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NEWS NOTES

A.G. APPOINTS 11-MEMBER NATIONAL ADVISORY COMMITTEE FOR LAW ENFORCEMENT EDUCATION PROGRAM

April 3, 1969: Attorney General John N. Mitchell has announced the appointment of an 11-member National Advisory Committee for the federal government's new law enforcement education program.

Mr. Mitchell said the Committee will hold its first meeting April 7 and 8 in Washington, D.C., to help draft long-range goals, develop cirriculum, and work on administrative procedures.

The grants for the program are administered by the Law Enforcement Assistance Administration (LEAA) under provisions of the Omnibus Crime Control and Safe Streets Act, passed by Congress last June.

In letters asking the 11 men to become Committee members, Mr. Mitchell said: "We want you to help us create the most effective program possible. Its clear purpose is to bring undisputed excellence to law enforcement."

Charles H. Rogovin, the LEAA Administrator, said the education program may be greatly expanded in fiscal 1970, with financial aid funds perhaps being increased to $20 million. Additional colleges and universities also may participate.

He added that the Committee members have a valuable variety of backgrounds, and include experts from both the academic world and the criminal justice system. They are:

David Craig, Public Safety Director, Pittsburgh; Vincent O'Leary, Professor, School of Criminal Justice, State University of New York, Albany; Charles V. Matthews, Director of the Center for the Study of Crime, Delinquency, and Corrections at Southern Illinois University, Carbondale; Stephen Horn, Ph. D., Dean of Graduate School, American University, Washington, D.C.; Patrick Healy, Executive Director, National District Attorney's Association, Washington, D.C.; George Trubow, Executive Director, Maryland State Planning Agency, Baltimore; Dr. Frank Dickey, Executive Director of the Federation of Regional Accrediting Commissions of Higher Education and associated with the American Council on Education, Washington, D.C.; Gaylon L. Kuchel, Chairman, Law Enforcement Department, University of Omaha; Joseph I. Giarusso, Superintendent of the New Orleans Police Department; William Mooney, Supervisor in Charge, Planning and Research Unit,

Training Division, Federal Bureau of Investigation, Washington, D.C.; Alan Purdy, Student Financial Aid Officer, University of Missouri at Columbia and President of the National Association of Student Financial Aid.

A.G. ANNOUNCES NEW APPOINTMENTS IN FED. PRISON SYSTEM

April 3, 1969: Attorney General John Mitchell has announced the following personnel changes in the Federal Prison System:

John T. Willingham, warden of the Federal Penitentiary, Leavenworth, Kansas, will become Associate Commissioner of Federal Prison Industries, Inc., replacing Olin C. Minton who retired February 28, 1969.

Robert I. Moseley, warden of the Federal Correctional Institution, Milan, Michigan, will become warden at Leavenworth, Kansas.

John J. Walsh, associate warden at the Federal Penitentiary, Marion, Illinois, will become warden at Milan, Michigan.

Virginia W. McLaughlin, associate warden at the Federal Reformatory for Women in Alderson, West Virginia, will become warden, replacing warden Gladys V. Bowman who also retired on February 28, 1969.

DEPARTMENT FILES FIRST CIVIL RIGHTS SUIT TO DESEGREGATE HOME FOR THE AGED

April 4, 1969: The Department of Justice has filed suit for the first time to desegregate a county home for the aged.

Attorney General John N. Mitchell said the housing discrimination suit under the Civil Rights Act of 1968 was filed in U.S. District Court in Columbia, S.C. against Anderson County, S.C., and several county officials.

The suit contends that white boarders are assigned to a brick veneer residential unit, while Negroes are assigned to frame homes whose facilities are substandard and inferior to those provided whites. Since the establishment of the Anderson County Home, the suit contends, it has been maintained and operated on a racially segregated basis.

The suit states that 36 elderly indigents are housed in the all-white building, which can accommodate 45 boarders, and four Negroes are housed in the separate facilities.

The case was referred to the Justice Department by the U.S. Department of Agriculture, after the Anderson County Home withdrew from the federal surplus food program in February, 1969.

