Journal of Criminal Law and Criminology

Volume 67 | Issue 4 Article 6

1977

Access to Impeaching Evidence--Discovery: Goldberg v. United States, 425 U.S. 94 (1976)

THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 67, No. 4

Printed in U.S.A.

DISCOVERY—ACCESS TO IMPEACHING EVIDENCE

Goldberg v. United States, 425 U.S. 94 (1976)

The Supreme Court in *Goldberg v. United States*[1] held that a statement taken or recorded from a government witness by a government lawyer that falls within the Jencks Act[2] definition of "statement"[3] must be produced for the defendant under the conditions specified in the Jencks Act: the government lawyer cannot refuse to produce the statement on the ground that it constitutes a part of his "work product."[4] In addition, the Court reiterated the proper roles of the trial court and appellate court in reviewing Jencks Act questions.

Petitioner Philip Goldberg and four co-defendants were charged in a multiple-count indictment with using the mails to perpetrate a fraudulent scheme in violation of 18 U.S.C. § 1341.[5] Edwin Newman, one of the co-defendants, agreed to plead guilty to a single count of the indictment and to testify as a government witness at Goldberg's trial.[6]

During the course of Goldberg's trial, Newman appeared as the key witness for the prosecution. He revealed in great detail the operation of the fraudulent scheme and the transactions alleged in the indictment. Upon cross-examination, Newman indicated that on a number of occasions he had been interviewed by government attorneys who took handwritten notes relating to his forthcoming trial testimony. Newman also testified that intermittently throughout the interviews he would verify or correct the accuracy of the lawyers' notes.[7] Since no court

[1] 425 U.S. 94 (1976).

[2] The Jencks Act, 18 U.S.C. § 3500 (1970) provides in pertinent part:

> Demands for production of statements and reports of witnesses.
>
> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case. . . . .
>
> (e) The term "statement," as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—
>
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> (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 and recorded contemporaneously with the making of such oral statement; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

[3] 18 U.S.C. § 3500 (e).

[4] Hickman v. Taylor, 329 U.S. 495 (1947), is generally considered to have established the attorney's "work product" doctrine. For a more recent illustration of the Court's handling of this doctrine *see* United States v. Nobles, 422 U.S. 225 (1975). In *Hickman* the Supreme Court held that while private memoranda, written statements of witnesses and mental impressions prepared by an attorney for use in his clients' behalf fall outside the scope of attorney-client privilege, they are protected as the "work product" of the attorney, and thus are granted a qualified immunity from discovery under federal rules.

[5] This provision is as follows:

Frauds and swindles

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1341 (1970).

[6] Subsequent to this agreement Newman's case was severed from petitioner's. The three other co-defendants entered guilty pleas.

[7] 425 U.S. at 100-01.

"Q. As you were explaining—or discussing your testimony, did anyone take notes?

"A. The two gentlemen took notes.

"Q. Were they occasionally read back to you to see whether or not they correctly understood what you were saying?

"A. Probably from time to time.

"Q. All right, sir. Did you either correct them or say 'Yes,

reporter was present at any of the meetings at issue,[8] the lawyers' notes provided the only record of the interviews.

Goldberg sought production of these aforementioned notes pursuant to the Jencks Act.[9] The Jencks Act provides for the production in a federal criminal prosecution of statements or reports of a government witness who has testified on direct examination, where such papers are encompassed within the statutory definition of producible "statement" and relate to the subject matter of the witness' testimony. The Jencks Act defines a "statement" as:

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
> (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 and recorded contemporaneously with the making of such oral statement.
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.[10]

The trial judge denied petitioner's motion for production and a subsequent motion for *in camera* inspection of the notes on the ground that the materials constituted the "work product" of the attorneys.

The United States Court of Appeals for the Ninth Circuit[11] affirmed the ruling of the trial court, but on a different ground. The appeals court did not consider the "work product" question, but instead held that the notes were not "statements" of the witness within the meaning of the Jencks Act. The Supreme Court granted certiorari in order to clarify the construction and administration of the Jencks Act.[12]

The Court[13] first addressed the "work product" issue considered by the district court. The government, by use of a variety of arguments, had attempted to persuade the Court that the work product of an attorney, protected by the Court since the landmark case of *Hickman v. Taylor,*[14] would be threatened if statements made to a government attorney and written down by the attorney were subject to production under the Jencks Act. Initially, the government argued that such statements were not even covered by the Act. It pointed out that the original language of the Jencks Act only dealt with statements made "to an agent of the government,"[15] and it asserted that government attorneys are not to be considered as "agents of the government" for the purposes of the Jencks Act. The Court disagreed and held that a government lawyer would be considered an "agent of the government." It rejected the government's legislative history argument, pointing out that the phrase "to an agent of the government" was deleted from section (a) of the Jencks Act in 1970, and that therefore all statements which fulfill the requirements of the Jencks Act are producible, regardless of to whom the statements are made.

