

# Evidence - Production of Documents - Right of Accused to Inspect Prior Statements of Government Witnesses

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ber of harmless and legitimate uses, justifies a requirement of proof that hypodermic instruments were intended to be used in a prohibited manner. The *Nicolosi* and *Johnson* cases contain no indication that in order to be found guilty of unlawful possession of a narcotic drug the possessor must intend to use the drug at all. Whether the ruling and the language of the instant case were intended to apply as well to cases involving possession of narcotic drugs is not clear. As there is very limited legitimate use to be made of narcotics, it is submitted that the court might very well intend to draw a distinction between the possession of hypodermic instruments and the possession of narcotics, and in the latter case to require only a showing that the possessor know that he possessed a narcotic.

*Daniel J. McGee*

EVIDENCE — PRODUCTION OF DOCUMENTS — RIGHT OF ACCUSED TO INSPECT PRIOR STATEMENTS OF GOVERNMENT WITNESSES

Defendant was convicted in federal district court of falsely swearing that he was not a Communist. On cross examination two government witnesses admitted making oral and written reports to the FBI concerning alleged Communist activities of the defendant. Defendant then moved that the court order production of these reports by the government for inspection and use in impeaching the witnesses. The motion was denied. The court of appeals upheld this denial on the ground that defendant had not laid the necessary foundation of inconsistency between the contents of the reports and the witnesses' testimony. On certiorari to the United States Supreme Court, *held*, reversed and remanded. A foundation of inconsistency is not required for production. It is enough that the specific prior statements, written or orally made, touch the events and activities about which the witnesses have testified. Further, the practice of giving documents to the trial judge for his decision as to their relevancy without first allowing the defendant to see them and present arguments for their production is disapproved. Finally, if the government under a claim of privilege withholds the reports when ordered to produce them, the criminal action should be dismissed. *Jencks v. United States*, 353 U.S. 657 (1957).

In prosecutions involving the question of production by the government of prior statements of its witnesses, the federal

criminal cases which have been appealed involve a typical situation. The government introduces a witness. Counsel for defendant cross examines the witness and learns of a prior statement made to the government. In order to see whether the prior statement can be used to impeach the witness' credibility,<sup>1</sup> defendant moves that the court compel the government to produce it. If the court overrules the motion, the issues on appeal are whether defendant can compel the prosecution to produce, during trial, the prior statements of its witnesses, and if so, what foundation must be laid to compel production.<sup>2</sup> A further question concerns the proper procedure the trial judge should follow in determining whether the prior statement is relevant for impeachment purposes.

Two federal cases in the 1920's<sup>3</sup> adhered to the general rule that defendant could not compel production of prior statements of government witnesses.<sup>4</sup> In 1932, however, the Fourth Circuit held defendant did have a right to production,<sup>5</sup> and the Second Circuit indicated such a right might exist under the proper circumstances.<sup>6</sup> Nevertheless, during the next two decades the United States Supreme Court and most of the circuit courts held that defendant could not compel production of prior statements.<sup>7</sup> The Second Circuit did not follow these cases, however, and in 1944 re-emphasized its former dictum<sup>8</sup> and held that defendant had a right to production provided he first showed contradiction

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1. Such a prior contradictory statement is introduced not for its truth, but to neutralize the witness' testimony. 3 WIGMORE, EVIDENCE § 1018, n. 3 (3d ed. 1940). In the federal system the fact that the witness admits the prior statement contradicts his testimony does not preclude introduction of the statement into evidence. *Gordon v. United States*, 344 U.S. 414, 420 (1953); *United States v. Krulewicz*, 145 F.2d 76, 79 (2d Cir. 1944).

2. Defendant in a federal criminal case has the right to discovery of documents before trial by virtue of FED. R. CRIM. P. 16, 17. The right to production *during* trial, however, has developed through case law.

3. *Lennon v. United States*, 20 F.2d 490 (8th Cir. 1927); *Arnstein v. United States*, 296 Fed. 946 (D.C. Cir. 1924) (prior statement in possession of *state* prosecutor).

4. 8 WIGMORE, EVIDENCE § 2224, n. 1 (3d ed. 1940). See also Annot., 52 A.L.R. 207 (1928), and cases cited therein.

5. *Asgill v. United States*, 60 F.2d 776 (4th Cir. 1932).

6. *United States v. Rosenfeld*, 57 F.2d 74 (2d Cir. 1932) (dictum).