* * *

POINTS TO REMEMBER

AIRCRAFT PIRACY - FALSE INFORMATION

Reference is made to the Attorney General's letter of December 14, 1961, distributed to all United States Attorneys to which an analysis of 49 U.S.C. 1472 was attached. It was pointed out in the "False Information" (49 U.S.C. 1472(m)) section of the analysis that clearance from the Criminal Division must be obtained prior to any declination of prosecution under 49 U.S.C. 1472(m).

It has been brought to our attention that various United States Attorneys' offices have been declining prosecution without clearance from the Criminal Division. Due to the increasing number of planes being hijacked to Cuba and the public attention being focused on this area, it is requested that strict adherence be given to this policy. Telephonic contact on this matter can be made with telephone extensions 3738 or 3750 in the Department.

(See also item in United States Attorneys Bulletin, Vol. 17, No. 9, February 28, 1969.)

ASSAULTING FEDERAL OFFICERS

In a recent case of assault on Federal officers (18 U.S.C. 111) an Assistant United States Attorney doubted propriety of prosecution because the evidence did not plainly establish that the defendants knew of the official capacity of the victims. The element of officiality in such cases goes to the question of jurisdiction over what would otherwise be a crime subject only to local jurisdiction. Defendant's knowledge is immaterial. United States v. Wallace, 368 F.2d 537 (C.A. 4, 1966), cert. den. 386 U.S. 976 (1967); United States v. Montanaro, 362 F.2d 257 (C.A. 2, 1966), cert. den. 385 U.S. 920 (1966). The favorable decision in Pipes v. United States, 399 F.2d 471 (C.A. 5, 1968), rehearing denied, 402 F.2d 271 (1968) placed all of the Circuits in unanimous support of the foregoing.

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ANTITRUST DIVISION

Assistant Attorney General Richard W. McLaren

SUPREME COURT

SHERMAN ACT

MOTION OF GOVERNMENT TO AFFIRM GRANTED.

Serta Associates, Inc. v. United States (Sup. Ct. 878; February 24, 1969; D.J. 60-89-14)

On February 24, 1969, the Supreme Court summarily affirmed the judgment of the U.S. District Court for the Northern District of Illinois (Bernard M. Decker, J.), that Serta Associates, Inc. had violated Section 1 of the Sherman Act by engaging in a scheme to fix retail prices and to allocate exclusive geographical territories among its licensees.

Serta Associates was organized in 1931 by a group of regional bedding manufacturers seeking a cooperative method of nationally merchandising trademarked bedding products. The company is wholly owned by its licensee members. In the early 1930's Serta initiated a policy of assigning exclusive territories to its licensee manufacturers. The allocations were written into the license agreements, but individual licensees were expressly authorized to agree among themselves to alter or adjust common geographical boundaries, and Serta encouraged licensees to settle territorial disputes among themselves. Serta licensees are not precluded from marketing private label products, and insofar as non-Serta brands are sold, Serta makes no attempt to regulate the activities of its licensees.

Serta has also followed a consistent policy of inducing retailers to sell and advertise Serta mattresses and box springs at agreed upon retail prices. Dealers are prohibited from using promotional devices that might disrupt the retail price structure. Serta sponsors cooperative advertising programs by supplying advertising mats and sales material and subsidizing part of the cost, but this assistance is available only to dealers willing to adhere to suggested retail prices.

The price maintenance policy is dependent almost entirely on licensee and dealer cooperation in reporting violations. A number of documents in the record contain statements of Serta licensees expressing a fear that price cutting in adjacent territories might create difficulties in maintaining the price level in their own territories. Serta supplements this policing system by subscribing to newspaper clipping services through which price cutting by uncooperative dealers can be promptly discovered.

The district court divided the trial into two parts. Serta agreed in a pretrial stipulation that it had indeed maintained a policy of exclusive territorial allocations since 1933. The trial court proceeded to conduct an evidentiary hearing on the price fixing allegations, postponing further consideration of the validity of the territorial arrangement until after resolution of the price fixing issues. The trial court rejected an offer of proof on the territorial issue by Serta who was advised to renew it after the court's decision on price fixing. Serta made no further attempt to introduce its evidence until approximately two weeks after filing its notice of appeal. The court rejected it again, this time as untimely.

