

St. John's Law Review

Volume 40
Number 2 *Volume 40, May 1966, Number 2*

Article 2

April 2013

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Recommended Citation

Wexler, David B. (1966) "The Constitutional Disclosure Duty and the Jencks Act," *St. John's Law Review*: Vol. 40 : No. 2 , Article 2.

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THE CONSTITUTIONAL DISCLOSURE DUTY AND THE JENCKS ACT

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INTRODUCTION

ACTING principally to clarify the Supreme Court's holding in *Jencks v. United States*,¹ Congress in 1957 passed the Jencks Act² — a discovery vehicle which enables federal criminal defendants to obtain from the prosecution information possibly useful during cross-examination to impeach the credibility of Government witnesses.³ In general, the act provides that after a Government witness testifies on direct examination, the accused in a federal prosecution is entitled, upon request, to all statements previously made by that witness to an agent of the Government which relate to the subject matter of the witness's trial testimony.⁴ "Statement" is defined technically in the act to encompass only written statements signed or adopted by the witness,⁵ and substantially verbatim recordings of oral statements, recorded contemporaneously with the making of the oral statements.⁶ Should the prosecution fail to deliver the statutory state-

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† The opinions expressed in this article are the personal views of the author and do not necessarily reflect the official position of the United States Department of Justice.

¹ 353 U.S. 657 (1957).

² 18 U.S.C. § 3500 (1964). The complete text of the Jencks Act appears in the appendix to this article.

³ A comprehensive discussion of the Jencks Act appears in Note, *The Jencks Act: After Six Years*, 38 N.Y.U.L. REV. 1133 (1963). An earlier noteworthy study is Comment, *The Jencks Legislation: Problems in Prospect*, 67 YALE L.J. 674 (1958).

⁴ No preliminary showing of inconsistency between the sought-after document and the witness's direct examination testimony is necessary for production.

⁵ 18 U.S.C. § 3500(e) (1) (1964).

⁶ 18 U.S.C. § 3500(e) (2) (1964).

ments to the defendant, the act dictates striking from the record the Government witness's testimony or, in rare instances, declaring a mistrial.

The act, together with the accompanying gloss of case law, establishes rather well-defined limitations on the scope of the Jencks discovery right. An emerging body of constitutional law requiring prosecutors to disclose evidence favorable to the accused,⁷ however, seems to be formulating, to some extent unwittingly, a governmental duty to reveal evidence of impeachment value which goes beyond the bounds of the Jencks Act. The present article will examine the possible effect of that body of law on Jencks Act discovery.

THE CONSTITUTIONAL DISCLOSURE DUTY AND ITS RELATIONSHIP TO THE JENCKS ACT

Recognizing a prosecutor's role as a public official rather than as a mere adversary,⁸ the courts, under the due process clause of the Constitution, have imposed on prosecutors a duty to disclose to defendants evidence which might aid the accused in securing an acquittal.⁹ Supreme Court involve-

⁷ *E.g.*, *Brady v. Maryland*, 373 U.S. 83 (1963). See generally Note, *The Duty of the Prosecutor to Disclose Exculpatory Evidence*, 60 COLUM. L. REV. 858 (1960); Carter, *Suppression of Evidence Favorable to an Accused*, 34 F.R.D. 87 (1964); Comment, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136 (1964).

⁸ The classic statement to that effect is the oft-quoted passage in *Berger v. United States*, 295 U.S. 78, 88 (1935): "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

⁹ *E.g.*, *Brady v. Maryland*, *supra* note 7; *Wilde v. Wyoming*, 362 U.S. 607 (1960) (per curiam); *Napue v. Illinois*, 360 U.S. 264 (1959); *Alcorta v. Texas*, 355 U.S. 28 (1957) (per curiam); *Pyle v. Kansas*, 317 U.S. 213 (1942); *United States ex rel. Thompson v. Dye*, 221 F.2d 763 (3d Cir.), *cert. denied*, 350 U.S. 875 (1955); *United States ex rel. Almeida v. Baldi*, 195 F.2d 815 (3d Cir. 1952), *cert. denied*, 345 U.S. 904 (1953); *People v. Savvides*, 1 N.Y.2d 554, 136 N.E.2d 853, 154 N.Y.S.2d 885 (1956). The cases have elevated to a constitutional plane the portion of Canon 5 of the Canons of Professional Ethics which relates to public prosecutors. ("The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly

ment in the area can be traced back some thirty years when, in *Mooney v. Holohan*,¹⁰ it held the fourteenth amendment violated where a state won a conviction through the knowing use of perjured testimony.¹¹

Using *Mooney* as a springboard, the Court has required prosecutors to correct false testimony given by Government witnesses even when the Government had not solicited the false testimony,¹² and has proscribed the suppression of evidence capable of exonerating the accused.¹³ It has become settled, too, that suppression cannot be justified on the ground that the withheld evidence relates only to the weak credibility of a Government witness, rather than directly to the defendant's innocence.¹⁴

The most recent Supreme Court pronouncement of the disclosure duty came in 1963 when, over the objection of Justice White who would have employed "more confining language and would not [have] cast in constitutional form a broad rule of criminal discovery,"¹⁵ the Court in *Brady*

reprehensible.") Cf. *Kyle v. United States*, 297 F.2d 507 (2d Cir. 1961); *United States v. Consolidated Laundries Corp.*, 291 F.2d 563 (2d Cir. 1961) (broad disclosure duty imposed by the supervisory power of the federal courts over the administration of criminal justice).

¹⁰ 294 U.S. 103 (1935). For a good discussion of the *Mooney* case, see Cahn, *Law in the Consumer Perspective*, 112 U. PA. L. REV. 1, 7-9 (1963).

¹¹ "[Due process] is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

¹² *Alcorta v. Texas*, *supra* note 9; *Napue v. Illinois*, *supra* note 9.

¹³ *Pyle v. Kansas*, *supra* note 9; *Wilde v. Wyoming*, *supra* note 9.

