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Criminal Procedure - Discovery - Statements of Co-Defendants in Federal Courts - United States v. Edwards 42 F.R.D. 605 (S.D.N .Y. 1967)

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Levy v. Louisiana, in extending the Equal Protection Clause to illegitimate children in cases involving the wrongful death of their mothers, recognizes that the law cannot discriminate against an individual where he has performed no illegal act²¹ and where his demeanor bears no relevant relationship to the wrong committed.

Whether or not the scope of the decision is limited only to the mother-child relationship in wrongful death actions is yet to be determined.²² However, the broad language employed by the court indicates that any such distinction based on illegitimacy may well be violative of the Equal Protection Clause of the Fourteenth Amendment, at least where close family relations are involved.

ROBERT KAHN

Criminal Procedure—DISCOVERY OF CO-DEFENDANTS IN FEDERAL COURTS. In *United States v. Edwards*,¹ the defendant was charged with interstate transportation of stolen securities in violation of Federal Law.² Defendant moved, *inter alia*, for the discovery of “. . . all statements of his co-defendants . . . referring to him. . . .”³ The court denied the motion, basing its decision on the defendant’s “. . . failure to show *materiality* and *reasonableness* (emphasis supplied) as required by Rule 16(b) of the Federal Rules of Criminal Procedure.⁴ The court further pointed out that

The entire tenor of Rule 16 is contrary to the production of such statements. No exception need be made where the movant believes they may support a possible motion for severance under

Powell, 67 Ga. App. 460, 21 S.E.2d 111 (1942); *Hiser v. Davis*, 234 N.Y. 300, 137 N.E. 596 (1922); *Molz v. Hansell*, 115 Pa. Super. 338, 175 A. 880 (1934); *Sesostris Youchican v. Texas & P. Ry. Co.*, 147 La. 1080, 86 So. 551 (1920); *Washington B. & A.R. Co. v. States*, 136 Md. 103, 111 A. 164 (1920); *Good v. Towns*, 56 Vt. 410, 48 Am. R. 799 (1883). *But see Frazier v. Oil Chemical Co.*, 407 Pa. 78, 179 A.2d 202 (1962); *Battalico v. Knickerbocker Fireproofing Co.*, 294 N.Y.S. 481, 250 App. Div. 258 (1937); *Barron v. Zimmerman*, 117 Md. 296, 83 A. 258 (1912).

21. Justice Douglas stated:

We start from the premise that illegitimate children are not “nonpersons.” They are humans, live and have their being. They are clearly “persons” within the meaning of the Equal Protection Clause of the Fourteenth Amendment. 88 S.Ct. at —.

22. This question constituted the principal basis for the dissent.

1. 42 F.R.D. 605 (S.D.N.Y. 1967).

2. 18 U.S.C. § 2314 (1964).

3. *United States v. Edwards*, 42 F.R.D. 605, 606 (S.D.N.Y. 1967).

4. *Id.*

Rule 14, F.R. Crim. P., since the latter rule expressly provides that on a motion for severance, the court may direct the prosecutor to furnish it for *in camera* inspection with any statements of co-defendants which the Government intends to use at trial.⁵

Prior to the adoption of Rule 16(b),⁶ statements of co-defendants were held to be not subject to discovery by individual defendants under the Federal Rules.⁷ Because of the failure to make specific reference to statements of co-defendants in the 1966 revisions to the Rules, doubts were raised as to whether such statements would now be available, in view of their prior history of unobtainability.⁸ Commentators on the revisions took note of this omission, the relative factors favoring and disfavoring inclusion based on wording within the section,⁹ and, also the relationship of Rule 16(b) to Rule 14¹⁰ governing relief

5. *Id.* at 606-07.

6. FED. R. CRIM. P. 16(b), 18 U.S.C. 16(b) (1966).

. . . (b) Other books, papers, documents, tangible objects or places.

Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a) (2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. 3500.

7. *E.g.*, *United States v. Kenner*, 36 F.R.D. 391 (D.C.N.Y. 1965); *United States v. Hughes*, 195 F. Supp. 795 (D.C.N.Y. 1961); *United States v. Faucher*, 195 F. Supp. 448 (D.C. Conn. 1961); *United States v. Bentvena*, 193 F. Supp. 485 (D.C. N.Y. 1960).

8. *See* FED. R. CRIM. P. 16(b), 18 U.S.C. 16(b) (1966); Advisory Committee's Note, 39 F.R.D. 69, 175-78 (1966).

9. *Compare* Reznock, *The New Federal Rules of Criminal Procedure*, 54 GEO. L. J. 1276 (1966), *with* Everett, *Discovery in Criminal Cases*, 1964 DUKE L.J. 477 (1964).

10. FED. R. CRIM. P. 14, 18 U.S.C. 14 (1966).

Relief from Prejudicial Joinder. If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by defendants which the government intends to introduce in evidence at the trial.

from prejudicial jointure. When examined in light of this commentary and "the [Supreme] Court's general attitude toward broader discovery in criminal cases,"¹¹ the holding in *Edwards* and other recent decisions¹² (supporting, by implication, disclosure of co-defendants' statements) can be better understood.