7. *Goldman v. United States*, 316 U.S. 129 (1942); *Neal v. United States*, 203 F.2d 111 (5th Cir. 1953); *D'Aquino v. United States*, 192 F.2d 338 (9th Cir. 1951); *Kaufman v. United States*, 163 F.2d 404 (6th Cir. 1947); *Boehm v. United States*, 123 F.2d 791 (8th Cir. 1941); *Little v. United States*, 93 F.2d 401 (8th Cir. 1937); *United States v. Toner*, 77 F. Supp. 908 (E.D. Pa. 1948), reversed on other grounds, 173 F.2d 140 (3d Cir. 1949). *Contra*, *United States v. Schneiderman*, 106 F. Supp. 731 (S.D. Cal. 1952) (factual situation and rationale of the court strikingly similar to that of the instant case).

8. *United States v. Rosenfeld*, 57 F.2d 74 (2d Cir. 1932).

between the prior statement and the witness' testimony.<sup>9</sup> In five subsequent decisions the Second Circuit adhered to this rule.<sup>10</sup> Finally, in 1953 the United States Supreme Court in *Gordon v. United States*<sup>11</sup> recognized the right of a defendant to production, although to what extent it adopted the Second Circuit's limitation on production was not entirely clear.<sup>12</sup> The first federal case to apply the *Gordon* holding interpreted that decision as meaning that defendant could compel production merely by making certain his demand was for *specific* documents in the hands of the prosecution.<sup>13</sup> Subsequent cases, however, held that the *Gordon* decision had adopted the position that defendant must lay a foundation of inconsistency before production would be compelled.<sup>14</sup>

In the instant case the court interpreted the *Gordon* decision as requiring only that defendant demand specific documents containing prior statements which touch the testimony of the witness. The court pointed out a practical difficulty inherent in the majority of the previous interpretations; only rarely could a defendant know that the prior statement contradicted the testimony unless the witness admitted this on the stand.<sup>15</sup> In the

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9. *United States v. Krulewitch*, 145 F.2d 76 (2d Cir. 1944) (prior statement exculpated the defendant).

10. *United States v. De Normand*, 149 F.2d 622 (2d Cir. 1945) (contradictions of minor nature; refusal to compel production upheld); *United States v. Simonds*, 148 F.2d 177 (2d Cir. 1945) (inspection by judge revealed no contradiction; production denied); *United States v. Cohen*, 148 F.2d 94 (2d Cir. 1945) (same); *United States v. Ebeling*, 146 F.2d 254 (2d Cir. 1944) (for production purposes, prior statement must show contradiction; but note dissent in which Justice Frank denied that the *Krulewitch* case imposed such a restriction); *United States v. Cohen*, 145 F.2d 82 (2d Cir. 1944) (judge need not compel production of non-contradictory statement); *cf. United States v. Walker*, 190 F.2d 481 (2d Cir. 1951) (no showing of contradiction; production refused).

11. *Gordon v. United States*, 344 U.S. 414 (1953).

12. Referring to the facts of the case, the court stated that "defense counsel laid a foundation for his demand by showing that the documents . . . were made by the Government's witness under examination, [and] were contradictory of his present testimony." *Id.* at 418. The court next seemed to characterize the proper demand broadly as one "for production of these specific documents," and which "did not propose any broad or blind fishing expedition among documents possessed by the Government on the chance that something impeaching might turn up." *Id.* at 419.

13. *United States v. Mesarosh*, 116 F. Supp. 345 (W.D. Pa. 1953).

14. *United States v. Fontana*, 231 F.2d 807 (3d Cir. 1956) (disapproved production with no foundation of inconsistency, yet did not reverse); *United States v. Bookie*, 229 F.2d 130 (7th Cir. 1956); *United States v. Lightfoot*, 228 F.2d 861 (7th Cir. 1956), cert. granted, 350 U.S. 992 (1955); *Scanlon v. United States*, 223 F.2d 382 (1st Cir. 1955); *Simmons v. United States*, 220 F.2d 377 (D.C. Cir. 1954); *Shelton v. United States*, 205 F.2d 806 (5th Cir. 1953). *But see United States v. Lebron*, 222 F.2d 531 (2d Cir. 1955) (trial judge should compel production if he finds anything contradictory in the prior statement).

15. See *United States v. Burr*, 25 Fed. Cas. 187, No. 14694 (C.C. Va. 1807) (cited in the instant case).

absence of such an admission a defendant might have been denied inspection of a document valuable for impeachment purposes,<sup>16</sup> under the previous majority view.

