

## A STATE PROSECUTOR LOOKS AT THE *JENCKS* CASE\*

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About half a year has passed since the Supreme Court of the United States handed down its highly-publicized decision in *Jencks v. United States*<sup>1</sup> on the first Monday of June. During that time newspaper editorialists, syndicated columnists and magazine writers have sat in judgment on the case. In general, they have excoriated the Supreme Court for its decision and raised ominous warnings that the security, and indeed even the survival of our nation, is at stake.<sup>2</sup>

The initial hysteria which foamed in the wake of the decision may be subsiding. The Congress has thrashed out the matter and passed a new law to clarify the decision.<sup>3</sup> Time, that proverbial healer, is gradually offering the opportunity for calm dispassionate analysis.

The purpose of this article is to point out soberly what the decision holds and then to analyze its possible applications to criminal prosecutions in the state courts.

### *The Holding in the Jencks Case*

Clinton E. Jencks was president of a member local of the International Union of Mine, Mill & Smelter Workers. In conformity with the provisions of the Taft-Hartley Act, he filed an affidavit of non-communism. An indictment followed, charging Jencks with perjury in swearing that he was not a member or affiliate of the Communist party at the time of the affidavit.

The case for the government was based on circumstantial evidence. Two principal witnesses were produced to show that Jencks was a member of the party during the affidavit period. Both witnesses were Communist party members paid by the Federal Bureau of Investigation to make reports of party

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1. 353 U.S. 657 (1957).

2. A sample of some evaluations: "Open the files of every police department in the country to every shyster lawyer who works for a hood and we might as well hand law-enforcement over the Lucky Luciano and let him run the show." George E. Sokolsky in syndicated column, June 13, 1957. "The Court's ruling has made the Federal machinery of Justice virtually grind to a halt." St. Louis Globe-Democrat, editorial page, July 19, 1957.

3. 18 U.S.C. § 3500 (1957).

activities in which they participated. One, J.W. Ford, in addition to describing five party meetings prior to the affidavit where Jencks was present, stated that as a security officer in the party he was not aware that any discipline had been taken against Jencks up to the time of the affidavit.

Harvey F. Matusow was the other government witness in the employ of the FBI. He testified that he had spent 10 days with Jencks a few months after the filing of the affidavit. The effect of Matusow's testimony was to show that Jencks was still active as a Communist.

Matusow and Ford admitted on the stand that they had made contemporaneous reports to the FBI, both oral and written, about matters covered by their testimony.

Defense counsel sought to have the court examine these previous statements and reports of the witnesses to see if they would have impeaching value. The defense was not prepared to show that the previous statements given to the FBI contradicted anything that Matusow and Ford said at trial. The trial court denied this motion, and the ruling was affirmed by the court of appeals.<sup>4</sup>

After the conviction of Jencks, Matusow recanted his trial testimony under oath at a hearing on a defense motion for a new trial. When the government attacked his credibility at this rehearing, the defense again moved for production of the statements and reports, this time to rehabilitate Matusow by showing that the documents supported his recantation. This motion was denied and the judge, apparently not believing the recantation, refused another trial. Once again the court of appeals affirmed.<sup>5</sup>

Granting a writ of certiorari,<sup>6</sup> the Supreme Court confined itself to the issue raised by the at-trial motion for production. Reversing the lower courts, it drew a broad rule to cover such situations.<sup>7</sup> The Court, speaking through Justice Brennan, held that a defendant is entitled to look at relevant statements or reports given by witnesses to the government, "touching the subject matter

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4. 226 F.2d 540 (5th Cir. 1955).

5. 226 F.2d 553 (5th Cir. 1955).

6. 350 U.S. 980 (1956).

7. As a "rule," the *Jencks* holding is new. But some lower federal courts prior to the decision had been granting disclosure of witnesses' statements, either for judicial inspection to determine impeachment value or immediate production to defendant, without any showing of contradiction. *e.g.*, *United States v. Schneiderman*, 106 F. Supp. 731 (S.D. Cal. 1952); *United States v. Bryson*, 16 F.R.D. 431 (N.D. Cal. 1954). Under Rule 17(c) of the Federal Rules of Criminal Procedure, one circuit has permitted pre-trial discovery of witnesses' statements for possible impeachment. *Fryer v. United States*, 207 F.2d 134 (D.C. Cir. 1953), *cert. denied*, 346 U.S. 885 (1953). There has been disagreement in this circuit whether this pre-trial disclosure is limited to capital cases where witnesses are endorsed prior to trial. *United States v. Carter*, 15 F.R.D. 367 (D.D.C. 1954); *United States v. Bell*, 126 F. Supp. 612 (D.D.C. 1955).

