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Introduction

The Jencks Act (Act)[1†] unconstitutionally impedes a defendant's access to justice and due process of law by limiting a defendant's ability to receive information that is crucial to an effective cross-examination of cooperating witnesses. In the cash-run underworld where written records are few, statements made by accomplices and informants who testify under plea arrangements have become the bedrock of complex federal narcotics prosecutions. Such witnesses have strong incentives to distort their testimony and point the finger at the defendant on trial. A system that prides itself on fair play cannot tolerate artificial constraints on the truth-seeking function that the adversary process serves.

The Act currently requires federal prosecutors to disclose all of its witness' "statements."[2] However, the timing, and indeed, the basic nature of that right are circumscribed. The statute provides, in relevant part that "[a]fter 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. . . ."[3] However, the measure limits the term "statement" to "(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 and recorded contemporaneously with the making of such oral statement . . . ."[4] Therefore, a witness "statement" as defined by the Act does not include any number of notes, data of proffers, discussions, or conversations that arise during testimony preparation with prosecutors.

Notes and data of proffers and debriefing sessions often reflect the various ways in which witness statements shift from the first interview to the actual trial. By limiting access to these notes and data, the Act effectively inhibits any attempts by defense attorneys at using these materials to impeach unreliable witnesses who are most often motivated by plea deals. Accordingly, defendants are denied their constitutional right to effective assistance of counsel because an attorney cannot effectively represent a client when informants can take and distort the truth or sometimes outright lie on the stand. Although the truth may sometimes prevail through cross-examination, this is not always the case. This article discusses the motivations behind witness dissembling, the problems that such false or embellished testimony presents for juries and defendants, and finally, what can be done to remedy the situation.

Judicial Deference to the Jencks Act

Federal courts have historically overruled defense counsel's requests for disclosure of case agents' FBI "Form 302" interview reports and notes generated during proffers and debriefings of cooperating witnesses.[5] These decisions are typically upheld unless the agent herself testifies;[6] the notes are a full transcription of the agent's discussion with the witness,[7] or the witness reviewed and approved or adopted the notes.[8] However, demanding the notes be substantially *verbatim* has sometimes led to seemingly anomalous results.[9]

In general, the standard of review for appellate courts is "abuse of discretion"[10] or "clear error."[11] However, appellate courts are not especially hospitable to alleged violations of the Act and tend to apply a "harmless error" standard for alleged violations of the Act and focus tends to turn on whether the violation was deliberate or inadvertent.[12] If the notes are of an exculpatory in nature and pertinent under the distinct but somewhat overlapping demands of *Brady v. Maryland*,[13] then a different analysis comes into play. An alleged *Brady* violation is adjudicated by determining whether the failure to disclose significantly undermined the verdict's fairness.[14] Therefore, in the normal run of cases, defendants carry a heavy burden on appeal to show prejudice of a decision to deny discovery of case agents' notes.[15]

Empirical Evidence Reveals Grave Flaws in the Act's Assumptions

The Pitfalls of Prosecuting Cases that Depend on Cooperators' Testimony

Modern federal narcotics and gang violence prosecutions depend heavily on the testimony of cooperating witnesses.[16] As one scholarly commentator has noted, "[t]hese are deemed 'historical cases' because virtually all of the evidence concerns acts that occurred in the past, often the distant past, for which there is only 'one rat after another.'"[17] In this respect, the Supreme Court has long recognized the "serious questions of credibility" posed by the use of informants testimony.[18]

All parties involved in the trial process understand – or at least are instructed at the close of evidence – that both informants and accomplices are prone to shade the truth in order to lessen or avoid possible incarceration.[19] It is assumed that the defense will be able to expose the witnesses' motivation and mendacity through cross-examination, and in turn, that the jury will be able to assess credibility and "make the right call."[20]

As an empirical proposition, these assumptions are very much a myth. The Federal Rules of Criminal Procedure's provisions for discovery[21] and the Jencks Act[22] operate in a way that can deprive defendants of their right to effective counsel in these types of cases. These statutes have been applied to preclude the defense from access to a basic tool necessary to advance an informed cross-examination in a complex twenty-first century criminal case – the documentary records that may reflect shifting stories given by accomplices' metamorphosis into trial witnesses, during proffer sessions.

Thwarting the defense's access to documentary information necessary to achieve effective cross-examination of cooperating witnesses disserves the truth-seeking function of the adversary system. Restricting disclosure wrongly assumes that defense counsel can, or are willing, to cross-examine blindly. These restrictions impede the jury's ability to evaluate the credibility of witnesses. Furthermore, contrary to popular belief, the ability of people to detect falsehood is statistically not much more accurate than flipping a coin.[23] The Jencks Act and Rule 26.2 of the Federal Rules of Criminal Procedure are skewed in a way that unconstitutionally maintains the low likelihood of detecting falsehoods in cooperating witness testimony, at the expense of defendants' right to due process.

The Act and the Associated Criminal Discovery Rules Rest on an Empirically Flawed Assumption

As Thomas Paine once observed, "[a] long habit of not thinking a thing wrong, gives it a superficial appearance of being right, and raises at first a formidable outcry in defense of custom."[24] The custom of utilizing the Jencks Act to preclude disclosure of notes of cooperating witnesses' statements made during the course of proffers and debriefings denies defendants access to potentially valuable impeachment material. The statute itself is a relic of the latter stages of the McCarthy era and was enacted under circumstances, which, when examined in light of contemporary legislative practice, seem remarkably attenuated.[25] The courts themselves have been inconsistent in explaining why the Act was passed in the first place.[26]

Recent scholarly authorities have questioned this shortfall. In the same fashion that *Crawford v. Washington*[27] emerged in the Supreme Court following a vigorous academic debate over the Confrontation Clause,[28] the time has come to tackle this issue head-on and to address the unconstitutionality, as applied, of the underlying policy in cases dependent on the testimony of cooperators working off plea agreements.[29]