¹⁴ *Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence . . ."); *United States ex rel. Bund v. LaVallee*, 344 F.2d 313, 315 (2d Cir. 1965); *United States ex rel. Rohrlich v. Fay*, 240 F. Supp. 848 (S.D.N.Y. 1965); *United States ex rel. Hicks v. Fay*, 230 F. Supp. 942 (S.D.N.Y. 1964); *Application of Kapatos*, 208 F. Supp. 883 (S.D.N.Y. 1962); *Smallwood v. Warden*, 205 F. Supp. 325 (D. Md. 1962). See also *United States v. Consolidated Laundries Corp.*, *supra* note 9; *People v. Savvides*, *supra* note 9. Cf. *Mesarosh v. United States*, 352 U.S. 1, 9 (1956) (psychiatric condition of Government witness resulted in his giving false testimony); Comment, 58 MICH. L. REV. 888, 895 n.33 (1960).

¹⁵ *Brady v. Maryland*, *supra* note 7, at 92 (White, J., concurring). It is hard to disagree with Justice White, or with Justices Black and Harlan (dissenting), that the due process question was not properly before the *Brady* Court.

*v. Maryland*¹⁶ fashioned a sweeping governmental disclosure obligation:

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.¹⁷

Decisions subsequent to *Brady* have read that case expansively;¹⁸ the ninth circuit in *Thomas v. United States*,¹⁹ for example, citing *Brady* as authority, invoked the "well-recognized rule . . . that a conviction cannot stand where a prosecutor has, either wilfully or negligently, withheld material evidence favorable to the defendant."²⁰

The constitutional disclosure duty affects the Jencks Act machinery because the former mandates governmental divulgence of impeachment evidence.²¹ The theoretical impact is easily demonstrable: after a Government witness testifies on direct examination, all pretrial statements made by that witness which are at variance with his trial testimony, or which otherwise bear unfavorably on his credibility, become evidence which will aid the accused in securing an acquittal, and are, therefore, seemingly subject to discovery under *Brady's* broad disclosure rule as a matter of due process,²² without regard to the producibility restrictions which inhere in the Jencks Act.²³

¹⁶ *Brady v. Maryland*, *supra* note 7.

¹⁷ *Id.* at 87.

¹⁸ *E.g.*, *Thomas v. United States*, 343 F.2d 49 (9th Cir. 1965); *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964), 25 MD. L. REV. 79 (1965); *United States ex rel. Meers v. Wilkins*, 326 F.2d 135 (2d Cir. 1964), 39 N.Y.U.L. REV. 565 (1964), 38 TUL. L. REV. 759 (1964).

¹⁹ 343 F.2d 49 (9th Cir. 1965).

²⁰ *Id.* at 53.

²¹ See cases cited note 14, *supra*.

²² The principal cases dealing with the constitutional disclosure duty have all imposed the duty on *state* prosecutors via the fourteenth amendment. Since the duty has been deemed so fundamental as to bind the states, it is a fortiori applicable to federal prosecutors under the fifth amendment. Cases involving federal prosecutors include *Taylor v. United States*, 229 F.2d 826 (8th Cir.), *cert. denied*, 351 U.S. 986 (1956); *Kyle v. United States*, *supra* note 9 (supervisory power); *United States v. Consolidated Laundries Corp.*, *supra* note 9 (supervisory power). See also *Berger v. United States*, *supra* note 8.

²³ The courts and the commentators are beginning to recognize the relationship between the two areas of law. See *United States ex rel. Bund*

THE DOCTRINAL IMPACT OF THE CONSTITUTIONAL DISCLOSURE
DUTY ON JENCKS ACT DISCOVERY

An across-the-board application of the constitutional disclosure duty to situations involving credibility evidence will yield a body of impeachment discovery rules considerably broader than those established by the Jencks Act. This section will focus upon some of the specific changes which would be wrought by the blanket superimposition of *Brady* on the Jencks domain.

"Statement" as a Word of Art

Subsections (e)(1) and (e)(2) of the Jencks Act²⁴ define the term "statement," as employed in that act, as written statements signed or approved by the witness,²⁵ and as substantially verbatim and contemporaneously transcribed recordings of oral statements.²⁶ In *Palermo v. United States*,²⁷ when the act first reached the Supreme Court for interpretation, Justice Frankfurter expressed the opinion that a defendant had no right, under non-Jencks procedures, to inspect unauthenticated or non-statutory statements—those falling without the subsection (e) definitions. He remarked, *obiter*, that "statements of a government witness made to an agent of the Government which cannot be produced under the [definitional] terms of 18 U.S.C. § 3500 cannot be produced at all."²⁸

v. LaVallee, *supra* note 14; Application of Kapatos, *supra* note 14; LOCKHART, KAMISAR & CHOPER, CONSTITUTIONAL RIGHTS AND LIBERTIES 246 (1964); *Recommended Procedures in Criminal Pretrials*, 37 F.R.D. 95 n.1 (1965); Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228, 242 (1964). Cf. Comment, *supra* note 14.

²⁴ 18 U.S.C. § 3500(e)(1) and (e)(2) (1964).

²⁵ 18 U.S.C. § 3500(e)(1) (1964).

²⁶ 18 U.S.C. § 3500(e)(2) (1964).

²⁷ 360 U.S. 343 (1959).

²⁸ *Id.* at 351. The Justice rejected, therefore, the "suggestion that the detailed statutory procedures restrict only the production of the type of statement described in subsection (e), leaving all other statements, *e.g.*, non-verbatim, non-contemporaneous records of oral statements, to be produced under pre-existing rules of procedure . . ." *Id.* at 349. Justices Brennan, Warren, Black and Douglas, concurring in *Palermo*, felt the Court should not have rendered gratuitously a dissertation on the producibility of non-Jencks documents. *Id.* at 361. They were concerned, moreover, that the rule espoused by the majority's dictum could not comport with the confrontation and compulsory process rights guaranteed by the Constitution. *Id.* at 362.

With the advent of *Brady*, it appears the *Palermo* dictum must be discarded;²⁹ the constitutional disclosure duty cases would seem to require the divulgence of statements containing matter favorable to the defense irrespective of the conformity of those statements to the Jencks authenticity standards.³⁰ To the comfort of at least four Justices, it should be noted that if a Government witness testifies at length as to his knowledge of the defendant's alleged criminal act, "a memorandum of a government agent simply stating that [the witness had been] interrogated for several hours as to his knowledge of the defendant's alleged criminal transactions [and had] denied any knowledge of them"³¹ will fall within *Brady's* constitutional discovery ambit.

Widely accepted by the courts, especially since *Brady*, is the rule that a conviction will not be saved by a prosecutor's honest but incorrect belief that certain evidence withheld by

²⁹ It is interesting, and surprising, to note that both *Palermo* and *Napue v. Illinois*, *supra* note 9, a leading constitutional disclosure case, were decided within a week of each other. Their overlapping nature went unnoticed by the *Palermo* Court.