The problem of production has involved an additional question, that of the proper procedure for determining relevancy of the prior statement for impeachment purposes. Under the previous jurisprudence, the decision as to the statement's relevancy was uniformly thought to depend on the discretion of the trial court.<sup>17</sup> The approved procedure was for the trial judge to examine the prior statement in his chambers.<sup>18</sup> If he refused to allow inspection by the defendant because the document was irrelevant, he was to seal it in the record to be sent up on appeal.<sup>19</sup> Decisions varied as to whether the denial of inspection was merely nonprejudicial error<sup>20</sup> or not error at all.<sup>21</sup>

The majority opinion in the instant case disapproved of the customary practice of allowing the trial judge to decide the statement's relevancy without first letting the defendant see it.<sup>22</sup> It was felt that the trial judge should hear defendant's arguments before deciding the question of relevancy, and that defendant could only present such arguments after he had seen the documents. This innovation prompted an Act of Congress which re-established the old custom of allowing the judge to determine relevancy in chambers.<sup>23</sup> The act provides that the judge may excise portions of the statement he considers irrelevant, but that the entire document must be sent up with the record, should defendant appeal his ruling.

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16. See *United States v. Schneiderman*, 106 F. Supp. 731 (S.D. Cal. 1952) (rationale similar to that of the instant case).

17. *Simmons v. United States*, 220 F.2d 377 (D.C. Cir. 1954); *Neal v. United States*, 203 F.2d 111 (5th Cir. 1953); *United States v. Coplon*, 186 F.2d 629 (2d Cir. 1950); *Kaufman v. United States*, 163 F.2d 404 (6th Cir. 1947); *United States v. Beekman*, 155 F.2d 580 (2d Cir. 1946).

18. *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950); *United States v. Beekman*, 155 F.2d 580 (2d Cir. 1946); *United States v. Lebron*, 222 F.2d 531 (2d Cir. 1955); *Shelton v. United States*, 205 F.2d 806 (5th Cir. 1953); *United States v. Grayson*, 166 F.2d 863 (2d Cir. 1948); *United States v. Simonds*, 148 F.2d 177 (2d Cir. 1945); *United States v. Ebeling*, 146 F.2d 254 (2d Cir. 1944); *cf. Scales v. United States*, 227 F.2d 584 (4th Cir. 1955), cert. granted, 350 U.S. 992 (1955).

19. *United States v. Simonds*, 148 F.2d 177 (2d Cir. 1945); *United States v. Ebeling*, 146 F.2d 254 (2d Cir. 1944).

20. *United States v. Walker*, 190 F.2d 481 (2d Cir. 1951); *United States v. De Normand*, 149 F.2d 622 (2d Cir. 1945).

21. *E.g.*, *Scales v. United States*, 227 F.2d 581 (4th Cir. 1955), cert. granted, 350 U.S. 992 (1955); *United States v. Lebron*, 222 F.2d 531 (2d Cir. 1955); *Shelton v. United States*, 205 F.2d 806 (5th Cir. 1953).

22. *Jencks v. United States*, 353 U.S. 657, 669 (1957).

23. 71 STAT. 595 (1957), 18 U.S.C. § 3500 (Supp. 1957).

A problem distinct from that of production occurs in cases where the government refuses to produce prior statements, claiming they are privileged. Although some decisions prior to the instant case indicated that the trial judge should be scrupulous in protecting the secrecy of the FBI files,<sup>24</sup> the majority of the federal cases held that the prosecution could not, by claiming privilege, suppress documents touching the pertinent activities of the accused,<sup>25</sup> and that a refusal to produce relevant prior statements would result in dismissal of the action.<sup>26</sup> While it is true that this rule evolved from a balancing of the government's interest in secrecy against the defendant's interest in material relevant to his defense,<sup>27</sup> it appears that the procedure of having the trial judge balance these interests in dealing with a claim of privilege was no longer followed; it had been decided as a matter of law that the defendant's interest was paramount. The majority in the instant case simply reaffirmed the rule that withholding relevant documents on the ground of privilege would result in dismissal of the case. The dissenters, however, seemed to feel that the question of privilege was still a matter to be decided by the trial judge, once he had inspected the statement. Apparently one aim of the Act of Congress was to allow the judge to do just that.<sup>28</sup> Yet the act does not use the word "privilege" when it speaks of inspection of the statement by the trial court, and so the rule on privilege re-emphasized by the majority in the instant case would seem to be changed by the act only in one particular. Formerly, if the government withheld the prior

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24. *Bowman Dairy Co. v. United States*, 341 U.S. 214 (1951); *Goldman v. United States*, 316 U.S. 129 (1942); *United States v. Bortlik*, 119 F. Supp. 425 (N.D. Pa. 1954); *United States v. Schneiderman*, 106 F. Supp. 731 (S.D. Cal. 1952).