The government also suggested that in passing the Jencks Act, Congress intended to limit the scope of the Supreme Court decision in *Jencks v. United States.*[16] In *Jencks,* statements made to an F.B.I. agent by two prosecution witnesses were required to be produced for the benefit of the defense.[17] The pub-

---

that's right,' or 'No, that's not right because it went this way, I believe,' words to that effect?
"A. Yes, that would happen."
Newman described this as the pattern followed at all meetings in question.

[8] A court reporter who had been present on at least one prior occasion was not there for any of the meetings at issue.

[9] 18 U.S.C. § 3500 (1970). The text of the Act is given in note 3 *supra.*

[10] 18 U.S.C. § 3500 (e).

[11] This was an unpublished memorandum opinion.

[12] 422 U.S. 1006 (1975). The grant of certiorari was limited to the following question: "Whether 18 U.S.C. § 3500, the Jencks Act, contains an 'attorney's work product exception'; and whether a Government attorney's notes of conversations with the key Government witness, to whom the prosecutors read back their notes from time to time where the witness corrected same, which notes were prepared 'only after lengthy conversations had occurred and a mutual understanding of the factual situation' had been reached, if not compellable under the Jencks Act, are compellable under the doctrine of Brady v. Maryland."

[13] Justices Stewart, White, Marshall, Blackmun, Rehnquist and Stevens joined Justice Brennan. Justice Stevens filed a concurring opinion, in which Stewart, J., joined. Justice Powell filed an opinion concurring in the judgment, in which Burger, C. J., joined.

[14] 329 U.S. 495 (1947). Generally, the "work product" rule of *Hickman* grants protection to material prepared by an attorney in contemplation of trial. In most jurisdictions this protection is regarded as qualified rather than absolute, so that "work product" is discoverable upon proper showing, usually something in the nature of exceptionally good cause. One could interpret the holding of the Court in *Goldberg* as an indication that the purposes of the Jencks Act provide sufficient good cause to overcome the qualified privilege of "work product." The Court, however, did not use this line of reasoning.

[15] This phrase was deleted in 1970 in order to add grand jury statements to the statutory definition of statement. 425 U.S. at 102 n.6 (1976).

[16] 353 U.S. 657 (1957).

[17] In this case two key prosecution witnesses had given pretrial statements to the F.B.I. regarding a labor union

lic reaction to this decision was enormous, and was apparently sparked by Justice Clark's dissenting opinion in *Jencks*.[18] In his opinion Justice Clark expressed the fear that the decision would cause a "Roman holiday for rummaging through confidential information" in the government's possession.[19] Public clamor and congressional concern resulted in the passage of the Jencks Act.[20]

The government in the instant case contended that to read the Jencks Act as allowing production of statements made to government lawyers rather than to investigative agents would serve as an expansion of the Court's decision in *Jencks* and would thus be contrary to congressional intent. The Court disagreed with the government's view of congressional intent. According to the Court the legislative history of the Jencks Act makes clear that the Act actually reaffirmed the Court's holding in *Jencks*.[21] The Act was not intended to limit the *Jencks* decision, but was instead concerned with clearing up misunderstandings in lower courts as to the application of the decision.

The government also urged its "limiting" construction of the Act, asserting that a different interpretation would allow defense counsel unfairly to impeach a witness by the use of a statement subject to the interpretation of the lawyer who had written the statement down. In rejecting this argument the Court noted that the Act includes a carefully phrased definition of "statement" which serves to eliminate any extraneous or prejudicial commentary by the writer.[22] In addition, the Court pointed out that section (c) of the Act provides a specific procedure for excising any material that does not relate to the subject matter of the witness' direct testimony or direct examination.[23] Thus if the trial court conscientiously examines the writings to determine whether production under the Jencks Act is called for, the interpretations of the writer could easily be detected and purged from the text.

