The Jencks Act - Availability of Jencks Material at Post-Trial Hearings - Third Circuit Extends Jencks Act to Sentencing Hearings

Nataly A. Harker
I. INTRODUCTION

In 1957, the United States Supreme Court held, in *Jencks v. United States*, that criminal defendants were entitled, during their trials, to access to the prior statements of government witnesses testifying against them. That same year, in a legislative response to the *Jencks* decision, Congress enacted the Jencks Act. The Jencks Act establishes a proce-

---

2. *Id.* at 668. In *Jencks*, the defendant, who was president of a labor union, was convicted for violating 18 U.S.C. § 1001 by swearing falsely in an affidavit filed with the National Labor Relations Board that he was not a member of the Communist party. *Id.* at 658-59. After two government witnesses admitted, during cross-examination, that they made oral and written reports to the FBI, the defendant requested that the reports be disclosed for inspection. *Id.* at 665-66. The trial court denied this request, without stating any reasons. *Id.* at 665.

On appeal, the defendant argued that the trial court erred in denying his motions to require the government to produce, for his inspection and use in cross-examination, the FBI reports made by the two government witnesses. *Id.* at 659. The United States Court of Appeals for the Fifth Circuit affirmed the trial court's denial of the defendant's motions as the defendant had not established any inconsistency between the witnesses' testimony and their pre-trial statements. *Jencks v. United States*, 226 F.2d 540, 552 (5th Cir. 1955).

The Supreme Court reversed and held that the defendant was not required to establish such an inconsistency. *Jencks*, 353 U.S. at 666. The Court held that a "sufficient foundation was established by the testimony [of the government witnesses]... that their reports [to the FBI] were of the events and activities related in their testimony." *Id.* The defendant was thus entitled to inspect the reports to decide whether to use them in his defense in order to discredit the government witnesses, regardless of the admissibility into evidence of such material. *Id.* at 668-69.

The procedures set down by the Court governing the disclosure of pre-trial statements of government witnesses were an "attempt to foreclose the contingency of perjured or erroneous testimony forming the basis for a conviction by ensuring the opportunity for fully informed cross-examination." Foster, *The Jencks Act—Rule 26.2—Rule 612 Interface—Confusion Worse Confounded,* 34 OKLA. L. REV. 679, 689 (1981).

3. 18 U.S.C. § 3500 (1985). In response to the *Jencks* decision and in view of the conflicting interpretations of the opinion by lower federal courts, Congress enacted § 3500, entitled "Demands for Production of Statements and Reports of Witnesses," to clarify the effect of the *Jencks* decision. See H.R. REP. No. 700, 85th Cong., 1st Sess. 3 (1957) (conflicting interpretations as to meaning of *Jencks* and "the necessity for a procedure which will be uniform throughout the Federal court system" led to Jencks Act); S. REP. No. 569, 85th Cong., 1st Sess. 2-3 (1957) (Jencks Act introduced because of conflicting interpretations of *Jencks* decision); 1957 U.S. CODE CONG. & ADMIN. NEWS 1861, 1862 (Jencks Act will
dure which affords a defendant in a federal criminal prosecution access to the pre-trial statements of government witnesses that relate to the subject matter of the witnesses' trial testimony (Jencks material), but only after the witnesses have testified on direct examination at the defendant's trial. 4 The result of the legislation is to "strike a balance be-

help correct "widespread misinterpretations and popular misunderstandings" of Jencks). [The Jencks case is readily perceived as the culmination of a logical progression in prior case law demarcating the bounds of the accused's right to obtain certain information that is in the possession of the government and pertinent to his defense." Foster, supra note 2, at 688.

The legislative history of the Jencks Act cites to a collection of lower federal court cases decided after the Jencks case and prior to the enactment of the Jencks Act. H.R. REP. No. 700, supra, at 9-11 (statement of Hon. Herbert Brownell, Jr.); S. REP. No. 569, supra, at 5-8 (statement of Hon. Herbert Brownell, Jr.). One of the problems which arose as a result of the judicial interpretations of the Jencks opinion was the insistence of some lower federal courts that defendants be allowed to rove at will through entire government reports, although only a small part of the reports related to the testimony of the government witness. See H.R. REP. No. 700, supra, at 3; S. REP. No. 569, supra, at 3-4; 1957 U.S. CODE CONG. & ADMIN. NEWS, supra, at 1864. Thus, although accepting the basic premise of the Jencks decision, Congress was concerned that the misapplication of that decision threatened to expose secret government files and confidential information to defendants, which could handicap the law enforcement arms of government agencies and injure the reputations of innocent persons. See H.R. REP. No. 700, supra, at 3; S. REP. No. 569, supra, at 4-6; 1957 U.S. CODE CONG. & ADMIN. NEWS, supra, at 1864. Accordingly, the Jencks Act protects "the legitimate public interest in safeguarding confidential governmental documents and at the same time it respects the interests of justice by permitting defendants to receive all information necessary to their defense." H.R. REP. No. 700, supra, at 4.

4. The Jencks Act currently provides:

(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 subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States
tween the demands and necessities of the defendant to have at his
disposal all that he can to aid in his defense and the interests of the
government to protect the sources of its information and to retain the
private character of confidential documents.” Thus, the Jencks Act
functions as a discovery device to aid a defendant in impeaching govern-
ment witnesses on cross-examination and serves as the exclusive means
for production of the qualifying Jencks material.6

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 de-
fendant pursuant to this section, the court in its discretion, upon appli-
cation 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 other-
wise 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.


One difference between the Supreme Court’s decision in Jencks and the
Jencks Act is that the Jencks Court required the impeaching Jencks material to be
provided by the government directly to a defendant. Jencks, 353 U.S. at 669.
Conversely, the Jencks Act requires a trial court to initially resolve disputes re-
garding producibility, and allows disclosure to a defendant of only those materi-
als which qualify as “statements” as defined in subsection (e), and which relate
to the subject matter of the witness’ testimony on direct examination. See 18
U.S.C. § 3500(b) (1985). The Jencks Act also provides that if the government
refuses to produce Jencks material to a defendant, a witness’ direct testimony
will be stricken or a mistrial directed. Id. § 3500(d). This provision serves as
another departure from the Jencks decision, where the Court declared that a fail-
ure to produce a witness’ statement would result in a dismissal. Jencks, 353 U.S.
at 672.

