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Discovery in Federal Criminal Proceedings

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NOTES

DISCOVERY IN FEDERAL CRIMINAL PROCEEDINGS

Introduction

The extent to which discovery of documents should be allowed in criminal proceedings has long been the subject of much controversy. In its simplest form, discovery is the disclosure by one party of facts, deeds, documents or other things which are in his exclusive possession, to his adversary who must seek the discovery so as to defend or prosecute adequately a pending cause of action or one to be brought in another court.[1]

At common law, no right of discovery was recognized in criminal cases[2] and until the adoption of the Federal Rules of Criminal Procedure in 1946, it is doubtful whether the existing law permitted discovery.[3] Although a broad right of discovery is available in civil cases,[4] no such latitude exists in criminal cases up to the present time in this country.[5] The distinction between civil and criminal actions has a logical basis. For example, in a civil case each side may take the deposition of the other, whereas in a criminal case the prosecution has no power to take a deposition of the defendant.[6]

Requisites for Discovery

In all criminal cases prosecuted in federal courts, pre-trial discovery is governed by Rule 16 and Rule 17(c) of the Federal Rules of Criminal Procedure. A motion for inspection made during the trial is not governed by any of the Federal Rules of Criminal Pro-

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[1] BLACK, LAW DICTIONARY 587 (3d ed. 1953).

[2] See Rex v. Holland, 4 T.R. 691, 100 Eng. Rep. 1248 (1792). See also Shores v. United States, 174 F.2d 838 (8th Cir. 1949); 6 WIGMORE, EVIDENCE § 1859g (3d ed. 1940).

[3] FED. R. CRIM. P. 16, Notes of Advisory Committee on Rules. See also United States v. Rosenfeld, 57 F.2d 74 (2d Cir.), *cert. denied*, 286 U.S. 556 (1932).

[4] Rule 34 of the Federal Rules of Civil Procedure provides in part: "Upon motion of any party . . . the court in which an action is pending may . . . order any party to produce and permit the inspection and copying or photographing . . . of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination . . . and which are in his possession, custody or control. . . ."

[5] *Ibid.*

[6] See United States v. Carter, 15 F.R.D. 367 (D.D.C. 1954).

cedure or by statute. Rather it is dealt with by judicial decision.[7]

To determine whether a demand for inspection is proper, the court must note whether the defendant asserts his demand for production and inspection of documents in the government's possession either by motion, a subpoena *duces tecum,* or by oral argument made before or during the course of the trial. Under Rule 16, a motion for discovery and inspection of documents may be made at any time after the filing of an indictment or an information.[8] Since Rule 16 requires that any motion filed thereunder must allege: that the documents are in possession of the government; that the documents were obtained from and belonged to the defendant or were obtained from others by seizure or process; that the documents are material to the defendant; and that the request is reasonable, such motions are limited in the documents which they may reach.[9]

Through Rule 17(c) production of documents may be compelled by subpoena.[10] However, inspection of such documents can be had only by a motion addressed to the discretion of the court.[11] As production of documents is distinguished from their inspection, so too the use of the subpoena should be distinguished from the motion to inspect subpoenaed documents.[12] Rule 17(c) provides that upon their

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[7] See Orfield, *Discovery And Inspection In Federal Criminal Procedure,* 59 W. VA. L. REV. 221, 239 (1957).

[8] Rule 16 of the Federal Rules of Criminal Procedure provides: "Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, *obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. . . .*" FED. R. CRIM. P. 16 (emphasis added).

[9] Interpreting Rule 16, the courts have held that the defendant is not entitled to a copy of his own confession, Shores v. United States, 174 F.2d 838, 843 (8th Cir. 1949); that since statements of the defendant after his arrest were obviously not material taken from or belonging to him, the defendant is not entitled to them, United States v. Chandler, 7 F.R.D. 365, 366 (D. Mass. 1947), *aff'd,* 171 F.2d 921 (1st Cir. 1948), *cert. denied,* 336 U.S. 918 (1949); and that a request for a copy of a statement made to an assistant United States Attorney must be denied because there was no showing of materiality or reasonableness, United States v. Peltz, 18 F.R.D. 394 (S.D.N.Y. 1955).