of their testimony at the trial.”<sup>8</sup> Such documents include those “written, and, when orally made, as recorded by the FBI . . . .”<sup>9</sup> The defense need show no contradiction between trial testimony and these reports. Furthermore, the practice of having the trial judge look at the reports initially to determine relevancy and materiality is disapproved. If the reports are shown to relate to the testimony of the witness, they are by that fact relevant and material for the purposes of production and inspection. (The court’s traditional power to rule on materiality and relevancy of evidence for admissibility at the trial is still unimpaired. While no longer having the discretion to refuse an order to produce the prior statements or reports to the defendant, the federal judge may still deny them admission if they are not acceptable evidence.)

The manifest effort of the Supreme Court to state its rule in *Jencks* clearly and unequivocally has not eliminated disagreement over interpretation of the case. Some of these interpretations raise questions which are, in my opinion, unreal; others raise substantial issues of the scope of the decision.

A measure of the dispute over the meaning of *Jencks* can be gleaned from the relative haste with which Congress pushed through a bill to resolve the difficulties. The statute which emerged from the conference committee in early September may well raise as many questions as it attempts to answer, but Congress apparently believed that fast action was necessary to protect the government from dismissal of criminal actions for failure to produce various parts of its files. Utilizing both the case and the new statute, we can try to answer some of the questions which surround the entire controversy.

Does a motion lie to produce witnesses’ statements prior to trial? The answer would clearly seem to be in the negative.<sup>10</sup> The *Jencks* opinion pinpoints the crucial issue as the need for impeachment by the defense. The key phrase refers to relevant statements or reports “touching the subject matter” of the witnesses’ testimony at the trial.<sup>11</sup> The court stresses the necessary essentials of a foundation for production: that the demand be for specific documents and not a demand for statements taken from persons not offered as witnesses. Again, referring to the question whether conflict need be shown between trial testimony and the previous statement, the Court says: “The occasion for determining a conflict cannot arise until after the witness has testified . . . .”<sup>12</sup> These statements emphatically preclude any right to

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8. 353 U.S. at 672.

9. 353 U.S. at 668.

10. For the way in which pre-trial motions have been handled in the District of Columbia circuit under the Federal Rules relating to discovery and subpoena, see note 7 *supra*. Other federal circuits have not permitted pre-trial disclosure of such documents under the rules. See Orfield, *Discovery and Inspection in Federal Criminal Procedure*, 59 W. Va. L. Rev. 221, 312 (1956-57).

11. 353 U.S. at 672.

12. 353 U.S. at 667.

inspection before the trial. But at least one federal district court has said that the *Jencks* rule entitles defendants to pre-trial disclosure.<sup>13</sup> Notwithstanding such a holding, it seems to me that the more defensible interpretation of *Jencks* rests with the courts which have refused such motions.<sup>14</sup>

Certainly there is no doubt that Congress interpreted the decision this way. In this connection, it is interesting to note that the managers for the House of Representatives in the conference committee which produced the final Congressional legislation issued a statement citing Judge George H. Moore of the eastern district of Missouri, and his application of the *Jencks* decision in the case of *United States v. Anderson*.<sup>15</sup> Judge Moore's interpretation, which was a standard for the conference committee as it framed the new statute, pointed out that the defendant would not be entitled to any statements or reports made by a person other than himself until that person has been called as a witness.

The law which finally passed both houses of Congress provides in its first section that no statement or report given to an agent of the government shall be the subject of subpoena, discovery or inspection "until such witness has testified on direct examination in the trial of the case."<sup>16</sup> Presumably this does not mean that in a pre-trial conference in the interest of judicial expediency, the prosecution and the defense could not stipulate that any statements or reports will be handed over before trial. But such an arrangement would come about only to save time and promote courtroom efficiency; it does not lie as a matter of right under the Supreme Court decision or the new statute.

