily limit the examination and possibly preclude the defendant from challenging any of the agent's answers. Furthermore, the trial judge relied upon the testimony of the government witness that was based upon his inspection of the interview report in order to determine whether the report was a substantially verbatim recital of what he had told the agent during the oral interview.¹⁶⁰ This also was error because the examination of the witness necessitated showing him the report, thus destroying or seriously undermining the value of the report for impeachment purposes.¹⁶¹

It is proper to use extrinsic evidence to determine the existence of unproduced statements taken by the FBI from the witness.¹⁶² Thus, the agent in charge of the investigation may be called. If there is serious question whether a record is a substantially verbatim report,

¹⁵² *Campbell v. United States*, 365 U.S. 85 (1961) (four justices dissented in part and concurred in the result in part), noted in 73 Harv. L. Rev. 179 (1959), 7 Wayne L. Rev. 487 (1961).

¹⁵³ *Id.* at 89.

¹⁵⁴ *Id.* at 92.

¹⁵⁵ *Id.* at 94.

¹⁵⁶ *Id.* at 95.

¹⁵⁷ *Id.* at 98.

¹⁵⁸ *Id.* at 96.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Id.* at 96-97.

¹⁶¹ *Id.* at 97.

¹⁶² *United States v. Chrisos*, 291 F.2d 535, 538 (7th Cir. 1961).

the trial judge should conduct a *voir dire* examination of the government agents.¹⁶³ "A hearing to receive extrinsic evidence may be required to determine: Whether a particular paper is a 'statement' . . . whether (where the record is not clear) statements exist in addition to those produced by the government . . . whether a statement once in existence is still in the possession of the government or has been destroyed."¹⁶⁴

The duty of excising unrelated parts of the statement rests on the trial judge.¹⁶⁵ Although he cannot relinquish such duty to government agents, the trial judge is entitled to the assistance of the Government in directing the court's attention to portions of the FBI reports it believes unrelated.¹⁶⁶ However, such portions should be considered by the court in their context. The relevant portions of the report should be delivered to the defendant without impairing the continuity. The provisions in subsection (c) for examination by the court in camera and the excision by the court of unrelated matter do not violate due process of law.¹⁶⁷ The entire text is preserved for appellate review although, in practice, a photostated copy of the original statement less the excised portions is delivered to the defendant.

If the trial court declares a mistrial after willful refusal by the Government to produce a statement to which the defendant is entitled by the statute, it is arguable that in a subsequent prosecution for the same offense that the defendant may assert double jeopardy.¹⁶⁸ The statute does not provide for dismissal of the indictment as a method of enforcement,¹⁶⁹ nor does it provide for contempt proceedings against the government agent who refuses production of the statement.¹⁷⁰ A motion to vacate will not be successful because discovery was not allowed under the statute.¹⁷¹ Objection to the ruling should be taken by appeal from the conviction. Furthermore,

¹⁶³ *United States v. Tomaiolo*, 280 F.2d 411, 413 (2d Cir. 1960); *United States v. McKeever*, 271 F.2d 669, 674 (2d Cir. 1959).

¹⁶⁴ *Ogden v. United States*, 303 F.2d 724, 736 n.41 (9th Cir. 1962).

¹⁶⁵ *United States v. Accardo*, 298 F.2d 133, 141 (7th Cir. 1962); *Bary v. United States*, 292 F.2d 53, 58 (10th Cir. 1961); *Holmes v. United States*, 271 F.2d 635, 637 (4th Cir. 1959).

¹⁶⁶ *Holmes v. United States*, 284 F.2d 716, 720 (4th Cir. 1960).

¹⁶⁷ *West v. United States*, 274 F.2d 885, 890 (6th Cir. 1960); *Travis v. United States*, 269 F.2d 928, 944 (10th Cir. 1959); *United States v. Davis*, 262 F.2d 871, 873 (7th Cir. 1959); *Sells v. United States*, 262 F.2d 815, 823 (10th Cir. 1958).

¹⁶⁸ See Note, 38 N.Y.U.L. Rev. 1133, 1141-42 (1963); Comment, 38 Texas L. Rev. 595, 611-12 (1960).

¹⁶⁹ Dismissal was a possibility under the *Jencks* decision. 353 U.S. 657, 672 (1957). On enforcement of discovery orders, see Note, 67 Yale L.J. 674, 697-99 (1958).

¹⁷⁰ In a case decided prior to the enactment of the statute, the trial court permitted such a proceeding. *United States v. Hall*, 153 F. Supp. 661, 664-65 (W.D. Ky. 1957).

¹⁷¹ *United States v. Angelet*, 255 F.2d 383, 385 (2d Cir. 1958); *United States v. Gandia*, 255 F.2d 454 (2d Cir. 1958).

a motion to vacate will not succeed if the record does not show that the statements existed or that there was any demand for such statements at the trial.¹⁷²

V. HARMLESS ERROR

Failure to produce a statement often has been held to be a substantial and prejudicial error.¹⁷³ However, the Eighth Circuit asserted that this was not necessarily true in all instances.¹⁷⁴ The Supreme Court accepted the latter approach in 1961.¹⁷⁵ Thus, an appellate court may remand a case to determine whether prejudicial error has been committed. In general there is no prejudicial error if the information withheld is otherwise in the possession of the defendant.¹⁷⁶ If it affirmatively appears that the report could have been used advantageously by the defendant, refusal to produce is reversible error.¹⁷⁷ It seems proper to conclude as one writer has done: "The application of the harmless error rule must necessarily depend upon a careful analysis of the facts and circumstances of each case."¹⁷⁸

VI. CONCLUSION

There have been approximately 150 decisions construing the Jencks statute. Mr. Justice Clark recently has pointed out, "The

¹⁷² *United States v. Rush*, 215 F. Supp. 882, 884 (E.D. La. 1963).

