Missouri Law Review

Volume 22
Issue 4 *November 1957*

Article 2

1957

Editorial Board/Recent Cases

MISSOURI LAW REVIEW

Published in January, April, June, and November by the School of Law, University of Missouri, Columbia, Missouri.

Volume XXII NOVEMBER, 1957 Number 4

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Subscription Price $2.50 per volume $1.00 per current number

MEMBER, NATIONAL CONFERENCE OF LAW REVIEWS

"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

Recent Cases

AVAILABILITY TO THE ACCUSED OF DOCUMENTS IN THE POSSESSION OF THE GOVERNMENT FOR THE PURPOSE OF IMPEACHING GOVERNMENT WITNESSES

Jencks v. United States[1]

In this case, the defendant, an officer of a labor union, filed an "Affidavit of Non-Communist Union Officer" with the National Labor Relations Board as re-

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

quired by section 9(h) of the Taft-Hartley Act.[2] He was then indicted on two counts for the alleged violation of federal law[3] by falsely swearing in that affidavit that he was not a member or affiliated with the Communist Party on April 28, 1950. The defendant was convicted on both counts by the district court and his petition for a new trial was denied. The Circuit Court of Appeals for the Fifth Circuit affirmed the conviction[4] and also the order denying the motion for a new trial.[5] The Supreme Court granted certiorari.[6]

The two principal government witnesses were H. F. Matusow and J. W. Ford, who were Communist Party members paid by the Federal Bureau of Investigation to make oral and written reports to the F.B.I. concerning the Communist Party activities in which they were currently participating. They made many such reports concerning the defendant, about which they testified at trial. The defendant contends that the trial court erred in refusing his motions to produce these records for inspection and use in cross-examining the two witnesses who had made them. Further error was alleged on the instructions to the jury concerning credibility of informers.[7] The Supreme Court reversed with Mr. Justice Brennan delivering the opinion of the Court.

It seems as though the sole reason for the trial court's refusal to order a production of the files was on the ground that a preliminary foundation of inconsistency had not been laid between the contents of the report and the testimony of the witnesses. It further appears that this was the reason that the Circuit Court of Appeals affirmed the refusal to order the production of these reports.[8] The Supreme Court held, on the contrary, that the petitioner was not required to lay a preliminary foundation of inconsistency because a sufficient foundation was established by the testimony of the witnesses to the effect that their reports concerned events and activities about which they were testifying.[9] The Court went on to say that the court of appeals misinterpreted the opinion in *Gordon v. United States*[10] and that that case did not require a preliminary showing of inconsistency.[11]

It is submitted that the *Gordon* case can be distinguished from the instant case on the grounds that in the *Gordon* case the witness admitted, upon cross-examination, that he had made prior inconsistent statements and that the Government was in

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2. 61 Stat. 146, as amended, 65 Stat. 601, 29 U.S.C. § 159 (h).
3. 62 Stat. 749, 18 U.S.C. § 1001.
4. Jencks v. United States, 226 F.2d 540 (5th Cir. 1955).
5. *Id.* at 553. The motion for a new trial was made on the grounds that one of the government's main witnesses had recanted, but the district court held that he told the truth at the hearing on the motion at which he claimed that he lied at the trial.
6. 350 U. S. 980 (1956).
7. 353 U. S. at 659. The court felt that it was unnecessary to consider the alleged errors in instructions because of their disposition of the case.
8. 226 F.2d at 552. On this point the court cited the following: Gordon v. United States, 344 U. S. 414 (1953); Bowman Dairy Co. v. United States, 341 U. S. 214 (1951); Goldman v. United States, 316 U. S. 129 (1942).
9. 353 U. S. at 666.
10. 344 U. S. 414 (1953).
11. 353 U. S. at 666.

