

Tuesday Afternoon Session, 2:00 P.M., November 1, 1966

(Thereupon the following proceedings were had
in Court's Chambers:)

THE COURT: Let the record show
that counselors are now about to make opening
statements.

Prior to hearing the opening statements
the Court instructs counselors that opening state-
ments as always is the case shall be used solely
for the purpose of indicating to the jury what each
side expects its evidence to adduce, and this is
the only proper office for opening statements,
and that the Court does not expect counselors,
and so orders counselors not to go beyond that
point.

Opening statements are not to be used
for argumentative purposes or for purposes of argu-
ment or for any other reasons, other than out-
lining to the jury what each side expects its
evidence to adduce as this trial progresses.

Let the record further show that the
Court is now again calling to the attention of
counsel, and instructing counsel if they have not
already instructed their witnesses or their pros-

pective witnesses, that their witnesses under no circumstances, irrespective of the examiner whether it is by way of direct or cross examination, shall any of these witnesses in responding to a question or volunteering information with respect to the defendant's offering to take a lie detector examination, his unwillingness to take a lie detector examination, his offering to take truth serum, his willingness to submit to it, his offering to submit himself to hypnosis, his refusal to submit himself to hypnosis, or any line of inquiry or any response of any type, in these areas, that may prejudice this lawsuit.

I want counselors to assure me that if they haven't already admonished their witnesses in this fashion, that before putting the witness on the stand that the witness will understand that this is an instruction and order of the Court.

Do you lawyers understand that?

MR. CORRIGAN: Yes, your Honor.

MR. BAILEY: The defense understands it, your Honor, and I would like to put my position in the record, that if the word lie detector is mentioned in this case, I will immediately move for a mistrial, even inadvertently, and the defense will certainly make every effort to see that its

witnesses don't go near the subject.

Even an oblique reference to a test without mention of lie detector I would consider grounds for mistrial, because it is in the consciousness of at least one juror according to the voir dire.

THE COURT: Do you wish to speak further to that, Mr. Corrigan?

MR. CORRIGAN: The State will have no part of any evidence relating to any lie detector test, or hypnosis, or sodium pentothal or truth serum or anything in that area.

THE COURT: Let the record further show that earlier today the defendant through counsel submitted the following motion, requesting an order of the Court for the State of Ohio to furnish to the defendant a copy of any statements, admissions or confessions of the defendant, whether they are in writing, either signed or not signed, or oral and reduced to writing, either signed or not signed, and/or recording, magnetic or mechanical, which the State of Ohio has acquired or had come into its possession on or after December 31, 1954.

The motion was submitted to the Court this morning, unsupported by affidavit or brief, and the Court wishes now to ask Mr. Bailey or Mr.

Sherman to address himself to the motion, address themselves to the motion.

MR. BAILEY: The defense counsel wishes to apologize for submitting a naked motion without brief, and under the circumstances were unable to submit affidavit.

I wish to have the record reflect that at this time, advising the prosecution and the Court, that last night certain information was given to the defense by a person who was an inmate of the Columbus State Penitentiary, and I wish to preface these remarks by saying that absolutely no reflection of any kind is intended against any person connected with the prosecution, but we feel that the prosecution has conducted itself in a highly professional manner.

However, the information which has been confirmed by a second source since, was in the following direction; that attempts are being made by officials in the prison at Columbus and probably at Marion to procure an inmate who will testify that while Doctor Sheppard was in custody down there he made admissions or confessions in connection with this case.

That is why we filed the motion asking

in essence for any statements he may have made post-trial. We have no knowledge of any such statements. We have every reason to believe that they were not in fact made, and if it should occur in the course of the trial that such evidence is offered and received, we will ask either for an indefinite continuance so that we can interrogate every single person in the penitentiary who had contact with whatever witness may come, or a mistrial, or both.

Last night was my first knowledge of this, and it is the reason that the motion was hurriedly submitted.