³⁰ In *Alcorta v. Texas*, *supra* note 9, for example, the prosecutor before trial made notes of an interview he had with the state's chief witness; those notes, containing information which would have been useful for impeachment and for buttressing the defense's affirmative allegations, were withheld by the prosecutor. Presumably, the disclosure of the information contained in those notes—whether substantially verbatim and contemporaneously recorded or not—would have accorded the defendant the due process of law which the Supreme Court held he had been denied.

Although *Alcorta* involved a state prosecution, to which the Jencks Act was not applicable, the Supreme Court, in fashioning a constitutional discovery rule, did not establish a disclosure exemption for statements which do not live up to reliability standards analogous to those prescribed by subsection (e).

For the English practice of disclosing prior statements of witnesses containing matter favorable to the accused, see Traynor, *Ground Lost and Found in Criminal Discovery in England*, 39 N.Y.U.L. REV. 749, 765-67 (1964).

³¹ *Palermo v. United States*, *supra* note 27, at 361-62 (concurring opinion of Justices Brennan, Warren, Black and Douglas). The concurring Justices were disturbed that such a memorandum does not meet the authenticity requirements of subsection (e). See *Campbell v. United States*, 373 U.S. 487 (1963), for another example of a marked variance between a Government witness's trial testimony and his pretrial statement. In *Campbell*, however, after much litigation, the pretrial statement was held producible under the Jencks procedure. For a good discussion of the *Campbell* case and its history, see Note, *The Jencks Act: After Six Years*, 38 N.Y.U.L. REV. 1133, 1142-43 (1963).

him would not have aided the defendant;³² defense counsel, rather than the prosecutor or the court, is considered the best judge of the usefulness of the evidence.³³ When this rule is coupled with the theory that statements containing information useful to the defense are discoverable, whether or not they are Jencks documents, as a constitutional ingredient of a fair trial, *Brady's* liberalizing effect on the discovery process is made apparent.

Thus, if after direct examination of a Government witness, the Government admits the existence of a pretrial statement but denies its authenticity, the court will hold a hearing or *voir dire* to determine whether the document comports with the producibility requirements of subsection (e).³⁴ Should the court decide that the document falls without section 3500, defense counsel could nevertheless make a *Brady*-request for the identical document, which should be complied with if the statement contains information materially advantageous to the defendant. If the Government or court persists in denying discovery of the document on

³² Pre-*Brady* cases recognizing the rule include United States *ex rel.* Thompson v. Dye, *supra* note 9 (heavily relied upon by the Supreme Court in *Brady*); Griffin v. United States, 183 F.2d 990 (D.C. Cir. 1950); and the *Jencks* case itself, *supra* note 1. The *Griffin* court emphasized "the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful." 183 F.2d at 993.

By explaining the principle underlying the disclosure duty to be "not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused," 373 U.S. at 87, and by holding suppressions of evidence favorable to an accused violative of due process "irrespective of the good faith or bad faith of the prosecution," *ibid.*, *Brady* put the finishing touches on the rule that a prosecutor should disclose, at least to the court, all evidence which might in some way reasonably aid the defendant. See *Barbee v. Warden*, *supra* note 18, at 845; *United States ex rel. Meers v. Wilkins*, *supra* note 18, at 137; *Ashley v. Texas*, 319 F.2d 80 (5th Cir.), *cert. denied*, 375 U.S. 931 (1963).

³³ The difficulty of the task to which the prosecutor is put is underscored by the fact that even pretrial statements which seem consistent with a witness' trial testimony may have impeachment value. As the *Jencks* Court noted: "Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony." *Jencks v. United States*, *supra* note 1, at 667.

³⁴ *Campbell v. United States*, *supra* note 31, at 494.

the ground that it does not contain matter useful to the defense, the document could be preserved for the appellate review of its useful nature.³⁵ An honest but wrongful guess by a prosecutor or district court on the "usefulness" issue could result in the reversal or the setting aside of a conviction.³⁶

Statement Must Be Made "to an Agent of the Government"

Under the Jencks Act, pretrial statements of Government witnesses, "whether within subsection (e) (1) or subsection (e) (2), are producible only if made to a Government agent."³⁷ This is abundantly clear from the legislative history,³⁸ although the face of the statute, at least with regard to subsection (e) (1) statements, is somewhat ambiguous.³⁹ One commentator⁴⁰ posed the question "whether 'statements' made by a government witness to a *state investigative official* should be made available to a defendant in cases where the 'statements' have been turned over to the federal government to aid it in the prosecution of the case."⁴¹ From the legislative history of the Jencks Act, it would appear that statements made to state investigators would not be producible unless, perhaps, the federal government had been involved in the state inquiry from its inception. Under such circumstances, it is arguable that the state officials would, for the purposes of disclosure, be deemed agents of the federal government.⁴²

³⁵ Cf. Carter, *Suppression of Evidence Favorable to an Accused*, 34 F.R.D. 87 (1964). See also *Recommended Procedures in Criminal Pretrials*, 37 F.R.D. 95 (1965).

³⁶ See notes 32 and 33 *supra*, and accompanying text.

³⁷ Note, *The Jencks Act: After Six Years*, 38 N.Y.U.L. REV. 1133, 1134 (1963).

³⁸ 1957 U.S. CODE CONG. & AD. NEWS 1870 (report to House managers).

³⁹ "Subsection (a), like subsection (e) (2), refers to statements or reports made to an agent of the Government. Subsection (e) (1), however, which deals with the authentication of oral statements, does not by its letter require that the producible statement be made to a Government agent. This source of constructional confusion is due only to a lack of careful draftsmanship, and a literal reading of the statute would prove unwise." Note, *The Jencks Act: After Six Years*, 38 N.Y.U.L. REV. 1133, 1134 (1963).

⁴⁰ Borillo, *Section 3500: Justice on a Tightrope*, 45 MARQ. L. REV. 205 (1961).

⁴¹ *Id.* at 213. (Emphasis in original.)

⁴² See *United States v. Borelli*, 336 F.2d 376 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965).