Relying almost exclusively on the Supreme Court's decision in United States v. Sealy, Inc., 388 U.S. 350, which held that a system of territorial allocations effectuated horizontally through a trademark licensing arrangement established by the licensee manufacturers of bedding products violated Section 1 of the Sherman Act, the district court concluded that the evidentiary and stipulated record in this case disclosed an aggregation of trade restraints virtually identical with the arrangement condemned in Sealy, and enjoined Serta from maintaining geographical allocations and from fixing prices.

Although Serta did not contest the district court's findings on price fixing, it argued in its jurisdictional statement that exclusive territories were ancillary to the lawful purpose of the trademark licensing joint venture and, absent price fixing, were consistent with the maintenance and promotion of competition in the bedding products industry. Serta claimed that it should have been allowed to introduce evidence to prove its claim. It also contended that the Government had failed to demonstrate on the record any connection between the price fixing and the policy of territorial allocations. Thus, Serta argued, the trial court's decree was too broad in that the unlawful price fixing could be effectively enjoined without including a separate ban on exclusive territorial allocations.

We filed a short motion to affirm directing the Supreme Court's attention to its earlier Sealy decision and arguing that Sealy controlled this case in every material respect. Indeed, Serta's theory, we argued, had previously been presented in an amicus curiae brief in Sealy and there impliedly rejected. Accordingly, full review by the Court was not warranted.

Justices Harlan and Stewart dissented from the Court's order affirming the judgment; they would have noted probable jurisdiction and set the case down for full argument. On March 20, 1969 Serta filed a petition for rehearing which was denied on April 7, 1969.

Staff: Gregory B. Hovendon, William R. Weissman,
Bertram E. Long and Harold E. Baily
(Antitrust Division)

DISTRICT COURTS

CLAYTON ACT

PARTIES AGREE TO VACATE PRELIMINARY INJUNCTION.

United States v. Atlantic Richfield Co., et al. (S.D. N.Y., 69 CIV 162; March 4, 1969; D.J. 60-57-037-3)

The Government in a stipulation, agreement and order filed on March 4, 1969, agreed not to oppose the defendants' application to the court to vacate a preliminary injunction enjoining the proposed merger of Atlantic Richfield Company (Atlantic) and Sinclair Oil Corporation (Sinclair).

On February 17, 1969, the court granted the Government's motion for a preliminary injunction to enjoin the proposed merger of Atlantic and Sinclair. The motion was granted upon the court's finding that the Government had demonstrated a probability of success at trial in proving that Atlantic and Sinclair's combined sales of gasoline in the Southeast amounted to 7.4 percent.

Thereafter, Atlantic and British Petroleum (BP) agreed that simultaneously with the merger of Atlantic and Sinclair, the latter's marketing properties in the Southeastern States, as well as those in the Northeastern States, would be sold to BP. The proposed sale of the Southeastern assets would remove the marketing overlap between Atlantic and Sinclair in the Southeast, considered by Judge Bryan as being a probable antitrust violation.

The stipulation requires that the proposed sale of assets to BP be consummated simultaneously with the merger of Atlantic and Sinclair. It also requires that subsequent to the merger and during the pendency of this litigation, Atlantic will preserve, maintain and promote the trademark "Sinclair", and will exercise its best efforts to maintain the sales volume of gasoline sold under the "Sinclair" trademark in the Midwest.

Atlantic is required, for a period of two years, but not longer than the pendency of this litigation, to maintain on every service station transferred to Atlantic pursuant to the proposed merger a sign bearing the "Sinclair" trademark. The agreement further provides that Atlantic may close down or dispose of any Sinclair station for economic or other business reasons in the exercise of good faith.

The Government agreed that it would not, after the proposed sale of assets to British Petroleum, include evidence of anti-competitive effects of the merger in the Northeastern or the Southeastern States at the trial of this action.