The Court also stated that these same provisions of the Jencks Act would protect the privacy of an attorney's thought processes. Any writings expressing the attorney's strategy, personal notes or other private thoughts would not fit the Jencks Act definition of "statement," and would be excised under section (c) of the Act as not relevant to the subject matter of the testimony of the witness.

The Court's analysis of the "work product" issue concluded with a comparison between the instant case and the opinion in *Hickman v. Taylor*[24] in which the Court established the "work product" doctrine. In *Hickman* the Court had viewed with obvious trepidation the production of an attorney's written account of a witness' remarks. The Court feared that the witness' words would be distorted, and that in order to explain what the witness said in reality, the attorney would be forced to take the stand, thus detracting from his role as an officer of

official's alleged communist activities. The defense requested production of their statements for impeachment purposes during the cross examination of the witnesses. The Supreme Court held that the defense was entitled to these statements. The defendant was not required to show any inconsistency with the testimony, and the reports were to be produced without regard to their admissibility into evidence.

[18] 353 U.S. 657, 681–82 (1957) (Clark, J., dissenting).

[19] One indication of the impact of Justice Clark's dissent is that at one point during the Congressional debate, the House Committee stated its goal as being to prevent defendants from "rummag[ing] through confidential information containing matters of public interest, safety, welfare, and national security." H.R. Rep. No. 700, 85th Cong., 1st Sess. 4 (1957). 425 U.S. at 104.

[20] The question of Congressional intent regarding the passage of the Jencks Act presents a difficult task due to numerous and often contradictory statements made by members of both houses of Congress during the debates and committee hearings. For a discussion of the public reaction and Congressional response to the *Jencks* decision, *see* Note, *The Jencks Legislation*, 67 YALE L.J. 674 (1958).

[21] In Campbell v. United States, 365 U.S. 85, 92 (1961) (Campbell I), Justice Brennan first expressed his opinion that the Jencks Act reaffirmed the holding of the Court in *Jencks*. This conclusion was based on the belief that the proposition central to both the *Jencks* decision and the Jencks Act is that a criminal defendant is entitled, for impeachment purposes, to relevant and competent statements of a government witness in the possession of the government.

[22] 18 U.S.C. § 3500 (e). *See* note 2 *supra*.

[23] 18 U.S.C. § 3500 (c) states that upon delivery of the statements to the court for in camera inspection, "the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness."

[24] 329 U.S. 495 (1947). This case involved a tort action against a tug owner due to an accident that claimed the lives of five of the nine crew members. Prior to the initiation of legal action, an attorney for the tug owners interviewed the survivors and took statements with an eye toward the anticipated litigation. After suit was brought by representatives of the deceased, plaintiff requested copies of all statements made by the survivors to defendant's attorney. The tug owners, through their attorney, declined to summarize or set forth the content of any such statements on the ground that this was a privileged matter and an attempt to indirectly obtain counsel's files.

The Supreme Court held that private memoranda, written statements of witnesses and mental impressions prepared by an attorney for use in his clients behalf fall outside the scope of attorney-client privilege. However, they are protected from discovery as "work product" of the attorney, and thus are granted a qualified immunity from discovery.

the court. In addition, the Court found no legitimate purpose for the production of the attorney's writings.

In the instant case the Court concluded that the Jencks Act itself should allay the fears expressed in *Hickman*. First, the Court noted that in Jencks Act cases there is a congressionally recognized purpose for the disclosure of a witness' statements to government lawyers, that being "to further the fair and just administration of criminal justice."[25] Second, the Court felt the risk of distortion is minimized by safeguards which allow the court to review the attorney's notes and excise irrelevant material. Finally, the Court saw no realistic risk of a government attorney who questioned the witness being called to testify himself about the witness' statements, since the only producible statements are those which can be fairly said to be the witness' own.

Having decided that the district court erred in holding that production of writings otherwise producible under the Jencks Act could be refused by use of the work product doctrine, the majority went on to find that the court of appeals erred in holding that the attorney's notes were not "statements" under the Act. The appeals court should never have undertaken the initial determination of whether the materials in question constituted producible "statements." It should have remanded the case to the district court and ordered it to conduct an inquiry into whether the prosecutor's notes constituted producible "statements."