Refusing access to case agents' notes of proffer and debriefing conferences with cooperating witnesses is based on an uncritical assessment and application of the Jencks Act and Rule 26.2 of the Federal Rules of Criminal Procedure. The courts have claimed that these provisions are meant to protect government files from so-called vexatious "fishing expeditions" while assuring defendants a right to compel production of "statements" that might be useful for impeachment.[30] That claim, it is submitted, is overstated. Both the Act and the discovery rule implicitly fail to recognize that "memory is highly fallible, and the process of memory retrieval and reconstruction [is] extremely fragile."[31] Neither the statute nor the rule accounts for the possibility that through cooperation and debriefing sessions with agents and prosecutors, witnesses' accounts can be adjusted over time, and may emerge in a form that differs greatly from what the witness claimed the first time that he sat down with Government agents. This dovetails into another factor recognized by some courts. In determining whether statements can be used for impeachment purposes, the witness's prior account need not be a flat contradiction of her trial testimony. An omission from the report of facts related at trial or a contrast in the way certain facts are emphasized may be quite material to the defense.[32]

Witness preparation has been called, perhaps not unfairly, the "[p]rofession's [d]irty [l]ittle [s]ecret."[33] It has been likened to "an art form" in which "American prosecutors are among its most practiced and capable artists."[34] One need not look any further than the Supreme Court's decision in *Kyles v. Whitley*[35] to discern an example of a key witness whose account of a crime varied so substantially between the time the police first interviewed him to when he testified that his statement raised "a substantial implication that the prosecutor had coached him to give it."[36]

A similar issue arose in *Spicer v. Roxbury Correctional Institute*.[37] In that case, one witness, Brown, faced pending narcotics charges when he met with his lawyer on various occasions.[38] Brown claimed that the defendant, Spicer, had been planning a robbery, despite not having seen him on the day of a brutal assault for which Spicer ultimately was convicted.[39] Seeking a bargain in his own case, Brown then directed his lawyer go to the prosecutor with this information.[40] During the prosecutor's interview, Brown suddenly claimed to have seen Spicer fleeing from the crime scene, making Brown an eyewitness, and thus a key element in the case because of other witnesses' inconclusive identification testimony.[41] In court, Brown repeated his claim, but added that he had told his lawyer the same account prior to the plea agreement.[42] However, the prosecutor never informed Spicer's counsel of the inconsistency between Brown's initial proffer to the prosecutor and his more expansive and inculpatory version of the facts.[43] Accordingly, the Fourth Circuit found that habeas was due because the inconsistency in Brown's testimony could have served as a powerful tool for Spicer had he known of it at the time of his trial.[44]

The concerns illustrated in *Kyles* and *Spicer* are hardly novel as "[m]any studies describe the distorting effects of suggestive questioning."[45] As these cases illustrate, the potential prejudice arising from the shifting testimony of pathological liars and cooperating witnesses after these persons have sat through private proffer and debriefing sessions with law enforcement agents is palpable.

Cooperating Witnesses have Numerous Motivations to Dissemble

An estimated one percent of Americans are pathological liars.[46] Putting these people aside for the moment, "[a]ccomplices, if they give information or testify, may have a natural tendency to lie in order to minimize their part in the crime."[47] Their motivations to perjure themselves may vary, but there is scant doubt that any number of factors, including the desire to minimize incarceration, may motivate cooperators.[48] Fear, revenge, the belief that if he or she does not testify against a co-defendant the co-defendant may testify against him, as a means of reordering a previously hierarchical relationship by testifying against a superior, the desire to take over an organization after helping to put the co-defendant away, and so forth, all constitute possible motivations to commit perjury.[49]

Cooperating witnesses, which in the underlying cases constitute the vast majority of the law enforcement witnesses, are susceptible to several extraneous influences. They are "(1) easily manipulated by coercive and suggestive interviewing techniques; (2) readily capable of giving false and embellished

testimony with the prosecutor's knowledge, acquiescence, indifference, or ignorance; (3) readily capable of creating false impressions by omissions or memory alterations that in the absence of any recordation or documentation eludes disclosure and impeachment; and (4) able to present . . . testimony to the jury in a truthful and convincing manner, which because of the nature of the cooperation process is difficult to impeach through cross-examination."[50]

Two other factors exacerbate the problem of shifting accounts arising from proffer sessions. The Sentencing Guidelines, for one, "create a powerful incentive for cooperators to exaggerate and falsify information."[51] It blinks at reality to think that the Guidelines do not create a powerful incentive to lie and derail the truth-seeking purpose of the criminal justice system.[52] Even within the Justice Department, "there are few, if any, internal standards for substantial assistance to guide the discretion of prosecutors" and the Department's *Principles of Federal Prosecution* "do not require a prosecutor to take into account the truthfulness, reliability, or completeness of a defendant's testimony when making a substantial assistance determination."[53] At the very least, "there is serious concern that this unregulated process corrupts the truth because it 'encourage[s] some defendants to exaggerate or falsify information' in order to obtain their [U.S.S.G.] 5K1.1 letter."[54]

Aside from the Guidelines' sentencing regime, complex prosecutions developed through the use of informants are characterized by another problem: the nature of the interaction between prosecution agents and cooperators. The problem is:

> Witnesses don't just take the stand and produce nice narratives in response to non-leading questions with out considerable work that the uninitiated cannot possibly appreciate.[55]
>
> The process by which prosecutors debrief the cooperating witness during proffer sessions and then prepare the witness to testify at trial is typically lengthy, measured in multiple interviews that occur over many weeks, if not months.[56]
>
> As an experienced appellate judge has remarked, "[i]f you decide to call an informer as a witness, you will end up spending much time with him preparing for his testimony."[57]

Experts describe these proffer and debriefing conferences as "the flashpoint which triggers perjury"[58] and "the black hole of corroboration"[59] because they are fertile ground for evidence of cooperators' inconsistent statements and bias to surface.[60] "[B]y their own admission these people are criminals, so they have already demonstrated a tendency to disregard legal norms" as well as being "by nature and definition … manipulative and self-interested; after being apprehended for commission of a crime, they have sought to use information in their possession to their advantage by bargaining against their confederates."[61]