Under *Brady*, and the other constitutional disclosure duty cases, the person to whom the witness's pretrial statement was directed is entirely irrelevant—if such a statement contains information of impeachment value, or if it is otherwise useful to the defendant's case, and if the statement at the time of trial is in the possession of the Government,⁴³ disclosure by the Government to the defense seems necessary.⁴⁴ In *United States v. Consolidated Laundries Corp.*,⁴⁵ for example, a new trial was granted because it was shown that the prosecution had negligently suppressed, among other things, a letter in its possession from an important Government witness to the telephone company.⁴⁶

*Statement Must "Relate to the Subject Matter" of the
Witness's Testimony*

To be producible under the Jencks Act, a Government witness's pretrial statement must "relate to the subject matter" of his trial testimony. If the Government acknowledges the existence of a pretrial statement, but claims that it does not meet this relevancy test, the act dictates a judicial *in camera* determination of relevancy;⁴⁷ the district

⁴³ The constitutional disclosure duty decisions might call for overturning a conviction for failure to reveal evidence to the defense even when the prosecuting attorney is unaware of that evidence, so long as *some* part of the Government, or at least the prosecuting arm of the Government—such as the police—is in possession of the information. See, e.g., *Barbee v. Warden*, *supra* note 18, at 846: "Nor is the effect of the nondisclosure neutralized because the prosecuting attorney was not shown to have had knowledge of the exculpatory evidence. Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure." See Cahn, *Law in the Consumer Perspective*, 112 U. PA. L. REV. 1, 9-12 (1963). See also Application of Kapatos, *supra* note 14, at 888: "I do not think that an accused's rights as defined by *Napue* should depend on the fortuitous circumstance that the district attorney who conducts the investigation also conducts the prosecution"

⁴⁴ See, e.g., *United States v. Consolidated Laundries Corp.*, *supra* note 9. Although often cited together with due process suppression cases, *Consolidated Laundries* was actually decided pursuant to the court's supervisory power over criminal justice.

⁴⁵ 291 F.2d 563 (2d Cir. 1961).

⁴⁶ *Id.* at 568-69.

⁴⁷ 18 U.S.C. § 3500(c) (1964).

court is to excise matter deemed irrelevant to the witness's trial testimony and direct the Government to deliver the remainder of the statement to the accused.⁴⁸ If no portion of the pretrial statement meets the test of relevancy, the entire statement, even if it is a signed or verbatim document, will be shielded from the defendant's reach.⁴⁹

Because of the relevancy formula, certain types of impeachment evidence—such as those statements showing a witness's bias or propensity to lie—are presumably not discoverable under the Jencks Act,⁵⁰ for, unlike prior inconsistent statements, those types of statements technically do not relate to the *subject matter* of the witness's trial testimony.⁵¹

⁴⁸ *Ibid.* "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 the correctness of the ruling of the trial judge."

⁴⁹ The Supreme Court touched upon the Jencks relevancy standards in *Scales v. United States*, 367 U.S. 203 (1961).

⁵⁰ Comment, *The Jencks Legislation: Problems in Prospect*, 67 YALE L.J. 674, 693-95 (1958). See 4 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §2183.1 (Supp. 1964): "Documents may well exist which would show bias or otherwise be useful in attacking the credibility of the witness, but which do not relate to the subject matter of his testimony at the trial. The procedure for inspection which the statute provides does not apply to such documents." Cf. *United States v. Soto*, 256 F.2d 729 (7th Cir. 1958). See also *United States v. Cardillo*, 316 F.2d 606 (2d Cir.), cert. denied, 375 U.S. 822 (1963); *United States v. Simmons*, 281 F.2d 354 (2d Cir. 1959), *aff'd en banc*, 281 F.2d 360 (2d Cir. 1960), where the second circuit held beyond the purview of the Jencks Act statements which are "collateral" or "incidental" to the witness's trial testimony. Those cases are pertinent because "a situation could arise where a witness' statement might be purely collateral and yet be relevant for impeachment purposes." Note, *The Jencks Right: Judicial and Legislative Modifications, the States and the Future*, 50 VA. L. REV. 535, 542 (1964). That author presents an interesting example. *Ibid.*

⁵¹ A somewhat liberal interpretation of the Jencks relevancy test, however, was provided by the Supreme Court in *Rosenberg v. United States*, 360 U.S. 366 (1959). That case held that "a statement by a witness that she fears her memory as to the events at issue was poor certainly 'relates to the subject matter as to which the witness has testified' and should have been given to defendant." *Id.* at 370. (Emphasis added.) *Accord*, *Ogden v. United States*, 303 F.2d 724, 739 n.55 (9th Cir. 1962). Note, however, that a statement regarding a witness's poor memory *in general*, as opposed to a poor recollection as to the events at issue, would probably not meet the Jencks relevancy standard even as interpreted by *Rosenberg*. Similarly, a statement regarding a witness's bias in the particular case might be producible under Jencks (*United States v. Borelli*, *supra* note 42), although a statement to the effect that a witness is prejudiced against a particular

The relevancy limitation, however, plays no part in framing the constitutional disclosure duty; that duty directs the prosecutorial divulgence of evidence bearing unfavorably on the credibility of witnesses without regard to the specific subject matter of their trial testimony.⁵² The mere fact that the witness is testifying against the defendant is presumably sufficient to set into operation the duty to disclose information materially affecting the former's credibility.⁵³

Statement Must Be "Requested"

As a prerequisite to the Government's obligation to produce a witness's pretrial statements pursuant to the Jencks Act procedure, subsection (b) requires the defendant, after the witness has testified on direct examination, to move for the production of those statements. The requirement of a demand has been construed strictly; without a motion from defense counsel, the Government's retention of statutory statements will not be deemed wrongful.⁵⁴ Moreover, al-

racial group presumably would not "relate to the subject matter" of his testimony, even were the defendant a member of that racial group.

⁵² See, e.g., United States *ex rel.* Hicks v. Fay, *supra* note 14 (prosecutor suppressed fact that important Government witness was insane). See also Mesarosh v. United States, *supra* note 14.

