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Criminal Law—Production of Government Records—Confidential Character

R. G. P.

*West Virginia University College of Law*

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Criminal Law—Production of Government Records—Confidential Character.—Petitioner, Jencks, was convicted of filing a false non-communist affidavit. Harvey Matusow and J. W. Ford, members of the Communist Party and paid FBI informants, testified that petitioner was a member of the party for four years. Ford and Matusow revealed during cross-examination that they had filed written and oral reports with the FBI concerning their association with petitioner. Petitioner's motion for an order directing an inspection of these reports, denied by the trial court, was also denied by the court of appeals upon the ground that the petitioner failed to demonstrate any inconsistency between the informant's testimony and their reports. Held, that the petitioner is not required to lay a preliminary foundation of inconsistency between reports and testimony of witnesses, where their testimony reveals that the reports relate to events about which they testified; moreover, only after an inspection of such reports by the defense may a trial judge determine inconsistency, materiality and admissibility of their contents. Reversed. Jencks v. United States, 77 Sup. Ct. 1007 (1957).

Although inspection of an informant's prior statements had been permitted prior to the principal case, formerly, a defendant was compelled to demonstrate through cross-examination a conflict between the statements of prosecuting witnesses made prior to the trial of the case, and their testimony, before the defendant could require the Government to produce these statements for inspection. United States v. Lightfoot, 228 F.2d 861 (7th Cir. 1956); United States v. Lebron, 222 F.2d 531 (2d Cir. 1955). In order to withhold statements from a defendant with impunity, the Government had only to produce a witness who did not utilize his prior statements to refresh his memory during his testimony, and one who could refrain from revealing any discrepancies between his testimony and statements. D'Aquino v. United States, 192 F.2d 385 (9th Cir. 1951); James v. United States, 191 F.2d 472 (4th Cir. 1951). Apparently, the government's witnesses were masters of this technique. Prior to the principal case, a substantial number of defendants appealed convictions upon the ground that the trial court erred in refusing to exact prosecuting witnesses' prior statements; none of these defendants, however, had been able to develop the requisite inconsistency. See, e.g., Goldman v. United States, 316 U.S. 129 (1941); Scales v. United States, 227 F.2d 581 (4th Cir. 1955); United States v. Simonds, 148 F.2d 177 (2d Cir. 1945).
Finally, in *Gordon v. United States*, 344 U.S. 414 (1952), by proper cross-examination, counsel was able to exact an admission from a government witness that a conflict existed between his present testimony and earlier statements; the Court held that the defendant was entitled to inspect the statements involved. The principal case extends this rule one step more, by permitting the accused to inspect the statements of his accuser without establishing the aforementioned inconsistency. Mr. Justice Clark, in his alarmed dissent, at page 1027, fears that "... the Court has opened their files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information." In point of fact, no FBI files are made available to the defendant under the principal case that were not already available under *Gordon v. United States*, supra; the Court has merely dispensed with the requirement of an acknowledged conflict between testimony and prior statements.

Mr. Justice Brennan, in the majority opinion, at page 1012, indicates which government records will be affected; only those reports of witnesses which relate to "... the events and activities related in their testimony," and only the statements of a prosecuting witness may be inspected. The Court does not propose that the petitioner should be permitted to wander aimlessly through the FBI files in search of some document of an impeaching character.

Congress, in an effort to limit the language of the principal case, has passed the so called Jencks Act, implementing the decision and setting forth the procedure for production and inspection of government records. The statute provides that when the United States alleges that a portion of a statement ordered to be produced contains irrelevant and perhaps confidential information, "... 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." 18 U.S.C. § 3500 (1957). There is an apparent conflict between this provision of the statute and the language of Mr. Justice Brennan, at page 1018, "Because only the defense is adequately equipped to determine the effective use for purposes of discrediting the Government's witness ... the defense must initially be entitled to see them to determine what use may be made of them." Curiously enough, the Jencks Act sets forth just what the petitioner asked, while the Court gave him much more. Mr. Justice Burton, points out in the concurring opinion, at page 1017, that the procedure of having the trial court determine
what portions of the statements are of value to the defendant has been approved and is customary. Indeed, many federal decisions have approved this method of procedure in regard to the type of documents here involved. See, e.g., United States v. Beekman, 155 F.2d 77 (2d Cir. 1946); United States v. Krulewitch, 145 F.2d 77 (2d Cir. 1944).

