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Evidence - Refreshment of Memory - Use of Written Material - Whether Opposing Counsel May Compel Inspection of Statements Used by a Witness in Refreshing His Memory but Which Were Not Used on the Witness Stand

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DISCUSSION OF RECENT DECISIONS

EVIDENCE—REFRESHMENT OF MEMORY—USE OF WRITTEN MATERIAL—WHETHER OPPOSING COUNSEL MAY COMPEL INSPECTION OF STATEMENTS USED BY A WITNESS IN REFRESHING HIS MEMORY BUT WHICH WERE NOT USED ON THE WITNESS STAND—In *People v. Scott*, 29 Ill. 2d 97, 193 N.E.2d 814 (1963), the Supreme Court of Illinois was confronted with the question of whether to further extend the "Federal rule," adopted in 1960 in Illinois, which makes prior statements of witnesses available to opposing counsel.

In *Scott*, two police officers were called as witnesses for the prosecution at the accused's trial for murder. Upon conviction, defendant appealed, contending as a ground for reversal that his right of cross-examination had been unreasonably restricted because access to a specified police report had been denied him. It was established that three sentences in the report were those of one of the two police witnesses, Banks, although the report was not alleged to have been used by him in refreshing his memory for testimony at the trial. The sentences dealt with the transportation of the defendant to the Crime Laboratory and subsequently to the Homicide Bureau. Insofar as this witness was concerned, the trial court, after examining the report, ruled that in this instance the defense had no right to inspection. The court felt that nothing Banks said on the stand was inconsistent with the report; to the contrary, he had stated the very same information on the stand. The second officer, Flynn, did not use the report to refresh his memory while on the stand or in the courtroom, but did admit on cross-examination that the preceeding evening and earlier that morning he had reviewed the report. Again, the trial judge ruled that the defendant could not inspect the report. However, on appeal, the Illinois Supreme Court held that the defendant was entitled to such inspection and that prejudicial error had been made by the trial judge in failing to allow defendant's counsel to examine the report used by Officer Flynn in refreshing his memory prior to taking the witness stand.[1]

Prior to the 1957 decision of *United States v. Jencks*,[2] the traditional view prevailed in the federal courts as it does still in a majority of the state courts.[3] The traditional view represented the proposition that there was no absolute right of opposing counsel to inspect statements of a witness which were not used by him on the stand in refreshing his memory.[4]

1 The Court also felt that by a strict application of the rule, the trial court committed error in not providing the defense access to the three sentences in the report which were in the words of Officer Banks, although not used for refreshing his memory. However, the error was not considered prejudicial since Banks did, in fact, repeat the very words on the stand. In addition, the sentences were immaterial.

2 353 U.S. 657, 77 Sup. Ct. 1007 (1957).

3 See 58 Am. Jur., Wit. § 601 (1948), in which the traditional view is stated to be the majority view. See also 28 A.L.R. 562 (1962), which cites numerous cases holding the traditional viewpoint and indicating it is the position of a majority of states. See also Commonwealth v. Fromal, 202 Pa. Super. 45, 195 A.2d 174 (1963); Artell v. State, Texas, 372 S.W.2d 944 (1963) for two late cases reaffirming the traditional view.

4 Both Wigmore and McCormick approve of this view. 3 Wigmore, *Evidence*, 111

This view is perhaps best illustrated by the leading federal cases prior to *Jencks*. In both *United States v. Lennon*[5] and *Goldman v. United States*,[6] it was held that there was no absolute right of the defendant to examine refreshing material not used by a witness on the stand. That was not to say, however, that the trial judge had no discretion to compel such inspection. For, as was stated by Justice Roberts in *Goldman*:

> . . . where a witness does not use his notes or memorandum in court, a party has no absolute right to have them produced and to inspect them. Where, as here, they are not witness' notes but are also part of government's files, a large discretion must be allowed the trial court. . . .[7]

The aforementioned cases, which were followed subsequently in *Echert v. United States*,[8] represented the federal view until June 3, 1957, when the *Jencks* decision was handed down. The impact of *Jencks* was such that legislative reaction occurred in less than 90 days.[9]