As these meetings unfold, cooperating witnesses are able to determine what the prosecutor wants to hear and can shift their recollections accordingly.[62] How prosecutors act during sessions with cooperating witnesses drive the proffer system and ". . . inducements for false testimony are very often the direct result of what prosecutors say at the proffers."[63] As one observer wrote:

> [W]hen a prosecutor tells a defendant or defense counsel what testimony is expected of the defendant (either in detail or in the form of bullet points) in order to qualify for cooperator/leniency/immunity status, the defendant is powerfully motivated to parrot what the prosecution wants and expects to hear. Similarly, if the defendant or his or her counsel provides a proffer of facts, which is then followed by the prosecutor announcing that those facts are insufficient or inaccurate, again the cooperating witness is powerfully motivated to 'change the story' to accommodate the prosecutor's version of the truth.[64]

To be sure, some might retort that the disclosure at trial of subject matter that the Jencks Act permits in conjunction with cross-examination suffices to explore inconsistencies, but, that is a mistaken view. The numerous factors that motivate cooperating witnesses to lie at trial, combined with the prosecutors' encouragement for them to do so, makes it incredibly difficult, if not impossible, for defense attorneys to prevent discrepancies without access to documentation of proffers and debriefing notes.

The criminal justice system has traditionally assumed that attorneys can uncover witness "coaching" through skillful cross-examination, supposedly the "greatest legal engine ever invented for the discovery of truth." The reality is, however, that "there is no empirical basis for this assumption."

Uninformed Cross-examination is not a Panacea

The criminal justice system has traditionally assumed that attorneys can uncover witness "coaching" through skillful cross-examination, supposedly the "greatest legal engine ever invented for the discovery of truth."[65] The reality is, however, that "there is no empirical basis for this assumption."[66]

Studies by The Innocence Project, a national litigation and public policy organization working to exonerate wrongfully convicted individuals[67] demonstrate that "the adversary system alone is not enough to correct the mistaken judgments of prosecutors concerning the testimony of cooperators and jailhouse snitches."[68] Presumably, ethical prosecutors recognize that "any variations in an accomplice witness's proposed testimony could be considered favorable to the defense and the existence of such differences should be disclosed under *Brady*."[69]

On the other hand, not all prosecutors are scrupulous. In *Banks v. Dretke*, the Supreme Court took the Court of Appeals for the Fifth Circuit to task for the court's cursory review of habeas cases.[70] In particular, the Court noted the Fifth Circuit's surprising lack of reference to *Strickler v. Greene*,[71] the controlling precedent on whether cause and prejudice exists for *Brady* prosecutorial misconduct claims.[72] In cases such as *Banks*, a thorough habeas review is necessary because some prosecutors deliberately misrepresent and conceal evidence that is critical to the impeachment of an informant.[73]

Even if all prosecutors err on the side of timely and full disclosure, courts' blind trust that cross-examination will reveal

inconsistencies fails to address the taint that arises when one does not know the process by which the prosecutor questioned the witness or the subtle ways in which an accomplice's story can be reworked over time. Furthermore, the problem is:

> . . . compounded by the fact that prosecutors cannot always know what the value of evidence might be to the defense. They may have no experience in thinking strategically from a defense point of view and they may lack knowledge about how the evidence in question could corroborate the defendant's version of events.[74]

Absent documentation of the underlying process, if the cross-examiner is:

> lacking a factual basis to believe that a witness's memory has been manipulated, that an 'I don't remember' is false or misleading, or that a failure to mention an incriminating fact is the product of improper coaching, it is unlikely that a cross-examiner would focus on the discrepancy, or be able to prepare an effective impeaching strategy about something of which he is ignorant.[75]

Without any documentation of the interview process:

> a jury may not learn whether the cooperating witness made inconsistent statements over the course of the interview process, whether the prosecution inadvertently (or deliberately) fed information to the witness that made the witness's testimony appear more credble and confident than it otherwise would have appeared, or whether the prosecution made any unrecorded threat or inducement to the cooperator that may have motivated the witness to testify.[76]

Such a process surpasses accepted standards of fair play, for, "[t]o shackle counsel so that he cannot effectively seek out the truth and afford the accused the representation which is not his privilege but his absolute right seems seriously to imperil the bedrock presumption of innocence."[77]

Unenlightened Juries are Poor Evaluators of Credibility

Some might suggest that it is reasonable to assume that the jury will make the right call. But a jury cannot always determine credibility by observing a witness's conduct. The fact of the matter is that "[u]nder the most spontaneous circumstances, trial demeanor is an inconsistent barometer of witness credibility. In the case of a well-prepared accomplice, demeanor may be a useless measure at best . . ."[78]

This proposition has been empirically validated over time, as "[d]ozens of studies have been conducted and statistically analyzed. When the studies are combined, a compelling pattern emerges – that as a general rule, people are poor human lie detectors."[79] Not only is the average person's ability to ferret out truth from falsehood about on the order of being "barely better, statistically, than flipping a coin,"[80] but:

> [t]o make matters worse, this research has shown that people are more confident than they should be in their ability to make these judgments – and that accuracy and confidence are not statistically correlated. What that means is that people who are highly confident in their lie detection skills are not more accurate than those who express low to modest levels of confidence.[81]

Even if the information calling the veracity of informant testimony into question ultimately surfaces, the prosecutor's disclosure only after a witness testifies at trial presents obstacles to witness impeachment. In this respect, *United States v. Owens* explains that:

> The failure to provide full disclosure of the government's case early in the proceedings limits a defendant's ability to investigate the background and character of government witnesses and the veracity of their testimony. For example, strict compliance with the Jencks Act necessitates frequent delays and adjournments. Counsel often needs time to digest and investigate the information received. As a practical matter, any thorough investigation at that juncture of the proceedings may usually be impossible, and counsel must do the best that they can in the brief time usually allotted. The court and the jury are inconvenienced by even brief delays; the rights of the defendants are jeopardized because such delays, if granted, often are not sufficient. The restrictions not only impinge upon the right of defendants to a fair trial, but also severely hamper the orderly process of criminal trials. They are wrong in principle and cause delay in practice.[82]