Under the *Jencks* rule, does a motion for disclosure apply to the entire FBI file in a given case? Certainly not. There is absolutely not one word in the majority opinion which indicates that the government must surrender its entire files. Nevertheless, it was the precipitate action by some district courts in ordering disclosure of whole files, as detailed by Attorney General Brownell in a statement given to the House Committee on the Judiciary,<sup>17</sup> which startled Congress into quick legislative action. Other district courts have unequivocally rejected requests for the prosecution's file.<sup>18</sup> As mentioned

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13. *United States v. Hall*, 153 F. Supp. 661 (W.D. Ky. 1957). The court declares that the language of the *Jencks* case "entirely dissipates any thought that the court must wait until the trial of the case and be actively engaged in the trial before the requirement to produce the documents can be made."

14. *United States v. Grossman*, 26 U.S.L. Week 2060 (D.N.J. July 12, 1957); *United States v. Benson*, 25 U.S.L. Week 2603 (S.D.N.Y. 1957); *United States v. Anderson*, (E.D. Mo. 1957).

15. The finding of fact and conclusion of law in this case, as yet unreported, is printed at 103 Cong. Rec. 14552 (daily ed. Aug. 26, 1957).

16. 18 U.S.C. § 3500 (1957).

17. Report of House Committee on the Judiciary, No. 700, 85th Cong., 1st Sess. (1957) p. 7.

18. *Simms v. United States*, 26 U.S.L. Week 2028 (D.C. Cir. June 8, 1957); *United States v. Haug*, 40 L.R.R.M. 2307 (N.D. Ohio 1957).

above, the *Jencks* decision itself is quite clear that the only matters which the federal government need turn over are statements taken from government witnesses who testify at the trial. Statements taken from confidential informants who do not take the stand need not be turned over.<sup>19</sup> Of course, once the federal government has offered a secret agent as a witness, his identity becomes immediately known and production of his relevant reports and statements could not be denied, under *Jencks*, merely on the grounds that the government has an interest in informants. By the time he has finished testifying, his value as an “undercover” informant has evaporated.

Running commentaries or summaries of the investigation made by FBI agents need not be produced.<sup>20</sup> However, if the summary contains a quotation from the witness, a question arises as to whether this constitutes an “oral as recorded” statement mentioned by the Court. Does the quotation have to be adopted by the potential witness, and if so, what type of adoption is necessary to bring it within the *Jencks* rule? Congress has attempted to answer these questions by its definition of “statement” in section “e” of the statute.<sup>21</sup>

Other aspects of the scope and application of the *Jencks* rule are also clouded. What if the government has a statement given by a witness, only part of which “touches” his trial testimony in the opinion of the prosecution? Who is to decide what “touches”? If the judge is final arbitrator, does this mean that the entire file of the prosecution must be produced for his inspection? How does the defendant contest a claim that all the designated documents have been produced?

The congressional attempt to answer these questions has taken the following form in the statute:<sup>22</sup>

- (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

19. But in some instances the federal government is required to reveal the identity even though the informer is not used as a witness at the trial. See *Roviaro v. United States*, 353 U.S. 53 (1957), cited by the *Jencks* majority as in “accord” with its decision. 353 U.S. at 672.

20. If the agent is himself the witness, presumably these commentaries or summaries will be relevant for his impeachment.

21. 18 U.S.C. § 3500 (1957); “(e) The term ‘statement’ . . . 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.”

22. 18 U.S.C. § 3500 (1957).

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 correctness of the ruling of the trial judge.

It will doubtless take many months of exposure to the interpretations of trial and appellate judges until the full value of the new statute is determined. A major point of interest is the relationship between the new bill and the Federal Rules of Criminal Procedure. But for the state prosecutor, most of this development will have little immediate significance. His point of concern will remain the case itself and the potential consequences in the states.

#### *Does Jencks Apply to State Prosecutions?*

The *Jencks* decision arose out of a federal criminal prosecution in a federal court. The Supreme Court needed only to decide if error had been committed in the administration of federal criminal justice.

On its face, then, the decision poses no special problem for the state prosecutor. The court made no pronouncement on constitutional rights, nor did it in any way suggest that the formulated rule would apply to the states. An analysis of the cases cited by the majority opinion would seem to show that the *Jencks* ruling rests on supervisory and administrative, and not constitutional grounds.<sup>23</sup> The only real authority for a claim of constitutional right to inspect witnesses' statements in the government's possession is contained in a case cited in one of the footnotes to the *Jencks* opinion.<sup>24</sup> And this case is

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23. The *Jencks* case apparently overrules *Goldman v. United States*, 316 U.S. 129 (1942), which held that if a witness does not use his notes or memoranda in court, a party has no absolute right to inspect them. Since the *Goldman* case was decided in 1942, it is difficult to conceive—if the fundamental issue is constitutional—that the court could within the space of 15 years reach two results so much at variance without once discussing the constitutional ground.

