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Abstracts of Recent Cases

Conclusion

"It is our opinion that the prompt and effective implementation of these recommendations will bring substantial improvement in the work of stamping out gambling. Relentless war must be carried on against organized crime. This war is a continuing war. We can turn the tide only by eternal vigilance and relentless prosecution of our laws. Only by such measures can we strike a truly devastating blow against gambling—the heartblood of organized crime."[1]

[1] The presentment was signed by Rudy Weissbratten, Foreman, on behalf of "The Second Additional Grand Jury of the County of Kings, for the March 1958 term." It was attested by Henrietta V. Carter, Secretary. The presentment bears the date of February 26, 1959.

ABSTRACTS OF RECENT CASES

Matthew J. Beemsterboer*

Remarks Made by Prosecutor in Closing Argument, Though Ordinarily Improper, May Be Proper in Response to Statements Made by Defense—Defendant was convicted of second degree murder. At the trial counsel for the defense asserted that the testimony of the state's chief witness, an admitted narcotics addict, had been suborned by prosecuting officials. In his closing argument the prosecutor stated that his reputation and that of the police were involved in the trial. The Court of Appeals of New York affirmed the conviction, holding that although ordinarily the prosecuting attorney may not attempt to bolster the credibility of witnesses for the prosecution with the prestige of his office, the remarks he made were proper in retaliation for the accusations made by the defense. The defense, not the prosecution, interjected the reputation and character of the prosecutor and police officials into the case. *People v. Marks*, 160 N.E.2d 26 (N.Y. 1959).

The trial judge refused to admit into evidence a statement made by the victim alledgedly exculpating the defendant. The statement was made by the decedent to a police officer, approximately six minutes after the shooting, naming one Edward Small as the person who had shot him. This statement, though inadmissible as a dying declaration because the decedent showed no awareness of impending death, was sought to be introduced as a spontaneous declaration. The trial judge ruled that the declaration of the decedent lacked spontaneity and that "sufficient time had elapsed under the circumstances so that it could have been a reflective fabrication." The Court of Appeals found no abuse of discretion in the resolution of this preliminary question of fact.

Child Is Sixteen Years of Age or Under Only on or Before His Sixteenth Birthday—Petitioner was charged with having committed lascivious acts with a child sixteen years of age. He objected to the jurisdiction of the court, contending that the child involved was sixteen years, six months and three days old at the time of the alleged crime and thus not "a child of the age of sixteen years or under" as recited in the statute denominating the offense with which he was charged. The Supreme Court of Iowa sustained a writ of *certiorari*, holding that a child is sixteen years of age or under only on or before his sixteenth birthday. *Knott v. Rawlings*, 96 N.W. 900 (Iowa 1959).

"Jencks" Act Governing The Production of Statements Made To Government Agents By Government Witnesses Is Interpreted—In three recent cases the United States Supreme Court granted *certiorari* to determine the scope and meaning of a new statute, 18 U.S.C. §3500 (Supp. V. 1958) governing the defendant's right to the production of statements made to government agents by government witnesses. The statute in essence provides that once a government witness has testified on direct examination in a criminal prosecution brought by the United States, the court upon demand of the defense shall order the Government to produce any statement made by the witness to a government agent. If the entire contents of the document relate to the subject matter of the witness's testimony it must be delivered to the defendant for his examination and use. If the Government claims that any part of the statement does not relate to the subject matter of the witness's testimony the court will order the document to be produced for the inspection of the court *in camera*. The court may excise such portions of the document as are not relevant and deliver the unexcised portion to the defendant. Non-compliance by the Government with an order of the court will result in the striking of the testimony from the record or a mistrial at the

* Senior Law Student, Northwestern University School of Law.

court's discretion. A statement, for purposes of the "Jencks" act means: "a written statement made by said witness and signed or otherwise adopted or approved by him; or 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 to an agent of the government and recorded contemporaneously with the making of such oral statement."

A government agent's brief summary of a three hour conference with a government witness, consisting of only six-hundred words, does not constitute a statement within the purview of the statute. *Palermo v. United States*, 27 U.S.L. WEEK 4471, (U.S. June 22, 1959). The United States Supreme Court, in a unanimous opinion, upheld the Government's refusal to produce this summary memorandum. Tracing the legislative history of the statute, the Court decided that the purpose of the statute was to limit the judicial power to compel the production of documents to a carefully restricted class of statements with detailed procedural safeguards. Motivating the Congress, it was said, was the fear that under the *Jencks* case government agents would be compelled to produce memoranda which would reveal the inner workings of the investigative process thereby endangering national security. The Court further interpreted the statute as a mandate that it was unfair to impeach a witness with statements which were not the witness's own words but rather "the investigator's selections, interpretations and interpolations." Thus the Government can be compelled to produce only those writings which satisfy the narrow statutory definition outlined above.

In *Rosenberg v. United States*, 27 U.S.L. WEEK 4478, (U.S. June 22, 1959), the petitioner was convicted of transporting into interstate commerce a check obtained through the perpetration of a fraud to which he was a party. A government witness had previously written a letter to the Federal Bureau of Investigation, stating that she feared her memory as to the events at issue was poor. The trial court refused to compel the production of the document in question and the Court of Appeals for the Third Circuit affirmed. The United States Supreme Court affirmed, holding that the trial court had erred in not compelling the production of the document but that such error was harmless since the witness had related the contents of the document upon cross-examination. The letter was said to satisfy the legislative definition in that it was in the handwriting of the witness, signed by her and clearly related to the subject matter to which she had testified.

The dissent concluded that the failure of the trial court to compel the production of the letter was not harmless error since the defense might have been able to make better use of the letter, than he was able to make of the witness's admission upon cross-examination.

In *Pittsburgh Plate Glass Company v. United States*, 27 U.S.L. WEEK 4464, (U.S. June 22, 1959), petitioners were convicted of conspiracy to violate the *Sherman Act*. The trial judge had refused to permit the defendant to inspect grand jury minutes covering testimony before that body of a key government witness at the trial. A divided Court affirmed, holding that the petitioners had failed to show any need for the production of the grand jury minutes. Referring to the legislative history of the statute, the Court concluded that Congress intended to exclude grand jury minutes from its operation. Thus a showing of a particular need was thought to be required to outweigh the long established policy of the secrecy of grand jury proceedings.

Upon appeal the defendants contended that the trial judge had insisted on a showing that the prior testimony before the grand jury was inconsistent with the testimony at the trial and that he had failed to examine the transcript to determine for himself whether any inconsistencies existed. The Court ruled that the trial judge had denied the motion not on those claimed grounds but "on the breadth of the petition" and that no request had been made for him to examine the transcript. Petitioners had mistakenly insisted on the transcript as a matter of right rather than showing that it was necessary to their defense.

The dissent insisted that the reasons for the policy of secrecy did not exist in the instant case. The defense had requested only those portions of the grand jury minutes which contained the witness's testimony regarding the subject matter to which he had testified at the trial. Examination of the transcript by the trial judge was thought to unduly hamper the preparation of a defense for the judge's judgement of what was relevant and necessary to such preparation was substituted for that of the trial counsel.

(For other recent case abstracts see pp. 382 and 429).