The Government's challenge of this merger is premised upon its contention that Atlantic is a potential entrant as a gasoline marketer into Midwestern areas in which Sinclair presently conducts gasoline marketing activities.

Staff: David R. Melincoff, Donald H. Mullins, Gregory R. McClintock and Neil E. Roberts (Antitrust Division)

SHERMAN ACT

COURT ORDERS DIVESTITURE IN SHOE MACHINERY CASE.

United States v. United Shoe Machinery Corp. (D. Mass., Civ. 7198; February 20, 1969; D.J. 60-137-1)

On February 20, 1969, Judge Charles E. Wyzanski, Jr., Chief Judge of the District Court for the District of Massachusetts, entered a final supplemental judgment which requires divestiture by the defendant of shoe machinery assets which would reduce its share of the domestic shoe machinery market to no more than 33 percent.

The judgment terminates litigation begun in 1947, in which Judge Wyzanski found in 1953 that United Shoe had violated Section 2 of the Sherman Act by monopolizing trade and commerce in the domestic shoe machinery market. The Supreme Court, upon appeal by the defendant, affirmed the court's decision. The 1953 judgment provided for a reexamination of domestic competition in the shoe machinery market on January 1, 1965 (designated by the court as "C-Day" in its order). It required both parties to report to the court the effect of the decree on such competition, and granted them the right to petition the court for modification of the judgment in view of its effect in establishing workable competition.

The Government reported to the court on "C-Day" that in its view workable competition had not been restored to the industry and petitioned the court for additional relief. The defendant reported to the court that workable competition had been restored and petitioned for the termination of substantially all of the terms of the decree. A trial was held in 1966 to determine if the court's decree had accomplished its purpose. The court

found that United had 62 percent of the industry revenues from the lease and sale of shoe machinery but concluded in its opinion on April 11, 1967, that the 1953 decree had operated in the manner and with the effect intended. It denied both the Government's and the defendant's petitions.

The Government appealed to the Supreme Court from the denial of its petition. On May 20, 1968, that Court reversed the district court's decision, stating that "If the decree has not, after 10 years achieved its principal objects", namely, "to extirpate practices that have caused or may hereafter cause monopolization, and to restore workable competition in the market - the time has come to prescribe other, and if necessary more definitive, means to achieve the result. A decade is enough." The Supreme Court remanded the case with instructions to determine whether the relief granted in 1963 had met the standards prescribed by the Supreme Court and, if not, to modify the decree so as to achieve the required result, with all appropriate expedition.

On February 20, 1969, Judge Wyzanski entered a supplemental judgment agreed to by the parties after extensive negotiations. The judgment requires United to divest within two years the productive assets of shoe machine models which in 1967 generated $8-1/2 million in lease and sale revenues. This divestiture will be sufficient to reduce United's share of the domestic shoe machinery market to no more than 33 percent. The judgment provides that the assets to be divested shall include the inventory of machines, the leased population, the inventory of parts, the jigs, dies and fixtures principally used to manufacture the divested models, copies of manufacturing and assembling data, copies of knowhow, designs and processes used to make and assemble the models, and similar assets that are necessary to manufacture the divested models. In the event that a purchaser of the productive assets of a machine model does not buy all of the leased population of that model, United is obligated to sell the balance of the leased population to another purchaser. Three-fourths of the divestiture must be selected by defendant from shoe machine models listed in a schedule attached to the judgment. The remaining one-fourth shall consist of shoe machine models not necessarily on the list and may, in defendant's discretion, be satisfied by sale of the leased population of those models, shoe machine assets for those models, or a combination of both.

At the request of the purchaser, United must furnish (1) service as well as training in service and assembly of the divested models during a two-year period following divestiture, and (2) replacement parts and products useable with the divested models during a period up to ten years after divestiture of the particular models.

