In the

Supreme Court of the United States

PHILIP J. GOLDBERG,

Petitioner.

v.

UNITED STATES OF AMERICA,

Respondent.

No. 74-6293

Washington, D.C.
January 14, 1976

Pages 1 thru 60

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Wednesday, January 14, 1976

The above-entitled matter came on for argument at 10:08 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

DONALD C. SMALTZ, ESQ., Arco Tower - Suite 4404, 515 South Flower Street, Los Angeles, California 90071, for the petitioner.

PAUL L.FRIEDMAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530, for the respondent.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Goldberg against the United States, 6293.

Mr. Smaltz.

ORAL ARGUMENT OF DONALD C. SMALTZ ON BEHALF OF PETITIONER

MR. SMALTZ: Mr. Chief Justice, and may it please the Court: The case comes to this Court on a writ of certiorari to the Ninth Circuit Court of Appeals. The case involves petitioner's conviction for violations of the mail fraud statute 18 U.S.C. 1541.

The indictment charged that the petitioner, Mr. Goldberg, and Edwin S. Newman and three other codefendants had violated the statute in connection with the issuance of single premium annuity policies to various individual annuitants who in turn pledged those annuities as collateral for existing or for new loans with various lenders. The annuities were issued from a life insurance company located in Phoenix, Arizona, known as Financial Security Life Insurance Company, sometimes referred to in the brief as FSL. The indictment charged that the defendant and his codefendants made false statements to the lenders who considered making loans or who made loans on the policies.

All of the defendants, with the exception of

petitioner and Newman, pleaded guilty to one or more counts prior to petitioner's trial. Petitioner's case went to trial by itself and he was found guilty of 14 counts of the indictment and sentenced to two years in prison on each of the counts, said sentence to run concurrently and fined $1,000 per count.

Following petitioner's conviction, Newman, whose case was severed about a week before petitioner's case was scheduled for trial, the indictment against Newman was dismissed and he was permitted to plead guilty to two misdemeanors.

The issue on which the writ was granted was whether the Jencks Act contains an attorney's work product exception and whether a government attorney's notes of conversations with key government witnesses to whom the prosecutors have read back their notes from time to time where the witness would correct the prosecutors' notes from time to time, if not compellable under the terms of the Jencks Act, are compellable under Brady doctrine.

Subsequent to this Court's granting of the petition, the United States conceded for the first time that certain of the notes contained in a packet of notes which was first lodged in the Court of Appeals on August 12, 1974, at the time of oral argument, that certain of these notes were in fact not the notes of the prosecutors as has been represented all the way up the line, but in fact were the handwritten notes of the

witness Newman.

QUESTION: I do not recall, Mr. Smaltz, but was that set out in the petition for certiorari?

MR. SMALTZ: No, sir, and I am going to get to that. It was not set out in the petition for certiorari because it was a fact unknown to petitioner at the time he filed the petition and the government did not make the disclosure until shortly before petitioner filed his opening brief in this case.

QUESTION: And how much of the so-called Jencks issue here involves those particular notes? Those written by Newman.

MR. SMALTZ: Your Honor, out of 237 pages, 40 pages are in Newman's handwriting.

QUESTION: Forty out of 237.

MR. SMALTZ: Yes, sir.

QUESTION: And the rest of the 237 are --

MR. SMALTZ: Are written primarily in the handwriting of Mr. Lebowitz and --

QUESTION: Was he the attorney?

MR. SMALTZ: He was the attorney for the government, yes, sir. He was one of two attorneys, and the other prosecutor's name was Keilp. Primarily most of the notes are in Mr. Lebowitz' handwriting.

QUESTION: And these are notes of conversations with Newman, are they?

MR. SMALTZ: Yes, sir, they are.

Now, the government has contended in its brief that because the Court did not grant the writ as to the notes in Newman's handwriting, that petitioner is foreclosed from discussing this matter. However, it is petitioner's contention that the matter is properly before the Court for two reasons:

First of all, the Brady argument made in the application for the writ subsumes the issue of evidence favorable to a defendant.

QUESTION: Are you assuming, Mr. Smaltz, that anything impeaching within the language of the Jencks Act necessarily is embraced within Brady? Brady talked about exculpatory evidence, as I recall. It didn't say that anything impeaching to a witness for the government was necessarily exculpatory.

MR. SMALTZ: Well, I am not saying that all Brady materials are necessarily Jencks materials, or all Jencks materials are necessarily Brady materials. But there is an area there where they overlap. And if the government fails to produce upon timely demand materials in its possession which will impeach its key witness, while they will engender a violation of Jencks, I submit, Mr. Justice Rehnquist, that they can also engender a violation of Brady.

QUESTION: What's your authority from this Court for

that proposition?

MR. SMALTZ: Well, in Palermo v. United States in the concurring opinion of Mr. Justice Brennan, I believe he indicated that the commands of the Constitution were close to the surface of the decision of this Court in Jencks v. United States.

QUESTION: That opinion didn't have much support, did it? How many votes did that get?

MR. SMALTZ: I think Mr. Justice Douglas in Augenblick indicated that the commands of the Sixth Amendment are close to the surface of the Jencks Act. I believe that a number of lower courts, one of them being Johnson v. Johnson, have indicated that the Jencks Act embodies the constitutional provisions of the Fifth and Sixth Amendments, an issue that we dealt with at some length in our brief.

Secondly, the second reason why this Court can consider the issue of Newman's handwritten notes is that the doctrine of plain error enables the Court to consider it, and since it was the government's failure to disclose this material both to the trial court and to the Ninth Circuit, petitioner cannot be charged with the responsibility for not knowing of these matters because he was not furnished a packet of these notes until August of 1975 when the Solicitor General's office for the first time provided him with a copy.

QUESTION: What is your authority from this Court for

that proposition that what might be plain error when reviewed by a Court of Appeals is a basis for expanding the grant of a writ in this Court?

MR. SMALTZ: Your Honor, I thought that the plain error doctrine is a doctrine that is used only in extraordinary circumstances, but when some act or some error exists which substantially affects the fairness, integrity, or probable reputation of judicial proceedings, I believe that is an accepted definition of when the plain error doctrine will apply. And that being the case, I submit that the government's failure to disclose the true character of what was in its possession rises to the level of plain error.

QUESTION: Mr. Smaltz, to back up a minute, when was this material handed to the Court of Appeals?

MR. SMALTZ: Your Honor, it was handed to the Court of Appeals at the time of oral argument.

QUESTION: Were you there?

MR. SMALTZ: Yes, sir.

QUESTION: Well, you knew it was handed to them.

MR. SMALTZ: Yes, sir, I was there.

QUESTION: I thought you said a minute ago you didn't know about this until after you filed your petition for cert.

MR. SMALTZ: No, we did not receive copies, your Honor, or inspect copies of these notes until after the

petition for certiorari had been granted. We received those copies in August of 1975.

What had happened was this, Mr. Justice Marshall. In the court below, in the trial court, and initially in its brief to the Ninth Circuit, the government contended that the notes relating to Newman, their handwritten notes of their conversations with him, had in fact been delivered to the trial judge for an in camera inspection. They said so in their appellate brief to the circuit.

We had taken the position that the trial court had never made an inspection. That was one of our complaints to the circuit. And ultimately the government admitted its error and they admitted it at the time of oral argument when the prosecutor stood up and requested permission from the court to file the packet of notes. And he said, "These are all the notes that I can now locate."