According to the Court, it is clearly the province of the trial judge to conduct an inquiry into the circumstances of the witness' interview and to make an appropriate determination based on the facts at the disposal of the court. Only then can the court know whether the material presented meets the requirements of the Jencks Act. Hence, the case was remanded directly to the district court with orders to hold a hearing to redetermine whether production of statements was called for under the Act, and to supplement the record with new findings. On the basis of those findings the court was either to reaffirm its denial of petitioner's motion and enter a new final judgment of conviction, or if the court concluded that any of the material should have been produced and that the error was not harmless, to vacate the conviction and accord petitioner a new trial.

Justice Stevens, joined by Justice Stewart,[26] agreed with the majority that the Jencks Act gave the defendant the right to request production of the witness' statements to the government attorney, but he took more seriously the threat of trial counsel being forced to testify. He was particularly concerned about difficulties which might occur when statements in the form of narratives or summaries written by an interviewer are allowed to be produced. The most serious problem would occur, according to Justice Stevens, when a witness had approved some, but not all, of what the attorney had said. Clearly, such notes could not be read to the witness to determine which portions were his own statements, for that would destroy their usefulness as an impeachment tool. Accordingly, Justice Stevens felt that there exists a "real danger" that the testimony of the attorney may be necessary to explain the contents of his notes.[27]

To solve this problem and, more importantly, to alleviate possible unfairness to the witness, Justice Stevens felt strongly that "any determination that a portion of the prosecutor's notes is producible must be supported by a finding of unambiguous and specific approval of the witness."[28] Justice Stevens wanted to make clear that more than relevance to the testimony and approval by the witness is necesary to make a writing a Jencks Act statement.

Justice Powell's concurring opinion, joined by Chief Justice Burger, accepted the majority's treatment of the "work product" issue. But Justice Powell did not agree with the majority that Newman's testimony *required*[29] the trial judge to conduct a collateral inquiry into producibility. He suggested that the Act requires the defendant to meet an initial burden of showing that a collateral inquiry is necessary to protect his rights and that in this case the defendant did not meet that burden.

According to Justice Powell, a simple indication of general concurrence by the witness that the information as recorded by the government attorney was correct, as in the instant case, was insufficient to establish that there was more than a speculative possibility that a statutory statement existed. The defense attorney's questions to the government witness must focus on whether there was adoption or approval of a specific statement by the witness. Justice Powell did not feel a collateral inquiry should be undertaken by the court.

Moreover, Justice Powell suggested that the witness should know that he is adopting the interview

[25] 425 U.S. at 107.

[26] *Id.* at 112.

[27] *Id.* at 115 & n.5.

[28] It remains unclear, however, whether even this rigid test would alleviate the need for testimony on the part of the attorney who wrote the notes.

[29] Throughout Justice Powell's opinion he italicized the word "required" for emphasis.

notes as a formalized statement in order for the court to classify them as a producible statement. Such safeguards, in the words of Justice Powell, are necessary "to assure fairness to witnesses and the Government as well as to defendants."[30] In the instant case, he concurred in the majority opinion only because, in view of the trial judge's mistaken holding on "work product," Goldberg's counsel may have refrained from asking additional questions believing that he had already satisfied the burden of showing the need for an inquiry.

The decision of the Court in *Goldberg v. United States* breaks a rather lengthy silence by the Court on the subject of the Jencks Act, since the leading cases dealing with interpretations of the Act are all over a dozen years old.[31] Yet, the majority decision in *Goldberg* provides no variation from the guidelines promulgated by these earlier decisions.

The decision to remand the case to the district court is in line with the Court's consistent position that the varied and complex factual issues involved in a Jencks Act determination require that the burden of fact finding be left to the trial court. In reaffirming this position the Court relied on *Campbell v. United States* (*Campbell I*),[32] where the Court unanimously concluded that the Jencks Act implied a duty by the trial judge to secure relevant evidence and conduct an inquiry into whether the material presented fits the requirements of the Jencks Act. In *Campbell v. United States* (*Campbell II*),[33] the Court stated that the issues that arise in Jencks Act cases are issues of fact, "predominantly a task for a *nisi prius*, not an appellate court."[34] Since the trial court in the instant case had made no inquiry whatsoever into the facts and circumstances surrounding the existence of a potential statement, the Supreme Court, following the guidelines of the *Campbell* cases[35] predictably remanded the case to the district court to conduct an inquiry into whether the prosecutor's notes constituted producible "statements."