[10] It should be noted that under Rule 17(c) a subpoena may issue from the government to a defendant. FED. R. CRIM. P. 17(c). However, its only purpose must be for production of evidence at the trial and not for pre-trial discovery. United States v. O'Connor, 118 F. Supp. 248, 250 (D. Mass. 1953) (dictum).

[11] See United States v. Schneiderman, 104 F. Supp. 405, 408 (S.D. Cal. 1952), where the court said: "It seems clear then that whether materials subject to subpoena are to be produced and inspected prior to trial rests within the discretion of the trial court."

[12] See Bowman Dairy Co. v. United States, 341 U.S. 214, 220 (1951) (fails to distinguish between subpoenas and motions when it speaks of subpoenas for "production, inspection and use"); Fryer v. United States, 207 F.2d

production the court may permit the documents to be inspected.[13] Only through filing a motion to inspect the subpoenaed documents may the defendant seek this exercise of judicial discretion.[14] To prevent the imposition of an unduly onerous burden on the government by liberal use of subpoenas, the rule permits the court, on motion promptly made, to quash or modify the subpoena if compliance would be unreasonable or oppressive [15] or if the documents demanded would not be admissible,[16] relevant [17] or be readily obtainable by other means.[18]

After a government witness has taken the stand, the defendant may have two distinct opportunities to demand production and inspection of documents in possession of the government. If, during direct examination, a witness uses a document to refresh his recollection, the defendant may, without question, demand an opportunity to inspect the document.[19] Prior to the decision in *Jencks v. United States*,[20] the rule was that a defendant was not entitled to a document in possession of the government for use in impeaching a government witness on the basis of prior contradictory statements contained therein, until he had laid a foundation for the impeachment.[21] To support a demand for a document, the defendant, in laying a foundation

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134 (D.C. Cir.), *cert. denied*, 346 U.S. 885 (1953) (court appears to treat issuance of subpoena as grant of right to inspect); United States v. Hiss, 9 F.R.D. 515, 516-17 (S.D.N.Y. 1949) (by quashing subpoena issued before trial and vacating pre-trial motion to inspect the subpoenaed documents on the ground that the documents could not be used in evidence until the witness was called, the court appears to be equating the subpoena and the motion).

[13] FED. R. CRIM. P. 17(c).

[14] See United States v. Schneiderman, *supra* note 10, at 407-08 (subpoenaed documents produced in court before trial; motion for pre-trial inspection denied); United States v. Iozia, 13 F.R.D. 335, 341 (S.D.N.Y. 1952) (subpoenaed documents produced in court before trial; motion for pre-trial inspection in discretion of court granted in part and denied in part). See also United States v. Maryland and Va. Milk Producers Ass'n, 9 F.R.D. 509, 510 (D.D.C. 1949).

[15] FED. R. CRIM. P. 17(c).

[16] United States v. Echeles, 222 F.2d 144, 152 (7th Cir. 1955); United States v. Brown, 17 F.R.D. 286, 287-88 (N.D. Ill. 1955).

[17] United States v. Ward, 120 F. Supp. 57, 59 (S.D.N.Y. 1954); United States v. Giglio, 16 F.R.D. 268, 271 (S.D.N.Y. 1954).

[18] United States v. Cohen, 15 F.R.D. 269, 273 (S.D.N.Y. 1953).

[19] Montgomery v. United States, 203 F.2d 887, 893-94 (5th Cir. 1953); United States v. Rappy, 157 F.2d 964, 967-68 (2d Cir. 1946), *cert. denied*, 329 U.S. 806 (1947).

[20] 353 U.S. 657 (1957).