In *Jencks*, a prosecution for filing a false non-communist affidavit with the National Labor Relations Board, the defendant sought to have produced for inspection all reports of two government witnesses which had been provided the Federal Bureau of Investigation. The reports were not used by the witnesses in refreshing their memories on the stand. Following the traditional view, the trial court held that the defense could not inspect the reports. On appeal to the United States Supreme Court, it was held that not only *could* the defense counsel examine material of the witness referred to on the witness stand in refreshing memory, but counsel for the defense could inspect *all statements* of the witnesses in the possession of the

(3d ed. 1940): "The rule should apply, moreover, to a memorandum consulted for refreshment before trial and not brought by the witness into court; for, though there is no objection to a memory being thus stimulated, yet the risk of imposition and the need of safeguard is as great. It is simple and feasible enough for the court to require that the paper be sent for and exhibited before the end of the trial." McCormick, *The Law of Evidence*, 17 (1954).

5 20 F.2d 490, 494 (8th Cir. 1927), wherein the rationale of the traditional view was summarized thusly: "The paper was not used while the witness was on the stand; it was not in the court, but was read by the witness in his room the day before the trial. Witnesses frequently refresh their memories before going into court, by referring to papers in their possession which are not taken into court; and where they rely on their recollection of the facts, as this witness did, it is not necessary that the writing be produced. It is only where the witness uses the paper to refresh his memory while on the stand that there exists a right to compel the production of the writing for inspection."

6 316 U.S. 129, 62 Sup. Ct. 993 (1942).

7 Id. at 995.

8 188 F.2d 336 (8th Cir. 1951). In Echert, a criminal prosecution decided in the Eighth Circuit, the Court refused to require a government agent to furnish copies of reports made by him concerning matters to which he testified on the stand; also a stenographer who reported the preliminary hearing before the commissioner was not required to furnish a transcript of her notes. Neither witness used the documents while on the witness stand. The Circuit Court held that the trial judge did not err in refusing defendant's demand. "Only when a witness uses a paper to refresh his memory when on the stand may production and inspection of a writing be demanded."

9 18 U.S.C.A., § 3500 (1951).

prosecution whether used for refreshing purposes or not. In addition, such inspection *would* occur *before* the reports were examined by the trial judge. Further, the Court felt it was not necessary to lay a foundation of inconsistency before defendant had access to such reports, as the Court had previously been thought to say.[10] Rather, the necessary elements were that ". . . for production purposes, it need only appear that the evidence is relevant, competent and outside any exclusionary rule. . . ."[11] After restating the traditional view that the trial judge had discretion to deny inspection of the statements of the witness when not used by him on the witness stand, Justice Brennan said:

> We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of . . . (the witnesses) . . . in its possession, written and, when orally made, as recorded by the F.B.I., touching the events and activities as to which they testified at the trial. We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purposes of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less. The practice of producing documents to the trial judge for his determination of relevancy and materiality, without hearing the accused, is disapproved. . . .[12]

The *Jencks* decision was quickly followed in *United States v. Matles*,[13] a proceeding to cancel a certificate of naturalization. In the district court trial, heard several months before *Jencks*, certain statements given government agents by witnesses who testified against the defendant were suppressed on the basis of the traditional view. Relying on *Jencks*, the defendant moved for a new trial. The motion was granted to the extent of opening the judgment for the purpose of taking the testimony, on cross-examination, of the government witnesses.

On September 2, 1957, Public Law 85-269 quickly modified the *Jencks* rule, providing that no statement or report in the possession of the United States which was made by a government witness or prospective witness ". . . shall be the subject of subpoena, discovery or inspection until said witness has testified on direct examination in the trial of the case."[14] The law

10 Gordon v. United States, 344 U.S. 414, 73 Sup. Ct. 369 (1953).

11 United States v. Jencks, 353 U.S. 657, 77 Sup. Ct. 1007, 1014 (1957).

12 Id. at 1014.

13 154 F. Supp. 574 (E.D.N.Y., 1957).