24. *United States v. Schneiderman*, 106 F. Supp. 731 (S.D. Cal. 1952), cited by *Jencks* majority in footnote 13. After examining the witnesses' prior statements in camera, the judge granted disclosure, saying: at 736: "... if material to a degree not clearly de minimis, both reason

significantly employed by the *Jencks* majority only for the broad proposition that “justice shall be done,” rather than for any point of constitutional weight.

But while the court did not resort to the language of the Constitution, it did make some suggestion of a fundamental question involved in the *Jencks* issue.<sup>25</sup> Based on that vague suggestion, certain assumptions of constitutional right have been made by commentators. But there has been some disagreement even among these commentators. For example, Congressional committees, working with proposed bills<sup>26</sup> to limit the scope of the case and restore judicial discretion on the question of the production for inspection, have entertained the fear that they were treading on Fifth Amendment grounds invulnerable to their legislative powers.<sup>27</sup> Senator Thomas C. Hennings of Missouri, considered an authority on constitutional matters, has stated that the *Jencks* case upholds the Sixth Amendment’s right of confrontation clause.<sup>28</sup> On the other hand, counsel for Jencks, while citing the Sixth Amendment in their argument to the Supreme Court, apparently relied<sup>29</sup> on the compulsory process clause: “In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . .”

The interest of the state prosecutor in the decision is the possibility that the *Jencks* holding—however amorphous its meaning now—will in time assume the substance of a constitutional right applicable to the states, or that state courts will find its rationale of such persuasive force as to encourage state compliance. As a practical matter, it is conceivable that defense lawyers in state courts will press their earliest opportunity for a look at the prosecutor’s files. This means that the issues of constitutionality and desirability posed by the *Jencks* case must be met and solved by the states in the near future.

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and policy advocate that the defense should be entitled to compel production of the evidence in fulfillment of the assurance of the Sixth Amendment.”

25. “Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense.” 353 U.S. at 667. “Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government’s witness and thereby furthering the accused’s defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less.” *Id.* at 668.

26. S. 2377, H.R. 7915, 85th Cong., 1st Sess. (1957).

27. Report of Senate Committee on the Judiciary, No. 569, 85th Cong., 1st Sess. (1957) p. 2: “The proposed legislation, as reported, is not designed to nullify, or to curb, or to limit the decision of the Supreme Court insofar as due process is concerned.”

28. Quoted in St. Louis Post-Dispatch, July 8, 1957. Reprinted in 13 J. Mo. B. 164. The decision in the *Jencks* case “apparently finds its rationale in the time-honored Sixth Amendment right of an accused ‘to be confronted with the witnesses against him.’”

29. Brief for petitioner, *United States v. Jencks*, p. 5.

*The Constitutional Issue*

It is the author's thesis that the *Jencks* case, and all of its logical extensions, cannot be a constitutional mandate to the states. Even if we assume that the constitutional interpretations of *Jencks* mentioned above do in time come to be accepted, still the state process would not be affected. For it is well settled that the provisions of the Bill of Rights are not embodied as such in the Fourteenth Amendment and applied against the states.<sup>30</sup> If *Jencks* is truly supported by the Fifth and Sixth Amendments, that does not automatically make it a rule applicable to the states.<sup>31</sup> The due process clause of the Fourteenth is protection only against such state action as violates the "immutable principles of justice,"<sup>32</sup> or those which are "of the very essence of a scheme of ordered liberty."<sup>33</sup>

As Edward S. Corwin tells us: "While in a general way (the due process) clause imposes on the powers of the state the same kinds of limitations that the corresponding clause of Amendment V does on the powers of the National Government, there is this conspicuous difference, that it does not subject state criminal procedure to the detailed requirements which the Fifth and Sixth Amendments lay upon the National Government. For this reason, the states remain free to remodel their procedural practices, so long as they retain the essence of 'due process of law,' that is, a fair trial in a court having jurisdiction of the case."<sup>34</sup>

In the last analysis, the constitutional importance of *Jencks* for the state prosecutor will be found in an answer to the question of whether or not the denial of disclosure for impeachment undermines the fairness of a trial. To my knowledge there are no state or federal authorities which have answered this question in definitive terms. But the courts have dealt with related issues which may shed light on the issue raised.