The Remedy

"We know that the traditional assumptions about the adversary system – that the parties are essentially balanced in power and that the truth will emerge in the contest between them – are simply not true in a significant number of cases." [83] Given the above concerns, " … whatever limitations juries may have … it is surely true that more information about the cooperator's odyssey from target to government witness would improve jurors' credibility assessments in this area."[84] And even though prosecutors are supposed to resolve all "doubtful questions in favor of disclosure,"[85] the Government is hardly in an informed position to know what may be useful to defense counsel seeking to probe a prospective trial witness's credibility. Even if they were informed, they have an incentive – such as securing a conviction – to not turn over that information. At a minimum, disclosure of all notes and documentation generated during proffer and debriefing sessions is necessary to place the defense on an even footing in these situations.[86] Disclosure of agents' notes also would be an incentive to encourage honest police work.

Courts do not hesitate in other contexts to strike down irrational rules that lack empirical substantiation. For instance, in *Bechtel v. FCC*,[87] the Court of Appeals for the District of Columbia Circuit determined that no objective evidence existed to support the FCC's so-called owner integration rule, a hoary doctrine that awarded credits towards licensure for applicants who promised to be involved actively in running their sta-

tions.[88] If prospective radio station licensees have a statutoryright under the Administrative Procedure Act[89] not to be subject to arbitrary government action that is rooted in empirically unsound propositions, then it is hard to see why the Constitution should permit a defendant whose liberty is potentially at stake to be subject to equally flawed legislative restrictions.

In light of history and objective realities, the Jencks Act, to the extent it has been applied to restrict access to notes of proffers and debriefings, unconstitutionally abrogates the rights to Due Process and effective assistance of counsel. The courts have and should exercise their supervisory powers to fashion a prophylactic procedural rule requiring disclosure of such notes during the pretrial process.[90]

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[1] 18 U.S.C. § 3500 (2000). The Jencks Act was enacted in the closing moments of the 1957 legislative year as a reaction to the decision in *Jencks v. United States*, 353 U.S. 657 (1957), in which the Supreme Court had ordered the production of statements made to the FBI by informants involved in a celebrated prosecution of alleged communists. Legislation to repeal the Court's decision was introduced the day after it was adopted and the measure was enacted in little over two months.

[2] *Id.* § 3500(c).

[3] *Id.* § 3500(b).

[4] *Id.* § 3500(e)(1)-(2).

[5] *See, e.g.*, United States v. Jordan, 316 F.3d 1215, 1255 (11th Cir. 2003) (reversing dismissal of indictment for prosecutorial misconduct); United States v. Brown, 303 F.3d 582 (5th Cir. 2002) (refusing to allow defense to question FBI agent about the contents of his notes did not violate defendant's Fifth Amendment rights); United States v. Bros. Constr. Co., 219 F.3d 300, 316 (4th Cir. 2000) (rejecting argument that witness "target letters" were a basis for prosecutorial misconduct); United States v. Marrero-Ortiz, 160 F.3d 768, 775-76 (1st Cir. 1998); United States v. Donato, 99 F.3d 426, 433 (D.C. Cir. 1996); United States v. Redding, 16 F.3d 298, 301 (8th Cir. 1994); United States v. Gonzalez-Sanchez, 825 F.2d 572, 586-87 (1st Cir. 1987).

[6] *See, e.g.*, United States v. Welch, 810 F.2d 485, 490-91 (5th Cir. 1987).

[7] *See, e.g.*, United States v. Oruche, 484 F.3d 590, 597-98 (D.C. Cir. 2007) (citing Palermo v. United States, 360 U.S. 343, 352-53 (1959)); *Jordan*, 316 F.3d at 1255 (finding FBI Form 302 reports not sufficiently verbatim to warrant disclosure); Williamson v. Moore, 221 F.3d 1177, 1183 (11th Cir. 2000) (holding non-verbatim, non-adopted notes not discoverable); *Donato*, 99 F.3d at 433 (clarifying agent's notes not witness's "own words"); United States v. Sasso, 59 F.3d 341, 351 (2d Cir. 1995) (refusing to require prosecutors to disclose verbatim statements if the author merely selected portions of lengthy oral statement); United States v. Carroll, 26 F.3d 1380, 1391 (6th Cir. 1994); United Stares v. Gross, 961 F.2d 1097, 1105 (3d Cir. 1992) (stating that brief quotations are not discoverable).

[8] *See, e.g.*, Goldberg v. United States, 425 U.S. 94, 110 n.19 (1976); *Oruche*, 484 F.3d at 598, 599 n.1 (deciding that before a case agent's notes qualified as Jencks materials, the witness must in some way have signed or signified her approval of the agent's notations and that the Act's definition of "statement" also required that it be "signed or otherwise approved by [the testifying witness]"); *Jordan*, 316 F.3d at 1255 (no evidence that witness adopted statement); United States v. Padin, 787 F.2d 1071, 1077-78 (6th Cir. 1986) (refusing to require production of DEA agents' debriefing report that summarized a witness interview because the witness did not "clearly and unambiguously adopt the report since she neither signed, read, nor had it read to her").

[9] *Compare* United States v. Arboleda, 929 F.2d 858, 863 n.8 (1st Cir. 1991) (determining that agent's raw notes were not Jencks material even though agent had read back notes to witness during interview in order to verify accuracy) *with* United States v. Roseboro, 87 F.3d 642, 645-46 (4th Cir. 1996) (stating that when a government agent interviews a witness and takes contemporaneous notes of the witness' responses, the notes do not become the witness' "statement," despite the agent's best efforts to be accurate, if the agent does not read back, or the witness does not read, what the agent has written).

[10] *See, e.g.*, United States v. Alvarez, 86 F.3d 901, 907 (9th Cir. 1996); Gross, 961 F.2d at 1104.