14 18 U.S.C.A., § 3500 (1951). Paragraph (b) provided that after a witness had testified on direct examination, the court

> shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of 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.

was intended to limit "fishing expeditions" by the defense, made possible by the Court's very broad holding in *Jencks*, which enabled counsel for the defense to inspect all statements of the witness in possession of the prosecution whether or not used for refreshment purposes or related to his testimony in the case.

The United States Supreme Court in *United States v. Palermo*[15] interpreted the aim of the statute to restrict the use of the word "statement" to impeachment purposes only; that is, to limit the right of inspection for use in cross-examination to statements and reports for which the witness, not the government, was responsible. No such limitation arose in *Jencks*.

People v. Moses[16] was the first Illinois criminal case making prior witness's statements available to the defense. In *Moses*, a prosecution for armed robbery, three witnesses for the prosecution gave statements concerning the robbery in question to the police. The defendant subpoenaed the records of the police in attempts to obtain the statements. The trial judge ordered that the documents be produced and some were in turn given to the defense counsel. Two records, however, both of which were reports of the investigating officers and which contained the statements in question, were regarded by the trial court as interdepartmental in nature and not public records. For that reason, they were not subject to defense inspection. The defendant contended that this ruling deprived him of a fair trial. On appeal, the defendant prevailed. Following *Gordon v. United States*[17] (*Jencks* was not to be decided until several weeks later), the court held that the defense had a right to such records if they were contradictory to the prosecution witness's present testimony. For that reason, the court felt reversible error had been committed.

In *People v. Wolff*,[18] Illinois for the first time expressly referred to and followed the Federal rule. In this case, the defendant and another were convicted of armed robbery. During the trial, a key prosecution witness had testified that he made a statement to the police but was unable to recall if it had been reduced to writing. Further cross-examination on that point was objected to by the prosecution and the objection was sustained. After con-

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Paragraph (c) provided that if the United States claimed such statements contained matter not related to the subject matter of the testimony of the witness, the court should order such statement produced for the court's inspection. The court could then delete unrelated matter, directing delivery of the remainder directly to the defendant. The word "statement," as used in the statute, was defined to mean a written statement of the witness either signed or otherwise "approved by him;" or a stenographic, mechanical, electrical, or other recording or transcript which was 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."

15 360 U.S. 343, 79 Sup. Ct. 1217 (1959), *reh'g denied*, 361 U.S. 855, 80 Sup. Ct. 41 (1959).

16 11 Ill. 2d 284, 142 N.E.2d 197 (1960).

17 344 U.S. 414, 73 Sup. Ct. 369 (1953).

18 19 Ill. 2d 318, 167 N.E.2d 197 (1960).

viction, the defendant appealed, contending his attempts to lay a foundation entitling him to see all the statements of the witness in the possession of the prosecution were thereby frustrated. The Illinois Supreme Court agreed. Great stress was placed upon both *Jencks* and Public Law 85-269; although suggesting these were not binding upon it, the court, through Justice Daily, discussed the problem at hand:

> Whether to adopt the Federal rule or to retain the traditional view that delivery of documents to an accused rests in the discretion of the trial judge in any case, presents a difficult choice. While the Federal rule is one of procedure, and therefore not binding before us, it is at the same time the latest and most thorough approach to the problem. Outside of these persuasions, we cannot help but be mindful of the observation in the Palermo case that "the commands of the Constitution were . . . close to the surface" of the decision in the *Jencks* case. Accordingly, we adopt the view that where no privilege exists, and where the relevancy and *competency* of a statement or report has been established, the trial judge *shall order* the document delivered directly to the accused for his *inspection* and use for *impeachment* purposes. However, if the prosecution claims that any document ordered to be produced contains matter which does not relate to the testimony of the witness sought to be impeached, the trial judge will inspect the document and may, at his discretion, *delete unrelated matters* before delivery is made to the accused.[19] (Emphasis supplied.)