The right to counsel, protected by the Sixth Amendment against the national government, is not a right of due process under the Fourteenth Amendment in every case.<sup>35</sup> Requests for compulsory process can be denied by a state within the bounds of due process if the requests are untimely made.<sup>36</sup> In absence of a statute, the accused in a criminal case is not entitled to have his

30. *Adamson v. California*, 332 U.S. 46 (1947); *Twining v. New Jersey*, 211 U.S. 78 (1908).

31. *Brock v. North Carolina*, 344 U.S. 424 (1953); *Betts v. Brady*, 316 U.S. 455 (1942); *Palko v. Connecticut*, 302 U.S. 319 (1937).

32. *Holden v. Hardy*, 169 U.S. 366, 389 (1898).

33. Justice Cardozo's formulation in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

34. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 247 (1954).

35. *Betts v. Brady*, 316 U.S. 455 (1942).

36. *Commonwealth ex rel. Jennings v. Maroney*, 179 Pa. Super. 571, 118 A.2d 287 (1955).



witnesses summoned at public expense as part of the constitutional right to compulsory process.<sup>37</sup>

Most state courts have held that it is not a violation of the Fourteenth's due process to deny a defendant the right to see his own confession prior to its admission at trial, unless prejudice can be shown by this denial.<sup>38</sup> And the Supreme Court has endorsed this conclusion.<sup>39</sup> Nor is the denial by a state of the discovery processes provided by Rule 16 of the Federal Rules of Criminal Procedure a violation of the Fourteenth Amendment.<sup>40</sup> The Illinois courts tell us there is no inherent right in a defendant to require information which he believes may possibly be in the personal files of the state's attorney.<sup>41</sup>

Recantation of testimony by a witness against an accused is not in itself a ground for invoking the due process clause.<sup>42</sup> Surely it would be anomalous to say that a defendant has no absolute right to a new trial when a witness claims that he has perjured himself, and yet say that when there is no evidence of any conflict in the witness's story the defendant has a constitutional right to look at his prior statement on the mere possibility of finding something impeaching.

On the other hand, a defense motion to subpoena the Grand Jury reporter and his notes to show that a trial witness gave contradictory testimony before the jury must be granted under the constitutional right of compulsory process, according to a Florida court.<sup>43</sup> Note that in this case the materiality of the evidence was admitted and the defendant had made an offer of proof with his subpoena. In an earlier case in Florida, the court held it would violate state constitutional rights of compulsory process to deny the defendant the opportunity of using the Grand Jury reporter and his records to impeach.<sup>44</sup> The court expressly said, however, that the case did not involve documents in the possession of the prosecuting attorney. And in a case where the defendant attempted to obtain transcripts of statements of state witnesses held by the prosecution, the Florida court has rejected a claim that due process required the production of these documents.<sup>45</sup>

Looking closely at the holdings in these related cases, it would seem that while due process might be violated by the failure of a state to produce for the

37. *State v. Blount*, 200 Ore. 35, 264 P.2d 419 (1953), *cert. denied*, 347 U.S. 962 (1953).

38. *Application of Tune*, 230 F.2d 883 (3rd Cir. 1956), *cert. denied*, 351 U.S. 987 (1956). For state reports see, 13 N.J. 203, 98 A.2d 881 (1953) (Justice Brennan, sitting on the New Jersey bench at the time, is author of the dissent), and 17 N.J. 100, 110 A.2d 99 (1954).

39. *Leland v. Oregon*, 343 U.S. 790 (1952).

40. *People v. Kross*, 112 Cal. App. 2d 602, 247 P.2d 44 (1952).

41. *People v. Murphy*, 412 Ill. 458, 107 N.E.2d 748 (1952), *cert. denied*, 344 U.S. 899 (1952).

42. *Madison v. State*, 205 Md. 425, 109 A.2d 96 (1954).

43. *Trafficante v. State*, 92 So. 2d 811 (Fla. 1957).

44. *State ex rel. Brown v. Dewell*, 123 Fla. 785, 167 So. 687 (1936).

45. *McAden v. State*, 155 Fla. 523, 21 So. 2d 33 (1945), *cert denied*, 326 U.S. 723 (1945).

defendant prior statements which have been shown to be contradictory, there is no support for the proposition that such statements must be produced absent such showing.

In summary, the *Jencks* opinion does not in and of itself apply to state courts. Even if it is a constitutional pronouncement, which is doubtful, the rule would get its vitality from constitutional provisions only applicable to the federal government. The need for disclosure on the part of a defendant would not constitute the type of basic right assured to the individual against the states by the Fourteenth Amendment.