5. Recent Legislation, Legislation—Federal Criminal Procedure—Modification of
Jencks Decision, 56 Mich. L. Rev. 314, 318 (1957). For a further discussion of
the legislative history of the Jencks Act, see supra note 3.

6. See Palermo v. United States, 360 U.S. 343, 351 (1959) (“The purpose of
the [Jencks] Act, its fair reading and its overwhelming legislative history compel
us to hold that statements of a government witness made to an agent of the
Government which cannot be produced under the terms of 18 U.S.C. § 3500
cannot be produced at all.”); United States v. Percevault, 490 F.2d 126, 129 (2d
Cir. 1974) (intent of Jencks Act is to afford defendants access to witness’ state-
Although the Jencks Act states that disclosure cannot be compelled until after a witness has testified on direct examination “in the trial of the case,” issues concerning the availability of Jencks material in a post-trial hearing have increased. Recently, in United States v. Rosa, the United States Court of Appeals for the Third Circuit addressed the issue of whether Jencks material should be made available to defendants at post-trial sentencing hearings. The Rosa court held that criminal defendants are entitled to Jencks material at sentencing hearings, because such material would not only be valuable to their defense, but would also ensure a more thorough and effective cross-examination of the government witnesses testifying against them.

7. 18 U.S.C. § 3500(a) (1985). This provision has been construed to “fore-stall not only all production of qualifying material in pretrial proceedings prior to the ‘trial of the case’ but also compulsory premature disclosure of such statements a day or so before trial.” Foster, supra note 2, at 708 (footnote omitted). Accordingly, many courts have consistently denied production of Jencks material before a trial on the merits. See United States v. Murphy, 569 F.2d 771, 774 (3d Cir.) (government not required to produce Jencks material during suppression of evidence hearing), cert. denied, 435 U.S. 955 (1978); United States v. Sebastian, 497 F.2d 1267, 1268 (2d Cir. 1974) (suppression hearing not a trial and pre-trial disclosure of Jencks material not allowed); United States v. Percevault, 490 F.2d 126, 129 (2d Cir. 1974) (“This unique but limited discovery device [Jencks Act] . . . was not intended to be utilized in preparation for trial.”); United States v. Covello, 410 F.2d 536, 544 (2d Cir.) (under Jencks Act, “pre-witness stand statements of persons testifying at suppression hearings are not comprehended within the statements the defense is entitled to examine at suppression hearings”), cert. denied, 396 U.S. 879 (1969).

In addition, many courts have construed the term “trial,” as required in the Jencks Act, to mean a proceeding conducted for the purpose of determining guilt or innocence. Murphy, 569 F.2d at 773 (citing United States v. Hodges, 489 F.2d 212 (5th Cir. 1973)).

8. See United States v. Rosa, 891 F.2d 1074 (3d Cir. 1989) (whether disclosure pursuant to Jencks Act may be required at sentencing hearings); United States v. Hodges, 489 F.2d 212 (5th Cir. 1973) (addressing issue of whether Jencks Act applies to revocation of probation hearing); Beavers v. United States, 351 F.2d 507 (9th Cir. 1965) (discussing whether disclosure pursuant to Jencks Act may be required in 28 U.S.C. § 2255 proceeding); United States v. White, 342 F.2d 379 (4th Cir.) (same), cert. denied, 382 U.S. 871 (1965); United States v. Kelly, 269 F.2d 448 (10th Cir. 1959) (same), cert. denied, 362 U.S. 904 (1960); United States v. Ameperosa, 728 F. Supp. 1479 (D. Haw. 1990) (whether disclosure pursuant to Jencks Act may be required at sentencing hearings); United States v. Fatico, 458 F. Supp. 388 (E.D.N.Y. 1978) (same), aff’d, 603 F.2d 1053 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980).

9. 891 F.2d 1074 (3d Cir. 1989).

10. Id. at 1075. For a further discussion of the facts of the Rosa case, see infra notes 12-28 and accompanying text.

11. Rosa, 891 F.2d at 1079. For a further discussion of the Third Circuit’s reasoning in Rosa, see infra notes 29-52 and accompanying text.
II. UNITED STATES v. ROSA

A. Facts

Ronald L. Plisco (Plisco), one of twenty-eight defendants in Rosa, was indicted on two counts, involving Plisco's participation in drug dealing. As a result of a plea agreement, the government dismissed one of the charges and Plisco pled guilty to the other.

At the sentencing hearing on the charge to which Plisco pled guilty, a government witness testified as to Plisco's involvement in a "life of crime" and implicated Plisco in the drug sales at issue. The government witness testified that: (1) he had known Plisco for many years; (2) in 1984, he himself sold cocaine and wanted to sell more; (3) he asked Plisco for money to finance his drug trafficking, and Plisco offered him $80,000, knowing that it was to be used to purchase cocaine; and (4) Plisco received some cocaine at cost.

Contrary to the government witness' testimony, Plisco averred that he had been entrusted to hold $300,000 for the government witness. Plisco's wife then testified that the money Plisco gave to the witness was merely a return of the witness' money which Plisco had been holding. Because Plisco's testimony thus conflicted with portions of the witness' testimony, it was expected that the defense would attempt to cast doubt on the truthfulness of the witness' testimony. As a result, at the outset of cross-examination of the government witness, Plisco's attorney filed a motion for the production of Jencks material. the United States District Court for the Western District of Pennsylvania denied the motion. In doing so, the district court relied on the Third Circuit's

---

12. Rosa, 891 F.2d at 1075. Plisco was one of 28 people indicted in a 113 count indictment charging drug, firearms and tax offenses. Id. In count one, Plisco was charged with violating 21 U.S.C. § 846 for joining in a conspiracy to possess cocaine with an intent to distribute more than five kilograms of cocaine. Id. In count eleven, Plisco was charged with violating 21 U.S.C. § 841(a)(1) for being in possession of a "multi-kilogram quantity of cocaine with intent to distribute." Id.

13. Id. The government dismissed count one and Plisco pled guilty to count eleven. Id. Plisco later filed a motion to withdraw his guilty plea. Id. This motion was denied and a sentencing hearing was held. Id.