[21] See Gordon v. United States, 344 U.S. 414 (1953), where the Court allows the inspection of certain documents. The Court said: "By proper cross-examination, defense counsel laid a foundation for his demand by showing that the documents were in existence, were in possession of the government, were made by 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." *Id.* at 418-19. See also United States v. Kinzer, 98 F. Supp. 6, 9 (D.D.C. 1951).

for impeachment, was required to show, by cross-examination of the witness: that the documents were in existence; that they were in possession of the government; that the documents were contradictory to the witness' present testimony; that the contradiction pertained to relevant, important and material matters bearing directly on the main issue being tried; and that they tended to impeach.

In opposition to a demand to produce documents, the government has certain recognized privileges and, in addition, the public interest may also dictate against disclosure.[22] It should be recognized, however, that such an argument does not have the strength and force in criminal cases that it has in civil cases.[23] If a defendant is able to establish that the document demanded has definite evidentiary value and is material to his defense, the courts will generally compel the government to produce the document or suffer a dismissal of the indictment.[24]

Jencks v. United States

The *Jencks* decision, pertaining to FBI files in criminal cases prosecuted by the federal government, has been widely discussed since it was handed down by the United States Supreme Court.[25] The case embraced the following situation: Clinton E. Jencks, as president of a local labor union, filed in 1950 a sworn affidavit, as required by law, with the National Labor Relations Board stating ". . . that he is not a member of the Communist Party or affiliated with such party." Subsequently, he was indicted [26] for falsely swearing in the affidavit that he was not a member of the Communist Party or affiliated with such party. During the trial at which Harvey F. Matusow and J. W. Ford, government witnesses, testified against Jencks, defense counsel requested an opportunity to inspect the reports the two witnesses submitted to the FBI. The government opposed the request, arguing that a preliminary foundation of inconsistency had not been laid between the contents of the reports and the testimony of the witnesses. Both the trial courts and the Court

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[22] If, for example, the document identifies a confidential informant or if the documents pertain to national defense and national security, disclosure will not be compelled unless such disclosure is necessary to the defense. See Scher v. United States, 95 F.2d 64 (6th Cir.), *aff'd*, 305 U.S. 251 (1929); United States v. Coplon, 185 F.2d 629, 638 (2d Cir. 1950) (dictum); United States v. Burr, 25 Fed. Cas. No. 14,694, at 190-92 (C.C. Va. 1807) (dictum); 8 WIGMORE, EVIDENCE § 2374 (3d ed. 1940).

[23] See United States v. Reynolds, 345 U.S. 1 (1953).

[24] See United States v. Beekman, 155 F.2d 580 (2d Cir. 1946); United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944).

[25] See, *e.g.*, 103 CONG. REC. 14549 (daily ed. Aug. 26, 1957); Brooklyn Tablet, Aug. 17, 1957, p. 1, col. 6-8.

[26] 18 U.S.C. § 1001 (1952) makes the willful filing of a false statement a crime punishable by a fine of $10,000 or imprisonment for not more than five years, or both.

of Appeals denied all such motions to produce the statements on this ground. The Supreme Court, reversing, ruled that the defense was entitled, without laying a preliminary foundation of inconsistency, to an order [27] directing the government to produce for inspection all reports of the government witnesses, in its possession. This order applies to all written reports and those oral reports that the government recorded.[28] They further ruled that the defense is entitled to inspect the reports to decide whether to use them in defense.

> The practice of producing government documents to the trial judge for his determination of relevancy and materiality, without hearing the accused, is disapproved. . . . Only after inspection of reports by the accused, must the trial judge determine admissibility—*e.g.*, evidentiary questions of inconsistency, materiality and relevancy—of the contents and the method to be employed for the elimination of parts immaterial or irrelevant.[29]

Concurring in the result of the majority, but with different reasoning, were Justices Burton and Harlan. They rejected the rule which would enable the defendant to judge the evidentiary value of statements before the trial judge has passed upon their admissibility. To them, ". . . in matters relating to the production of evidence or the scope of cross-examination, a large discretion must be allowed the trial judge." [30] They pointed out that the Court went beyond the request of the petitioner in the case, the request that reports be produced for examination by the trial court.[31]