¹⁷³ *United States v. Cardillo*, 316 F.2d 606, 615 (1963); *United States v. Sheer*, 278 F.2d 65, 68 (7th Cir. 1960); *Holmes v. United States*, 271 F.2d 635, 638 (4th Cir. 1959); *Bradford v. United States*, 271 F.2d 58, 67 (9th Cir. 1959); *United States v. Prince*, 264 F.2d 850, 852 (3d Cir. 1959); *Johnston v. United States*, 260 F.2d 345, 347 (10th Cir. 1958); *Bergman v. United States*, 253 F.2d 933, 935 (6th Cir. 1958); *Lohman v. United States*, 251 F.2d 951, 953 (6th Cir. 1958).

¹⁷⁴ *Karp v. United States*, 277 F.2d 843, 849 (8th Cir.), *cert. denied*, 364 U.S. 84 (1960). The court relied on *Rosenberg v. United States*, 360 U.S. 343, 367 (1959).

¹⁷⁵ *Killian v. United States*, 368 U.S. 231, 243 (1961); see also *Leach v. United States*, 320 F.2d 670, 672 (D.C. Cir. 1963); *United States v. Kahaner*, 317 F.2d 459, 473 (2d Cir. 1963); *Saunders v. United States*, 316 F.2d 346, 350 (D.C. Cir. 1963); *Hance v. United States*, 299 F.2d 389, 397 (8th Cir. 1962); *United States v. Annuziato*, 293 F.2d 373, 381 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961); *United States v. LaRocca*, 219 F. Supp. 53, 58 (W.D. Md. 1963).

¹⁷⁶ It was harmless error for the Government to withhold a typewritten copy of a statement, the original of which was in the possession of the defendant's counsel. *Rosenberg v. United States*, 360 U.S. 367, 370 (1959). Moreover, the government witness had testified as to the contents of the statement. *Ibid.* If grand jury minutes containing the same statements as another statement are produced, it is not reversible error not to produce the other statement. *United States v. Aviles*, 200 F. Supp. 711, 715 (S.D.N.Y. 1961), *aff'd*, 315 F.2d 186 (2d Cir.), *vacated sub. nom.*, *Evola v. United States*, 375 U.S. 32 (1963). If the Government supplied the documents to the defendant before the trial, it is not reversible error in refusing to allow discovery at the trial. *Anderson v. United States*, 262 F.2d 764, 771 (8th Cir. 1959). This is true even though the defendant requests discovery during the trial.

¹⁷⁷ *Campbell v. United States*, 373 U.S. 487, 497 n.14 (1963); *Clancy v. United States*, 365 U.S. 312, 316 (1961); *United States v. McCarthy*, 301 F.2d 796, 799 (3d Cir. 1962); see Comment, 38 *Texas L. Rev.* 595, 604-05 (1960); Note, 73 *Harv. L. Rev.* 183 (1959).

¹⁷⁸ *Borillo*, *supra* note 46, at 217; see also Note, 38 *N.Y.U.L. Rev.* 1133, 1137-38 (1963).

delineation of the limits of the Jencks Act has been peculiarly the province of this Court."¹⁷⁹ Rights acquired as a result of the *Jencks* decision will be lost if the courts pursue a policy of strict statutory construction. Although the statute appears to limit pre-trial discovery, such discovery would be expeditious in some instances. However, the Advisory Committee on Rules of Criminal Procedure has rejected liberalization of the pre-trial discovery rules. Further study by the Committee and Congress on the interrelation of the statute and the Federal Rules of Criminal Procedure seems desirable. Inspection of unauthenticated statements after a witness has testified is inhibited by decisions which hold that trial discovery is governed exclusively by the statute. The trial court should have discretion to allow discovery in such cases. Furthermore, if statements evidencing bias or a propensity to lie are not producible, statutory amendments are needed. It seems unfortunate that courts have not applied the statute to grand jury minutes. Moreover, the Advisory Committee has not proposed an amendment to Rule 6 of the Federal Rules of Criminal Procedure to permit such discovery.

Finally, the doctrine of harmless error should be applied with great caution. Statutory discovery during the trial was intended to give the defendant an absolute right to discovery, whereas the pre-trial discovery pursuant to the Federal Rules of Criminal Procedure has often been referred to as discretionary in character. "[O]nly the defense is adequately equipped to determine the effective use for the purpose of discrediting the Government's witness and thereby furthering the accused's defense."¹⁸⁰ Dean Wigmore has stated the principle that should govern:

[A] sense of fairness, emphatically expressed in legislation a century old, has conceded to the accused the power to obtain discovery before trial of the prosecution's list of witnesses and even documents . . . and this is in effect a repudiation of that much of a privilege. So why should there remain a privilege to withhold *at the trial* when the danger or fabrication of false counter-evidence has passed?

It seems wise to stand firm upon ordinary considerations of fairness, and to hold that the prosecutor is not entitled at the trial to withhold from the inspection of the accused and the jury any documents or chattels relevant to the case unless they are otherwise privileged.¹⁸¹

APPENDIX

§ 3500. Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no

¹⁷⁹ *Evola v. United States*, 375 U.S. 32 (1963).

¹⁸⁰ *Jencks v. United States*, 353 U.S. 657, 668-69 (1957).

¹⁸¹ 8 Wigmore, *Evidence*, § 2224, at 207-09 (McNaughton Rev. 1961).

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) to an agent of the Government 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 paragraph (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; or
- (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 to an agent of the Government and recorded contemporaneously with the making of such oral statement.