14. Id. at 1075, 1078. The government witness, Marvin Droznek, was also charged in the indictment and had pled guilty. Id. at 1075.

15. Id. “Plisco’s testimony conflicted with Droznek’s [the government witness] as to the source and ownership of the $80,000.” Id.

16. Id.

17. Id.

18. Id. at 1075, 1078. The Third Circuit in Rosa noted that it was to be “expected that at allocution, Plisco would claim that Droznek [the government witness] had not testified truthfully.” Id. at 1078.

19. Id. at 1075.

20. Id.
decision in *United States v. Murphy*,\(^\text{21}\) which held that Jencks material was to be produced only during trial. The district court, therefore, concluded that a sentencing hearing did not fit the definition of a trial as espoused in *Murphy*.\(^\text{22}\) Plisco was then sentenced to fifteen years imprisonment and fined $50,000.\(^\text{23}\)

On appeal to the Third Circuit, the defense argued that the district court had erred on four grounds.\(^\text{24}\) The Third Circuit, agreed with the district court on three of the four grounds assigned as error and affirmed Plisco's conviction.\(^\text{25}\) The fourth ground charged that the district court erred in finding that "it was not necessary for the government to provide Jencks Act material to Plisco pursuant to 18 U.S.C. § 3500."\(^\text{26}\) The Third Circuit agreed with Plisco on the fourth ground assigned as error and found it was erroneous for the district court to deprive Plisco of Jencks material at his sentencing hearing.\(^\text{27}\) As a result, the Third Circuit vacated Plisco's sentence and remanded for resentencing.\(^\text{28}\)

**B. The Court's Application of Jencks**

The Third Circuit, in a unanimous opinion, began its analysis by

\(^{21}\) 569 F.2d 771 (3d Cir.), cert. denied, 435 U.S. 955 (1978). For a further discussion of the *Murphy* decision, see *infra* notes 55-60 and accompanying text.

\(^{22}\) *Rosa*, 891 F.2d at 1077 (citing *Murphy*, 569 F.2d at 774). In *Murphy*, the Third Circuit asserted that Jencks material was producible only at a trial, which was defined as a proceeding conducted to determine guilt or innocence. *Murphy*, 569 F.2d at 773 (citing *United States v. Hodges*, 489 F.2d 212 (5th Cir. 1973)). The district court in *Rosa* concluded that a sentencing hearing was not a proceeding to determine guilt or innocence. *Rosa*, 891 F.2d at 1076. For a further discussion of the *Murphy* decision, see *infra* notes 55-60 and accompanying text.

\(^{23}\) *Rosa*, 891 F.2d at 1075.

\(^{24}\) *Id.* at 1076. Plisco alleged that the district court erred in holding that: 1) his plea of guilty was constitutionally valid; 2) the government had not breached its plea agreement; 3) Plisco could not withdraw his guilty plea, or in the alternative, enforce the plea agreement; and 4) it was not necessary for the government to provide Jencks Act material to Plisco pursuant to 18 U.S.C. § 3500.

*Id.* It was only the fourth ground that was substantively addressed by the Third Circuit in *Rosa*, however, because the court summarily found that the district court did not err in the other respects. *Id.*

\(^{25}\) *Id.* Specifically, the court found that "the district court did not err in upholding Plisco's guilty plea; in holding that the government did not breach its plea agreement with Plisco; and in holding that Plisco could not withdraw or enforce his plea agreement." *Id.*

\(^{26}\) *Id.*

\(^{27}\) *Id.* at 1076, 1079.

\(^{28}\) *Id.* at 1079. For a further discussion of the Third Circuit's rationale for vacating Plisco's sentence and remanding for resentencing, see *infra* notes 29-52 and accompanying text.
discussing *Jencks v. United States*, 29 from which the Jencks Act took its name and in which the Supreme Court provided its reasons for affording a criminal defendant access, during trial, to the pre-trial statements of government witnesses.\(^\text{30}\) The Third Circuit noted the *Jencks* Court's emphasis on the value, for cross-examination purposes, of making government documents available to defendants at trial, because it afforded them a better opportunity to test the credibility of a witness' trial testimony.\(^\text{31}\) The Third Circuit also focused on the *Jencks* Court's recognition that where the government has a duty to see that justice is done, "it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."\(^\text{32}\) The *Rosa* court concluded that the rationale of *Jencks* and the purpose of the Jencks Act would be "diserved" if Plisco was deprived of material valuable to his defense and liberty at his sentencing hearing.\(^\text{33}\)

C. Review of the District Court's Rationale

The Third Circuit then proceeded to review the district court's rationale for denying Plisco's motion for Jencks material at his sentencing hearing.\(^\text{34}\) First, the Third Circuit disagreed with the district court's reliance on *United States v. Murphy*.\(^\text{35}\) The court indicated that the issue in *Murphy*—whether the Jencks Act was applicable to a pre-trial suppression hearing—was distinguishable from the situation in the instant case. The Third Circuit in *Rosa* found the district court's reliance on *Murphy* understandable in light of the language of the Jencks Act and the holding of the Third Circuit in *Murphy*.\(^\text{35}\) The *Murphy* court held that Jencks material was not producible at a pre-trial suppression hearing. *Murphy*, 569 F.2d at 774. For a further discussion of the *Murphy* case, see infra notes 55-60 and accompanying text.

\(^{29}\) 353 U.S. 657 (1957). For a further discussion of the *Jencks* decision, see supra note 2. For the relevant text of the Jencks Act, see supra note 4.

\(^{30}\) *Rosa*, 891 F.2d at 1076-77 (citing *Jencks*, 353 U.S. at 667).

\(^{31}\) *Id.* at 1076-77. In *Jencks*, the Supreme Court stated:

> Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness’ testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness’ trial testimony.

*Jencks*, 353 U.S. at 667. For a further discussion of the *Jencks* decision, see supra note 2.

\(^{32}\) *Rosa*, 891 F.2d at 1077 (quoting *Jencks*, 353 U.S. at 671 (quoting United States v. Reynolds, 345 U.S. 1, 12 (1953))).

\(^{33}\) *Rosa*, 891 F.2d at 1079. The court further stated that it could "perceive no purpose in denying the defendant the ability to effectively cross-examine a government witness where such testimony may, if accepted, add substantially to the defendant's sentence." *Id.*

\(^{34}\) *Id.* at 1077.