Jencks Rule as Applied by the Courts

Shortly after the *Jencks* decision was handed down, a number of conflicting decisions, even within judicial districts, were rendered by the courts, each purporting to interpret or follow *Jencks*.[32] Perhaps

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[27] "We hold that the petitioner was not required to lay a preliminary foundation of inconsistency, because a sufficient foundation was established by the testimony of Matusow and Ford that their reports were of the events and activities related in their testimony." Jencks v. United States, 353 U.S. 657, 666 (1957).

[28] "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 FBI, touching the events and activities as to which they testified at the trial." *Id.* at 668.

[29] *Id.* at 669. They also said: "We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. . . . [T]he defense must initially be entitled to see them to determine what use may be made of them. *Justice requires no less.*" *Id.* at 668-69 (emphasis added).

[30] *Id.* at 669.

[31] Petitioner in his brief had 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." *Id.* at 673 n.1 (emphasis added).

[32] 103 CONG. REC. 14551-52 (daily ed. Aug. 26, 1957). In the Southern District of Texas a District Judge ruled that on the basis of the *Jencks* de-

the most widely publicized case illustrating the disturbing conflict of judicial opinion in applying *Jencks* to *pre-trial* disclosure occurred in a criminal fraud case arising in Kentucky. Citing *Jencks* as authority, the court granted the defense motion for pre-trial examination of all documents, exhibits and statements intended for trial use. The Department of Justice instructed the United States Attorney not to produce them and furnished him with copies of opinions from other courts reasoning against such pre-trial submissions under *Jencks*. When an FBI agent appeared in court he cited Departmental Order 3229 in stating that he was without authority to make statements available. The court held the FBI agent in civil contempt and imposed a fine of $1,000. In his ruling, the judge stated:

> I cannot understand why the United States would object to a full compliance with the order. It seems clear that the language of Jencks decision entirely dissipates any thought that the court must wait until the trial of the case before requiring the production of documents. There could be no reason for such a rule.[33]

Many of the decisions interpreting *Jencks* were just short of revolutionary. Orders for the government to furnish the defense with a list of witnesses in advance of trial; orders for the production of entire investigative files and grand jury proceedings; and even orders for the release of convicted kidnappers when the government objected to producing its entire FBI file in the case, were given.[34] These interpretations demonstrated the need for a regular procedure to handle demands for, and production of, statements and reports of witnesses in the government file in order to prevent serious damage to federal law enforcement.[35]

The Senate Judiciary Committee, particularly the subcommittee, addressed itself to the problem and, on June 24, 1957, introduced bill No. S. 2377.[36] The legislation as originally introduced was prepared by the Department of Justice and introduced by Senator O'Mahoney, chairman of the Subcommittee on Improvements in the Federal Crim-

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cision, the defendant was entitled to relevant statements and reports after the witness had testified. United States v. Parr, *id.* at 14552. In the same circuit, another District Judge ordered the United States Attorney to turn over to the defense its entire FBI investigative file, prior to trial. To add insult to injury, the attorney for the defense asked the United States Attorney to mail him the file. United States v. Young, *id.* at 14552.

[33] See S. REP. No. 981, 85th Cong., 1st Sess. (1957) in 14 U.S. CODE CONG. & ADMIN. NEWS at 3220 (Sept. 20, 1957).

[34] See 103 CONG. REC. 14551-54 (daily ed. Aug. 26, 1957).

[35] In a letter to Rep. Joseph W. Martin, Jr., of Massachusetts, Republican leader of the House, J. Edgar Hoover wrote concerning the proposed legislation: "Its enactment is vital to the future ability of the Federal Bureau of Investigation to carry out its internal security and law enforcement responsibilities." Brooklyn Tablet, Aug. 17, 1957, p. 17, col. 3.