The judgment places restrictions on what may be acquired by a single purchaser. An eligible purchaser may not, except under certain stated conditions, purchase models which account for more than one-half of the revenues generated in 1967 by the machines to be divested from the list attached to the judgment and may not purchase more than three of certain important machine models designated on the list. An eligible purchaser is defined as one who is not a shoe manufacturer, one who intends to lease or sell shoe machines principally to the shoe machinery market, or any person to whom the plaintiff consents. The judgment requires United to use its best efforts to obtain offers and to negotiate in good faith with all persons who express a bona fide interest in purchasing assets for any models selected for divestiture.

Defendant is enjoined for five years from offering in the United States shoe machines manufactured or distributed by any foreign company which it owns or controls, which perform any of the same operations on a shoe as are performed by the machine models for which productive assets have been divested. United is also enjoined for five years from the date of divestiture of productive assets for a shoe machine model from offering for sale, lease or otherwise in the United States: (1) the model divested; (2) a modification of any model retained by the defendant if such modification would make the retained model the substantial equivalent of the divested model; or (3) any other new model not previously offered by defendant which in whole or in significant part is the substantial equivalent of the divested model in function and operation.

The third restriction on the offering of new models does not apply if United gives the purchaser of the divested model a two-year head start on new models, which are at least in major part the substantial equivalent of the divested model, and an even start on new models which are the substantial equivalent of the divested model in significant but less than major part. In this latter case, United must also grant a reasonable royalty license if the license is necessary for the new model, provide productive assets and reasonable assistance in obtaining assets if the purchaser is otherwise unable to manufacture the new model, furnish replacement parts and unique shoe machine products for such new model and offer to sell to the purchaser during a five-year period machines of the new model at United's offering price less a reasonable distributor's discount.

A second broad category of relief relates to patents and knowhow. The judgment requires United for a period of ten years from the entry of the judgment or eight years following completion of divestiture, whichever first occurs, to license upon request any shoe machine patent or unique product patent held by United or under which it has the right to issue sublicenses. The license is to be unrestricted and for the full term of the

patents, unless the applicant desires less than the full term or less than all the rights under the patent. The judgment specifies a procedure for determination of reasonable royalties whereby if agreement is not reached within 90 days of the date of application, either United or the applicant may apply to the court for determination of the reasonable royalty. Pending such determination the applicant has the right to use the patent subject to payment of interim royalties to be determined by the court. Similar provisions are made for knowhow.

Until the obligation to issue licenses under the judgment expires, the defendant must publish at six month intervals the patent numbers and brief descriptions of all patents and patent licenses subject to the compulsory license provision of the judgment in a publication of general circulation in the shoe and shoe machinery manufacturing industries.

An unusual provision requires United to offer its machinery for sale to persons who intend to resell or lease it to others and to offer installation, service, repair and parts for machines so sold.

The judgment further provides that certain provisions of the court's earlier 1953 judgment shall be terminated upon the completion of divestiture or five years thereafter. Practically all of the remaining provisions of the 1953 decree as well as certain provisions of the new supplemental judgment are to terminate in ten years from the date of the closing of the last purchase agreement. However, the plaintiff may apply to the court for continuation of any of these provisions if it satisfies the court that adequate competitive conditions in the shoe machinery industry have not been brought about.

Staff: Margaret H. Brass, Robert J. Ludwig,
Thomas R. Asher and Lionel Epstein
(Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General William D. Ruckelshaus

COURTS OF APPEALS

SUITS IN ADMIRALTY ACT

CONTRACT OF TOWAGE GIVES RISE TO IMPLIED WARRANTY OF WORKMANLIKE SERVICES, SIMILAR TO WARRANTY IMPLIED IN STEVEDORING CONTRACT.

Malcolm B. Tebbs v. United States, et al. (C.A. 4, Nos. 12,837, 12,838 and 12,839; March 3, 1969; D.J. 61-35-247)

A towing company contracted with the United States Marshal to shift a dead, unmanned tanker in the Marshal's custody. During the shifting, the tanker collided with and damaged plaintiff's yacht. The district court held that the collision was caused by the concurrent negligence of the United States and the towing company; that the towing company impliedly warranted that it would perform its services in a workmanlike manner; and that because it breached the warranty, the towing company must indemnify the United States for its damages.