\(^{35}\) *Id.* (citing United States v. Murphy, 569 F.2d 771 (3d Cir.), cert. denied, 435 U.S. 955 (1978)). The Third Circuit in *Rosa* found the district court's reliance on *Murphy* understandable in light of the language of the Jencks Act and the holding of the Third Circuit in *Murphy*. *Id.* The *Murphy* court held that Jencks material was not producible at a pre-trial suppression hearing. *Murphy*, 569 F.2d at 774. For a further discussion of the *Murphy* case, see infra notes 55-60 and accompanying text.
hearing—was inapposite to the issue presented in Rosa—whether the Jencks Act was applicable to a post-trial sentencing hearing. Moreover, the Rosa court noted that the Third Circuit in Murphy had recognized some judicial authority for extending the Jencks Act to certain kinds of post-trial hearings, although not specifically to post-trial sentencing hearings.

D. Supporting Precedent

In support of its decision, the Rosa court relied heavily upon the reasoning articulated by the United States District Court for the Eastern District of New York in United States v. Fatico, in which the court held that the Jencks Act was applicable to sentencing hearings when a government witness testifies. Similar to Plisco in Rosa, the defendant in Fatico pled guilty and, at his sentencing hearing, sought to obtain Jencks material. The court relied heavily upon the reasoning articulated by the United States District Court for the Eastern District of New York in United States v. Fatico, in which the court held that the Jencks Act was applicable to sentencing hearings when a government witness testifies. Similar to Plisco in Rosa, the defendant in Fatico pled guilty and, at his sentencing hearing, sought to obtain Jencks material.

36. Rosa, 891 F.2d at 1077. The court noted that when it affirmed the district court's decision in Murphy, it was "emphasizing that Jencks Act material was not available prior to trial." Id. (quoting Murphy, 569 F.2d at 774).

37. Id. As authority for applying the Jencks Act to post-trial hearings, the Murphy court cited United States v. White, 342 F.2d 379 (4th Cir.), cert. denied, 382 U.S. 871 (1965) and United States v. Kelly, 269 F.2d 448 (10th Cir. 1959), cert. denied, 362 U.S. 904 (1960), both of which concluded that the disclosure of Jencks material would be required in a post-trial proceeding brought pursuant to 28 U.S.C. § 2255. Murphy, 569 F.2d at 774 n.11. Section 2255 allows a defendant to attack a criminal judgment and sentence, but the scope of the attack is limited to matters which may be raised by collateral attack. Kelly, 269 F.2d at 451. Because § 2255 limits a defendant to raising matters which only may be raised collaterally, "errors in procedure on the initial trial of the case are not open for review." Beavers v. United States, 351 F.2d 507, 509 (9th Cir. 1965). "It is not a proceeding in the original criminal prosecution but is an independent proceeding, civil in nature." Kelly, 269 F.2d at 451. While a § 2255 action is "civil in character, the plaintiffs in them [are] defendants in the criminal proceedings out of which the motions arose." Id. Thus, the Fourth and Tenth Circuits have concluded that a § 2255 proceeding was sufficiently in the nature of a criminal proceeding to make the Jencks Act applicable. White, 342 F.2d at 382 n.4; Kelly, 269 F.2d at 451. The Rosa court noted, however, that neither the White decision nor the Kelly decision was directly on point, as they did not involve post-trial sentencing hearings. Rosa, 891 F.2d at 1077. For a further discussion of the White and Kelly decisions, see infra notes 77-79 and accompanying text.

The Murphy court also cited United States v. Hodges, 489 F.2d 212 (5th Cir. 1973), as an example of a case where the court refused to order the production of Jencks material in a post-trial proceeding. Murphy, 569 F.2d at 774 n.11. In Hodges, the Fifth Circuit held that Jencks material was not producible at a probation revocation hearing. Hodges, 489 F.2d at 214. For a further discussion of the Hodges decision, see infra notes 61-63 and accompanying text.

38. 458 F. Supp. 388 (E.D.N.Y. 1978), aff'd, 603 F.2d 1053 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980). The Rosa court noted that "[s]urprisingly, in the years since United States v. Fatico, 458 F.2d 388 (E.D.N.Y. 1978) was decided, no other court, and in particular, no court of appeals has had the occasion to address this issue." Rosa, 891 F.2d at 1077 n.2.

39. Fatico, 458 F. Supp. at 400. For a further discussion of the Fatico decision, see infra notes 40-41 & 43 and accompanying text.
material from the prosecution. The district court, on remand, held that Jencks material should be provided to the defendant, since the need for disclosure of such material at a sentencing hearing is just as great as it is at a trial. The Third Circuit in Rosa found that the facts before the Fatico court were sufficiently analogous to the situation facing Plisco at his sentencing hearing, and thus relied on the portion of the Fatico opinion which stated:

[T]he defendant's only hope was to attack the credibility of the Government agents by attempting to impeach them with their prior statements and reports. Without this limited weapon, the defendant remained virtually defenseless. Nor could the defendant rely on a subsequent trial to rectify any inaccurate findings. Unlike a pre-trial hearing, which may be followed by a trial at which the defendant is afforded full procedural protections, sentencing is the end of the line. The defendant has no opportunity to relitigate factual issues resolved against him.

The Third Circuit also recognized that in sentencing Plisco, the district court in Rosa considered the government witness' testimony without giving Plisco any opportunity to attack the witness' credibility.

40. Fatico, 458 F. Supp. at 399. In Fatico, the defendant was charged with conspiracy to receive and receiving stolen goods from interstate commerce. Id. at 391. The defendant pled guilty to the conspiracy charge and, during the sentencing hearing, the district court denied the defendant's request to inspect copies of each of the witnesses' pre-trial statements after their direct testimony. Id. at 399. On remand, however, the district court reversed its ruling. Id. at 400.

41. Id. The Fatico court stated that "the need for Jencks discovery is just as great at a sentencing hearing to determine a critical fact not established at trial that directly affects the defendant's liberty, as it would be at trial." Id. (emphasis added).

42. Rosa, 891 F.2d at 1077 (the "reasoning with respect to the defendant in Fatico is just as applicable to the situation which confronted Plisco at his sentencing").