Now, there is a factual dispute about that, and I understand that the government has filed an affidavit of the prosecutor, Mr. Lebowitz, who avows to this Court that in essence what he told the circuit was that these are all the notes, period. We have filed a contrary affidavit which is an exhibit to our reply brief.

QUESTION: We are not in a position to pass on some evidence, are we?

MR. SMALTZ: Well, I would think not, your Honor,

but since the government has lodged these notes as materials which were not part --

QUESTION: Did the Court of Appeals consider the Jencks Act material?

MR. SMALTZ: Well, your Honor --

QUESTION: If you know.

MR. SMALTZ: The Court of Appeals in its opinion stated that the notes that had been -- the notes of the prosecutors -- I will give you the precise language.

QUESTION: The notes were the work papers.

MR. SMALTZ: Pardon me, sir?

QUESTION: Were the work papers, isn't that what they were?

MR. SMALTZ: They were work papers -- the court said this, the Circuit Court: "Apart from the question whether such notes were exempt from the Jencks Act as 'work product,' they were not statements of the defendant within the meaning of 3500(e).. We find no clear, prejudicial error." That's found at Appendix 120.

The court indicated in its opinion that they examined the notes. I think you have to assume that. But I have some doubt as to whether they could make a meaningful examination for a variety of reasons. When the government lodged this 237-page packet, the notes are interspersed, there is no pagination to the notes. There is no chronological order to

the notes. There was no explanation by the government as to who wrote what at the time they were filed.

QUESTION: What were the circumstances? You said they were delivered to you in August of 1975?

MR. SMALTZ: Yes, sir.

QUESTION: Was there some explanation made why they were delivering them to you in August 1975?

MR. SMALTZ: Yes, sir.

QUESTION: What was the explanation.

MR. SMALTZ: The Solicitor General said that they were going to file these notes with this Court, and also they were going to file other materials which were not part of the record which --

QUESTION: But you actually were given a copy of them?

MR. SMALTZ: Yes, sir, I was.

QUESTION: Is that what suggests that the government conceded in August '75 that you should have had those when you made the demand at time of trial?

MR. SMALTZ: I would like to view it as a concession, your Honor, but I don't think the government so regarded it as a --

QUESTION: Why would they give you -- everything else was in camera, whatever was handed up was handed up to judges. Is that right?

MR. SMALTZ: Yes, sir.

QUESTION: And not given to you.

MR. SMALTZ: Yes, sir.

QUESTION: Until August 1975.

MR. SMALTZ: Yes, sir.

QUESTION: I don't quite understand why they would give them to you in August 1975.

QUESTION: Because they were going to be lodged in this Court, and it's the practice for counsel whenever he lodges anything with this Court in pending litigation to let his adversary know about it, and give him copies of it.

MR. SMALTZ: At the time --

QUESTION: Unless it was filed with a limitation of an in camera examination.

MR. SMALTZ: And at the time the notes were filed in the appellate court, the Ninth Circuit, the government did not provide --

QUESTION: In my experience in Jencks Act cases, and there have been quite a few since I came here since the Jencks Act was passed, since I wrote the Jencks opinion, those things were always handed up in camera. The parties were not given them if the government takes the position that they are not subject to being handed over under the Jencks Act. So I don't understand how you got them in August '75.

MR. SMALTZ: I got them, your Honor, as we were

putting the finishing touches on our opening brief. And I will take anything I can get from the government.

QUESTION: But you had them when you filed your petition for cert, did you?

MR. SMALTZ: No, I did not, your Honor.

QUESTION: That's the date I think that is left in some doubt.

MR. SMALTZ: The petition for certiorari was filed --

QUESTION: I'm trying to find the date here, and I can't find it.

MR. SMALTZ: In the case, on April 3, 1975. We did not receive the notes until sometime in the second week of August 1975.

In our reply brief filed on behalf of petitioner, at pages 16 and 17 there is a chart which we have prepared and is printed in the brief which summarizes the various stages of what occurred with regard to these notes and the positions taken by the government. The positions vary depending upon the court involved. In fact, the Solicitor General in filing his response or his opposition to the petition for certiorari never even hinted that any of the notes that were lodged with the Ninth Circuit and which were at issue in this case were in fact authored by Newman.

So in essence we have two different sets of notes, those prepared by the prosecutors and those prepared by the

witness himself.

Now, this case presents an unusual Jencks Act case in the sense that the petitioner, that Mr. Newman, who was the key witness against the petitioner, was required by virtue of a contract entered into with the government to make a full and complete statement. Newman was codefendant in the scheme charged. Immediately prior to trial he entered into a written deal with the government. The plea agreement appears in the Appendix at pages 48 to 50. Under the terms of paragraph 1 of the agreement Newman was to give a complete statement under oath concerning those events which were alleged in the indictment. Under paragraph 3(a) of that agreement the government agreed to sever Newman, and Newman agreed to testify for the government, said testimony being in conformity with the statement having been given to the United States Attorney under oath before trial. Further, that in the event Newman failed to honor the terms of his plea agreement with the government, that the government would use his pretrial statement under oath as well as his testimony at the trial of petitioner against Newman in a subsequent trial.

The agreement also provided that if petitioner's case went to trial, Newman would plead guilty to a felony, but if petitioner pleaded guilty, then Newman would be permitted to plead two misdemeanors, and in both instances the government would recommend probation for --

QUESTION: On what page in the Appendix do we find that, Mr. Smaltz?

MR. SMALTZ: Your Honor, at pages 48 to 50. The precise page is 48 and 49.

As it turned out, Mr. Newman was the 35th and last witness called by the government in its case-in-chief. He was also the sole rebuttal witness. Newman purported to testify on direct examination practically in ipsissimis verbis to 91 conversations he allegedly had with petitioner which in turn linked petitioner to the illegal scheme and allegedly demonstrated petitioner's knowledge in scienter.

Newman's testimony on direct examination lasted three days and spanned 440 pages. He was the key to the government's case, a fact even the Solicitor General's office acknowledges, and he had worked with the petitioner in petitioner's various insurance companies for over a decade. Newman was a lawyer and he was a signatory to all the correspondence which emanated from Financial Security Life Insurance Company to the lenders, and all but two of the count mailings from the insurance company were executed and/or sent by Newman. It was Newman who after consulting a Phoenix attorney provided the form of responses to the lenders which were utilized by FSL and which ultimately resided in petitioner's indictment.

During the course of the trial the judge as well as the prosecutor described the correspondence which emanated from

Newman as the crux of the government's case.

Now, on the very same day that this plea bargaining agreement is dated between Newman and the government, which is May 11, 1973, Newman participated in a 2-1/2-hour question and answer session with two attorneys for the government, Messrs. Lebowitz and Keilp, a postal inspector by the name of ? Doyle Marshall, Mr. Newman's own counsel, and a reporter. Newman's testimony briefly --

QUESTION: By "reporter" you mean a court reporter?

MR. SMALTZ: Court reporter, yes, sir.

Newman's testimony briefly touched on some of the matters alleged in the indictment, but it did not cover all of his testimony in direct. The session, this May 11 session with the two prosecutors and the court reporter, concluded with the prosecutor's observation as follows: "For the record, the time is now 4:30. We have not exhausted all the transactions on which Mr. Newman can testify. We intend to continue this discussion off the record at a later time as well as the Goldberg transactions which will be explored at a further time."

On cross-examination by petitioner of Newman --

QUESTION: Before you leave that, you did have a copy of the transcript of the May 11th interview, didn't you?

MR. SMALTZ: Yes, sir, I did.

QUESTION: So you were on notice that there would be

a further conversation.