possession of these inconsistent statements.[12] On the other hand, it was never shown in the *Jencks* case that the witness had made prior inconsistent statements, but rather, that the witness had made reports which were in the Government's possession.[13] Further, Mr. Justice Jackson in announcing the opinion of the Court in the *Gordon* case, said, "By proper cross-examination, defense counsel laid a foundation for his demand by showing that the documents were in existence, were in the possession of the Government, were made by the Government's witness under examination, were contradictory of his present testimony, and that the contradiction was as to relevant, important and material matters which directly bore on the main issue being tried: the participation of the accused in the crime. The demand was for production of these specific documents and did not propose any broad or blind fishing expedition among documents possessed by the Government on the chance that something impeaching might turn up."[14] In the *Jencks* case, the Court cited the latter part of the preceding statement and went on to say, "We reaffirm and re-emphasize these essentials."[15] The Court then quoted another portion of the *Gordon* case as authority for their proposition that no preliminary foundation of inconsistency need be laid, in which it was said that "For production purposes, it need only appear that the evidence is relevant, competent, and outside of any exclusionary rule. . . ."[16] Upon examination of the *Gordon* case it was found that the above statement was made when the Court was speaking of the admissibility of the inconsistent statements once they had been produced, and was not said in reference to the problem as to whether or not the Court should force the Government to produce them as the Court in the *Jencks* case seemed to infer.[17]

After finding it unnecessary that a preliminary foundation of inconsistency be laid, the Court gave the following order, ". . . the petitioner was entitled to an order directing the Government to produce for inspection *all* reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F.B.I., *touching* the events and activities as to which they testified at the trial."[18] (Emphasis added.) Perhaps the scope of such a statement might be broader than the statement the Court had made early in the opinion to the effect that an essential element for the production of documents was that " '[t] he demand was for production of . . . *specific documents and did not propose any broad or blind fishing expedition* . . . on the chance that something impeaching might turn up.' (Emphasis added.) 344 U. S., at 419."[19]

At this point it will be interesting to observe that the defendant's requests for inspection were limited to only a certain few reports dealing with only specified meetings and conversations and for the purpose of impeaching the credibility of the important government witnesses. Further, the defendant did not ask to see the docu-

12. 344 U. S. at 416.
13. 353 U. S. at 666.
14. 344 U. S. at 418.
15. 353 U. S. at 667.
16. 344 U. S. at 420 quoted in 353 U. S. at 667.
17. See 344 U. S. at 420.
18. 353 U. S. at 668.
19. 353 U. S. at 667.

ments himself, but instead, only that these specified reports be turned over to the trial court to determine their value for impeachment purposes, and then, if they were of value and unprivileged, to allow the defendant to use them.[20] Instead of allowing the defendant his request, the Court went further and held that the defendant was entitled to inspect the reports, the reason being that only the defense was adequately equipped to determine their use in furthering the accused's defense. "The practice of producing government documents to the trial judge for his determination of relevancy and materiality, without hearing the accused, is disapproved."[21] The Court handled the problem of its order being broader than requested by the petitioner by making the following statement, "The petitioner's counsel, believing that Court of Appeals' decisions imposed such a qualification, restricted his motions to a request for production of the reports to the trial judge for the judge's inspection and determination whether and to what extent the reports should be made available to the petitioner."[22] It is submitted that there might be a question raised as to the adequacy of this reason that the Court gives for deciding a question broader in scope than the one presented.

In the *Jencks* case, one other important consideration was presented, to wit, the great national interest in not having certain documents in the possession of the F.B.I. publically disclosed for fear that such disclosure would decrease the effectiveness of that government agency. The court handled this problem by claiming that the Supreme Court noticed, in *United States v. Reynolds*,[23] the holdings of the Court of Appeals for the Second Circuit[24] that in criminal causes ". . . the Government can invoke its evidentiary privileges only at the price of letting the defendant go free."[25] It will be observed that the Court in the *Reynolds* case, after making the above statement, went on to say that it had no application in that case because it was a civil case, and not a criminal case.[26] In light of this fact, it will be noticed that the Supreme Court has in no case specifically accepted the doctrine that the Government has the choice of protecting the national interest by non-disclosure of vital documents by the Government at the price of allowing the defendant to go free.