43. Rosa, 891 F.2d at 1078 (quoting Fatico, 458 F. Supp. at 400). In further support of its decision, the Fatico court also quoted the dissenting Justices in Palermo v. United States: "[N]othing in the [Jencks] statute or its legislative history justifies our stripping the trial judge of all discretion to make nonqualifying reports available in proper cases." Fatico, 458 F. Supp. at 400 (quoting Palermo v. United States, 360 U.S. 343, 361 (1959) (Brennan, J., dissenting)).

44. Rosa, 891 F.2d at 1078. The Third Circuit in Rosa asserted that the government witness' "testimony, without an attack on its credibility if such was available, not only substantiated the government's claims of Plisco's involvement in drug-dealing, but it also attributed a substantial criminal history to Plisco." Id. at 1078-79. Plisco claimed, however, that the government witness partially lied while testifying against him, as evidenced by the sentencing hearing transcript:

THE WITNESS [Plisco]: Yes, Your Honor. I'm sorry for everything that I've done and that I'm guilty of; that all the things you've heard today from Mr. Droznek [government witness] on the witness stand are not true. It is true that since I've been arrested in New Castle, Armstrong County, I believe, I've gotten out of the numbers business
The Third Circuit opined that sentencing is the most critical stage of a criminal proceeding, and concluded that there was no purpose in denying Plisco material which would ensure a more effective cross-examination of the government witness, especially where such material would be valuable to Plisco’s "very liberty."\(^{45}\)

Although the sentencing of Plisco in Rosa was not governed by the Federal Sentencing Guidelines,\(^{46}\) the Third Circuit cautioned in a footnote that the sports business, and I was just going along making an honest living and turned my back on things; and I don’t want any involvement with anything or any people or any—anybody.

And, Your Honor, I beg you for leniency in the case, understanding.

MR. HIRSCHHORN: Just let me, Your Honor—I need to ask Mr. Plisco a question.

(Off the record discussion.)

THE WITNESS: Not all the things that Droznek said, Your Honor, today on the witness stand in front of you are true. Not all of them are true.

THE COURT: I understand you to say that, they were not true.

MR. HIRSCHHORN: I understand him to say all of them were not true, but that’s not exactly what he meant. What he meant is not all of them.

THE WITNESS: Not all of them are true, Your Honor.

THE COURT: I understand your position.

\(^{45}\) Rosa, 891 F.2d at 1079. The Third Circuit reasoned that the "rationale of Jencks v. United States...and the purpose of the Jencks Act would be disserved if the government at such a grave stage of a criminal proceeding could deprive the accused of material valuable not only to his defense, but to his very liberty." Id. (footnote omitted).

\(^{46}\) See 18 U.S.C. § 3553 (1985 & Supp. 1990). In 1984, Congress enacted the Comprehensive Crime Control Act, which contained, among its many federal criminal law reforms, the Sentencing Reform Act. Ogletree, The Death of Discretion? Reflections on the Federal Sentencing Guidelines, 101 Harv. L. Rev. 1938, 1945 (1988). The Sentencing Reform Act established the United States Sentencing Commission to draft Sentencing Guidelines which would "narrow the disparity in sentences imposed by federal courts upon similarly situated offenders for comparable criminal conduct." Id. at 1945-46. "The Act requires courts to impose sentences 'which reflect the seriousness of the offense'; 'promote respect for the law'; 'provide just punishment for the offense'; 'afford adequate deterrence to criminal conduct'; 'protect the public from further crimes of the defendant'; and 'provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.'" Ogletree, supra, at 1946 (quoting 18 U.S.C. § 3553(a)(2)). To advance the goals of the Act, the Commission is responsible for determining under what circumstances a defendant would be subject to a particular sanction. Ogletree, supra, at 1946. In addition, the Commission is required to rank each offense
note that, in the future, when a sentence is mandated by the Guidelines, a defendant’s need for Jencks material may be even more compelling. In cases where the Guidelines are applied, the judge will be required to sentence within a Guideline range based upon specific factual findings. Thus, when a defendant pleads guilty, like Plisco in Rosa, the severity of the sentence depends entirely on what facts are shown at the sentencing hearing, and the “need by a defendant for prior statements made by government witnesses called to testify against him, may be even more imperative . . .”

Relying on all of these factors, the Rosa court decided that Plisco was entitled to Jencks material at the sentencing hearing. To hold otherwise would deprive Plisco of material valuable not only to his defense, but to his liberty, and would be contrary to the rationale of the Jencks Court and the purpose of the Jencks Act. Plisco’s sentence was then vacated, and the case was remanded to the district court for further proceedings consistent with the Third Circuit’s opinion.

III. Analysis

The issue of whether to extend the Jencks Act to a sentencing hearing was one of first impression before the Third Circuit and, aside from the United States District Court for the Eastern District of New York’s decision in Fatico, it had not been addressed by another court. In analyzing according to its seriousness by employing a grading scheme created by Congress. “To implement the grading scheme, the Commission developed guidelines that take into consideration a multitude of factors concerning the offense, including the defendant’s role in the offense, whether a weapon was used, the amount of monetary loss, and the injury to victims.” Ogletree, supra, at 1946 n.48. The Act allowed a court flexibility to depart from a specified sentence when it finds that “an aggravating or mitigating circumstance” exists that was not adequately taken into account in the general Sentencing Guidelines. Ogletree, supra, at 1946 n.49.

Plisco’s sentence was not governed by the Sentencing Guidelines because his offense occurred before they became applicable. Rosa, 891 F.2d at 1079.

47. Id. The Rosa court stated that in Guidelines cases, “the judge has much less leeway to moderate a sentence based upon perceived weaknesses in the government’s case . . .” Id.

48. Id. The Third Circuit in Rosa noted:

Thus, for example, a violation of 21 USC § 841(a)(1), the crime to which Plisco pled guilty, has a base offense range which varies from a base level 6, which can lead to no prison sentence, to a base level 42, which can lead to life imprisonment for even a first-time offender. . . . The severity of the sentence will depend solely on what is demonstrated at the trial, or in the case of a guilty plea such as Plisco’s, at the sentencing hearing.

Id.