[36] See 103 CONG. REC. 9095-96 (daily ed. June 24, 1957).

inal Code of the Committee of the Judiciary.[37] The Senate report declares that

> it is the specific intent of the bill to provide for the production only of written statements previously made by a Government witness in the possession of the United States which are signed by him or otherwise adopted or approved by him, and any transcriptions or recordings of oral statements made by the witness to a Federal law officer, relating to the matter as to which the witness has testified.[38]

The Committee rejected ". . . any interpretation of the *Jencks* decision which would provide for the production of entire investigative files, grand jury testimony, or similar materials." [39]

The bill, approved and enacted into law on September 2, 1957,[40] adopts the principle in the majority opinion of the *Jencks* decision insofar as it requires the government to produce the written or recorded statements or reports of a witness without first having to lay a foundation for impeachment. However, the statute explicitly provides that

> . . . no statement or report . . . which was made by a Government witness or prospective Government witness . . . shall be the subject of subpoena, discovery, or inspection *until said witness has testified on direct examination in the trial of the case.* . . .[41]

The statute, however, substantially adopts the procedure set forth in the *Jencks* concurring opinion for implementing the principle as adopted.[42] Section (c) provides:

> If the United States claims that any statements 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 statements which do not relate to the subject matter of the testimony of the witness.[43]

If the defendant objects to the excision and is finally adjudged guilty by the trial court, the entire text of the statement ". . . shall be made available to the appellate court for the purpose of determining the correctness of the ruling . . ." [44] in the event an appeal is taken.

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[37] S. REP. No. 981, 85th Cong., 1st Sess. (1957) in 14 U.S. CODE CONG. & ADMIN. NEWS at 3215 (Sept. 20, 1957).

[38] *Id.* at 3216.

[39] *Ibid.*

[40] 18 U.S.C. § 3500 (Supp. 1957).

[41] *Ibid.* (emphasis added).

[42] See Jencks v. United States, 353 U.S. 657 (1957), where Mr. Justice Burton said: "Whether a new trial is required should depend on the contents of the requested reports. If the reports contain material that the trial court finds has evidentiary value to petitioner, a new trial should be granted in order that the petitioner may use it." *Id.* at 678 (concurring opinion).

[43] 18 U.S.C. § 3500 (Supp. 1957) (emphasis added).

[44] *Ibid.*

This provision minimizes the dangers inherent in defense counsel's inability to see the entire statement, by subjecting the trial court's excisions to appellate scrutiny.

It should be noted that the statute, in providing alternative courses of action for the trial judge, does not adopt the strict ruling of the majority opinion which requires dismissal of the criminal action when the government elects not to produce a statement or report for the inspection and use of the defendant.[45] The course of action to be pursued by the trial judge must depend upon the importance of the testimony, the documents to be produced, and other facts and circumstances.

Conclusion

There has developed, in recent years, a strong tendency to allow liberal discovery in civil actions. However, this tendency should be strongly controlled in criminal prosecutions. The highest court of the State of New Jersey recently stated:

> In criminal proceedings long experience has taught the courts that often discovery will lead not to honest fact-finding, but on the contrary to perjury and the suppression of evidence.[46]

It is submitted that it is far easier for a perjured witness or a fabricated defense to instill only a reasonable doubt in the minds of a jury, than it is to balance the weight of a civil plaintiff's evidence.

DISMISSAL OF GOVERNMENT EMPLOYEES UNDER FEDERAL AND NEW YORK SECURITY RISK LAWS

Introduction

There is general agreement that no disloyal citizen should be employed in government. How to achieve this end, however, is one of the great controversies of our time. Some have criticized the current loyalty and security programs as infringements on civil liberties; others claim that by them, our system of government is being under-

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[45] "We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in the possession of government witnesses touching the subject matter of their testimony at the trial." Jencks v. United States, *supra* note 41, at 672.

[46] State v. Tune, 13 N.J. 203, 98 A.2d 881, 884 (1953).