*Should the Jencks Rationale Prevail in The States?*

However, even if we grant that *Jencks* has no constitutional relevance for the states, the significance of the case still cannot be blinked away by state prosecutors. The fact remains that seven of the eight Supreme Court justices who decided the case agreed that it is justice for the defendant to have access to prior statements of government witnesses if these statements are relevant to a complete defense. The concurring opinion disagrees only with the method of determining relevancy and materiality of the documents, not in the necessity of doing so.<sup>46</sup> Surely there is great persuasive force in the near unanimity of the Court on this point. Furthermore, the state prosecutor is still confronted with the statement of Justice Clark, the one member of the Court who opposed the type of disclosure authorized by the *Jencks* majority. In his dissent, the Justice claimed that on the federal level the decision would have the effect of completely frustrating government intelligence agencies, but he added: "This may well be a reasonable rule in state prosecutions where none of the problems of foreign relations, espionage, sabotage, subversive activities, counterfeiting, internal security, national defense, and the like exist. . . ."<sup>47</sup> (Just how the Justice reached this conclusion, even though it is dictum only, is somewhat of a mystery. There are still some rather substantial problems on the state level which would be affected by the *Jencks* rule—narcotics, and gambling syndicates, to mention but two. The scope of police intelligence squads may be more restricted than their federal counterparts, but one can hardly conclude that their work is less deserving of every legitimate protection.)

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46. In the concurring opinion, 353 U.S. at 674, Justice Burton writes: "A rule requiring a showing of contradiction in every case would not serve the ends of justice. I concur, therefore, in that portion of the Court's opinion holding that petitioner laid a sufficient foundation for the production of the reports. I would not, however, replace the inflexible and narrow rule adopted by the courts below with the broader, but equally rigid rule announced by the Court. In matters relating to the production of evidence or the scope of cross-examination, a large discretion must be allowed the trial judge."

47. 353 U.S. at 682.

In short, once the constitutional issue is put aside, we are only at the threshold of an argument in the states over the merits and demerits of full and free disclosure. Using Missouri as an example, I propose to show the various forms which the problem of the *Jencks* rationale may take, and to comment briefly on them. To do that intelligibly, we must first look at Missouri law on the subject.

Missouri's Rules of Criminal Procedure do not provide for discovery and inspection in criminal cases;<sup>48</sup> neither do they answer the *Jencks* issue of disclosure of possible impeaching statements at trial. But Rule 25.19<sup>49</sup> does have as its object the production "of documents or objects at the trial that contain evidence material and relevant to the issues and to require prior production and inspection of such records or objects if prior production and inspection will expedite the trial."<sup>50</sup>

No case in Missouri has squarely met the question of whether statements and reports of witnesses, held by the prosecution, must be produced to defendants for possible impeachment at trial after the witness has testified. This is in itself significant, for it means that defense attorneys, in the absence of the statute, have never seriously argued that they have a right to such statements, absent any showing of contradiction between the trial testimony and the previous statement.

In the leading case of a quasi-*Jencks* nature in Missouri, involving a pre-trial demand, the Supreme Court of state denied the right of inspection by defendant of written statements made by witnesses already endorsed for trial.<sup>51</sup> The claim of defendant in this case was bottomed on a statute<sup>52</sup> giving the court discretion to order production of any papers "containing evidence relating to the merits of the action."

The court said, in rejecting the defense motion,

No reason is assigned why these statements should be produced, and no facts are alleged which tend to show that the statements contain evidence material to the defense of the party asking for their production. Besides, the written statements of these witnesses would be hearsay, and therefore not admissible in evidence except by way of impeachment in event the witness testified to a state of facts different from those contained in the written statement made by him. The statute does not authorize the court to order the production of papers

48. State *ex rel.* Phelps v. McQueen, 296 S.W.2d 85 (Mo. 1956).

49. MO. REV. STAT. (1955 Cum. Supp. p. 1097).

50. See note 48 *supra*.

51. State *ex rel.* Page v. Terte, 324 Mo. 925, 25 S.W.2d 459 (1930).

52. MO. REV. STAT. § 1378 (1919), which is substantially the same as its successor MO. REV. STAT. § 510.030 (1949), applying to civil procedure.

in the absence of a showing that they contain evidence material to the issues in the pending case.<sup>53</sup>

And the court expressly pointed out that the mere possibility of impeachment would not sustain a pre-trial motion under the statute.