MR. SMALTZ: Yes, sir, I was, and that's where our cross-examination commenced when we began it with Mr. Newman.

On cross-examination the petitioner established that Newman met with just the two prosecutors, Messrs. Lebowitz and Keilp, on May 12, June 9, June 10, June 11, and June 16, 1973. At those sessions no reporter was present and neither were either of the two postal inspectors who were assisting the prosecution of this case.

On cross-examination with regard to what happened at these sessions, Newman testified that the prosecutors would take notes which they would read back to him from time to time and which Newman would correct.

After establishing these facts, petitioner moved for production of these notes under the authority of the Jencks Act. The court, without waiting to hear from the government and without inspecting any of the notes, denied petitioner's request sui sponte on the basis that these notes constituted the prosecuting attorneys' work product. Petitioner twice thereafter, the following two days, renewed his motion for production of these notes under the terms of Jencks, the second time in a written memorandum which asserted that the notes if outside the Jencks Act were compellable under the doctrine of Brady v. Maryland.

QUESTION: Were any of the notes you are talking about now, did they include these 40 pages you told us about?

MR. SMALTZ: I don't know what they included at that time, Mr. Justice Brennan.

QUESTION: You don't know when those 40 pages of notes were handwritten by Newman.

MR. SMALTZ: No, sir.

QUESTION: Certainly they are not referred to in the original transcript copy which you did have.

MR. SMALTZ: No, sir, they are not part of the May 11 statement.

QUESTION: Which must mean they must have been at some time later, on one of the dates that you have given us up through June.

MR. SMALTZ: I think that's a fair inference. I think something that adds to that inference is the fact that when the prosecutor lodged these materials with the Ninth Circuit, they were in response to the fact that the petitioner was claiming that he was entitled to the notes.

QUESTION: As of those particular dates.

MR. SMALTZ: Yes, sir.

QUESTION: And they did include these 40 pages, that which was handed up included those 40 pages.

MR. SMALTZ: Yes, I assume so. I never saw the notes, but according to the Solicitor General's office --

QUESTION: Now that you have been interrupted, may I ask you something just to clear my own mind?

Is the only discussion of this issue the single paragraph on page 122 of the Appendix?

MR. SMALTZ: Yes, sir.

QUESTION: That is, the only discussion in the Court of Appeals.

MR. SMALTZ: Yes, sir, it is.

QUESTION: Was it 122? 120. 120, the second full paragraph on the page on page 120 is the entire discussion of this issue in the Court of Appeals.

MR. SMALTZ: That is correct.

QUESTION: Thank you.

MR. SMALTZ: Now, the district court judge on these three occasions the request for the notes was made, without ever examining the notes, met each motion with the assertion that the notes were work product and refused even to inspect the notes in camera.

QUESTION: Where do we find in the record his statement that he did not?

MR. SMALTZ: Mr. Chief Justice, I believe at page 94 is where the district court judge for the first time enunciates the work product doctrine here.

QUESTION: Who was the district judge?

MR. SMALTZ: Judge Copple.

QUESTION: Judge Copple.

MR. SMALTZ: Yes, sir.

QUESTION: Who wrote the opinion in the Court of Appeals?

MR. SMALTZ: Judge Koelsch.

QUESTION: I don't see it in the appendix.

MR. SMALTZ: I believe, your Honor --

QUESTION: A memorandum opinion, wasn't it?

MR. SMALTZ: I'm sorry, I didn't hear.

QUESTION: It's a memorandum opinion.

QUESTION: I know, but with an unidentified author, is that it?

MR. SMALTZ: I do not believe the author was identified. I have the impression it was written by Judge Koelsch, but not from what appears.

QUESTION: He was modest about it.

QUESTION: Before you continue, is it necessary for us in coming to a decision in this case to know whether or not any particular notes were identified by Newman as having been read back to him?

MR. SMALTZ: I think for purposes of the Jencks Act that fact is a key fact.

QUESTION: But are any notes so identified?

MR. SMALTZ: No, none of the notes that the prosecutor, Solicitor General's office, have lodged with the Court are so

identified.

QUESTION: And how do you think the case should be disposed of?

MR. SMALTZ: I believe, Mr. Justice Powell, the case ought to be reversed.

QUESTION: And remanded -- what sort of direction?

MR. SMALTZ: For a new trial.

QUESTION: What about the Campbell position?

MR. SMALTZ: Well, there was Campbell (I) and Campbell (II). It seems to me that the Court would have saved a lot of time and effort had they reversed and remanded the first time around.

QUESTION: That doesn't answer my question.

MR. SMALTZ: Well, I say, your Honor, that in Campbell -- that was decided, as I recall, in 1963 -- the Jencks Act was then still a relatively new piece of legislation --

QUESTION: Yes, but questions whether or not these particular notes are the notes that were read back and, as you told us, were corrected by him, questions of that kind I take it could under a Campbell disposition be determined with the trial judge then free to reinstate the verdict or not as he may determine whether the notes should have been turned over.

MR. SMALTZ: If I may suggest, Mr. Justice Brennan, I think that the Court's opinion in Clancy v. United States is more appropriate, for this reason: In the first place, the

government has conceded that at least some of the notes were Jencks Act statements and should have been turned over. They take the position that it was harmless error? But as the Court held in Clancy, once it's established that some of the notes are Jencks Act statements and the defendant had been denied those notes through the actions of the government, it is not for appellate courts to speculate as to the use that could have been made.

Further, I submit it's a very difficult decision --

QUESTION: The Court of Appeals here didn't reach the work product issue, but it did say apparently that none of the papers that had been handed up to them constituted statements within the meaning of the Jencks Act.

MR. SMALTZ: Yes, sir, they did say that.

QUESTION: I take it that's at least one of the issues here. It's a threshold issue, if you are going to deal with the case the way the Court of Appeals did. Does that mean we must look at these papers and decide whether they are statements?

MR. SMALTZ: The Government has conceded that some of them are statements.

QUESTION: Well, I don't know. Have they really conceded that?

MR. SMALTZ: Yes, they have, your Honor, I believe in their brief. We pointed out in our reply brief that --

QUESTION: I know, but do you think that determines, some government concession determines the construction of the Jencks Act?

MR. SMALTZ: No, but I agree that the facts that appear in the record in the courts below --

QUESTION: Well, what you are suggesting is that we do have to decide whether each one of these pieces of paper is a statement or not.

MR. SMALTZ: I don't know that you have to decide that. I know that --

QUESTION: Well, surely, as to those that we do not know, as I understand the record at present, that in fact Newman had corrected them, had them read back, and adopted them.

MR. SMALTZ: He so testified.

QUESTION: I know, but as I understand it, to which he testified we don't know of the many papers that have been filed here.

MR. SMALTZ: We do not.

QUESTION: Now, doesn't that set up a factual issue as to whether or not those particular documents are or are not statements within the meaning of the Jencks Act in the sense that have they been adopted by the government's witness? And if that's so, why doesn't that require a Campbell hearing?

MR. SMALTZ: Well --

QUESTION: We can't do it up here obviously.

MR. SMALTZ: The petitioner, Mr. Justice Brennan, did not ask this Court to sit as a nisi prius court. It was the government. We started with the proposition that we made an appropriate record below and that the government thwarted petitioner's efforts to have an evidentiary hearing at the time.

QUESTION: What did the Court of Appeals mean when it said -- this is a very cryptic sentence that simply says they are not statements. What is that based on?

MR. SMALTZ: I don't know that, your Honor, and I can't --

QUESTION: Didn't you argue in the Court of Appeals that there was no work product exception and that these were statements within the meaning of the Jencks Act?