25. *Roviaro v. United States*, 353 U.S. 53 (1957); *United States v. Reynolds*, 345 U.S. 1 (1953) (dictum); *Christoffel v. United States*, 200 F.2d 734 (D.C. Cir. 1952); *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950); *United States v. Grayson*, 166 F.2d 863 (2d Cir. 1948); *United States v. Beekman*, 155 F.2d 580 (2d Cir. 1946); *United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944); *United States v. Mesarosh*, 116 F. Supp. 345 (W.D. Pa. 1953).

26. *Roviaro v. United States*, 353 U.S. 53 (1957); *United States v. Reynolds*, 345 U.S. 1 (1953) (dictum); *Christoffel v. United States*, 200 F.2d 734 (D.C. Cir. 1952); *United States v. Grayson*, 166 F.2d 863 (2d Cir. 1948). *But see* *United States v. Schneiderman*, 106 F. Supp. 731 (S.D. Cal. 1952) (acknowledges possibility of striking witness' testimony instead of dismissing the case). Apparently, however, the case would be remanded to allow the government to produce the statement and continue prosecution. *Roviaro v. United States*, 353 U.S. 53 (1957); *Christoffel v. United States*, 200 F.2d 734 (D.C. Cir. 1952) (*semble*); *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950); *United States v. Beekman*, 155 F.2d 580 (2d Cir. 1946); *United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944).

27. *United States v. Schneiderman*, 106 F. Supp. 731, 736 (S.D. Cal. 1952).

28. S. REP. No. 569, 85th Cong., 1st Sess. 2 (1957).

statement of its witness, the trial court would dismiss the action; under the act the trial court may either strike the testimony of that witness or, if the interests of justice require it, declare a mistrial.<sup>29</sup>

Thus the instant case and the ensuing act appear to have settled the clash between the interests of privilege and production. The defendant in a federal criminal case may, by demanding specific documents, compel production of prior statements touching the testimony of a government witness who has testified,<sup>30</sup> and the trial judge will determine relevancy of these statements in chambers.<sup>31</sup> However, should the government elect to claim its privilege and withhold the documents, the witness' testimony will be stricken or a mistrial declared.<sup>32</sup>

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#### EVIDENCE — PRODUCTION OF DOCUMENTS — RIGHT OF ACCUSED TO INSPECT PRIOR STATEMENTS OF STATE WITNESSES

Defendant was convicted of rape. At the trial the prosecutrix stated during cross examination that she had made a written statement to the police just after the alleged offense. Defendant moved for production of the statement by the prosecution for possible use in impeaching the prosecutrix.<sup>1</sup> The district attorney offered to produce the statement voluntarily if defendant would read all of it to the jury, but defendant refused this conditional offer. The trial court then declined to compel production, and the Louisiana Supreme Court *held*, affirmed. Defendant had not laid the foundation necessary for production by showing either that production of the prior statement was "essential" to defendant or "was contrary in any respect" to the prosecutrix's testimony. *State v. Weston*, 232 La. 766, 95 So.2d 305 (1957).

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29. 71 STAT. 595 (1957), 18 U.S.C. § 3500 (Supp. 1957).

30. *Jencks v. United States*, 353 U.S. 657 (1957). However, defendant cannot utilize this procedure *prior* to trial to obtain statements of a prospective government witness. *United States v. Benson*, 20 F.R.D. 602 (S.D.N.Y. 1957).

31. 71 STAT. 595 (1957), 18 U.S.C. § 3500 (Supp. 1957).

32. *Ibid.*

1. The credibility of a witness may be impeached by showing that the witness has made a prior statement which contradicts his testimony, provided a foundation is laid by calling the attention of the witness to the circumstances in which the prior statement was made. LA. R.S. 15:493 (1950). If the prior statement is introduced, it does not serve to prove the truth of what it says, but is admitted solely to neutralize the testimony of the witness. *E.g.*, *State v. Bodoïn*, 153 La. 641, 96 So. 501 (1923).