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Memorandum
for Dept. File
W. J. Williams

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MEMORANDUM FOR THE ATTORNEY GENERAL

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Re: Scope and Effect of Jencks Decision

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6/12

In considering the scope of the decision in the Jencks case, it is helpful to consider the background which led to the holding. It is significant that in the Jencks case, and also in the Gordon case, 1/ which preceded it, the witnesses whose statements were demanded were of doubtful veracity: in Gordon the witness was an accomplice who had plead guilty; in Jencks it was Harvey Matusow. The character of the witnesses undoubtedly led the court to go to extremes in defining the procedures to test the trustworthiness of their testimony. Compare the Goldman case 2/, where denial of production of reports of federal agents was affirmed.

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The result is highly unfortunate, since the language of the decision, placed in a framework of serious doubt as to the credibility of the witness, is more broad and sweeping than it might have been in another context.

1. The New Problems Raised

The Jencks decision has made three significant changes in the production rule as understood and practiced by the Department.

1. It has unequivocally abolished the requirement that a foundation of inconsistency between the pre-trial statement and the testimony be laid by the defense as a condition to an order for production.

2. It has extended the rule to the recorded report of oral statements made by the witness.

3. It disapproves the practice of screening out of extraneous material by the court and requires production to the defense of the whole document containing the report or statement of the witness.

44/111 FN1

1/ 344 U.S. 414.

2/ 316 U.S. 129.

44/111 FN2

2. Production of Oral Statements

I strongly disagree with the instructions presently in effect directing United States Attorneys not to produce reports of oral statements unless the witness has adopted the report as a correct summary of his statement. The court held:

10 "We now hold that 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." (Slip opinion 11, emphasis supplied.)

The argument in support of the present instructions is that recordings of oral statements which have not been approved or adopted by the witness are pure hearsay, and presumably, that the Jencks decision did not intend such unconfirmed recordings of statements to be included. The court did not so limit its decision, and I believe would hold that it was intended to cover this situation if the point were expressly raised.

The fact that these statements, being hearsay, would clearly be inadmissible if offered in evidence is not controlling. Written statements of a witness who is present are not admissible as substantive evidence, since they, too, are hearsay. The question is not whether the statements, written or oral, are evidentiary in themselves, but whether they may cast light on the trustworthiness of the testimony of their author.

Use of pre-trial statements for impeachment purposes tests the witness in two respects: as to accuracy of memory (the earlier statement being presumed the better recollection because more nearly contemporaneous) and as to reliability--i. e., whether intervening influences may have colored the testimony, and altered it from the statement made before such influences came into play.

Of course the unconfirmed oral statement is subject to attack as an inaccurate recording. Such a defect, however, goes to its weight, not to its permissible use for impeachment.

Certainly the defense could call the agent to whom the witness made the statement and ask him his recollection of the statement. Yet

that recollection could be more faulty than the agent's contemporaneous recording of his understanding of the conversation.

I see no objection from the government's standpoint to producing records of unconfirmed oral statements. In this connection, I believe we do not run into any problem of producing the entire FBI report which contains the agent's recording. When the court speaks of producing the reports for defense inspection, it is referring to the reports of a witness. Thus, where an FBI agent takes the stand and he has reported the subject matter of his testimony only in a Bureau report, it may be necessary to hand over the entire report for inspection. Similarly, where an informant's report touches his testimony, the whole report must go in. But where the witness on the stand has made an oral report to an agent, the recording of that report is all that the defense is entitled to. The recording is the complete report in question. I think there is no doubt that it would be sufficient compliance with an order to produce a recording of a statement to hand over only a copy of that recording.

3. The Specific Questions Raised

Mr. Hoover has propounded a number of questions, the first of which is whether the rule applies to all government witnesses, not merely informants. The opinion clearly says so (slip opinion 11).

My answers to Mr. Hoover's other questions follow.

a. Crime scene search

If an FBI agent testifies as to his search and his findings, his notes made on the scene are properly subject to production, and are the best evidence of the trustworthiness of his testimony. Because of the court's stress of the word "reports" it is likely that some courts, at least, will require the production of the report of the search as well as the original notes.

b. Laboratory notes and reports

If an FBI ballistic expert, for example, testifies, his work papers and reports would come within the rule.

c. Single interviews with oral statement

If any government witness has made an oral pretrial statement, its recording by the FBI must, in my opinion, be produced.

d. Agent's notes and memoranda

The agent's means of recording findings as to which he testifies must be produced on demand.

e. Written records of laboratory experts

As a precautionary measure, all work sheets in the FBI laboratory should be either preserved or incorporated into the expert's report; they may be called for to test his accuracy.

f. Memorandum to identify latent prints

If the original memorandum or label to identify a print is not preserved, the report should sufficiently trace custody, so that the chain of possession may be shown by documentary evidence on demand.

g. First written record of complaint

The first complaint of a witness is often considered highly significant by the courts, and is subject to production.

h. Surveillance logs

Must be produced if the agent testifies to the surveillance.

i. What constitutes the relevant and material report

The first recording made by the agent, whether of a search or an interview, is the best evidence, and under normal circumstances, the only relevant evidence which can be properly called for.

This question is further commented on in the recommendations.

j. Reading whole or part of report

If the only form in which a relevant written report exists is in the body of a report prepared by the witness which also deals with extraneous material, I believe that the decision requires delivery of the entire report to the defense.

k. Subversive Activities Control Board

I believe all the answers here suggested apply to Board proceedings.

1. Civil cases

So far, the court has not approved sanctions upon the government for its refusal to respond to orders for production in a civil case in which it is defendant. In the Reynolds case 3/, it reversed a default judgment against the government for failure to produce evidence, where vital defense reasons were pleaded for non-production.

It is my prediction that if non-production should be based upon executive privilege with no plea of vital national interests, a default judgment would be sustained.

4. Recommendations as to Investigative Procedures

As indicated by Mr. Hoover's questions noted as (c), (d), (e), (f), (h), (i), and (j), the most urgent problem is created by the court's ruling that the entire report submitted by the witness must be handed over to the defense for inspection, regardless of the inclusion therein of matter having nothing to do with the testimony, so long as part of that report touches the subject matter of his testimony. Compliance with this rule will be unacceptable in some pending cases.

For the future, at least until such time as the Jencks case is modified, the only answer is a revision of the reporting procedure, which in some instances will be burdensome, but appears to be essential.

The following are my specific recommendations:

a. Notes of interviews

Original notes of interviews with prospective witnesses as well as prospective defendants to be retained, and not to be destroyed after incorporation into Bureau reports.

This should avoid production of the Bureau report when the agent testifies, and cut off controversy over the source or accuracy of recordings of oral statements of other witnesses.

b. Memoranda and Reports of findings

Original notes of search or other physical finding to be retained. Also, the report of findings should be a separate document which may be annexed to the Bureau report but not incorporated therein. It is

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possible that some courts will require the report of finding produced even though original working memoranda have been retained.

c. Working papers in laboratory

The present very excellent practices of the Bureau, in which each step, particularly in chain of custody, is recorded, should be continued. A report which is made directly from original notes is a sufficient record. In such instance the report itself would be subject to production. The laboratory report should be kept as a separate document and not incorporated into the Bureau report. It will, of course, contain the exact material and the conclusions which will be the subject of the expert's oral testimony.

d. Surveillance logs

Review of phraseology in surveillance logs should be made to assure that present procedures do not render their production unacceptable.

e. Intelligence reports

In this very sensitive area, it may prove impossible to segregate informants' reports on one subject from other extraneous information. Where the informant is a prospective witness every effort should be made to obtain reports confined to the subject matter of the future testimony.

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