[11] *See, e.g.*, Campbell v. United States, 373 U.S. 487, 493 (1963); United States v. Redding, 16 F.3d 298, 301 (8th Cir. 1994); United States v. Grunewald, 86 F.3d 531, 535 (8th Cir. 1993); United States v. Gonzalez-Sanchez, 825 F.2d 572, 587 (1st Cir. 1987); United States v. Darby, 744 F.2d 1508, 1525 (11th Cir. 1984); Williams v. United States, 338 F.2d 286, 289 (D.C. Cir. 1964) (finding that withholding production "not an ordinary finding of fact" but "factual conclusion arrived at by applying legal standard to the other facts found;" if trial judge's decision at odds with underlying facts or based on misapplication of law, clearly erroneous standard governs).

[12] *See Goldberg*, 425 U.S. at 112 n.21 (holding that "[s]ince courts cannot 'speculate whether [Jencks material] could have been utilized effectively' at trial … the harmless-error doctrine must be strictly applied in Jencks Act cases"); *Oruche*, 484 F.3d at 596; United States v. Jackson, 345 F.3d 59, 77 (2d Cir. 2003) ("Where. . . Jencks Act violation is inadvertent, the defendant must establish that there is a significant chance that the added item would instill a reasonable doubt in a reasonable juror.") (citing United States v. Gonzalez, 110 F.3d 936, 943 (2d Cir. 1997)); United States v. Susskind, 4 F.3d 1400, 1401 (6th Cir. 1993); *Alvarez*, 86 F.3d at 907-08; United States v. Roemer, 703 F.2d 805, 807 (5th Cir. 1983).

[13] 373 U.S. 83 (1963).

[14] *See, e.g.*, United States v. Oruche, 484 F.3d 590, 597 (D.C. Cir. 2007) (reversing district court's grant of new trial for Brady violations); United States v. Haire, 371 F.3d 833, 841 (D.C. Cir. 2004), *vac'd on other grds*, 543 U.S. 1109 (2005) ("Brady does not require that the prosecutor 'deliver his entire file to defense counsel, but only [that he] disclose evidence favorable to the accused, that if suppressed, would deprive the defendant of a fair trial.'").

[15] *See, e.g.*, *Haire*, 371 F.3d at 841 ("We will not find error on the mere speculation that files, such as the debriefing material not disclosed herein, may contain Brady information."); United States v. Due, 205 F.3d 1030, 1033 (8th Cir. 2000) (refusing to recognize any prejudice arising from court's failure to order production of notes because disclosure would not materially aid attack on witness' credibility); United States v. Holton, 116 F.3d 1536, 1546-47 (D.C. Cir. 1997) (no prejudice; notes consistent with agent's testimony); United States v. Wong, 78 F.3d 73, 80 (2d Cir. 1996) (no prejudice from failure to disclose statements;

witness impeached himself during cross-examination and defense had access to other impeachment information); United States v. Dekle, 768 F.2d 1257, 1263 (11th Cir. 1985) (notes not subject to Jencks Act but arguably should have been produced under *Brady* for impeachment purposes; harmless error since impeachment was deemed merely cumulative). *But see* United States v. Minsky, 963 F.2d 870, 874-76 (6th Cir. 1992) (finding that the government's failure to provide interview notes which the defense could have used to impeach the prosecution's key witness found to be error under *Brady*, but no Jencks violation was found).

[16] *See, e.g.*, United States v. Lyons, 352 F. Supp. 2d 1231, 1248 n.25 (M.D. Fla. 2004) (granting amended motion to dismiss for prosecutorial misconduct) (citing R. Michael Cassidy, *"Soft Words of Hope:"* Giglio*, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 Nw. U. L. Rev. 1129 (2004)) *See also* George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 Pepp. L. Rev. 1, 53-54 (2000); Steve S. Nemerson, *Coercive Sentencing*, 64 Minn. L. Rev. 669, 679 n.28 (1980) (prosecutorial use of the testimony of accomplices and other informants is commonplace).

[17] Ellen Yaroshefsky, *Cooperation With Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 Fordham L. Rev. 917, 938 (1999).

[18] Banks v. Dretke, 540 U.S. 668, 701 (2004) (quoting On Lee v. United States, 343 U.S. 747, 757 (1952)).

[19] *See, e.g.*, United States v. Thorne, 527 F.2d 840, 842 n.2 (D.C. Cir. 1975) (quoting Instruction No. 2.23, Criminal Jury Instructions for the District of Columbia (2d ed. 1972) ("An informer's testimony should be examined by you with greater care than the testimony of an ordinary witness. You should scrutinize it closely to determine whether it is colored in such a way as to place guilt upon the defendant in order to further the witness' own interest. You should [receive such testimony with suspicion and] act upon such testimony with caution."). *Accord Dretke*, 540 U.S. at 702 ("jury instructions from the First, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits on special caution appropriate in assessing informant testimony") (citing 1A K. O'Malley, J. Grenig, & W. Lee, *Federal Jury Practice and Instructions*, Criminal § 15.02 (5th ed. 2000)).

[20] *See, e.g.*, Hoffa v. United States, 385 U.S. 293, 311 (1966) ("The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury.").

[21] Fed. R. Crim P. 26.2.

[22] 18 U.S.C. § 3500 (2000).

[23] *See infra* note 79 and accompanying text.

[24] Thomas Paine, Introduction to Common Sense 3 (Nelson F. Adkins ed., American Heritage Series 1953) (1776).

[25] *See* United States v. Palermo, 360 U.S 343, 346-49 (1959) (tracing legislative reaction to Jencks decision). Speaking in opposition to the haste with which the measure had been adopted, one senator stated, "Now, in a near frenzy over the prospect of delay or acquittals during the next several months, we set ourselves the task of legislating a rule of court, during the hectic last minute rush of this session, without having conducted any hearings in depth, without seeking or gaining the reasoned advice of bench and bar. And, allowing only one hour of general debate, we expect to add dignity and effectiveness to our system of justice." Paul K. Rooney & Elliot L. Evans, *Let's Rethink the Jencks Act and Federal Criminal Discovery*, 62 A.B.A. J. 1313, 1314 (1976) (quoting remarks of Senator Coffin).