49. Id. at 1079.

50. Id. at 1079.

51. Id.

52. Id. The Rosa court did, however, affirm Plisco’s conviction. Id.

53. Rosa, 891 F.2d at 1077 n.2.
lyzing this question, it is submitted that the Third Circuit's resolution of this issue in *Rosa* represents a correct analysis of precedent and a just result. As a consequence of the Third Circuit's decision, a criminal defendant will not be deprived of material over which the government has control and possession where it is valuable to his defense during a sentencing hearing, and the government will fulfill its duty of ensuring that justice is done.

A. Narrow Construction of the Jencks Act

Prior to *Rosa*, there were many courts which narrowly construed the Jencks Act and refused to permit disclosure of Jencks material at criminal proceedings other than at a trial to determine guilt or innocence.\(^{54}\)

For example, the United States Court of Appeals for the Third Circuit in *United States v. Murphy*\(^{55}\) addressed the issue of whether the Jencks Act was applicable to a pre-trial evidentiary hearing resulting from a motion to suppress.\(^{56}\) Although it conceded that the issue was probably not considered by Congress,\(^{57}\) the Third Circuit affirmed the district court's denial of the defendant's motions to direct the government to produce

---


Most of the decisions which refused to extend the Jencks Act to critical criminal proceedings aside from a trial dealt with requests for production of material in the context of discovery motions or preliminary hearings. *Sebastian*, 497 F.2d at 1270. In justifying its reluctance to broaden the scope of the Jencks Act disclosure, the Second Circuit in *Sebastian* asserted:

> But although we might well—as a matter of policy—favor broadening the Jencks Act or generally liberalizing federal discovery, we do not feel that we can ignore the weight of authority... or the language of the Act in the absence of contrary legislative history or specific direction from Congress.

*Id.*

---


\(^{56}\) *Id.* at 772.

\(^{57}\) *Id.* at 773. The *Murphy* court cited the Second Circuit in *United States v. Covello*, which opined:

> In all probability Congress did not consider the question whether a suppression hearing is itself a "trial" or whether such a hearing is so much an integral part of the criminal trial that determines a defendant's innocence or guilt so as to intend either that the Act apply to such a hearing or that it not do so. In any event, the courts have consistently construed the statute literally, reading "trial" to mean "trial," and have held that under 18 U.S.C. § 3500 the pre-witnessstand statements of persons testifying at suppression hearings are not comprehended.
Jencks material during the suppression hearing. The Murdoch court opined that the language of the Jencks Act and its legislative history reveal that pre-trial statements of a government witness must not be produced until the conclusion of direct examination of the government witness at trial. The Third Circuit in Murdoch defined a trial as a proceeding used to determine guilt or innocence, and thus concluded that a pre-trial evidentiary hearing resulting from a motion to suppress was not a trial within this definition.

Another case supporting the proposition that Jencks material is to be produced only at trial is United States v. Hodges. In Hodges, the United States Court of Appeals for the Fifth Circuit held that the government was not required to produce the prior statements of a government witness who testified against the defendant at a probation revocation hearing. The Hodges court averred that the Jencks Act refers only to trials, not hearings, and it was intended to apply only to those proceedings conducted to determine guilt or innocence.

within the statements the defense is entitled to examine at suppression hearings.


58. Murphy, 569 F.2d at 774.

59. Id. at 773-74. Although the legislative history of the Jencks Act provides little guidance about the extent of the Act’s application beyond the trial stage, the Murphy court found Congress to have been “greatly” concerned with the timing of disclosure of pre-trial witness statements to defendants. Id. at 773. The specific language of the Jencks Act, which states that the disclosure of prior statements by a government witness may not be compelled “until said witness has testified on direct examination in the trial of the case,” supported their finding. Id. (emphasis supplied).

It has been argued, however, that “[l]iteral conformance with the terms of this provision engenders delay and inconvenience . . . and may denigrate the ability of counsel to utilize documents produced effectively during cross-examination.” Foster, supra note 2, at 708-09 (footnote omitted). For the relevant text of the Jencks Act, see supra note 4.

60. Murphy, 569 F.2d at 773 (citing United States v. Hodges, 489 F.2d 212 (5th Cir. 1973)).

61. 489 F.2d 212 (5th Cir. 1973). In Hodges, the defendant pled guilty to possessing marijuana with intent to distribute. Id. at 213. The defendant was placed under supervised probation for five years. Id. Thereafter, the government filed a motion to revoke probation claiming that the defendant had conspired to import marijuana into the United States and to distribute the drug while he was on probation. Id. During the revocation hearing, the defendant discovered that a government witness had given a statement to the prosecution which implicated the defendant in unlawful marijuana activities. Id. When this government witness testified against the defendant, the defense counsel filed a motion for the production of the statement under the Jencks Act. Id. The court sustained the government’s objection that the “statement involved other individuals not yet indicted or tried” and that the “Jencks Act refers only to ‘trials’ and not ‘hearings’” and thus denied the defendant’s motion. Id. at 213-14.

62. Id. at 214. The Fifth Circuit in Hodges stated that “the Jencks Act had no application to the revocation hearing here in issue.” Id.

63. Id. The Fifth Circuit in Hodges concluded that a revocation hearing involved no question of guilt or innocence, but merely determined whether a de-
Significantly, however, *Murphy* and *Hodges* did not involve contested sentencing hearings where the testimony of a government witness is relevant to the validity and severity of a defendant's sentence, and thus different considerations were involved.64 A pre-trial hearing, for example, is followed by a trial in which a defendant will be afforded an opportunity to try to impeach government witnesses with their prior statements in order to clarify any inaccurate findings.65 A sentencing hearing, on the other hand, limits a defendant who has pled guilty to only one opportunity to impeach government witnesses with their prior statements and to persuade the judge as to certain factual allegations in order to lessen the sentence.66 Moreover, even if a defendant did not plead guilty, the witnesses called at a sentencing hearing may be entirely

64. See *Rosa*, 891 F.2d at 1077 ("*Murphy* involved a request that Jencks Act material be produced at a pretrial suppression hearing, not at a post-trial sentencing hearing.") (emphasis supplied)).