⁵³ The evidence subject to disclosure might be a pretrial statement made by the witness. United States *ex rel.* Bund v. LaVallee, *supra* note 14; Application of Kapatos, *supra* note 14. It is important to note that the evidence may take many other forms as well. Hence, information obtained from *third parties* (non-witnesses) calling into question the witness's credibility should be made available to the defense, United States *ex rel.* Meers v. Wilkins, *supra* note 18; Application of Kapatos, *supra* note 14; Smallwood v. Warden, *supra* note 14 (state in rape prosecution suppressed evidence acquired from a physician as to prosecuting witness's bad moral reputation and history of venereal disease); United States *ex rel.* Thompson v. Dye, *supra* note 9. Cf. United States *ex rel.* Rohrlisch v. Fay, *supra* note 14. In England, "the prosecution also makes ready disclosure of any criminal records of prosecution witnesses that might be useful to the defense for impeachment." Traynor, *Ground Lost and Found in Criminal Discovery in England*, 39 N.Y.U.L. REV. 749, 763 (1964).

Even if pretrial remarks of witnesses indicating bias were ordinarily producible under the Jencks Act (*cf.* United States v. Borelli, *supra* note 42), non-compliance with *other* Jencks requirements would render the information unavailable under the act. But that evidence would, of course, be discoverable under *Brady*.

⁵⁴ Ogden v. United States, *supra* note 51; United States v. Grabina, 295 F.2d 792 (2d Cir. 1961), *vacated and remanded for resentencing*, 369 U.S. 426 (1962) (*per curiam*); United States v. Simmons, *supra* note 50, at 358; Johnston v. United States, 260 F.2d 345 (10th Cir. 1958), *cert. denied*, 360 U.S. 935 (1959); United States v. Tellier, 255 F.2d 441, 449 (2d Cir.), *cert. denied*, 358 U.S. 821 (1958).

though the request need not mention the Jencks Act by name,⁵⁵ the request must be specific in nature.⁵⁶ It is clear, too, that a premature demand is insufficient.⁵⁷

The necessity of a request with regard to the constitutional disclosure duty has not achieved the status of its Jencks Act counterpart; in fact, it would seem that a demand is not essential to spark the evidentiary production of matter favorable to the accused. Although *Brady* used the term "request" in framing its disclosure rule,⁵⁸ cases decided subsequent to *Brady* have plainly held defense discovery demands unnecessary.⁵⁹ In *United States ex rel. Meers v. Wilkins*,⁶⁰ for example, the second circuit noted:

The case before us differs from *Brady* in that the defense counsel here never requested the disclosure of evidence from the prosecutor, but we think that such a request is not a *sine qua non* to establish a duty on the prosecution's part.⁶¹

Similarly, in an opinion of the Fourth Circuit Court of Appeals, Judge Sobeloff in *Barbee v. Warden*⁶² held:

It is no answer that *Barbee's* attorney failed to ask for the [withheld evidence]. . . . While a diligent defense counsel might have learned about the police reports, this is too speculative a consideration to outweigh any unfairness that actually resulted at the trial.⁶³

⁵⁵ *Howard v. United States*, 282 F.2d 648 (6th Cir.), *cert. denied*, 364 U.S. 879 (1960).

⁵⁶ *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 493 (2d Cir. 1960). See also *Foster v. United States*, 308 F.2d 751, 755 (8th Cir. 1962) (request must be for "statements" rather than for the Government's "file").

⁵⁷ *Rich v. United States*, 261 F.2d 536 (4th Cir. 1958), *cert. denied*, 359 U.S. 946 (1959). *Johnston v. United States*, *supra* note 54.

⁵⁸ "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). (Emphasis added.)

⁵⁹ *United States ex rel. Meers v. Wilkins*, *supra* note 18; *Barbee v. Warden*, *supra* note 18.

⁶⁰ *Supra* note 18.

⁶¹ *United States ex rel. Meers v. Wilkins*, *supra* note 18, at 137. See Comment, *Prosecutor Held to Have Duty to Disclose Material Exculpatory Evidence Without Prior Defense Request*, 39 N.Y.U.L. REV. 565 (1964).

⁶² *Supra* note 18.

⁶³ *Id.* at 845.

Even the cases relied upon in *Brady* as expressing "the correct constitutional rule"⁶⁴ neither involved nor mentioned defense requests.⁶⁵ Once again, then, *Brady* exceeds the Jencks Act in disclosure liberality.⁶⁶

"Grand Jury Minutes" Excluded From the Jencks Act Procedure

Consisting as it does of an entire body of law in its own right, the law governing the producibility of grand jury minutes cannot in this article be dealt with at any great length. But because of its close relationship with both the Jencks Act and *Brady* discovery procedures, at least some

⁶⁴ *Brady v. Maryland*, *supra* note 58, at 86.

⁶⁵ *United States ex rel. Thompson v. Dye*, 221 F.2d 763 (3d Cir.), *cert. denied*, 350 U.S. 875 (1955); *United States ex rel. Almeida v. Baldi*, 195 F.2d 815 (3d Cir. 1952), *cert. denied*, 345 U.S. 904 (1953). "In fact, the decision of the Maryland Court of Appeals in *Brady* [226 Md. 422, 174 A.2d 167], which the Supreme Court affirmed, was not framed in terms of the necessity of a request." Comment, 39 N.Y.U.L. Rev. 565, 566 (1964). See also Cahn, *Law in the Consumer Perspective*, 112 U. PA. L. Rev. 1, 11 (1963).

⁶⁶ If, therefore, the Government is in possession of a witness's pretrial statements which are favorable to the defense (*e.g.*, statements materially inconsistent with the witness's trial testimony) the prosecutor, with or without a defense motion, would seem to be obliged to reveal that evidence. *Cf. United States v. Zborowski*, 271 F.2d 661, 668 (2d Cir. 1959): "The prosecutor must be vigilant to see to it that full disclosure is made at trial of whatever may be in his possession which bears in any material degree on the charge for which a defendant is tried." See Comment, 58 Mich. L. Rev. 888, 895 n.33 (1960). If a defendant, after conviction, learns of the wrongful suppression, he can move for a new trial (see *United States v. Consolidated Laundries Corp.*, 291 F.2d 563 (2d Cir. 1961)), or attack his conviction collaterally under 28 U.S.C. § 2255 (*Kyle v. United States*, 297 F.2d 507 (2d Cir. 1961)). Even if the courts should retain a demand requirement, a blanket *Brady* request will presumably suffice (see Carter, *Suppression of Evidence Favorable to an Accused*, 34 F.R.D. 87 (1964)), and "evidence which is discovered subsequent to the request [*e.g.*, after the demand, a witness testifies in a manner inconsistent with his pretrial statement, thereby making the latter useful to the defense] would have to be disclosed voluntarily by the prosecutor . . ." Comment, 39 N.Y.U.L. Rev. 565, 567 n.17 (1964).