[26] *See* Goldberg v. United States, 425 U.S. 94, 103 (1976) (claiming that the Act was intended to reaffirm and not limit the *Jencks* decision and that Congress ostensibly was not concerned with the case itself but rather misinterpretations of the *Jencks* decision and misunderstandings of its implications in the courts of appeals and the district courts) (citing S. Rep. No. 981, at 3-5 (1957); H.R. Rep. No. 700, at 2-3, 4, 6 (1957). It is hard to understand why that professed concern was credited. The vehicle to override the case passed through Congress in near-record speed after the *Jencks* decision, during which time there appears not to have been a groundswell of decisions misapplying or misinterpreting the decision. A degree of judicial candor appears in some lower courts, which noted that the Act was intended to cabin the *Jencks* opinion. *See, e.g.*, United States v. Derrick, 507 F.2d 868, 871 (4th Cir. 1974) ("[P]urpose of the Act was to limit in certain respects the breadth of the Jencks decision").

[27] 541 U.S. 36 (2004).

[28] Michael R. Dreebin, *Prefatory Article: The Confrontation Clause, the Law of Unintended Consequences, and the Structure of Sixth Amendment Analysis*, 34 Geo. L.J. Ann. Rev. Crim. Proc. iii, xv-xviii (2005) (discussing scholarly debate among law journals that animated Crawford.).

[29] In approving the Jencks Act's constitutionality nearly half a century ago, the Supreme Court relegated the issue to a footnote holding that Congress could enact rules of procedure for the federal courts. *Palermo*, 360 U.S. at 353 n.11. The Court did not address the Due Process clause or the Sixth Amendment's guarantee of effective assistance of counsel. Nor did it have the benefit of the scholarship and studies that have been generated over the intervening years. *Id.*

[30] *See, e.g.*, United States v. Carter, 613 F.2d 256, 261 (10th Cir. 1979); United States v. Catalano, 491 F.2d 268, 274-75 (2d Cir. 1974).

[31] Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 Cardozo L. Rev. 829, 838 n.44 (2002) [hereinafter Gershman, *Witness Coaching*] ("There is a large body of psychological literature describing the vulnerability of memory. Several prominent studies include Frederick Charles Bartlett, *Remembering: A Study in Experimental and Social Psychology* (1987); Elizabeth Loftus & Katherine Ketcham, *The Myth of Repressed Memory* (1994); Israel Rosenfeld, *The Invention of Memory: A New View of the Brain* (1988) [and] George A. Talland, *Disorders of Memory and Learning* (1969).").

[32] United States v. Susskind, 4 F.3d 1400, 1406-07 (6th Cir. 1993); United States v. Smaldone, 544 F.2d 456, 460 (10th Cir. 1976).

[33] Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 Mo. L. Rev. 699, 740 (1998).

[34] John G. Douglass, *Confronting The Reluctant Accomplice*, 101 Colum. L. Rev. 1797, 1833 n.157 (2001).