The Fourth Circuit, in affirming, held that a contract of towage gives rise to an implied warranty of workmanlike performance similar to the warranty implied in a stevedoring contract, which the Supreme Court has said is "the essence of /a/ stevedoring contract". Ryan Co. v. Pan-Atlantic Corp., 350 U.S. 124, 133 (1955). The Court also held that the customer's concurrent negligence does not defeat its right to indemnity from the expert contractor, when the customer's negligence does not prevent or seriously handicap the contractor in his ability to render a workmanlike performance.

Staff: Morton Hollander and Anthony W. Gross (Civil Division)

TRANSFERS UNDER 28 U.S.C. 1404(a)

CASE MAY BE TRANSFERRED UNDER 28 U.S.C. 1404(a) EVEN THOUGH PLAINTIFF HAS NO CAPACITY TO SUE UNDER LAW OF STATE IN WHICH TRANSFEREE COURT IS LOCATED.

Farrell v. Wyatt (C.A. 2, No. 33,246; March 18, 1969; D.J. 157-55-147)

This action arose out of the collision and crash of a light plane and a jet airliner in North Carolina; the administrators of the estates of 13

passengers killed in the crash sued the United States, the airline, and other defendants for wrongful death in the Southern District of New York. On the defendants' motion the district court transferred the action to the Western District of North Carolina pursuant to 28 U.S.C. 1404(a). The plaintiff petitioned the Court of Appeals for a writ of prohibition or mandamus to prevent the transfer of the case.

The Second Circuit refused to prohibit the transfer, rejecting the plaintiffs' claim that the district court had lacked power to transfer the case. Preliminarily, the Court held that the fact that the district court record had physically been sent to the transferee court before the writ was sought in the Court of Appeals did not deprive that Court of jurisdiction to question the power of the district court to transfer the case, because such physical transfer of the court record was a legal nullity if the district court had lacked power to effect the transfer under 1404(a). (The Court did note that where the issue on review of a transfer is whether the district court had abused its discretion, the failure of the plaintiff to object and to seek a stay before the physical transfer of the record would weigh heavily against him.)

The plaintiffs' main argument was that the cases had been improperly transferred because, within the meaning of 1404(a), they could not have been brought in the Western District of North Carolina. Plaintiffs contended that North Carolina law requires administrators of decedents' estates to be North Carolina residents, and as they were not such, they could not have brought the suits there. The Court of Appeals rejected this argument, and, citing Van Dusen v. Barrack, 376 U.S. 612, held that the "might have been brought" language of 1404(a) requires only that the federal requirements of jurisdiction and venue for commencement of suit be satisfied in the transferee court, and that it is irrelevant to the validity of a 1404(a) transfer that the plaintiff might lack capacity to sue under the local law of the state in which the transferee court is located. Therefore, the plaintiffs- administrators need not qualify under North Carolina law, and need not be replaced in the transferee court by administrators who could qualify.

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorney Patricia M. Hynes (S.D. N.Y.)

STANDING

TRAVEL AGENTS LACK STANDING TO ATTACK RULING OF COMPTROLLER OF THE CURRENCY PERMITTING NATIONAL BANKS TO ACT AS TRAVEL AGENTS.

Arnold Tours, Inc. v. William B. Camp (C.A. 1, No. 7192; March 27, 1969; D.J. 145-3-876)

The Comptroller of the Currency issued a ruling permitting national banks to furnish travel services for their customers. Various travel agents brought an action in the district court contending that the ruling was illegal, since the rendition of travel services was not an "incidental power" permitted banks under the National Bank Act, 12 U.S.C. 24(7). The district court dismissed the suit for lack of standing. The First Circuit has just unanimously affirmed. In affirming, the Court of Appeals noted that plaintiffs had shown neither an exclusive franchise, a statutory aid to standing, nor any other legally protected right to be free of the competition of national banks.