MR. SMALTZ: Yes, we did.

QUESTION: And I suppose the government said they weren't statements within the meaning of the Jencks Act.

MR. SMALTZ: Well --

QUESTION: Didn't they argue that?

MR. SMALTZ: Yes, they did, Mr. Justice --

QUESTION: Then the Court of Appeals had the issue before them about whether they were statements or not. And they said they were not.

MR. SMALTZ: That is true. They said they were not.

But I have difficulty understanding how the Court of Appeals could work their way through through those notes --

QUESTION: I understand, you think they were quite wrong.

MR. SMALTZ: In addition to being wrong as a matter of law, I think as a factual matter it was impossible for anybody to work their way through those notes when there was no explanation at all. At least the Solicitor General in his brief here purports to give some explanation, sir.

QUESTION: It would help if they had written it out, I agree with you.

QUESTION: It would help if you had known what had been submitted to the Court of Appeals, what was there.

MR. SMALTZ: It would help very much.

QUESTION: It would certainly also have helped in the Court of Appeals whether or not anything was a statement, whether or not it was something read back to the witness which he had adopted after correction. And you couldn't have known that, as I understand it.

MR. SMALTZ: We can't identify which notes the witness was referring to in his cross-examination.

QUESTION: Mr. Smaltz, what did the Court of Appeals mean by "statements of the defendant." These weren't [illegible] statements of the defendant, were they?

MR. SMALTZ: We never contended they were statements

of the defendant, your Honor, and neither did the government. That may have been an error.

QUESTION: Mr. Smaltz, we're not giving you much chance to argue your case, but I'm having difficulty knowing exactly what the issue is.

On page 55 to 57 of the S.G.'s brief, he quotes testimony, which I take it to be Newman's testimony, page 55, and says that this is virtually all that Newman said concerning his adoption or approval of the notes.

Now, if in fact that is virtually all, what evidence do you have that Newman indeed did adopt or approve any of these notes?

MR. SMALTZ: In the first place, may I respond to the question this way, Mr. Justice Powell: We have set forth some additional facts in our brief, our opening brief --

QUESTION: Testimony of Newman?

MR. SMALTZ: Yes, sir, Mr. Justice Powell.

QUESTION: More specific than this?

MR. SMALTZ: At least to some extent more specific.

The problem was that we wanted to have the trial judge make an in camera inspection as this Court has required since Palermo v. United States. At that point in time we then asked him to take extrinsic evidence to try and prove our contention that the statements were adopted or prove by the witness.

The trial judge absolutely refused to conduct an in camera proceeding or even look at the notes. So we were closed down at the threshold. The government stood silent on two occasions while the trial judge stated that the work product privilege applied. On the third occasion the government claimed work product privilege. When the case got up to the Ninth Circuit, the government abandoned the work product privilege and for the first time contended that they were not statements within the meaning of the act.

QUESTION: When was this testimony given by Newman?

MR. SMALTZ: When was this testimony --

QUESTION: The testimony in which he indicated he really didn't know, on 55 to 57 of the S.G.'s brief.

MR. SMALTZ: When he said for the first time he really wasn't sure whether that was part of the pattern?

QUESTION: Yes.

MR. SMALTZ: That was given, your Honor, on -- the testimony was given at the start of his cross-examination.

QUESTION: Was that during the trial itself?

MR. SMALTZ: Yes, sir.

QUESTION: And there is no further -- well, is there reference in one of your briefs to some additional testimony?

MR. SMALTZ: Yes, sir, there is.

QUESTION: But not quite as specific as this, as I recall.

MR. SMALTZ: I think we set forth in each and every instance what he said.

QUESTION: Yes. And you are saying you didn't have an adequate opportunity to develop that particular aspect of the case.

MR. SMALTZ: That's correct.

QUESTION: Why is that so? At that time why couldn't that have been pursued beyond that point?

MR. SMALTZ: It couldn't be pursued because the trial judge shut us down. He said, in essence, until you find a case that says that attorneys' notes are not work product, I am not going to do anything. Each time we said, Would you please look at the notes. He said, No, not until you find a case. So he would not conduct any sort of in camera proceeding at all.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Smaltz, you undertook and hoped to reserve 5 minutes for rebuttal. We will allow you that 5 minutes later, and we will adjust times accordingly. So you can count on 5 minutes for rebuttal.

MR. SMALTZ: Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: If you need it.

Mr. Friedman.

ORAL ARGUMENT OF PAUL L. FRIEDMAN

ON BEHALF OF RESPONDENT

MR. FRIEDMAN: Mr. Chief Justice, and may it please the Court: I would like to take a minute or two at the outset to try to explain the notes handwritten by Newman. Some of what I say about them is not in the record, and I want to make that clear. But I think it's important to understand what we at least have been informed about these notes, because it might clear some things up.

QUESTION: Would you tell us what is in the record and what is not as you go along?

MR. FRIEDMAN: Yes, I will, Mr. Justice Marshall.

QUESTION: Thank you.

MR. FRIEDMAN: Now, it is true that there were three requests for Jencks material when Newman was testifying in the government's case-in-chief. In each case the request was for prosecutors' notes, and in each case -- well, at least in the third case -- this is in the record -- in the written motion filed by Mr. Smaltz he specifically said, We are talking about notes that were generated prior to the time that Mr. Newman took the stand in the government's case-in-chief. There was no Jencks request when Newman took the stand as a rebuttal witness.

In the appendix on page 110 Mr. Smaltz begins to lay the foundation and inquires: Have you met with the

prosecutors again since you completed your testimony in the government's case-in-chief?

And the answer was yes, he spent all day on the 4th of July with the prosecutors and he has been at their offices on an average of five hours a day since the 4th of July.

And this all took place, as I recall, on July 9, this testimony.

The question was never asked what happened there, did the prosecutors take notes, did you write notes? There was no request for Jencks materials.

We think -- and let me say this, which is not in the record. We have been informed that all of the notes handwritten by Newman were generated after he left the stand in the government's case-in-chief. At the conclusion of the trial again, and this is not in the record, the prosecutor scooped up all the notes that related to Newman and Newman's testimony and things that Newman had told them and put them in one pile, both the prosecutors' notes and the notes written by Newman. He did the same thing in relation to other witnesses. He put them in his files.

In writing his brief in the Court of Appeals he made a mistake. Some notes relating to another witness not involved in the issue here had been turned over for in camera inspection; his recollection was that he had also turned these notes over

for in camera inspection. That's what he said in his brief in the Court of Appeals.

At the time of oral argument in the Court of Appeals, as I understand it, Mr. Smaltz had filed a brief that the court had some question about whether it would accept because it was too long for a reply brief, and some sort of an arrangement was struck whereby he would waive oral argument if the court would let him file his brief. The government was then asked would it waive oral argument, too. Not wanting to interfere with the court's plan to save some time, the government said sure. As a result it did not have the opportunity to explain all that was in the packet of notes that was then being lodged with the court. It did explain that it made a mistake in its brief and now it would like to lodge these notes.

QUESTION: It was not orally argued before the Ninth Circuit.

MR. FRIEDMAN: It was not orally argued before the Ninth Circuit, as I understand it.

The notes were turned over. The Court of Appeals --

QUESTION: You mean filed.

MR. FRIEDMAN: Were filed with the Court of Appeals.

QUESTION: Not turned over.

MR. FRIEDMAN: Not turned over to Mr. Smaltz.

QUESTION: Lodged.