It should be noted, too, that under Jencks, when a statement is turned over to defense counsel, he is given the task of rummaging through the document (a recess is held if necessary) to find possible inconsistencies. But in light of *Meers* and *Barbee*, which seek in part to relieve a defendant from the burdens which often flow from having a less than diligent defense counsel (*cf.* Comment, 39 N.Y.U.L. Rev. 565-66 (1964)), the constitutional disclosure duty may require a prosecutor who is aware of specific inconsistencies to disclose their existence. *Cf. United States v. Spangelet*, 258 F.2d 338, 342 (2d Cir. 1958).

attention must be devoted to the disclosure at trial of a witness's prior testimony before a grand jury.

In the leading case of *Pittsburgh Plate Glass Co. v. United States*,⁶⁷ involving criminal antitrust violations, the Supreme Court held the law pertaining to the disclosure of grand jury minutes unaffected by the Jencks Act.⁶⁸

It appears to us clear that *Jencks v. United States* . . . is in nowise controlling here. It had nothing to do with grand jury proceedings and its language was not intended to encompass grand jury minutes. Likewise, it is equally clear that Congress intended to exclude those minutes from the operation of the so-called Jencks Act. . . .⁶⁹

Because of the veil of secrecy which guards grand jury proceedings, *Pittsburgh Plate Glass* held that grand jury minutes need only be made available to the defense upon a showing that "a particularized need" exists for the minutes which outweighs the policy of secrecy."⁷⁰

Most circuits adhere to the "particularized need" approach; and to satisfy the "particularized need" production prerequisite, a defendant must often, though not always,⁷¹ make a preliminary showing of inconsistency between the witness's grand jury and trial testimony. The second circuit, however, discarded the "particularized need" test in favor of a more liberal discovery rule. In *United States v. Giampa*,⁷² that court announced:

If it is . . . established at the trial that the witness has testified before the Grand Jury and defense counsel requests that the trial court examine the minutes for inconsistencies in testimony given upon the trial and before the Grand Jury, the trial court should read the minutes and if inconsistencies be found should make such portions of the minutes available to defense counsel.⁷³

⁶⁷ 360 U.S. 395 (1959).

⁶⁸ Though Justice Clark wrote in *Pittsburgh Plate Glass* for a strongly divided Court, the division did not involve the inapplicability of the Jencks Act to grand jury minutes—on that point, the Court was in total agreement. "As the Court points out, discovery of grand jury minutes is not affected by the *Jencks* statute . . ." *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 403 n.2 (1959) (dissenting opinion).

⁶⁹ *Id.* at 398.

⁷⁰ *Id.* at 400. See also *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Cf. FED. R. CRIM. P. 6(e).

⁷¹ *Pittsburgh Plate Glass Co. v. United States*, *supra* note 68, at 400-01.

⁷² 290 F.2d 83 (2d Cir. 1961).

⁷³ *Id.* at 85.

Under *Giampa*, therefore, it is mandatory upon the trial court, assuming a proper foundation has been laid, to examine grand jury transcripts for possible inconsistencies and to disclose to the defendant any portions of the minutes containing inconsistencies.⁷⁴

Brady's impact upon the disclosure of grand jury minutes is already somewhat discernible.⁷⁵ Certain cases framing the general constitutional disclosure duty (not relating to the producibility of grand jury minutes), for example, have drawn upon liberal second circuit grand jury decisions for authority.⁷⁶ Other cases have expressed the view that due process requires a prosecutor to inform the court or the defense counsel of grand jury testimony which would aid in exculpating the accused.⁷⁷ But *Brady's* real potential thrust in this area would be felt by the judicial recognition, as an element of due process, of the prosecutorial obligation to reveal those portions of a witness's grand jury testimony which are inconsistent with his trial testimony—and a recent second circuit case, *United States ex rel. Bund v. LaVallee*,⁷⁸ expressly noticed *Brady's* likely effect.

Bund had been convicted of larceny in a New York State court. At his trial, the court examined the victim-witness's grand jury testimony and, concluding that it conformed to the trial testimony, denied the defendant access to the minutes. Following conviction, Bund petitioned the federal courts for redress, alleging deprivation of his

⁷⁴ Judges within the circuit have differed, however, over whether the "harmless error" doctrine, firmly imbedded in the Jencks procedure, should be applied to cases where trial courts fail to perform correctly the duty imposed upon them by *Giampa*. See *United States v. Annunziato*, 293 F.2d 373, 382 n.5 (2d Cir.), cert. denied, 368 U.S. 919 (1961). Compare the *Giampa* opinion with *United States v. Hernandez*, 290 F.2d 86 (2d Cir. 1961). For a discussion of the applicability of the "harmless error" rule to Jencks and *Brady* discovery, see the next subsection of the instant article.

⁷⁵ See, e.g., *United States ex rel. Bund v. LaVallee*, 344 F.2d 313 (2d Cir. 1965); Carter, *Suppression of Evidence Favorable to an Accused*, 34 F.R.D. 87 (1964).

⁷⁶ See, e.g., *Thomas v. United States*, 343 F.2d 49, 53-54 (9th Cir. 1965), citing and quoting *United States v. Zborowski*, *supra* note 66, a leading case on the discovery of grand jury transcripts.

⁷⁷ See *United States ex rel. Meers v. Wilkins*, 326 F.2d 135, 139 (2d Cir. 1964) (construing broadly the holding of *Application of Kapatos*, 208 F. Supp. 883 (S.D.N.Y. 1962)).