This is still the law in Missouri, and pre-trial inspections based on the unsubstantiated hope of turning up impeaching statements are denied.<sup>54</sup> The same reasoning has prevailed in rejecting pre-trial motions to inspect Grand Jury minutes for possible impeachment evidence.<sup>55</sup>

In regard to motions made at trial for documents held by the prosecution, Missouri has denied the defendant access to his own signed statements not introduced at trial,<sup>56</sup> his transcribed answers given to prosecution questions,<sup>57</sup> and wire-recorded conversations between him and law-enforcement officers.<sup>58</sup> In the first two of these cases, defendant obviously wanted the documents recording his own statements to undermine and impeach testimony relating to what those statements were.

In other words, Missouri has refused pre-trial inspection of statements that might impeach because there has been no proof of relevancy and materiality. These pre-trial motions have usually been based on statutes, but the rationale which denies the request would apply to at-trial motions also—unless by showing contradiction the defendant proves the materiality of the documents. Missouri has also denied at-trial inspection of statements made by defendant himself, where defendant seeks to impeach witnesses testifying to the very matter contained in the statement, or where the effort is to establish some fact favorable to defendant's position.

None of these situations are on *all fours* with the situation with *Jencks*: a motion *at trial* to produce prior statements *made by adverse witnesses* who have testified. But the import of Missouri law seems *contra* to any such production. If the witness cannot have documents which record his own statements (the contents of which he presumably remembers) to impeach an adverse witnesses' version of them, why should he be allowed to have statements of adverse witnesses on the mere hope that they may be in conflict with trial testimony?<sup>59</sup>

53. 324 Mo. at 932, 25 S.W.2d at 462.

54. *State v. Brown*, 360 Mo. 104, 227 S.W.2d 646 (1950); *State v. Richette*, 342 Mo. 1015, 119 S.W.2d 330 (1938).

55. *State v. McDonald*, 342 Mo. 998, 119 S.W.2d 286 (1938).

56. *State v. Hancock*, 340 Mo. 918, 104 S.W.2d 241 (1937).

57. *State v. Kelton*, 229 S.W.2d 493 (Mo. 1957).

58. *State v. Lawson*, 360 Mo. 95, 227 S.W.2d 642 (1950).

59. It should be pointed out that the defendant is protected against any deliberate use of perjured *evidence* or knowing suppression of evidence by state prosecutors. Such actions by a state prosecutor violate the Fourteenth Amendment. *United States ex rel. Thompson v. Dye*, 221

*An Assumption of Change in State Law*

In the face of what appears to be the Missouri sentiment on this question, let us now suppose that the state decides to overrule its previous cases and their clear tendency to deny a *Jencks*-type disclosure. Any change should, of course, come initially from the Supreme Court of Missouri; a trial judge would hardly be justified in overruling all the analogous Missouri precedents on the question. Our supposition is that the Supreme Court of the state becomes persuaded that as a matter of procedural fairness in criminal prosecutions, it should follow the example of the *Jencks* decision and allow inspection of prior statements made by prosecution witnesses without any showing of contradiction with trial testimony.<sup>60</sup>

To what matters would or should such a state ruling apply? How would that affect criminal prosecutions, taking St. Louis as an example?

There are various documents, different in purpose and form, which could theoretically come under a *Jencks*-type rule. In analyzing them, we should remember the purpose of that rule: the use for impeachment of statements handed over at the time the witness is testifying.

Among the items that might be found in the prosecutor's file in any given case are:

*Transcripts of Coroner's Inquest.* No need exists for any new rule here, as the defense now has available to it these records.

*Grand Jury Testimony.* The answers given by prospective witnesses in the Grand Jury room are transcribed verbatim by a reporter, and represent responses to questions put by an assistant circuit attorney, or less frequently, a member of the jury itself. The fact of stenographic transcription fairly well assures the accuracy of the documents, but a major obstacle to any rule to produce is the public policy against divulgence of Grand Jury testimony unnecessarily. Under the statute,<sup>61</sup> the defense can produce a juror himself to testify at the trial concerning the consistency of witnesses' statements, and this—rather than the production of the minutes of the jury—has been held to be the proper way to impeach such a situation.<sup>62</sup>

*Warrant Office Statements.* Before an information is issued, the assistant circuit attorney will have interviewed the complainant and other witnesses, and

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F.2d 763 (3rd Cir. 1955), *cert. denied*, 350 U.S. 875 (1955); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Mooney v. Holohan*, 294 U.S. 103 (1935).