MR. FRIEDMAN: Lodged.

QUESTION: Was that at the request of the court or voluntary on the part of the government?

MR. FRIEDMAN: I'm not sure. I'm informed it was voluntarily on the part of the government.

The court, since the issue before it was whether prosecutors' notes were statements and/or work product, probably when it reviewed the notes operated under the assumption that these were all written by the prosecutors, although there were a number of different handwritings involved; there were a number of different prosecutors involved. They concluded on the face of the notes that they weren't statements.

Now, we operated on the assumption that these were all prosecutors' notes --

QUESTION: They were not statements of the witness Newman.

MR. FRIEDMAN: They were not statements of the witness Newman. Now, the court said statements of the defendant, and we think that's just a mistake, because that's --

QUESTION: Obviously the statute deals with statements of the witness.

MR. FRIEDMAN: Right. If they were statements of the defendant, they would have been turned over under Rule 16.

We found out that some of these notes were hand-written by Newman after we had filed our opposition to the

cert petition and after the Court granted cert, because frankly that's the time we began to look at the case very closely for the first time.

We felt obligated to explain the difference in the notes and to make some argument regarding the Newman notes, and because of all the confusion and because Mr. Smaltz had not seen these notes, we gave him a copy of the whole packet of notes.

QUESTION: May I ask right there, Mr. Friedman, did you give them to them because you thought they were Jencks materials to which he was entitled?

MR. FRIEDMAN: No.

QUESTION: Then why? I don't follow it.

MR. FRIEDMAN: We were too generous perhaps.

QUESTION: Ordinarily the U.S. Attorney if he thinks they are not statements producible under Jencks Act only lodges them, as my Brother Stewart says, with the judge for in camera inspection, doesn't he?

MR. FRIEDMAN: That's right.

QUESTION: And if he turns them over to defense counsel, he turns them over because the U.S. Attorney agrees they are producible Jencks statements, isn't that it?

MR. FRIEDMAN: In turning them over we did not intend to indicate to anybody that they were Jencks material.

QUESTION: But the case was now here; certiorari

had been granted.

MR. FRIEDMAN: That's right. We're not talking about the trial court, we're not talking about the Court of Appeals; we are talking about here where we want to make arguments concerning work product, concerning what are statements, and concerning, as a large portion of our brief discusses, the kinds of things the prosecutors generally write, the kinds of notes they create in preparing for trial as opposed to agents' notes. And in order to argue that and to permit Mr. Smaltz to argue it -- and again, maybe we were too generous -- we gave him the notes so he could respond. This was no concession.

QUESTION: Why didn't you give them to him in the Court of Appeals?

MR. FRIEDMAN: Why?

QUESTION: Uh-huh.

MR. FRIEDMAN: In the Court of Appeals, again, we were arguing that on the face of the notes you can tell that they are not statements. The prosecutors did not give it to them. Although again I am under the impression that Mr. Smaltz was at least given the opportunity to glance through this packet of notes at that time, not a chance to see them, have them, study them, but to glance through them and see the general nature of them.

QUESTION: That's just your word against his.

MR. FRIEDMAN: I'm not sure he disagrees with that statement.

QUESTION: Well, it's not in the record anyhow.

MR. FRIEDMAN: No. Again, it is not in the record.

As to the Newman notes --

QUESTION: May I just ask you this: When this case was in the Court of Appeals you did not know, or there was not an awareness of the person arguing on behalf of the government that 40 pages of this stuff was in Newman's handwriting, is that correct?

MR. FRIEDMAN: Since he was the prosecutor who tried the case, he knew it, but it didn't register in his mind --

QUESTION: He didn't make it known.

MR. FRIEDMAN: He just pulled the packet of notes that said "Newman" on the cover and lodged them with the Court of Appeals.

QUESTION: And the presumption, or the assumption, the hypothesis, the premise in the Court of Appeals was that all this handwriting was handwriting of various prosecutors, government prosecutors.

MR. FRIEDMAN: I think we have to assume that that's what they assumed.

QUESTION: Right.

QUESTION: And if the judge had examined them in camera, would he have found that out, that some of these were

in Newman's handwriting?

MR. FRIEDMAN: Well, it depends -- well, if --

QUESTION: This is on the point that the judge refused to look at them. That's the only thing I was talking about.

MR. FRIEDMAN: If they had been turned over at the time the request was made, it is our understanding that the Newman notes didn't exist, so they would not have been turned over. Since there was no renewed Jencks request when Newman testified as a rebuttal witness, there was nothing that made the prosecutors think that they even ought to turn these over, there was no demand for it, they weren't thinking about it, they were in the midst of a 7-week trial.

So there are a number of things that can be done about the Newman --

QUESTION: Mr. Friedman, just before you leave this point about whether you were too generous with the defendant, do I correctly understand that the government gave the Court of Appeals the impression that they were entirely prosecutors' notes?

MR. FRIEDMAN: I think that's right.

QUESTION: You wouldn't really say you were too generous in correcting that impression when there were 40 pages of Newman's handwriting in there, would you?

MR. FRIEDMAN: I don't think that we were too generous

in correcting the --

QUESTION: Wouldn't there be an obligation on the government to make that known at an appropriate time?

MR. FRIEDMAN: I think it was our obligation to make that known as soon as we were aware of it. Whether it was also our obligation to give Mr. Smaltz a copy of the packet of the notes at that time is the only point on which I am saying perhaps we were too generous. But certainly we had an obligation to let --

QUESTION: Do you concede that the packet of notes contains statements within the meaning of the Jencks Act?

MR. FRIEDMAN: We concede that the notes handwritten by Newman, 40 pages of notes, in that 40 pages was a 7-page narrative which Newman wrote out sitting in the prosecutor's office explaining relationships between Goldberg --

QUESTION: Do you concede that that's a statement?

MR. FRIEDMAN: We concede that it's a statement.

QUESTION: Within the meaning of the statute.

MR. FRIEDMAN: Within the meaning of the statute.

QUESTION: And it was not turned over to the trial judge for his consideration.

MR. FRIEDMAN: Because there was no demand for it. So it's a statement --

QUESTION: Well, that depends upon when it was made, and the question of when it was made is not one that's resolved

by the record.

MR. FRIEDMAN: That's right.

QUESTION: That's fair to say, isn't it?

MR. FRIEDMAN: That's fair to say.

QUESTION: At least as to them then why isn't there a Campbell proceeding required?

MR. FRIEDMAN: What we have said in our brief is that perhaps the appropriate procedure is for a Campbell hearing as to those notes.

QUESTION: You say you don't know when that 7-page statement was made?

MR. FRIEDMAN: We think we know but it's not in the record.

QUESTION: You think you know, but isn't the record clear enough that it was made before the testimony, his direct testimony?

MR. FRIEDMAN: No. The 7-page narrative, indeed all of the 40 pages of notes handwritten by Newman, we are under the impression, we have been told, were written after Newman's direct testimony in the government's case-in-chief and before his rebuttal testimony.

QUESTION: Before his testimony on rebuttal.

MR. FRIEDMAN: Yes.

QUESTION: That's your understanding but the record doesn't show it.

MR. FRIEDMAN: That's our understanding. And if you look at the statement, there is great support for that --

QUESTION: That may be true, Mr. Friedman. Obviously we are not the tribunal to resolve issues like that.

QUESTION: Your understanding of the time sequence is not supported by the record itself, is it? This is part of your off-the-record --

MR. FRIEDMAN: It is not supported by the record.

