

June 24, 1959

Memorandum concerning the Pittsburgh Plate Glass case.

In the Pittsburgh Plate Glass case, both the majority and the minority opinions recognize that there are circumstances in which the defendants should be given access to the grand jury testimony of a witness. The majority held that in Pittsburgh Plate Glass, the defendants had not made an adequate showing of justification for access to the transcript, and accordingly, the trial judge had properly exercised his discretion in denying such access. The minority were of the opinion that a proper showing of justification had been made because the Government had tendered the witness whose grand jury testimony was sought, and because of the importance of the testimony of that witness.

Pittsburgh Plate Glass was a criminal antitrust action, tried to a jury.

This case by no means forecloses the possibility that the Supreme Court will hold that denial of the defense motion for access to the testimony of the Government witness, Heras, in United States v. Parr, et al., was not a proper exercise of discretion by the trial judge. The Parr case is a mail fraud prosecution tried to a jury.

The vital distinction is that in Parr's case, as the Court of Appeals held, it was demonstrated at the trial that Heras had made numerous statements to investigating officers

which were inconsistent with and contradictory of his testimony on trial. As the Court stated, "Some inconsistencies and discrepancies were admitted by Heras, including an admission that he had sworn falsely in previous affidavits".

This fact should be sufficient to bring the case within an accepted category of situations in which the defense may have access to the grand jury testimony of a Government witness where it is shown that there is an inconsistency between the trial testimony and the grand jury testimony.

Even if it was not shown in the case of Heras that there was an inconsistency between his testimony at trial and his grand jury testimony, the probability that there was such an inconsistency is overwhelming in view of the extraordinary proof of such conflicts between Heras' trial testimony and prior statements -- including statements under oath. (I do not know whether the defense was allowed or able at the trial to show specific inconsistencies between Heras' trial testimony and his testimony at the grand jury. Probably no such proof could be made because the defense did not have access to the grand jury testimony, and such proof would be impossible in the circumstances.)

On the facts of the Parr case, the Supreme Court could -- and should -- hold that all of the requirements for access to

Hera's grand jury testimony were met: That is, that a prima facie case was established of the existence of conflicts between the witness' grand jury testimony and his testimony at the trial.

In view of the extensive proof that Hera's trial testimony contradicted previous sworn statements, two legal consequences should follow:

1. There was no need for the defense to file a motion to ask the trial judge to examine the grand jury transcript for the purpose of satisfying himself that there was an inconsistency between Hera's grand jury testimony and his testimony at the trial. The purpose of such a motion is merely to establish, prima facie, that there were such inconsistencies and that the existence of such inconsistencies justifies giving the grand jury transcript to the defense for purposes of impeaching the witness. In the present case, this procedure should be considered unnecessary because the overwhelming possibility that such inconsistencies between the trial testimony and the grand jury testimony exist, was otherwise established on the trial record.

2. The mere fact that the defense was able to demonstrate numerous inconsistencies between Hera's testimony and prior statements and to draw from him a concession that he had sworn falsely in an affidavit to the investigating agents,

did not justify the trial court in denying to the defense access to Hera's grand jury testimony. -- The Court of Appeals for the 5th Circuit held that the trial court might well have considered "that any additional inconsistent testimony that the grand jury transcript might show Hera had given would be merely cumulative". This principle is clearly wrong and insupportable: Particularly in a jury case where a man is on trial for an infamous crime, he has a right to show not merely some of the lies that a government witness states at the trial, but all of them. Moreover, it is not for the courts to assume that a jury might not be more impressed by the fact that a government witness has given inconsistent testimony to a grand jury than they would be by inconsistent statements to investigating agencies. Further, and more important, is the fact that the assertion that the defense is not entitled to access to the grand jury testimony for impeachment purposes because the defense has demonstrated that the government witness is a liar, directly contradicts the theory and purpose of allowing the defense to use the grand jury transcript in these circumstances: That is, the established principle is that the defense may use the grand jury testimony of a witness for impeachment purposes if it appears that the grand jury testimony is inconsistent with the testimony at the trial. Certainly, access to the grand jury testimony cannot logically

or fairly be denied on the very grounds that the defense has created an overwhelming presumption of conflict between the grand jury and the trial testimony by demonstrating that the witness has lied on many occasions.-- A contrary conclusion would place a premium upon a "big" liar. His grand jury testimony would be sacrosanct.

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Viewing the votes of the individual jurists in both United States v. Procter & Gamble, and United States v. Pittsburgh Plate Glass, I believe that there is a very good chance that a substantial majority of the Justices would vote for reversal in the Parr case on the merits of the situation there presented. The four members of the Court who dissented in Pittsburgh Plate Glass would almost certainly vote to reverse. Justices Harlan and Frankfurter dissented in United States v. Procter & Gamble on the grounds that a proper showing had been made for access to the entire transcript which justified the trial judge in granting such access. In United States v. Procter & Gamble, the only showing made was that access to the grand jury testimony would expedite the handling of a big antitrust case. It is possible that Justices Harlan and Frankfurter would distinguish between

their votes in Procter & Gamble and the situation in Parr on the grounds that in Procter the trial judge exercised his discretion to grant access to the grand jury testimony. However, in Parr's case, the situation is so extreme that even these Justices might well conclude that the trial judge proceeded on an erroneous principle and improperly exercised his discretion. -- It is particularly necessary for the Supreme Court to review and reverse Parr's case in order to demonstrate to the trial judges the proper principles upon which they should exercise their discretion, namely, that where the record shows, or the trial judge finds, a prima facie case of inconsistency between the witness' testimony at the trial and before the grand jury, the trial judge should grant a defense motion for access to the witness' grand jury testimony; but where, as in Pittsburgh Plate Glass, no such probability of conflict has been established, either by the trial judge's examination of the transcript or otherwise, the trial judge may properly deny access.

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In the Pittsburgh Plate Glass case, the Supreme Court held that where a defendant in a criminal case moves for production of the grand jury testimony of a government witness and does not establish any facts justifying his motion other than the bare circumstance that the witness testified before the grand jury, the trial judge was justified in denying the motion.

In United States v. Parr, et al., the trial judge denied the defense motion for access to the grand jury testimony of a government witness, and the denial was sustained by the Court of Appeals for the 5th Circuit.

It is entirely possible, however, that the Supreme Court would rule that the trial court in the Parr case should have granted the defense motion. The fundamental difference between the two cases is that in Parr, it was proved at the trial that the government witness had made numerous statements, including statements under oath, which were inconsistent with and contradictory of his testimony at the trial. This proof establishes a strong probability that the witness also testified before the grand jury inconsistently with his testimony at the trial.

As the Court of Appeals held in the Parr case, "Some inconsistencies and discrepancies were admitted by Heras, including an admission that he had sworn falsely in previous affidavits," -- which were given to government investigating agencies.

Both the majority and the minority in the Pittsburgh Plate Glass case appear to agree that where inconsistency is shown between the grand jury testimony and the trial testimony of a witness, the defense is entitled to his grand jury testimony. In the Parr case, the presumption that such inconsistency exists is sufficiently strong to bring it within this established category of cases, and to distinguish the Parr case from Pittsburgh Plate Glass.