In resolving the work product question the Court simply adopted the approach of all the courts of appeal that have considered it[36] and reached the same conclusion: a government lawyer cannot circumvent the requirements of the Jencks Act by use of a work product argument. In fact, in view of the general approach taken by the circuit courts, it is somewhat surprising that the government even attempted to make the work product argument. It is even more surprising in light of the Court's own earlier emphasis that all statements which fit Jencks Act requirements must be produced.[37]

However, although the majority opinion follows prior Jencks Act decisions closely, the two concurring opinions in *Goldberg* arguably indicate that four members of the Court—Justices Powell, Stevens, Stewart and Chief Justice Burger—are taking a somewhat stricter approach to the requirements of the Jencks Act, perhaps placing more of a burden on the defense initially to show that a producible statement exists. For example, Justice Powell, joined by Chief Justice Burger, would apparently attempt to distinguish between issues raised at the collateral hearing and those relating to whether a collateral hearing need be held at all. The question of what specific foundational requirements need be shown by the defense in order to obtain a collateral hearing had never before been presented to the Supreme Court, and those few lower courts that addressed the issue merely assumed that a prima facie showing that producible statements existed was all that was required.[38] Justice Powell places more emphasis on an early determination that a "statement" exists, than previous cases had indicated was necessary or desirable. But, he does not seem to be suggesting that the prima facie standard be eliminated and replaced by a more restrictive standard such as proof by clear and convincing evidence. Rather, he seems merely to be indicating a desire to "tighten" the requirements of the prima facie showing.

Justice Stevens' concurring opinion also suggested a tightening of the requirements to be met before a statement will be considered producible under the

[30] 425 U.S. at 127.

[31] *See* Campbell v. United States, 373 U.S. 487 (1963) (Campbell II); Campbell v. United States, 365 U.S. 85 (1961) (Campbell I); Palermo v. United States, 360 U.S. 343 (1959).

[32] 365 U.S. 85 (1961).

[33] 373 U.S. 487 (1963).

[34] *Id.* at 493.

[35] *See also* Palermo v. United States, 360 U.S. at 353, which held that final decision as to production must rest within the good sense and experience of the district judge guided by the standards outlined by the Court.

[36] United States v. Smaldone, 484 F.2d 311, 317 (10th Cir. 1973), *cert. denied*, 415 U.S. 915 (1974); United States v. Hilbrich, 341 F.2d 555, 557 (7th Cir.), *cert denied*, 381 U.S. 941 (1965); Saunders v. United States, 316 F.2d 346, 350 (D.C. Cir. 1963); United States v. Aviles, 315 F.2d 186, 191 (2nd Cir. 1963).

[37] 373 U.S. at 487 (Campbell II); 365 U.S. at 85 (Campbell I); Palermo v. United States, 360 U.S. at 343.

[38] Harney v. United States, 306 F.2d 523 (1st Cir. 1962); Ogden v. United States, 303 F.2d 724 (9th Cir. 1962); United States v. Annunziato, 293 F.2d 373 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961).

Jencks Act. Justice Stevens, joined by Justice Stewart, would require unambiguous proof that the witness specifically and knowingly adopted the statement, and his opinion directs the trial court to stress or make a careful examination of this particular issue. He does not, however, suggest that this factual determination be taken out of the hands of the trial court, and he clearly considers his opinion to be consistent with that of the majority.[39]

Thus, while the concurring opinions evidence a slight shift from the earlier approaches of the Court in Jencks Act cases, they do not indicate any major dissatisfaction with the way in which the Act is currently administered by the courts.

In conclusion, the central issue in *Goldberg*, as in all Jencks Act cases, was the balancing of competing interests protected by the statute: "the interest of the Government in safeguarding government papers from disclosure, and the interest of the accused in having the Government produce 'statements' which the statute requires to be produced.[40] In drafting the Jencks Act, Congress itself dealt with this delicate balance and set forth statutory guidelines to aid in the determination of when disclosure of statements would be necessary. The balance struck is inherent in the language of the Act itself. In *Goldberg,* the Court, re-emphasizing the action of Congress in setting up this balance, held that a government attorney cannot circumvent the requirements of the Jencks Act by the use of a work product argument. In addition, the Court reinforced the role of the trial court as the proper forum for determining the factual stituations that surround the production of a Jencks Act statement. In so holding the case does not break any new ground, but it serves as a clear reminder that the Jencks Act retains its vitality.

[39]425 U.S. at 116.

[40]365 U.S. at 95 (Campbell I).