QUESTION: If we construe that what has been lodged with this Court is part of the record, we must accept the fact that the record does contain statements by the witness that were not disclosed to the defense.

MR. FRIEDMAN: It contains statements by the witness that were not disclosed to the defendant.

QUESTION: That's in the record, if we treat what you have lodged with this Court as part of the record.

MR. FRIEDMAN: Yes.

Now, on the other hand, when you look at the statements, particularly the 7-page narrative, which is the only thing we concede is a statement within the meaning of Jencks, it relates to testimony given by a witness named Paradine who testified as a defense witness after Newman testified in the government's case-in-chief, and when Newman took the stand as a rebuttal witness, he began to testify concerning relationships with Paradine, and he was cut off by

an objection from Mr. Smaltz, sustained by the court, at least until the prosecutor could show the court in a transcript, because it was daily copy, what part of Paradine's testimony this was to rebut. A page and a half of that 7-page statement relates to the testimony before Newman was cut off. In fact, his testimony is almost verbatim from that 7-page statement.

So the inference, we think, is clear that it wasn't created until after Newman left the stand and until after Paradine had testified. And in any event only a page and a half of 239 pages of notes relates in any way to testimony at trial, and it's completely consistent and almost verbatimly consistent with what he said at trial.

QUESTION: That's the type of argument that should be made to the trial court instead of here.

MR. FRIEDMAN: It's the type of argument that should be made to the trial court, but --

QUESTION: You concede this is a statement of the witness, but you don't concede it's a statement of the witness producible under the Jencks Act.

MR. FRIEDMAN: That's right.

QUESTION: Because it doesn't concern the things, the matters to which he testified.

MR. FRIEDMAN: That's right. And additionally, but again this is something that we have to argue on the basis of things outside the record, there was no renewed demand for

Jencks material at the time --

QUESTION: You think if the Court of Appeals had been told everything that it should have been told, or if it had been told what you are telling the Court now, or if any court had, it should have reached the same decision that the Court of Appeals did, namely, these are not statements producible --

QUESTION: If the facts are as you tell us.

MR. FRIEDMAN: Right.

QUESTION: We don't know that they are.

QUESTION: We don't, no.

QUESTION: And that's why I can't understand why this case doesn't automatically call for a Campbell hearing.

MR. FRIEDMAN: At least as to the Newman notes.

QUESTION: Of course it does. Well, I would say the whole works.

MR. FRIEDMAN: Not necessarily the prosecutors' notes.

Now, again, maybe the prosecutors did not turn the Newman notes over to the Court of Appeals.

QUESTION: Because they weren't in the record either.

MR. FRIEDMAN: They weren't in the record, he knew they didn't exist at the time the Jencks request was made, the Jencks request was only for prosecutors' notes, it was only for prosecutors' notes that existed at the time that Newman testified in the government's case-in-chief. There was no

renewed Jencks request at all when Newman took the stand in rebuttal, and certainly none for the notes handwritten by Newman. So it shouldn't have been --

QUESTION: Was there not a Brady issue in the case at that point?

MR. FRIEDMAN: No, I don't think so, your Honor, unless there was something in the notes that is truly exculpatory in the Brady sense, unless there are facts --

QUESTION: Had not the defendant contended there was a Brady issue in the case?

MR. FRIEDMAN: He contended there was a Brady issue.

QUESTION: Of course, you wouldn't know the merits of that contention without knowing whether or not there was anything exculpatory in the notes.

MR. FRIEDMAN: The prosecutor examined everything that he had and in response to --

QUESTION: But the prosecutor's examination may not have been as careful as it sometimes should be.

MR. FRIEDMAN: I don't think this Court --

QUESTION: Apparently the prosecutor was under the impression that there were 40 pages of his notes that just weren't there. It's a rather unusual situation. Did he not give the Court of Appeals the impression that everything was his own notes?

MR. FRIEDMAN: Yes.

QUESTION: And he must have known better, musn't he?

MR. FRIEDMAN: At that time? Again, it's not in the record. We don't know whether he went through this packet of notes before his oral argument in the Court of Appeals or just suddenly realized that --

QUESTION: What sort of a duty does the government lawyer have in preparing for an argument in the Court of Appeals? Shouldn't he have at least looked at the file?

MR. FRIEDMAN: Well, he was under the impression until he walked into the courtroom that it was already in the record.

QUESTION: I thought this wasn't orally argued.

MR. FRIEDMAN: It wasn't, but he prepared for oral argument I gather. Anyway --

QUESTION: Can't a judge rely on what a U.S. Attorney recommends? The U.S. Attorney says,I have looked at this,and in fact he had not looked at it? Is that what you are -- are you saying he presented something to the court that he hadn't first examined himself?

MR. FRIEDMAN: It's not in the record exactly the process he went through before he lodged this with the court.

QUESTION: Didn't you say a minute ago he had just barely looked through it?

MR. FRIEDMAN: I said I don't know whether he did or didn't.

QUESTION: But don't I assume that he did look at it?

MR. FRIEDMAN: I don't know.

QUESTION: Or is that the way you run the U.S. Attorney's office?

QUESTION: Mr. Friedman, someone, if this case goes back on a Campbell remand, someone has got to go through the mechanical process of turning these pages over one at a time, identifying the handwriting of one person as distinguished from another, that is, the notes of the lawyers that the government has distinguished from the things written in the handwriting of Newman, is that not so?

MR. FRIEDMAN: That's true, yes.

QUESTION: That means a hearing in the district court would be required.

MR. FRIEDMAN: I think that on the notes handwritten by Mr. Newman that the record at this stage, unless this Court is willing to undertake the process of determining that there was no error or harmless error, that there should be a Campbell hearing with regard to the Newman notes. The thrust of our argument deals with the notes written by prosecutors, and as we understand it, that's the issue the Court was interested in when certiorari was granted. We don't think there has to be that kind of a hearing with regard to those notes. And the reason we say that is that by their nature and, in the context of this case, lawyers' notes taken in preparation for

trial are not going to be 99 times out of a hundred Jencks Act statements. He doesn't write a long narrative, continuous account of things or he would never be able to use the notes in examining a witness in court. We think it would be useless to say that the Palermo and Campbell procedure of an in camera inspection and taking of extrinsic evidence that applies when agents make reports should always apply to prosecutors.

QUESTION: May I ask, Mr. Friedman, as a matter of curiosity really, I think this is the first Jencks Act case we have had now in 10 or 15 years, isn't it? I had the general impression that the practice had grown up with perhaps the help of the Justice Department, of U.S. Attorneys almost automatically turn over to defense counsel in trials everything they have in the way of -- no matter who took them -- notes of conversations with government witnesses after the government witness had completed his direct examination. Am I right in that impression or not?

MR. FRIEDMAN: I think the impression that you have is wrong.

QUESTION: Oh.

MR. FRIEDMAN: And my own explanation --

QUESTION: Why don't we have more cases on it?

MR. FRIEDMAN: Because I don't think most people believe that prosecutors' notes contain Jencks Act statements. In my own experience as an assistant U.S. Attorney, there were

never requests -- rarely requests -- for prosecutors' notes. Prosecutors take notes -- everybody has his own way of taking notes obviously. But you write down the general subject matter --

QUESTION: What other statements of government witnesses then are automatically turned over as a matter of course?

MR. FRIEDMAN: What seems to me to be automatically turned over are reports of investigative agents, FBI, secret service, postal inspectors, that kind of thing, or the kind of thing that we had here where the prosecutors took a statement from him, a question-and-answer statement under oath, which is clearly --

QUESTION: Well, certainly there may be statements taken by prosecutors which would still be Jencks Act statements.