The exclusive quality of Rules 14 and 16, referred to in *Edwards*,¹³ has been commented upon as follows:

No negative implication for discovery can be properly drawn from the amendment to rule 14 which authorizes the court in ruling on a severance motion to order the prosecutor to deliver to the court for *in camera* inspection any statements of defendants he intends to introduce at the trial. This provision simply assures judicial access to such statements to facilitate the determination of whether prejudice may result in a multiple defendant trial from the introduction of statements not admissible against all the defendants. This provision is not directed to the problem of whether, and under what circumstances, direct defense access to such statements shall be allowed.¹⁴

Thus, while such statements remain independent of inspection under a motion for severance, their discovery is nonetheless restricted by the requirements of "materiality" and "reasonableness" of Rule 16(b) and the criteria of the Jencks Act,¹⁵ which governs use of statements of Government witnesses.

Concerning the latter, the court in *United States v. Gleason*¹⁶ struck

11. *United States v. Westmoreland*, 41 F.R.D. 419, 422 (S.D. Ind. 1967) See FED. R. CRIM. P., 18 U.S.C.A. 16(b) (1966) (explanatory note).

The extent to which pretrial discovery should be permitted in criminal cases is a complex and controversial issue. The problems have been explored in detail in recent legal literature, most of which has been in favor of increasing the range of permissible discovery.

12. *United States v. Wallace*, 272 F. Supp. 838 (S.D.N.Y. 1967); *United States v. Westmoreland*, 41 F.R.D. 419 (S.D. Ind. 1967); Cf. *United States v. Turner*, 274 F. Supp. 412 (E.D. Tenn. 1967).

13. 42 F.R.D. 605, 607 (S.D.N.Y. 1967).

14. Rezneck, *supra* note 9, at 1284-85, at n. 32.

15. 18 U.S.C. § 3500 (1964). "Demands for production of statements and reports of witnesses." The *Jencks Act* is aimed at the non-discoverability of a government witness' statement until after the direct testimony of the witness is given at trial. For a discussion of the *Jencks Act* within the general purview of criminal discovery, see, e.g., *Louisell, Criminal Discovery*, 49 CALIF. L. REV. 56, 73-74 (1961); *Krantz, Pretrial Discovery in Criminal Cases; A Necessity for Fair and Impartial Justice*, 42 NEB. L. REV. 127, 143-144 (1962).

16. 265 F. Supp. 880 (S.D.N.Y. 1967) (Income tax evasion).

a balance between the due process requirement of disclosure of evidence *favorable* to the defendant¹⁷ and the requirements of Rule 16 (b) protecting the "work product" of the prosecution and statements of a co-defendant from whom a severance had been granted. (In the latter instance, the defendant who is prosecuted first becomes a potential government witness, whose statements would then fall under the Jencks exclusion.)¹⁸ Choosing to examine the statements *in camera*, the *Gleason* Court denied their discovery on grounds they were not "novel" or "unexpected."¹⁹

Based on facts similar to the *Edwards* case,²⁰ *United States v. Westmoreland*²¹ and *United States v. Wallace*²² have each *implied* that (1) statements of co-defendants are subject to discovery under 16(b), absent the granting of a severance under Rule 14; and (2) the test as to whether such statements will be made available for discovery by a defendant is (at the discretion of the court) based upon the "reasonableness" and "materiality" of the request.²³

Though clearly representing an abrupt departure from previously strict discovery rules, the impact of the holding in *Edwards* and its concomitant decisions is limited by the fact that in each instance the case was decided adversely to the defendant, thus failing to afford any clear definition of what is "reasonable" and "material" in a given situation.²⁴ It is upon this point that future court decisions must dwell in order more clearly to define the limits of Rule 16(b) and what is required of a movant thereunder.

THOMAS D. HORNE

17. *Brady v. Maryland*, 373 U.S. 83 (1963).

18. See *Hickman v. Taylor*, 329 U.S. 495 (1947), on the origin of the "work product" doctrine.

19. *United States v. Gleason*, 265 F. Supp. 880, 886 (S.D.N.Y. 1967).

20. The facts were similar here in their relationship to the discovery motion.

21. 41 F.R.D. 419 (S.D. Ind. 1967) (violation of Internal Revenue Code).

22. 272 F. Supp. 838 (S.D.N.Y. 1967) (receipt and possession of stolen money).

23. The decision in *Edwards* appears to refute the argument that all items in possession of the government must be *material* (or else the government would not bother to have them); or that pretrial statements of one with such intimate connection with the case as to be joined as a co-defendant are in themselves material and that under such circumstances a request for their production would *prima facie* be reasonable. See 8 R. CIPES, *MOORE'S FEDERAL PRACTICE*, 16-12 (1966); Everett, *supra* note 9, at 507-08; Reznick, *supra* note 9, at 1279; G. SHADOAN (ed.), *LAW AND TACTICS IN FEDERAL CRIMINAL CASES*, 130-31 (1964).

24. See 2 L. ORFIELD, *CRIMINAL PROCEDURE UNDER THE FEDERAL RULES*, 538-39 (1966). Though written in light of former Rule 16, the author's conclusion that, "the question of reasonableness may not be decided in the abstract, for what would be reasonable in one case might not be in another," seems to best summarize the problem that now faces the courts. See cases cited therein.