[35] 514 U.S. 419 (1995).
[36] *Id.* at 443 n.14.
[37] 194 F.3d 547 (4th Cir. 1999).
[38] *Id.* at 550-51.
[39] *Id.*
[40] *See id.*
[41] *See id.* at 551.
[42] See id. at 552.
[43] *Id.* at 556-60.
[44] *See id.* at 556-60.
[45] Gershman, *Witness Coaching*, *supra* note 31, at 839 n.46 ("A common misconception about memory is that it is a process of reproducing or retrieving stored information, in the manner of a videotape or a computer. In fact, memory is much more a process of reconstruction." (quoting MONROE FREEDMAN, UNDERSTANDING LAWYERS ETHICS 152 (Matthew Bender ed. 1990)); John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 329 (1989) ("Memory is not like a phonograph record; the perception of an event does not leave a single, clear imprint that can be replayed precisely and at will."); Michael Owen Miller, *Working With Memory*, 19 LITIG. 10, 11 (Summer 1993) (noting that memory is not a single mental process but involved three stages of acquisition, retention, and retrieval, each of which may be "enhanced, suppressed, or distorted").
[46] Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 345 n.202 (2001) (citing ROBERT D. HARE, WITHOUT CONSCIENCE: THE DISTURBING WORLD OF THE PSYCHOPATHS AMONG US (Guilford Press 1999). *See also* United States v. Sperling, 506 F.2d 1323, 1331-32 (2d Cir. 1974) (exemplifying the length to which people will go to sometimes to relate a situation where an informer was emboldened or contrite enough to admit to a letter that described his "terrible mental state" for having caused a mistrial by perjuring himself on the witness stand at a previous trial; stated that his main purpose during the past 9 ½ months had been to "try my very best to assist the Government," and that he "looked forward eagerly to testifying in narcotics cases for the Government, against Vincent Pacelli, Jr. and others") (emphasis in original).
[47] Sam Roberts, Note, *Should Prosecutors Be Required To Record Their Pretrial Interviews With Accomplices And Snitches*, 74 FORDHAM L. REV. 257, 270-71 n.111 (2005) (quoting Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 35 (1992)). See also Honorable Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L. J. 1381, 1383 (1996) ("Criminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law."). Furthermore, witnesses often lie in proffer session as they attempt to shift blame and minimize appearance of their actions. *Id.* at 1403-04.
[48] *See* United States v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987) ("It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence … ")
[49] *See* Cassidy, *supra* note 16, at 1135-36 nn.34-38.
[50] *See* Gershman, *Witness Coaching*, *supra* note 31, at 848 & n.100 ("The setting for the proffer session is hardly conducive to producing a neutral, objective, and accurate recollection. The setting is often tense and intimidating. Given the enormous inducements to the cooperator to give false or misleading testimony, as well as the inducements to the prosecutor to accept the cooperator's veracity, the context is inherently manipulative for both the cooperator and the prosecutor."); Cassidy, *supra* note 16, at 1140 n.65 ("The process of interaction between prosecutors and accomplices during a process of multiple interviews and trial preparation sessions also tends to contribute to an accomplice's capacity to fabricate without detection; the close working relationship formed between the parties may humanize the witness in the minds of the prosecutor and cause the prosecutor to believe that the accomplice witness is telling the truth even about facts that are not corroborated.").
[51] Gershman, *Witness Coaching*, *supra* note 31, at 849-50. *Accord* C. Blaine Elliott, *Life's Uncertainties: How to Deal with Cooperating Witnesses and Jailhouse Snitches*, 16 CAP. DEF. J. 1, *3 (2003) (finding that the Sentencing Guidelines have increased motivation to cooperate); Michael S. Ross, *Thinking Outside the Box: Proposals for Change: How the Enforcement of Ethical Rules Can Minimize the Dangers of Prosecutorial Leniency and Immunity Deals*, 23 CARDOZO L REV. 875, 879 (2002) ("In fact, there is often, among defendants, a competition which occurs, in which all defendants want to offer enough testimony to . . . receive a more lenient sentence.").
[52] *See* United States v. Singleton, 165 F.3d 1297, 1310 (10th Cir. 1999) (Kelly, J., dissenting). *See also* Cassidy, *supra* note 16, at 1140.
[53] Yaroshefsky, *supra* note 17, at 927 & nn.43-44 (citing United States Department of Justice, United States Attorney's Manual § 9-27.620 (1997)).
[54] *Id.* at 926 & n.38 (citing The Substantial Assistance Staff Working Group, U.S. Sentencing Commission, Federal Court Practices: Sentence Reductions Based on Defendants' Substantial Assistance to the Government, 43 (May 1997)).
[55] Daniel Richman, Symposium, *Expanding the Evidentiary Frame for Cooperating Witnesses*, 23 CARDOZO L. REV. 893, 898 & n.16 (2002) (citing Bruce A. Green, *"The Whole Truth?": How Rules of Evidence Make Lawyers Deceitful*, 25 LOY. L.A. L. REV. 699 (1992)).
[56] Roberts, *supra* note 47, at 278 & n.170 (citing Douglass, *supra* note 41, at 1836 n.173 (stating that "[w]ith key cooperating witnesses in major cases, prosecutorial polishing of cooperators may be measured in weeks or months"); Yaroshefsky, *supra* note 17, at 930 ("Typically, there are a number of debriefing sessions prior to the government making a decision that the defendant should be signed up for a cooperation agreement. . . In most cases, the cooperator is expected to agree to testify and, if necessary, will spend considerable time with the assistant handling the case."); Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 15-17 (2003) (describing the cooperation process); John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & POL'Y 423, 447-52 (1997) (explaining proffer and debriefing sessions).
[57] Trott, *supra* note 47, at 1396.
[58] Ross, *supra* note 51, at 884.
[59] Yaroshefsky, *supra* note 17, at 935.
[60] *See* Roberts, *supra* note 47, at 278-79 & n.175 (stating that "[b]ecause [the pretrial interview] process can be lengthy and

because it often carries some of the typical negotiating give-and-take, it is possible, maybe even likely, that the witness's proposed testimony that was proffered at the beginning of the process differed in some respects from the testimony proffered at the end of the process" (citing United States v. Sudikoff, 36 F. Supp. 2d 1196, 1202 (C.D. Cal. 1999))).

[61] Cassidy, *supra* note 16, at 1141 n.66 (referencing Yaroshefsky, *supra* note 17, at 943-45).

[62] *See* Roberts, *supra* note 47, at 278; Douglass, *supra* note 41, at 1836-37 ("Even if prosecutors and police take pains to avoid 'tainting' their witness with information from other sources, the danger of tailoring testimony is almost unavoidable. It is exceedingly difficult to discuss a case with a potential witness without exposing information that will assist the witness in avoiding an impeachable contradiction at trial.").

[63] Ross, *supra* note 51, at 884.

[64] *Id.*

[65] 5 J. H. Wigmore, Evidence § 1367, at 32 (J. Chadbourne rev. ed. 1974).

[66] Gershman, *Witness Coaching*, *supra* note 31, at 854-55 n.128 (quoting Applegate, *supra* note 46, at 311 ("While the adversary system touts the effectiveness of cross-examination for revealing the truth, there is little empirical support for this conclusion.")).

[67] The Innocence Project Homepage, http://www.innocence project.org/ (last visited Oct. 2, 2007); *see generally* McKithen v. Brown, 481 F.3d 89, 92 (2d Cir. 2007) (recognizing a post-conviction remedy under 42 U.S.C. § 1983 giving access to DNA testing). The appellate court pointed out that with advances in forensic DNA testing it now is possible to demonstrate statistically "to a practical certainty" that some persons have been wrongly convicted. *Id.* at 92 n.3 (quoting Harvey v. Horan, 285 F.3d 298, 305 n.1 (4th Cir. 2002)) (Lutting, J., dissenting). Furthermore, "[a]s of March 12, 2007, by one count, as many as 197 factually innocent, incarcerated individuals have been exonerated by post-conviction DNA testing. *Id*. at 92 n.2 (citing The Innocence Project, *supra*).

[68] Elliott, *supra* note 45, at 14 n.115 (citing The Innocence Project Homepage, *supra* note 67). *Accord* Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 Wis. L. Rev. 541, 547 (2006) (noting that despite a jury's determination of guilt there have been "scores of exoneration cases in which a defendant's actual innocence has been established beyond dispute have certainly taught us that juries sometimes convict innocent men and women"); Gershman, *Witness Coaching*, *supra* note 31, at 832 n.17 ("[T]here is an increasing concern – amply documented by recent reports of wrongful convictions – that the criminal justice system is seriously prone to error.") (citing *inter alia*, J. Liebman et al, A Broken System: Error Rates in Capital Cases, 1973-1995, at 5 (2000) ("massive study" of every capital punishment case in U.S. between 1973-1995 was 68%)).