65. See *Fatico*, 458 F. Supp. at 400. The *Fatico* court asserted that, with a pre-trial hearing, a defendant could "rely on a subsequent trial to rectify any inaccurate findings" and would be "afforded full procedural protections." *Id.*

66. *Id.* The *Fatico* court stated that "[i]n the vast majority of cases which result in a plea of guilt, [sentencing] is, for the defendant, the only critical stage." *Id.* at 396 (emphasis added). The *Fatico* court also recognized that, at a sentencing hearing, a "defendant has no opportunity to relitigate factual issues resolved against him" and "where, after a guilty plea, the critical fact was litigated for the first time at the sentencing hearing, the defendant is irreparably disadvantaged." *Id.* at 400.

However, like sentencing hearings, there are strong policy arguments for requiring pre-trial disclosure at a suppression hearing. See United States v. *Sebastian*, 497 F.2d 1267, 1270 (2d Cir. 1974); *Fatico*, 458 F. Supp. at 399. For example, the Second Circuit stated:

Since findings at such a hearing as to the admissibility of challenged evidence will often determine the result at trial and, at least in the case of fourth amendment suppression motions, cannot be relitigated later before the trier of fact, pre-trial production of the statements of witnesses would aid defense counsel's impeachment efforts at perhaps the most crucial point in the case. . . . [A] government witness at the suppression hearing may not appear at trial so that defendants could never test his credibility with the benefit of Jencks Act material.

*Sebastian*, 497 F.2d at 1270.

On the other hand, the Third Circuit in *Murphy* focused on the policy arguments against producing Jencks material at pre-trial suppression hearings. *Murphy*, 569 F.2d at 774. If Jencks material was required to be disclosed to defendants at pre-trial suppression hearings, "there would be significant danger that suppression motions would be noticed, not for their stated purpose, but as a discovery device, unavailable to those not able to trigger such a hearing in the context of their cases." *Id.*
different from those who testified at the defendant's trial, and thus a sentencing hearing will still serve as a defendant's only chance to test the credibility of those witnesses.

B. Policy Reasons for Extending the Jencks Act to Sentencing Hearings

The legislative history of the Jencks Act provides little guidance concerning the extent of the Act's application beyond the trial stage. Yet, the Supreme Court's decision in Jencks "suggests that the need for Jencks discovery is just as great at a sentencing hearing to determine a critical fact not established at trial that directly affects the defendant's liberty, as it would be at trial." Generally, the use of pre-trial statements of government witnesses ensures a more thorough and effective cross-examination of those witnesses. Whether a defendant is at a trial or at a sentencing hearing, the importance of being able to effectively cross-examine government witnesses remains the same.

Furthermore, it is important to recognize that the Jencks Act was "designed to further the fair and just administration of criminal justice" and, thus, was intended to advance the interest that the United States has in seeing that justice be carried out in a criminal prosecution. Implicit within this interest of the United States is an assurance that defendants will be sentenced fairly. In order for the Jencks Act to advance this interest, and thus guarantee a fair sentence, a defendant at a sentencing hearing must have access to Jencks material in order to prevent the possibility of erroneous or perjured testimony from impacting upon the judge's sentencing decision. Moreover, since the advent of the Federal Sentencing Guidelines, it is important that a defendant have an opportunity to cross-examine a government witness thoroughly and effectively in order to establish the relevant facts which will be considered by the sentencing judge.

It should be noted, however, that during a sentencing hearing, the government's confidentiality concerns regarding disclosure of private

67. See United States v. Covello, 410 F.2d 536, 544 (2d Cir. 1968), cert. denied, 396 U.S. 879 (1969). The court in Covello opined that Congress probably did not consider whether the Jencks Act should be applicable to pre-trial suppression hearings. Id. For a further discussion of the congressional oversight perceived by the Covello court, see supra note 57.

68. Fatico, 458 F. Supp. at 400.

69. See Jencks, 353 U.S. at 667 (recognizing the value of pre-trial statements for impeachment purposes); Fatico, 458 F. Supp. at 399 (pre-trial statements are critical tool for effective cross-examination).

70. Campbell v. United States, 373 U.S. 487, 495 (1963) (quoting Campbell v. United States, 365 U.S. 85, 92 (1961)) (addressing whether interview report incorporating pre-trial statements of government witness was required to be produced to defendant under Jencks Act in bank robbery trial).

71. See Jencks, 353 U.S. at 668 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)) (interest of United States in criminal prosecution "is not that it shall win a case, but that justice shall be done").

72. See Rosa, 891 F.2d at 1079 n.3.
documents to a defendant weigh more heavily than they would during trial. At trial, a defendant's guilt or innocence will be determined. Disclosure of Jencks material is therefore necessary to give a defendant the opportunity to effectively cross-examine the government witnesses and to prove his innocence by using information which might be material to his defense. If a defendant is found guilty, his liberty will be restricted. The sentencing hearing is utilized to aid the judge in determining the extent of the restriction to be imposed upon a defendant's liberty. Thus, it is arguable that the interest of the government in preserving the confidential nature of its files takes on a more compelling stance once a defendant's guilt has been decided, because the crucial question is merely how much of a defendant's freedom will be restricted, and not whether it will be restricted.

This argument loses some of its validity, however, in light of the recognition by some courts that sentencing "is a critical, often the most critical, stage of criminal proceedings." Therefore, it could just as well be argued that there is no good reason why Jencks aid to defendants should assume a less important stance in the process for determining how long their liberty will be restricted than it would in the elaborate process already created to aid in their defense during trial. Cross-examination, whether it is performed at a trial or at a sentencing hearing, is the principle means by which the truth of a witness' testimony will be tested. It is necessary at a sentencing hearing, therefore, to afford a defendant the means by which to impeach the government witnesses testifying against him, since his very liberty depends on the success of his defense.

C. Expanding the Jencks Act to Proceedings Other than Trial

Despite the narrow construction of the Jencks Act given by many courts, "[m]odifications of the express language of the Jencks Act's limitation on compelling production of Government reports to the trial setting are being recognized and adopted." For instance, United States v.

73. The legislative history of the Jencks Act reveals that Congress found it "essential to preserve the confidential nature of Government files lest innocent persons whose names may be mentioned in the investigation of criminal cases should be, without reason, exposed to public oblique." 1957 U.S. CODE CONG. & ADMIN. NEWS 1861, 1864. Congress also considered the "protection of law-enforcement techniques, sources of intelligence, and protection of confidential informants" as important. H.R. REP. No. 700, supra note 3, at 9; S. REP. No. 569, supra note 3, at 5.