MR. FRIEDMAN: Yes. Now, our position, as I think we made --

QUESTION: But those things, aren't they automatically turned over?

MR. FRIEDMAN: Yes. Our position is not that -- and that's why we don't say there is a broad attorney's work product exception. Just because something is taken down by a prosecutor instead of an agent it's not exempt from the Jencks Act. But the nature of the kind of thing that is taken by a prosecutor will normally not be a statement within the meaning of the Jencks Act. This 89-page statement under oath taken

by the prosecutors clearly is a Jencks Act statement. But his cryptic notations preparing himself to examine witnesses, 99 times out of a hundred will not contain the kind of statements that Jencks was talking about.

QUESTION: Has this kind of issue come up before?

MR. FRIEDMAN: It has come up in some of the circuits, and the circuits have considered the work product question and generally they have said there is no broad work product exception, but a number of them have said, But we have got to look more closely when they are prosecutors' notes. There are certain problems that develop when they are prosecutors' notes we are talking about that don't develop when they are investigative agents' notes. And that's what we are trying to say here.

QUESTION: I take it that you think that when the facts are developed, if they are developed, it will show that you did turn over everything that you had that were statements by the time the witness got off the stand on his direct examination.

MR. FRIEDMAN: Everything that was a Jencks Act statement, yes.

QUESTION: Well, none of these papers involved, you think, were then in existence.

MR. FRIEDMAN: The notes taken by the prosecutors, some of them were in existence, sir.

QUESTION: But not the narrative.

MR. FRIEDMAN: Not the narrative.

QUESTION: Mr. Friedman, would we have to enlarge the question upon which we have granted certiorari in order to reach the Newman notes?

MR. FRIEDMAN: Well, it may be subsumed within the Brady question, but there is nothing exculpatory in them, and he has had the notes for five months now, and it's pointed out nothing is --

QUESTION: Then what do you think in answer to my question?

MR. FRIEDMAN: I think the answer is no, it is not included within the question upon which certiorari was granted. But as we tried to point out in our brief it's not Mr. Smaltz' fault that he didn't raise the additional question. We do wonder whether the Court would have granted cert on the additional question of the witness' own handwritten notes, because that's clear, if they fall within the definition of a statement and were written by the witness, they should be turned over.

QUESTION: Of course, customarily we administer certiorari not to do justice in individual cases but to try to get before us issues that we think are of significant importance to the law in general.

MR. FRIEDMAN: That's correct.

QUESTION: But quite often it appears after a grant of certiorari that something has happened that leads us, for example, to dismiss the writ as improvidently granted. We do that at least several times during the course of a term because of after-developing events,and after-developing events in this case might lead us to do something else beside dismissing the writ, do as you suggest, for example, with respect to the handwritten statement of Newman.

MR. FRIEDMAN: As to the prosecutors' notes, however, we think they are not statements. An examination which the Court of Appeals made shows they are not statements. The real kind of tough issue in the case, I think, is not the question of what a statement is, but what is adopted or approved, what does that mean. And they must be, in order to be producible under Jencks, both statements of the witness and adopted or approved by the witness. These were not adopted or approved because we think adopted or approved means that the precise words written in the notes have to be adopted or approved or else it's not fair to try to impeach someone with words that aren't his own. And I think the legislative history supports us; I think that (e)(2) was intended to be broader than (e)(1), not just the opposite, and the Court said that in Palermo.

Even Mr. Smaltz' --

QUESTION: I want to go back a minute. Don't you

agree that in this case with the testimony before the judge he should have at least looked at those?

MR. FRIEDMAN: No, I don't.

QUESTION: Why?

MR. FRIEDMAN: Because they were prosecutors' notes, there was a representation by an attorney, an officer of the court, that they were not substantially verbatim, not written by the witness, not continuous, narrative kind of statements included within the Jencks Act, and there is no evidence they were adopted or approved within the meaning of the Jencks Act.

QUESTION: I see.

MR. FRIEDMAN: The general content of the notes, the general facts were checked with the witness,but not the words of the notes. In effect, -- Mr. Smaltz, interestingly enough, relies on a characterization that the Assistant U.S. Attorney made in his brief in the Court of Appeals that entries in the notes were only made after lengthy conversation and a mutual understanding of the facts was reached. He said that indicates adopted or approved. We think it indicates just the opposite. They sat there for a long time --

QUESTION: What about corrections? Didn't he tell us that some had been corrected, Mr. Friedman?

MR. FRIEDMAN: Well, I think if you look at that excerpt --

QUESTION: What page are you on?

MR. FRIEDMAN: Page 92 of the Appendix. The question Mr. Smaltz asked was: Were they (the notes) occasionally read back to you to see whether or not they correctly understood what you were saying?

And the answer was: Probably from time to time.

Q All right, sir. Did you either correct them or say, "Yes, that's right," or "No, that's not right because it went this way, I believe," words to that effect?

And he said, Yes, that would happen.

Now, again, this may be subject to interpretation, but I think the reasonable interpretation is that he was not correcting the words taken down by the prosecutors in the sense of adopting those words as his own, but he was saying, yes, that's right certain facts happened that way or, no, it's not right, those facts didn't occur that way.

QUESTION: Have we any way of identifying from the record precisely what notes were the subject of that particular colloquy?

MR. FRIEDMAN: No. The only thing that we know that they had to do with some of the notes taken on June 9 and 10. But, of course, he met with the prosecutors on May 13, June 9, 10, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 before he ever took the stand on direct, and then he met with them a number of times before his rebuttal testimony. So we are talking about one part of possibly two days' meetings with the

prosecutors in which there was a general verification of the facts, the way I read it, and not an actual adoption or approval of the words.

QUESTION: Incidentally, does the Department have any particular procedure by which to signify approval or adoption, whether the interrogation is by an investigative official or by a prosecutor?

MR. FRIEDMAN: I don't believe so. I think the general policy is that adoption or approval means some sort of a formal acceptance of the words comparable to initialing or signature, but not necessarily initialing or signature, and perhaps something more specific ought to exist.

QUESTION: But there is nothing in this, initialing or anything in here?

MR. FRIEDMAN: Pardon me?

QUESTION: In this work product , there is no initialing or anything on the one that's before us.

MR. FRIEDMAN: No signing, no indication that he ever looked at the prosecutors' notes, and no reason why he would look at the prosecutors' notes. There is nothing to indicate that any of these pages, other than those that have now been identified as his, were adopted or approved by him in any way. In fact, Mr. Smaltz in his reply brief keeps referring, when he lists the categories of things, to information in the notes, but he never calls them statements. He lists six pages on which

there are direct quotations and there is a single thing in quotation marks on each page, but even there we can't be entirely sure that they are Newman's words. There may be a paraphrase that relates to conversations he and other people had. But Mr. Smaltz says we have got this information. He doesn't call them statements.

QUESTION: Mr. Newman was a lawyer,wasn't he?

MR. FRIEDMAN: Mr. Newman was a lawyer. He had not practiced law in some years, but he was a lawyer. And he was intimately familiar with the operation of this insurance company, and the prosecutors having about three weeks to prepare raided his education on things.

Let me just say one thing about the Brady question. There seem to be two Brady questions that he is raising. One is that non-Jencks type material may nevertheless be Brady if it would be helpful in cross-examination; and we think the answer to that is that unless it contains exculpatory things, material, substantive kinds of evidence, it's not Brady, and he still hasn't shown.