⁷⁸ 344 F.2d 313 (2d Cir. 1965).

constitutional rights. The case was disposed of at the circuit level, that court agreeing with the New York trial court that the minutes contained nothing of value to the defendant.⁷⁹ The court, therefore, was not specifically called upon to decide whether the governmental withholding of materially inconsistent grand jury minutes would be constitutionally offensive. Nonetheless, the *Bund* discussion of the problem is enlightening:

The absence of a constitutional requirement that Grand Jury testimony of a witness must always be made available to the defense does not necessarily mean that it never need be. It could be argued with some force that when the Grand Jury testimony is exculpatory and the trial testimony inculpatory, or even when both are inculpatory but so inconsistent as to cast serious doubt on the veracity of the witness, failure to make the Grand Jury testimony available on request is within the principle of the decisions holding it to be a denial of due process for the prosecutor to fail to disclose known exculpatory evidence to the defense. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964); *United States ex rel. Butler v. Maroney*, 319 F.2d 622 (3d Cir. 1963). Whether a state could justify non-disclosure of Grand Jury testimony of that character against due process attack on the basis of the historic policy of preserving the secrecy of Grand Jury testimony is an issue on which the Supreme Court has yet to speak.⁸⁰

Bund noted explicitly that the second circuit *Giampa* procedure is not constitutionally mandated.⁸¹ But if the

⁷⁹ The court also found nothing constitutionally improper with New York's refusal to apply retroactively the doctrine of *People v. Rosario*, 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448, *cert. denied*, 368 U.S. 866 (1961)—New York's judicially manufactured "Jencks" type rule under which, in the words of *Bund*, "a prior statement of a witness, including his testimony before a Grand Jury, should be made available to the defense for possible use on cross-examination." *United States ex rel. Bund v. LaVallee*, *supra* note 75, at 315.

⁸⁰ *United States ex rel. Bund v. LaVallee*, *supra* note 75, at 315. On the rule of secrecy, see Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 VA. L. REV. 663 (1962). The changed composition of the Supreme Court will doubtlessly affect its attitude toward the secrecy rule. In that regard, it should be noted that all four dissenters in *Pittsburgh Plate Glass* are presently on the Court: the Chief Justice, and Justices Brennan, Black and Douglas. It should also be noted that where a witness's prior sworn testimony is used to attack his credibility, his impeachment will be enhanced. See *United States v. Zborowski*, *supra* note 66, at 667.

⁸¹ "Although this Circuit requires its own trial judges to examine the Grand Jury testimony of witnesses who give evidence at a criminal trial

Brady rule is applied to grand jury testimony, the logical result, dictated by caution, would be the adoption of a *Giampa*-type proceeding whereby courts could impartially attempt to assess the usefulness to defendants of grand jury minutes. In some respects, moreover, the constitutional disclosure duty cases might liberalize discovery in the grand jury testimony area even beyond *Giampa*—a defense foundation and “request” that the court examine the minutes might be held unnecessary,⁸² and the improper withholding of grand jury transcripts from the defense might, where a constitutional right is involved, be less likely to be termed “harmless error.”⁸³

Remedy for Non-Production and the “Harmless Error” Doctrine

Since 1959, when *Rosenberg v. United States*⁸⁴ was decided by the Supreme Court, the “harmless error” doctrine has been entrenched in the Jencks Act discovery process. Justice Brennan, joined by the Chief Justice and Justices Black and Douglas, dissenting in *Rosenberg*, did not spurn altogether the application of the “harmless error” doctrine in a Jencks Act setting; instead, the *Rosenberg* dissenters suggested a different approach to the rule—a presumption of *harmful* error:

Although we need not go so far as those courts which have suggested that the harmless error doctrine can never apply as to statements producible under the statute . . . fidelity to the principle underlying *Jencks* and the *Jencks* statute requires, I think, that when the defense has been denied a statement producible under the statute, *an appellate court should order a new trial unless the circumstances justify the conclusion that a finding that such a denial*

and makes this available to the defense where inconsistencies exist . . . there has been no hint that this procedure was thought to be compelled by the due process clause of the fifth amendment.” *United States ex rel. Bund v. LaVallee*, *supra* note 75, at 314-15.

⁸² See notes 54-65 *supra*, and accompanying text.

⁸³ Moreover, since a statement need not be flatly contradictory to a witness's trial testimony in order to be useful for impeachment purposes, (see note 35 *supra*), *Brady* would require trial courts to examine grand jury minutes for more than mere inconsistencies; a court's refusal to disclose minutes to a defendant might result in a new trial if an appellate court were to find the minutes in some way useful to the defense.

⁸⁴ 360 U.S. 367 (1959).

was harmful error would be clearly erroneous. In that determination, appellate courts should be hesitant to take it upon themselves to decide that the defense could not have effectively utilized a producible statement.⁸⁵

The imposition of the "harmless error" rule on the Jencks Act means, in essence, that, despite the philosophical foundation of the act (*i.e.*, that only the defense attorney is adequately equipped to assess the usefulness of a witness's statement), a defendant is entitled only to those documents which, in an appellate court's opinion, actually contain matter useful to the defense,⁸⁶ and then only if the court feels the defendant was prejudiced by the non-disclosure. Ironically, in the one area where the Jencks Act contemplated discovery broader than that required by *Brady*—the automatic disclosure of authenticated documents *irrespective* of their actual impeachment value—the courts have constricted the act's meaning.

As might be expected, the remedy for non-production under the constitutional disclosure duty cases surpasses that of the Jencks Act "harmless error" rule. At one time, the rule accepted by Judge Friendly in *Kyle v. United States*⁸⁷ was thought to govern.⁸⁸ *Kyle* contrasted

the rule that the knowing use of perjured testimony requires reversal even though prejudice is not affirmatively shown, with 'the area of passive nondisclosure of exculpatory evidence, in which prejudice is the central matter of inquiry and the evidence not disclosed is subjected to a critical examination to determine whether it is reasonably likely that a different result would have been reached had the exculpatory evidence been made available.'⁸⁹

The *Kyle* "balancing test,"⁹⁰ except with regard to instances of prosecutorial guile, seems even more restrictive

⁸⁵ *Id.* at 375-76 (dissenting opinion). (Emphasis added.)

⁸⁶ See *United States v. Annunziato*, 293 F.2d 373 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961).

⁸⁷ *Supra* note 66.

⁸⁸ See *Application of Kapatos*, *supra* note 77, at 888.

⁸⁹ *Kyle v. United States*, *supra* note 66, at 513.