I don't say that it is going to happen, but it has happened in other cases and I am fearful of it, and if it does happen those are the remedies I think we are forced to seek, and under the recent decision of Gregory versus United States, Court of Appeals, District of Columbia, July 28th of this year, it is very plain that as a matter of Federal Constitutional right the defendant would be entitled to interrogate without the presence of any representative of the State, every person who might have evidence bearing upon the evidence that I have described.

I put that in the record now because if there is to be such evidence, I think that we are entitled to know about it in advance so that we can take protective steps.

THE COURT: Does Counselor Corrigan or Spellacy wish to speak to the record?

MR. CORRIGAN: May it please the Court, the law of the State of Ohio, and the law as promulgated by the Federal courts, do not preclude in any manner, and give the right to the defendant to talk to whatever witness he will talk with or to.

This has no relationship, however, to a motion to discover statements or evidence that is part of the working file of the prosecuting attorney.

The law of Ohio, the leading cases are the Sharp case, the Yeoman case, the Woods case, all of which preclude the turning over to defense counsel any statements of any witnesses who are asked by the prosecuting attorney; the same, much the same as we would be precluded from going through the file of the defense counsel to find what statements of witnesses he might have.

This is quite a different thing than

that of denying to the defendant or to the defense an opportunity to talk with any witnesses, and certainly we would have no part of denying them that opportunity at all.

THE COURT: Let the record show -- do you have anything further, Mr. Corrigan?

MR. CORRIGAN: No.

THE COURT: Anything further, Counselor Bailey?

MR. BAILEY: No, your Honor. I only reiterate that any such evidence would come as a complete surprise and leave the defense wholly unprepared to deal with it, as the defendant deserves to have it dealt with.

THE COURT: Let the record show that the motion of the defendant is hereby overruled. See State vs. Corcan, 3 Ohio State, 2nd, 125; State vs. Sharp, 162 Ohio State 173; State vs. Yeoman, 112 Ohio State 214; State vs. Rhodes, 81 Ohio State 397.

Counselor Bailey, I am interested in the citation of the case which you called to the Court's attention, and I would like to have the citation if you have it available.

MR. BAILEY: I don't think that

it is printed yet. It was not as of a week and a half ago when I had occasion to call upon its authority in another case in another state.

But it is Gregory vs. U. S., decided by the Circuit Court of Appeals for the District of Columbia. The majority opinion was written by Judge Wright with a dissent by Judge Danaher. It was decided on July 28th, and the thrust of the case is that where the U. S. Attorney had not permitted or had advised a witness who would testify for the Government, that the witness should not talk with defense counsel except in the presence of the United States attorney, that the Federal Constitutional rights as well as certain Federal statutes had been violated, because the defendant had a right to prepare for trial which included the private interrogation of prospective witnesses, and there were other points in the case but that is the one to which I refer at the moment.

And the reason I bring it up is because there is no way in the world that we can interrogate someone or investigate someone whose identity may not be known to us until he hits the witness stand.

Now, again, Mr. Corrigan has not stated that such evidence will not be presented, which

throws the matter in a different light.

Therefore, I am going to move at this time that the Court instruct the prosecution not to refer to any such evidence in its opening statement, until voir dire on its admissibility can be had.

THE COURT: Mr. Corrigan, do you wish to say anything?

MR. CORRIGAN: I am not going to make any such reference in opening statement, in any event.

MR. BAILEY: Now, there is one additional matter. Our position as of the moment is that statements made by the defendant in this case are admissible up until the afternoon of July 4th, 1954, when Officer Robert Schottke accused the defendant of murder and said that he was the guilty party.

As of that time we feel the principles of the Escobedo case, the investigation had shifted to the accusatory stage, and unless there was strict compliance with the rules of Escobedo and Miranda, any subsequent statements should not be admitted in this case and ought not be referred to in opening statement until they have been litigated.

This includes specifically the inquest

testimony of Doctor Sheppard, wherein he was denied, according to the testimony of the Coroner in the last trial, his right to counsel. Counsel was permitted only as a spectator and not permitted to advise or object or in any way participate.