QUESTION: But you concede that something that may not be a statement within the definition of the Federal statute might still be producible under Brady, under the Brady doctrine.

MR. FRIEDMAN: If Newman said Goldberg didn't do any of these things that I told you for three weeks he did, and the prosecutors just wrote a cryptic note, that would be Brady.

QUESTION: Yes.

MR. FRIEDMAN: But that's because it's not being turned over to try to impeach him with prior inconsistent statements, but because it tends to show that he's not guilty.

QUESTION: Or real evidence, tangible evidence,might be Brady. It wouldn't be a statement at all.

MR. FRIEDMAN: Somebody else's fingerprints on a gun, or that sort of thing.

No, we are certainly not trying to limit Brady. But we are saying that Brady does not subsume Jencks and sort of swallow it up.

His other point has to do with this plea agreement, but he cross-examined about the plea agreement. He brought out an awful lot of evidence about the agreement, the nature of it, what Newman expected from it, tried to show bias, and brought out how much time he had spent with the prosecutors, but didn't always follow up on that. He got the judge to give instructions upon the care with which accomplices' testimony should be considered. The judge instructed that Newman was going to get probation, or at least that the prosecutors were going to recommend probation. And even now that he has had the notes, he doesn't show how he would have shown any more with the aid of the notes. And there is nothing in the notes that relates to the plea agreement. The only thing it shows is he spent a lot of time with the prosecutors and that Mr. Smaltz

knew and was able to bring out.

We think that in this case there is absolutely no legitimate claim to a new trial. There is a legitimate claim to a hearing in the Campbell sense and the question of the notes handwritten by Newman. We think that there need not be such a hearing on the notes handwritten by the prosecutors if the Court accepts our view that the term "statement" and the terms "adopted" or "approved" must be very narrowly defined, as Congress intended, particularly when prosecutors' notes --

QUESTION: That requires us to look at the papers.

MR. FRIEDMAN: It requires you to leaf through the papers, because it's pretty clear on its face that they are not statements.

QUESTION: And the Court of Appeals if it had -- another alternative for it would have been to say the work product basis for the district court's ruling was unsound and we remand to do this detail job itself. But it didn't write any opinion; it didn't tell us anything about these papers.

MR. FRIEDMAN: It did indicate they went through the papers.

QUESTION: All it said, they weren't statements.

MR. FRIEDMAN: Well, on the face of the papers it's clear, except, as we say, in the case of the 7 pages handwritten by Newman, that they are not statements.

QUESTION: Of course, Mr. Friedman, one of the

problems in this statute from the beginning, this in camera inspection, has been that parties argue these cases without knowing anything about the materials and opinions can't be written which disclose what's in the materials. It's a silly --

MR. FRIEDMAN: That's right.

But, of course, Palermo, I think, says, and you would know better than I, that when it's clear that they are statements, they are turned over; when it's clear that they are not statements, they are not turned over. It's in those doubtful cases that you need an in camera inspection.

QUESTION: All I am suggesting is that lawyers come here and argue these cases; they don't know what they are talking about, and we can't tell them what they are talking about, and yet we have to decide.

MR. FRIEDMAN: In this case Mr. Smaltz knows what he is talking about because he has seen the papers.

QUESTION: Yes.

MR. FRIEDMAN: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Smaltz.

REBUTTAL ARGUMENT OF DONALD C. SMALTZ

ON BEHALF OF PETITIONER

MR. SMALTZ: I am going to take advantage of the Court's offer of five more minutes.

I would like first to address myself to the fact that the Government contends that we did not renew our motion

for the statements of the prosecutors of Mr. Newman's conversations at the time Newman testified in rebuttal. I don't know how many times we have to make a request, but the trial judge cut us short and said there is an attorney work product exception, and I submit that we would have taken a significant chance of arousing Judge Copple's ire if after having had the motion denied three times,we would have come up again with the same request just because Newman is on rebuttal.

Secondly, at the beginning of the trial on May 15 --

QUESTION: What you would have been requesting, you say, then, on rebuttal had you simply renewed your earlier request would have been prosecutors' notes, because I take it Judge Copple wouldn't have overruled on the same basis a request for a statement, narrative statement, of the witness Newman.

MR. SMALTZ: I do not believe he would if the government had told him that they exist, because on May 15, Mr. Justice Rehnquist, before the trial began -- this is not covered in the brief, but it appears in the record. At page A-99 of the reporter's transcript the judge entered what might be referred to as a continuing order for the government to turn over all Jencks Act statements. Judge Copple ordered the government on May 15, before the trial began, to produce every document which it had in its possession or as it gains possession thereof, to produce copies of them"for you"(referring to me, because I had made this motion), for the defendant.

That is, every document that is to be used in presentation of the government's case, all Jencks Act statements of witnesses who will or may be called will be delivered to the defendant by tomorrow.

QUESTION: This is in the appendix?

MR. SMALTZ: No, sir, it is not.

QUESTION: It's not in the record? It is in the record.

MR. SMALTZ: It is in the record, but it's not in the appendix.

QUESTION: Not in the appendix.

MR. SMALTZ: It's in the reporter's transcript at page A-99. I believe that it was the intent of Judge Copple to have the government turn over to the defense all Jencks Act statements. But Judge Copple had no way of knowing and the defendant had no way of knowing of the fact Newman was writing these statements, and there was no way for that fact to come to the attention of anybody unless the prosecutor fulfilled its duty and called that fact to the attention of the court. They did not do so.

QUESTION: Why did you move three times during the trial, then, for Jencks Act statements if Judge Copple had already entered an order prior to trial requiring the government to turn them over?

MR. SMALTZ: Well, I moved three times because I

believed that Mr. Lebowitz had taken notes which constituted Jencks Act statements, and I believed that the prosecutor did not feel that that complied, or that those notes were Jencks Act statements.

During the direct examination of Mr. Newman, even sitting away at counsel table, I could observe that the prosecutor was reading from a document that was handwritten out and rather detailed, and I wasn't craning my neck to see that because there was a huge book that the prosecutor had on his desk, and that's what prompted me initially in my cross-examination to ask those questions about attorneys' notes.

Further, I would like to invite the Court's attention to pages 5 and 6 of our reply brief because the second reason that I asked about attorneys' notes was that Newman, while he was committed to having made a complete statement to the government by the terms of the plea agreement only made a partial statement, and I knew that somewhere along he had to fulfill that requirement to the government, and I thought it was odd that a reporter wasn't present. And on pages 5 and 6 of our reply brief we attempt to analyze why that agreement in and of itself makes the attorneys' notes compellable.

I would like to say one more thing, and that is that the government argues the legislative history, demonstrates that Congress intended to shield prosecutors' trial notes from production. Our review of the legislative history of Congress'

enactment of the Jencks Act, which was cited in the government's brief, discloses no such concern for attorneys' notes, but does disclose a concern for the witness in questioning a witness about a statement he never saw or whose language he never adopted or approved.

Now, the congressional attempt with respect to the meaning of adoption or approval we agree is not precisely set forth in the legislative history. Nonetheless, the thrust of the provision was to ensure that unless the defendant had in some way been informed of statements attributed to him and has indicated his approval of their accuracy, the summaries should not be turned over to the defense. But in the context of this case, for the reasons that we set forth at pages 6 and 7 of our reply brief, Newman was committed to giving an accurate statement and the prosecutors were committed to receiving an accurate statement.

For the reasons we have expressed in our briefs and here at oral argument, we respectfully submit that petitioner's conviction should be reversed and a new trial ordered.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:19 a.m., oral argument in the above-entitled matter was concluded.]