⁹⁰ "The conclusion we draw from all this is that the standard of how serious the probable effect of an act or omission at a criminal trial must be in order to obtain the reversal or, where other requirements are met, the vacating of a sentence, is in some degree a function of the gravity of the

than an ordinary "harmless error" rule. *Brady* and other cases decided subsequent to *Kyle*, however, indicate that the "passive non-disclosure" aspect of *Kyle* is no longer the law.⁹¹ First of all, *Brady* makes clear that passive non-disclosure of evidence favorable to an accused violates due process even when the prosecutor withholds the evidence in complete good faith.⁹² Moreover, in *Fahy v. Connecticut*,⁹³ a case involving the use of illegally seized evidence in violation of the defendant's constitutional rights, the Supreme Court, finding it unnecessary "to decide whether the erroneous admission of evidence obtained by an illegal search and seizure can ever be subject to the normal rules of 'harmless error' . . ." ⁹⁴ applied a standard resembling the "presumption of harmful error" test advocated in the Jencks Act area by the *Rosenberg* dissenters: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."⁹⁵

It may be that, over the vigorous objections of Justices Harlan, Clark, Stewart and White, who dissented in *Fahy*, the Supreme Court, when squarely presented with the issue, will accept the view often expressed by the late Judge Jerome Frank—that an error invading constitutional rights can under no circumstances be deemed "harmless."⁹⁶ At the least, it may be expected that the Court will, as it did in *Fahy*, presume harmful error whenever rights guaranteed by the Constitution are infringed. That seems to be what

act or omission; the strictness of the application of the harmless error standard seems somewhat to vary, and its reciprocal, the required showing of prejudice, to vary inversely, with the degree to which the conduct of the trial has violated basic concepts of fair play." *Id.* at 514.

⁹¹ Indeed, the very circuit that announced the *Kyle* rule has seemingly indicated its awareness that the law has changed. See *United States ex rel. Meers v. Wilkins*, *supra* note 77, at 139 n.2. "Since the state offered no explanation for the failure to disclose the evidence, we need not consider whether the withholding of material evidence may be excused."

⁹² See text accompanying note 19 *supra*, for the language employed by the *Brady* Court. See also text accompanying note 22 *supra*, quoting from *Thomas v. United States*, 343 F.2d 49, 53 (9th Cir. 1965).

⁹³ 375 U.S. 85 (1963).

⁹⁴ *Id.* at 86. (Emphasis added.)

⁹⁵ *Id.* at 86-87.

⁹⁶ Cahn, *Fact—Skepticism and Fundamental Law*, 33 N.Y.U.L. REV. 1, 16-17 (1958).

was done by the fourth circuit, in *Barbee v. Warden*,⁹⁷ with respect to the constitutional right to evidentiary disclosure.⁹⁸ Since the constitutional disclosure duty applies to witnesses' pretrial statements containing information useful to defendants for impeachment purposes, it seems the *Rosenberg* dissenters may have won their battle.⁹⁹

CONCLUSION

Brady's cumulative effect upon Jencks would be drastic—it would “amend” section 3500 in the following manner: after a Government witness has testified on direct examination, the Government, to avert the reversal or the setting

⁹⁷ 331 F.2d 842 (4th Cir. 1964); cf. *United States ex rel. Thompson v. Dye*, *supra* note 65, at 767.

⁹⁸ 331 F.2d 842 (4th Cir. 1964). The *Barbee* court discussed the *Kyle* test, but presumably rejected it in favor of a *Fahy*-type rule. *Barbee* noted: “Involved is a question of fundamental fairness rising to the level of constitutional due process which cannot be brushed aside as a mere error in an evidentiary ruling.” *Id.* at 847.

⁹⁹ In one other respect, *Brady's* remedy for non-production seems to exceed the Jencks Act. In *Campbell v. United States I*, 365 U.S. 85, 98 (1961), the Supreme Court expressly refused to rule whether the innocent, good faith destruction by the Government of Jencks documents should be equated with non-compliance (the Government conceded that destruction for improper motives, or in bad faith, with the purpose of suppressing evidence should be so equated). Justice Frankfurter, however, for those concurring in part and dissenting in part, expressed the view that the act did not require the preservation of such documents. *Id.* at 102. See also *Killian v. United States*, 368 U.S. 231, 242 (1961). Lower courts seem to have aligned themselves with Justice Frankfurter's position. See, e.g., *Campbell v. United States II*, 303 F.2d 747, 751 (1st Cir. 1962), *rev'd on other grounds*, 373 U.S. 487 (1963) (indicating that it would express no view on the first circuit destruction-of-notes rule); *Ogden v. United States*, 303 F.2d 724, 737 (9th Cir. 1962); *United States v. Annunziato*, *supra* note 74, at 382; *United States v. Thomas*, 282 F.2d 191, 194 (2d Cir. 1960) (by implication). Moreover, the general view seems to be that if Jencks documents have been innocently destroyed, a defendant is entitled to “secondary evidence” of a witness's pretrial statement not as a matter of right, but only in the discretion of the trial court. *Ogden v. United States*, *supra*, at 249-50: “When a producible statement has been innocently destroyed the court may require the Government to furnish the information contained in the destroyed statement from a source which would not otherwise be subject to discovery.” (Emphasis added.) *Accord*, *United States v. Thomas*, *supra*, at 195: “Whether the report shown to defendant's counsel was within the terms of Section 3500 is not in issue. The trial judge properly exercised his discretion in favor of the defendants in permitting them to have the report.” (Emphasis added.) *But see* *United States v. Annunziato*, *supra* note 74, at 382. Under *Brady*, of course, if a Jencks document has been destroyed, and if the Government is in possession of secondary information useful to the accused, it would seem obligatory upon the prosecutor to reveal it, regardless of its form.

aside of a prospective conviction, must disclose, even without a prior defense demand, all statements (authenticated, unauthenticated, grand jury minutes, *etc.*) in its possession which contain information bearing unfavorably upon the credibility of that witness, even if those statements do not technically relate to the subject matter of the witness's direct examination testimony!

Such a drastic alteration should be arrived at, if at all, only after careful deliberation, and with due regard for the fact that the rules, being of a constitutional origin, will also be binding upon the states via the fourteenth amendment. Though the cases have encroached increasingly upon the Jencks Act discovery domain, the courts have not analyzed their decisions in terms of their impact on section 3500.

Perhaps pretrial statements are sufficiently different from other forms of evidence so as to warrant, in some respects, a different set of discovery rules. Requiring a demand as a prerequisite to receiving a witness's pretrial statements, for instance, may not be too great a burden for the accused to shoulder; a request in that setting is clearly distinguishable from requiring a defense request for the production of information about which the defendant is ignorant. Other examples could, of course, be given. Regardless of the ultimate result, all that is asked is that the courts consciously come to grips with the problem and avoid a purely mechanical transplantation of *Brady* rules to situations involving the producibility of witnesses' pretrial documents. An area such as Jencks Act discovery is far too important and far too controversial to be nullified *sub silentio*.

A P P E N D I X

§ 3500. *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) to

an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(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 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 the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such

portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(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;
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.