Thus, the court adopted the pertinent provisions of the Federal rule, including the requirement that the demand be for specific statements written by the witness or recorded by the prosecution. In addition, the production was specifically limited to impeachment purposes. Said the court:

> All authorities examined agree that use of documents produced under the rule is restricted to *impeachment*, thus it is held that only statements or reports which could properly be called the witness's *own words* should be made available to the defense. More specifically, as pointed out by the Supreme Court of the United States, the *demand* must be for "specific statements which had been written by the witness or, if orally made, as recorded by agents of the government.[20] (Emphasis supplied.)

Since the Court had required in *Wolff* that any statement be in the witness's own words, the Court in *Scott* was hard-pressed to find in Officer Flynn's testimony evidence that the report met this requirement. Flynn replied "Yes" when asked: "Before testifying here today, did you go back through any of your reports or writings . . . to refresh your memory . . . ?" Flynn also said that among the writings referred to was the report in question. The Court construed this as indicating the report was in Flynn's own words. Justice Underwood stated:

> It is thus apparent that the only proof in the record as to this does

[19] Id. at 201.
[20] Id. at 199.

> indicate that some portion, at least, of the refreshing material was prepared by the witness in his own words and was available to defendant under our prior decisions.[21]

In summary, it clearly appears that under the Illinois adoption of the Federal rule, as clarified in *Scott*, the defendant in a criminal prosecution may have access to a testifying witness's prior statements which are in the hands of the prosecution. That is true regardless of whether the statements are used in refreshing memory while on the stand or not.[22]

R. HANKIN

PATERNITY[1]—PRESUMPTION OF LEGITIMACY—PROOF NECESSARY TO REBUT PRESUMPTION—In *People v. Monroe*, 43 Ill. App. 2d 1, 192 N.E.2d 691 (2d Dist. 1963), the Appellate Court of Illinois was confronted with the question of whether the presumption of legitimacy of a child conceived during wedlock was overcome by the wife's testimony that she had no intercourse with her husband during the possible period of conception. In the trial court, the jury found that the evidence presented by the wife was sufficient to rebut the presumption and that the defendant paramour was the father of her child. On appeal, the defendant contended that the pre-

21 People v. Scott, 29 Ill. 2d 97, 193 N.E.2d 814, 821 (1963).

22 Interestingly, it is equally apparent that the United States Court of Appeals, Seventh Circuit, feels the traditional view should prevail in civil litigation; that no absolute right exists in the examining party to demand inspection of a writing not used by the testifying witness in refreshing his memory on the stand. In Goldman v. Checker Cab Co., 325 F.2d 853 (7th Cir. 1963), decided since the Scott decision, the plaintiff brought an action for alleged injuries sustained while a passenger in the defendant's taxi which was allegedly struck from the rear by another of the defendant's vehicles. The Court held that the trial court erroneously quashed the deposition of the plaintiff's physician who had treated the plaintiff from the date of the accident to the trial. The osteopath, testifying in his office from memory alone, refused the defendant's demand that he produce his records of the treatment of the plaintiff. For that reason, the trial court quashed he deposition. In reviewing the transpirings below, the Court of Appeals cited Echert, but made no mention of Jencks. Justice Kiley, speaking for the Court said: "Since the doctor testified from memory alone, defendant was not entiled to have the records produced at the taking of the deposition. Echert v. United States. . . . The opportunity given by the district court to bring the doctor from Missouri with his records did not cure the error. . . . If defendant wishes to obtain Dr. Gould's records, it has the opportunity to do so by appropriate procedures on remand."

An interesting question which arises inferentially in Goldman v. Checker Cab Co. is whether the decision limits the discretion of the trial court, previously considered part and parcel of the traditional view. The question may be answered when it is remembered that since the witness's testimony was under deposition, the trial court acutally had no discretion to compel inspection. Therefore, since there is no absolute right under the traditional view to inspect, no reason then existed to quash the deposition, especially in view of Fed. R. Civ. P., Rule 45(b), which provides: "For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein. . . ."

1 Ill. Rev. Stat. ch. 106 3/4 (1963).