So we feel that everything said by Doctor Sheppard after the afternoon of July 4th, 1954, and his interrogation by Officer Schottke and Gareau in the Bay View Hospital, is inadmissible and ought not to be described.

THE COURT: Everything following the afternoon of July 4th?

MR. BAILEY: Yes. There is testimony in the record that at that time and on that date, Officer Schottke in the presence of Officer Gareau said to Sam Sheppard, "We think you killed your wife; as a matter of fact, we know you did." And the conversation went from there.

That was the time when I think the lie detector test was first requested.

THE COURT: The Court understands the position of the defense and the Court will rule on the evidence as it comes or may come from the witnesses at the time it comes from the stand, having in mind the principles enunciated in the

Escobedo and Miranda cases, and the cases that concern themselves with the principles of law laid down in those cases.

MR. BAILEY: The purpose of my motion, your Honor, was this: In the Supreme Court of the United States we challenged the State of Ohio to state the facts and circumstances which would support a finding of guilty.

Of course, this was done not by Mr. Corrigan, but by the Attorney General of Ohio. But the principal, or, the substance of the statement allegedly supporting the conviction, that is to say, sufficiency as a matter of law, was a detailed description of six or seven different statements given by Doctor Sheppard with minor discrepancies pointed out as an indication that he was lying, i.e., guilty.

If this is to be the thrust of the opening, then evidence is being discussed which may well be ruled out. Certainly some of it we are satisfied that you will rule out, that is to say, all interrogation conducted in the jail after counsel were physically ejected.

But I am not trying to interfere with my brother's case. But if evidence is described in

the opening which is prejudicial, and later deemed inadmissible, which is not susceptible of being corrected by instruction and admonition, then, of course, we have a mistrial which I don't think any of the counselors want.

MR. CORRIGAN: With regard to the opening statement, the Court and the defense can rest assured that I will allude to nothing in that area, in any sense of the word. We, too, are desirous of not again going to the U. S. Supreme Court.

MR. BAILEY: The last matter, your Honor, I must of course in framing my opening incorporate part of the evidence which the prosecution is going to submit, that is to say, that by the time we get the ball many of the facts that we would present if we started from scratch with our own burden of proof will be in evidence. I think 90% of what the State is going to prove we will agree is a fact, and that principally we are talking about the question of what inferences should be drawn.

Now, I have indicated in voir dire there is a serious question as to whether or not the defendant will testify. If he does not, I have no

right to put in his self-serving statements, his denials of guilt.

If I describe them in opening, it will be in reliance on the fact that the prosecutor will submit at least one of the defendant's versions of what happened.

If that is going to be so, then I can truthfully say this evidence will be presented. But I don't mean to imply when I say the defendant's story was this, or you will hear that it was this, that he is going on the stand, and I don't want to be bound by that.

Mr. Corrigan indicates that he intends to introduce some evidence of the defendant's story, which I expect, and I think that solves the problem.

THE COURT: Anything further, gentlemen, that either of you wish to speak to the record?

MR. CORRIGAN: Nothing on the part of the State.

THE COURT: If the record doesn't already so indicate, let the record show that the defendant's motion, which we have here under discussion, is hereby overruled.

Gentlemen, I understand that there is

a motion now, joint motion for separation of witnesses, and I will announce that in open court. Is that true, Mr. Corrigan?

MR. CORRIGAN: I so move, your Honor.

THE COURT: Mr. Bailey?

MR. BAILEY: It is, your Honor, yes.

THE COURT: Thank you, gentlemen, and let's proceed with opening statements.

(Thereupon the jury was brought into the courtroom, and the following proceedings were had in the presence and hearing of the jury:)

THE COURT: Good afternoon, ladies and gentlemen.

JURY: Good afternoon.

THE COURT: Ladies and gentlemen, we come now to the proceeding where we are ready to hear opening statements of counsel. Opening statements of counsel are permitted by law solely for the purpose of permitting counsel to indicate to you what each counsel expects its side of the case or its evidence will produce and be adduced as we go through this case, and as testimony and evidence comes from the witness stand and the witness stand alone.

Opening statements are not evidence, and