60. The State court would not be following the *Jencks* decision as a rule of law binding them, for such is not the case. The hypothetical posed here is that the court is convinced of the desirability of the rule, not of its legal necessity under the Federal Constitution.

61. MO. REV. STAT. § 540.300 (1949).

62. *State v. Thomas*, 99 Mo. 235, 12 S.W. 643 (1889). Since MO. REV. STAT. § 540.105 (1955 Cum. Supp.) now provides for an official reporter, there may be less reason to deny the minutes to defendant as possible impeachment material.

questioned them closely on various aspects of the alleged crime. Very often this exchange is transcribed by a stenographer.<sup>63</sup> Clearly, if a *Jencks*-type rule is imminent in Missouri, this variety of statement is the most likely to be affected. There is no danger here that the answers of the witness will be garbled by another's attempt at summary, since the questions and answers are put in the record exactly as they occurred.

*Statements to Investigators.* A group of special investigators work out of the Circuit Attorney's office. Sometimes they obtain statements from potential witnesses which are written by the declarant, or signed and adopted by him. These are obviously as reliable as the warrant office statements mentioned above, because the person who makes them deliberately approves the version recorded by the investigator. However, these investigators also talk to witnesses and then make a summary of that conversation which the potential witness never sees. These are inexact and unreliable when considered for the purposes of impeachment.

*Police Reports.* These take a variety of forms. One or more officers may investigate each case and write up their notes in a rough form. These notes are then worked over by a clerk-typist whose job is to synthesize, summarize and shape the information into a running account of the case. Sometimes the clerk will editorialize, nearly always he will be required to blend the various reports into a continuous running narrative.

Another type of police report involves a verbal recitation of the investigating officer's findings to his commanding officer who, in turn, will write the report and send it to the Chief of Police.

Still another police report may consist of a single officer's written statement incorporating quotations from a witness.

Any attempt to require production of police reports for impeachment of an officer on the witness stand would lack justification. In most instances, as pointed out above, the officer has in fact not been the party who put the facts of his report in final form. Either his superior or a clerk-typist has intervened between the officer's version and the report which finally emerges as official. Would it not be incongruous to bind a policeman to the hearsay summary of a clerk?

If the police report is used to impeach the person originally interviewed by the officer, many of the same objections occur. For the report normally is not the work of the policeman who talked to the potential witness. The *Jencks* rule applied in this situation would mean that a witness would be confronted with a statement allegedly made by him, as reported by a clerk who heard it from an officer who was only one of a group making reports on the same incident.

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63. This is not true for many prosecution offices outside the city of St. Louis. It should also be pointed out that the Circuit Attorney of St. Louis is only responsible for the prosecution of felonies, not of misdemeanors.

*Prosecutor's Summaries.* Normally, the prosecution's files will include comments made by an assistant circuit attorney as to what the witnesses will testify, based upon his interviews with them. Certainly no one would contend that this work product of the prosecutor could have any proper value to impeach a witness.

As a prosecutor, then, my personal reaction to a *Jencks* rule in the states would be this: It would be unwise and unnecessary for state courts to order pre-trial disclosure of statements designed for impeachment. It would certainly be disastrous if the whole file of the prosecutor should be opened for what is called a "fishing expedition." Such a rule would also lack any justification in the case of police reports which represent boiled down hearsay statements of a clerk.

Whether warrant office statements of prosecution witnesses should be turned over to the defense at trial is a more arguable question. At least the defendant can say of such statements that they are probably accurately recorded, and that the memory of the potential witness should have been better at the time of the statement since he was closer then to the underlying incident. But what the defendant cannot say about any of these statements is that they are probably relevant, or that he has a need for them. In effect, defendant is blindly throwing out his line to see if he can hook any information that might be helpful to him. The state courts will have to decide if our judicial process really requires that defendants be allowed this fisherman's cast.

#### CONCLUSION

While *Jencks* is not a constitutional mandate to the states, and while Missouri by all the evidence does not endorse its rationale, there may be an argument brewing for state prosecutors over whether the defendants should not be allowed to look at witnesses' statements in the files. If it comes, the argument should be restricted to the type of reports where the previous statements have been carefully recorded and the witness has, through conduct or signature, approved their contents. In my opinion, a warrant office statement would qualify for serious consideration under this criterion, but a police report would not.