In viewing the constitutionality of that part of the Jencks Act which conflicts with the majority opinion, the Court can find abundant precedent for the view that granting a trial judge wide discretion in determining the materiality of evidence of this nature is not a violation of the due process clause of the fifth amendment. Glasser v. United States, 315 U.S. 60 (1941); United States v. Krulewitch, supra. Whether the defendant is allowed to inspect the whole of an accuser's statement or only those portions which are, in the judgment of the court, relevant and material, is not, however, the critical element of the case. The Jencks Act recognizes that, whenever a defendant is faced with a government witness whose prior statements may be of value for impeachment purposes, the defendant has a right to inspect such parts of his statements which touch and concern the incriminating testimony without first laying a foundation of inconsistency between the reports and the testimony. The Jencks Act, therefore stands a rather good chance of surviving.

The circumstances under which the FBI may be compelled to produce certain of its files are quite limited. Nevertheless, even if some portion of a statement, material to the informant's testimony, contained confidential information, it has always been the law that, in a criminal case, "... the Government may invoke evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also 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. ..." United States v. Reynolds, 345 U.S. 1, 12 (1952). Were it otherwise, the defense would be deprived of an invaluable instrument for impeachment purposes and powerless to contradict the false testimony of an arch perjurer such as Matusow. See, Matusow v. United States, 229 F.2d 335 (5th Cir. 1956).

A careful analysis of the principal case, as implemented by the Jencks Act, can do much to dispel visions of communist and criminal
elements "rummaging through" the files of the Department of Justice on a "Roman holiday."

R. G. P.

Judgment Lien—Doctrine of Relation Back—Notice of Suit as Notice of Lien.—A began a personal action against B in June, 1953, which was matured for trial at the term which began on September 2, 1953. The trial of the case was begun on October 12, 1953, resulting in a judgment for A, rendered on November 17, 1953. Cs, attorneys for B, to secure payment of legal fees, obtained from B a deed of trust on certain real estate, executed on October 13, 1953. In a partition suit in which all lienholders were named defendants, a special commissioner in chancery designated A's judgment as fifth and Cs' deed of trust sixth in order of priority. Upon exceptions, the circuit court entered a decree holding that Cs' deed of trust was entitled to be fifth in order of priority. Held, that sufficient time having elapsed for the case to be matured for trial at the September term, the judgment rendered on November 17, 1953, related back and became effective on September 2, 1953, the first day of the term, taking priority over the deed of trust of Cs who were not purchasers for value without notice. Cooper v. Cooper, 98 S.E.2d 769 (W. Va. 1957).

W. Va. Code c. 38, art. 3, § 6 (Michie 1955), upon which the decision is predicated, is as follows:

"Every judgment for money rendered in this state, other than by confession in vacation, shall be a lien on all the real estate of or to which the defendant is or becomes possessed or entitled, at or after the date of the judgment, or if it was rendered in court, at or after the commencement of the term at which it was so rendered, if the cause was in such condition that a judgment might have been rendered on the first day of the term . . . ."

At common law, by a legal fiction, the whole term is considered as but one day, and the rule is that a judgment rendered on any day has relation to and is a judgment of its first day. 2 Freeman, Judgments § 976 (5th ed. 1925). The statute is merely declaratory of the common law. Smith v. Parkersburg Co-operative Ass'n, 48 W. Va. 232, 37 S.E. 645 (1900); Dunn's Ex'rs v. Renick, 40 W. Va. 349, 22 S.E. 66 (1895). The court in the principal case, at page 773, declares that "the manifest purpose of that part of the statute is to prevent claimants from obtaining any advantage over one another by reason