According to the Jencks Act, defendants are only entitled to government documents which relate to the witness' direct testimony, and will not be allowed to rove at will through entire investigative files and government materials. 1957 U.S. CODE CONG. & ADMIN. NEWS, supra, at 1862. Thus, the Jencks Act "will serve both to protect individual rights during criminal prosecutions and to protect confidential information in the possession of the government." Id.

74. Fatico, 458 F. Supp. at 396.

Murphy was superceded when Rule 12(i) of the Federal Rules of Criminal Procedure was amended to require that Jencks material be provided to criminal defendants at pre-trial hearings on motions to suppress evidence.\(^{76}\)

Furthermore, many courts have applied the Jencks Act to post-trial proceedings held pursuant to 28 U.S.C. §2255 which entail independent and collateral inquiries into the validity of a conviction.\(^{77}\) Section 2255 allows a defendant to attack a criminal judgment and sentence, but the scope of the attack is limited to matters which may be raised only collaterally.\(^{78}\) Although a Section 2255 proceeding is an independent civil action, and although the Jencks Act applies only to criminal prosecutions, the Fourth Circuit has concluded that a Section 2255 proceeding was "sufficiently in the nature of a criminal proceeding" to hold the Jencks Act applicable.\(^{79}\)

Thus, due to the climate of expansion regarding the disclosure of Jencks material to defendants, it is not surprising that the Third Circuit continued that expansion in Rosa. Moreover, it is likely that, in the future, other courts will endorse the Third Circuit's decision in Rosa. Indeed, one such example is United States v. Ameperosa,\(^{80}\) decided one year after Rosa, in which the United States District Court for the District of Hawaii adopted the decision and rationale of the Third Circuit in Rosa.\(^{81}\) The Ameperosa case is factually similar to Rosa, and like the Third Circuit in Rosa, the Ameperosa court concluded that the government could be compelled to provide Jencks material at a sentencing hearing.\(^{82}\) The Ameperosa court opined that the court's and society's interest in sentenc-

---

For a further discussion of these "modifications," see infra notes 76-79 and accompanying text.

76. FED. R. CRIM. P. 12(i) (1983). Federal Rule of Criminal Procedure 12(i) now provides: "(i) Production of Statements at Suppression Hearing. Except as herein provided, Rule 26.2 [Jencks Act] shall apply at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule." Id. For a discussion of United States v. Murphy, see supra notes 55-60 and accompanying text.

77. United States v. White, 342 F.2d 379, 382 n.4 (4th Cir.) (Jencks material must be produced in §2255 proceeding), cert. denied, 382 U.S. 871 (1965); United States v. Kelly, 269 F.2d 448, 451 (10th Cir. 1959) (same), cert. denied, 362 U.S. 904 (1960). Contra Beavers v. United States, 351 F.2d 507, 509 (9th Cir. 1965) (Jencks Act inapplicable to §2255 proceeding).

78. Kelly, 269 F.2d at 451. The legislative purpose in enacting §2255 "was to provide that an attack upon a judgment and sentence in a criminal case which previously might have been made in a proceeding in habeas corpus should be made by motion filed in the court in which the sentence was imposed . . . ." Id. 79. White, 342 F.2d at 382 n.4. See also Kelly, 269 F.2d at 451.


81. Id. at 1483.

82. Id. at 1479. The defendant in Ameperosa pled guilty to theft and, during the sentencing hearing, requested the court to direct the government to produce FBI reports for the defendant's inspection and use. Id. at 1479-80. For a discussion of similar facts as those in the Rosa case, see supra notes 29-52 and accompanying text.
ing a defendant fairly and "to only such periods of incarceration as the facts of the crime warrant under the Sentencing Guidelines" outweighs any government concern of being burdened or of having lengthy and complex proceedings.\(^8\)

**IV. Conclusion**

The *Rosa* opinion is the first circuit court decision to require the production of Jencks material to defendants at sentencing hearings and represents a huge step toward assuring defendants a fair sentence. The Third Circuit's decision in *Rosa* provides defendants with a critical tool for effectively cross-examining government witnesses and, thus, increases a court's ability to assess the credibility of these witnesses. Because a sentencing hearing will sometimes only afford defendants one opportunity to attack the credibility of the government witnesses testifying against them, it is essential that defendants be given any material which may be valuable to their defense.

Furthermore, extending the Jencks Act to sentencing hearings is supported by its stated purpose, the rationale of the Jencks Court, and the government's interest in ensuring that justice is reached. Although the government has a more compelling confidentiality concern during a sentencing hearing, this interest is outweighed by a defendant's interest in establishing the relevant facts to be considered by the sentencing judge and in being accorded a fair sentence. Moreover, the *Rosa* court, by extending the Jencks Act to sentencing hearings, was merely following the lead of other administrative and judicial decisions which have modified the language of the Jencks Act to allow production of pre-trial government documents at proceedings other than a trial.

Undoubtedly, the Third Circuit in *Rosa* recognized "[t]he value of a witness' own prior statement in probing the validity of the witness' memory, exposing inaccuracies in the testimony, and compelling the qualification of unqualified assertions . . . ."\(^8\) The impact of the Third Circuit's rationale in *Rosa* is clearly evident from the *Ameperosa* opinion. Like the *Ameperosa* court, other courts will recognize that the Third Circuit's decision in *Rosa* serves the interests of justice by affording those

---

83. *Ameperosa*, 728 F. Supp. at 1482. The *Ameperosa* court, like the *Rosa* court, stated that the "rationale of Jencks v. United States and the purpose of the Jencks Act itself would be disserved if the government, at such a grave stage of a criminal proceeding, could deprive the defendant of material valuable to his very liberty." *Id.*

84. Foster, *supra* note 2, at 689. "The procedures for disclosing pretrial statements of government witnesses . . . are an attempt to foreclose the contingency of perjured or erroneous testimony forming the basis for a conviction by ensuring the opportunity for fully informed cross-examination." *Id.* at 688-89.
defendants facing a sentence an opportunity to a fair and equitable defense.

Nataly A. Harker