[69] United States v. Sudikoff, 36 F. Supp. 2d 1196, 1202 (C.D. Cal. 1999).

[70] Banks v. Dretke, 540 U.S. 668 (2004).

[71] 527 U.S. 263 (1999).

[72] Dretke, 540 U.S. at 691-92 & n.12.

[73] *See id*. at 675-76 (finding that the defendant's failure to investigate the status of two essential government informants was the result of the prosecution's persistent misrepresentations and omissions concerning their status, leading to the defendant's failure to expose false testimony). *See also* United States v. Koubriti, 336 F. Supp. 2d 676, 680-81 (E.D. Mich. 2004) (describing a situation in which the prosecution had engaged in a "pervasive and prevalent" pattern of "fail[ing] in its obligation to turn over to the defense, or to the Court, many documents and other information, both classified and non-classified, which were clearly and materially exculpatory of the Defendants as to the charges against them."). Furthermore, in this case, "as the Government's filing also ma[de] abundantly clear, the prosecution materially misled the Court, the jury and the defense as to the nature, character and complexion of critical evidence that provided important foundations for the prosecution's case." *Id. See generally* United States v. Boyd, 55 F.3d 239 (7th Cir. 1995). Then, too, the prosecutorial misconduct exposed post-trial in the so-called El Rukn cases was of a similar ilk. *See id.* (government knowingly allowed two witnesses to perjure themselves at trial and withheld evidence that during the trial witnesses had used illegal drugs and received unlawful favors from government prosecutors and their staffs).

[74] Prosser, *supra* note 68, at 569.

[75] Gershman, *Witness Coaching*, *supra* note 31, at 854-55.

[76] Roberts, *supra* note 47, at 261.

[77] Hon. William Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for the Truth*, 1963 Wash. U.L.Q. 279, 287 (1963).

[78] Douglass, *supra* note 34, at 1843 & n. 200 ("Most empirical studies suggest that witness demeanor is a misleading measure of truthfulness.") (citing, Jeremy A. Blumenthal, *A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 Neb. L. Rev. 1157, 1189 (1993); Olin Guy Wellborn III, *Demeanor*, 76 Cornell L. Rev. 1075, 1091 (1991)).

[79] Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident But Erroneous*, 23 Cardozo L. Rev. 809, 809-10 & n.3 (2002) [hereinafter Kassin, *Human Judges*].

[80] Kassin, *supra* note 79 at 810 & n.4 (citing M. Zuckerman, Bella M. DePaulo, & R. Rosenthal, *Verbal and Nonverbal Communication of Deception*, *in* 14 Advances in Experimental Social Psychology 1 (1981); Aldert Vrij, Detecting Lies and Deceit: The Psychology of Lying and the Implications for Professional Practice (2000)). *See also* Saul M. Kassin, *The American Jury: Handicapped in the Pursuit of Justice*, 51 Ohio State L. J. 687, 688 (1990) (asserting that "psychological research suggests that people perform at only slightly better than chance levels in evaluating truth and deception").

[81] *Id.* at 810 (interpreting this statistic to mean that "people who are highly confident in their lie detection skills are not more accurate than those who express low to modest level of confidence.").

[82] 933 F. Supp. 76, 78 (quoting Hon. H. Lee Sarokin & William E. Zukermann, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption*, 43 Rutgers L. Rev. 1089, 1090 (1991)); *see also* Prosser, *supra* note 68, at 598 ("Late access to impeachment evidence, such as prior statements of witnesses, similarly diminishes the likelihood that the fact finder will be in a position to make reliable

determinations of guilt or innocence.").

[83] Prosser, *supra* note 68, at 614.

[84] Richman, *supra* note 55, at 898.

[85] United States v. Agurs, 427 U.S. 97, 108 (1976).

[86] Ross, *supra* note 51, at 888 ("[T]he prosecutor should turn over to defense counsel, in a timely manner, the notes of any and all proffer sessions, and changes of the witness' story over time, as part of the *Brady* obligation. While defense counsel often relies on *Brady* material when preparing a defense, without receiving notes relating to proffer sessions of a cooperating witness, it may prove to be impossible to adequately prepare a defense.").

[87] 10 F.3d 875 (D.C. Cir. 2004).

[88] *See id.* at 880-81; *see also* Am. Family Ass'n v. FCC, 365 F.3d 1156, 1166 (D.C. Cir. 2004) ("The Commission may well have a future obligation to reevaluate the point system if the empirical predictions and premises it used to justify the point system turn out to be erroneous.")

[89] 5 U.S.C. § 706 (2000).

[90] *See* United States v. Johnson, 221 F.3d 83, 96 (2d Cir. 2000) ("Guided by considerations of justice, and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.") (quoting United States v. Hasting, 461 U.S. 499, 505 (1983) (citations omitted)); Daye v. Attorney General, 712 F.2d 1566, 1571 (2d Cir. 1983) (noting that "federal courts have authority under their supervisory powers to oversee the administration of criminal justice within federal courts."); *see also* Thomas v. Arn, 474 U.S. 140, 146 (1985) ("It cannot be doubted that the courts of appeals have supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation."); United States v. Eastern Med. Billing, Inc., 230 F.3d 600, 607-13 (3d Cir. 2000) (discarding *Allen* charge); United States v. Bostic, 371 F.3d 865, 872-73 (6th Cir. 2004) (announcing new sentencing protocols); United States v. Minge He, 94 F.3d 782, 792-93 (2d Cir. 1996) (sentencing appellant for violation of law because the prosecution failed to give reasonable advance notice to defendant, through his attorney, in order to permit him to be represented if he so chose at debriefings). Notably, the decision that animated the Act, *viz.*, *Jencks v. United States*, 353 U.S. 657 (1957), itself was an exercise of the judiciary's supervisory power.

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† 18 U.S.C. § 3500 (2000) (The Jencks Act)

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(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 subsection (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;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.