The holdings of the Court of Appeals for the Second Circuit that were cited in conjunction with the *Reynolds* case were the cases of *United States v. Andolscheck*[27]

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20. See 353 U. S. at 673 n.1, reading as follows: "In his brief, petitioner states: 'Petitioner asked only that the reports be produced to the trial judge so that he could examine them and determine whether they had evidentiary value for impeachment purposes. Petitioner sought access only to those portions of the reports having this value. The motion therefore proposed no broad foray into the government's files and afforded the judge every opportunity to protect the government's legitimate privilege as to the matters not connected with this case.'"
21. 353 U. S. at 669.
22. 353 U. S. at 670.
23. 345 U. S. 1 (1953).
24. United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944); United States v. Beekman, 155 F.2d 580 (2d Cir. 1946).
25. 353 U. S. at 671.
26. 345 U. S. at 12.
27. 142 F.2d 503 (2d Cir. 1944).

and *United States v. Beekman*.[28] Although these cases are more formidable authority than the *Reynolds* case, they both might be distinguished on the grounds that the basis for the refusal was the general regulations of the O.P.A. and of the Treasury Department prohibiting officers of these agencies from publishing agency documents for any reason. Further, there was no showing in either case that the production of the documents could seriously threaten vital national interest or hamper the functioning of an important security agency of the Government. Concerning the problem of national security, the attention of the reader might also be called to the *Gordon* case. There the Court stated, "The Government did not assert any privilege for the documents on grounds of national security, confidential character, public interest, or otherwise."[29] Concededly, this was only dictum, but the mere presence of such a statement reflects, by implication, the feeling of the court that the *absence* of such factors builds a stronger case in favor of the inspection of the documents by the other party.

In the *Jencks* case, Mr. Justice Brennan in delivering the opinion of the Court, was speaking for himself and four other justices. Mr. Justice Burton, joined by Mr. Justice Harlan, concurred separately stating that he believed the case should be reversed on the ground of prejudicial error in the instructions given by the trial court to the jury. He disagreed with the majority on the point of turning over the documents in question to the accused and stated that they should instead have been given to the trial court for inspection for inconsistencies as requested by the accused. Mr. Justice Clark dissented, stating that the documents should not be turned over to the defendant for national security reasons and that it would seriously impair the efficiency of the F.B.I., but he did approve of the practice of turning them over to the trial court for inspection for inconsistencies with testimony that had been given.

The exact precedent that was established by the *Jencks* case is far from clear, but it can be conservatively said that the decision will have the effect of giving an accused person greater accessibility to the confidential files of the F.B.I. than before. It was felt by many that, at a minimum, the efficiency of the F.B.I. would be greatly decreased if they would have to work in constant fear of eventually having to choose, in many cases, between making their files public or not prosecuting persons who were believed to have committed serious crimes. Congress immediately recognized the impending danger and, as a result, passed a statute which greatly modified, if not abolished, any precedent set by the *Jencks* case.[30] The statute attempts partially to protect the internal security of the F.B.I. while at the same time protecting persons on trial from being convicted on false or inconsistent testimony of Government witnesses. The statute provides, in essence, the following:

"a. In any criminal prosecution brought by the United States, no statement or report in the possession of the United States . . . shall be the subject

28. 155 F.2d 580 (2d Cir. 1946).
29. 344 U. S. at 419.
30. Pub. L. No. 85-269, 85th Cong. (Sept. 2, 1957) (adding new section 3500 to title 18, U.S.C.).

of . . . , inspection until said witness has testified . . . in the trial of the case.

"b. After a witness called by the United States has testified . . . , the court shall, on motion of the defendant, order the United States to produce any statement . . . 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 . . . statement relate to the subject matter of the testimony . . . , the court shall order it to be delivered directly to the defendant . . . .

"c. If the United States claims that any statement ordered to be produced . . . contains matter which does not relate to the subject matter of the testimony . . . , the court shall order the United States to deliver such statement for the inspection of the court in camera . . . [T]he 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 . . . [T]he court . . . may recess . . . for such time . . . required for the examination by said defendant and his preparation for its use in the trial.

"d. If the United States elects not to comply with an order . . . under paragraph (b) and (c) . . . , the court shall strike from the record the testimony of the witness . . . , unless . . . the interests of justice require that a mistrial be declared."

Although the effectiveness of this statute has not yet been judicially interpreted, it seems to spell out the rights of the accused and the rights of the Government much more clearly than was done in the *Jencks* case.

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