Staff: Alan S. Rosenthal and Leonard Schaitman (Civil Division)

DATA PROCESSING COMPANY HAS STANDING TO ATTACK RULING OF COMPTROLLER OF THE CURRENCY THAT NATIONAL BANKS MAY MAKE DATA PROCESSING SERVICES AVAILABLE TO OTHER BANKS AND BANK CUSTOMERS.

The Wingate Corp. v. William B. Camp, et al. (C.A. 1, No. 7186; March 27, 1969; D.J. 145-3-905)

The appellant (Wingate), which provides data processing services to the public, brought an action to enjoin the Industrial National Bank of Rhode Island from performing similar services on its data processing equipment. The Comptroller of the Currency was also named a defendant, since the bank was to provide these services pursuant to the Comptroller's ruling that such activity is within a bank's incidental powers under 12 U.S.C. 24, Seventh.

The district court held that Wingate was without standing to bring the action. On appeal the First Circuit reversed. The Court agreed with the Comptroller that standing did not arise merely from the fact that Wingate would allegedly suffer from economic competition by the bank, or that the bank's activity allegedly violated the National Bank Act and was therefore "illegal competition". However, Wingate had also alleged that Section 4 of the Bank Service Corporation Act, 12 U.S.C. 1864, had as its primary purpose the protection of data processing companies from this type of competition. The Court held that this granted standing to Wingate.

In so holding, the First Circuit concededly went into conflict with the Eighth Circuit's holding in Association of Data Processing Service Organizations, Inc. v. Camp, ___ F.2d ___ (No. 19218, decided February 6, 1969).

Staff: Alan S. Rosenthal and Stephen R. Felson (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Will Wilson

COURTS OF APPEALS

NARCOTICS AND DANGEROUS DRUGS

FIFTH AMENDMENT DEFENSE NOT AVAILABLE TO SELLER OF MARIHUANA TO PURCHASER WHO DOES NOT FURNISH REQUIRED MANDATORY WRITTEN ORDER FORM.

United States v. Michael S. Buie (C.A. 2, No. 32,826; March 12, 1969, D.J. 12-51-1524)

Defendant was convicted after jury trial of selling marihuana to a purchaser who did not furnish the mandatory written order form in violation of 26 U.S.C. 4742(a). He challenged the conviction on the ground that since under statutory requirements the purchaser, in order to obtain the form, must among other things disclose the name and address of the proposed vendor /26 U.S.C. 4742(c)/, the Fifth Amendment privilege against self-incrimination can be invoked as a defense under the principle enunciated in Marchetti v. United States, 390 U.S. 39 (1968).

The Court following the rationale of United States v. Minor, 398 F.2d 511 (C.A. 2, 1968), concluded that since it is the purchaser and not the seller who must apply for and obtain the requisite order form, the claim of Fifth Amendment privilege being personal and non-transferable is not available to the seller. Nor did the Court agree that the statute is aimed at a class "inherently suspect of criminal activity" (Marchetti v. United States, supra) inasmuch as the number of purchasers registered demonstrates sufficient legitimate traffic in marihuana requiring regulation.

Staff: United States Attorney Robert M. Morgenthau;
Assistant United States Attorneys Gary P. Naftakis
and Douglas S. Liebhafsky (S.D. N.Y.)

BANK ROBBERY

COURT REJECTS CONTENTION THAT ALDERMAN CASE REQUIRES GOVT. TO TURN OVER ENTIRE FILE TO DEFENSE.

U.S. v. John Zack Mitchell (C.A. 4, No. 12,617, decided April 1, 1969)

Defendant was indicted for bank robbery, 18 U.S.C. 2113(a). Prior to trial defense counsel moved for disclosure of the entire Government

(X)

file. The trial judge ordered production of the entire Government file and made an in camera inspection of it, turning over to the defendant all evidence favorable to him. The defendant objected to this procedure, arguing that only the defendant can make the determination as to what is favorable to him. He relied on the recent Supreme Court decision in Alderman v. United States, ____ U.S. ____ (decided March 10, 1969), where the Court held that a defendant was entitled to examine the Government's file of information obtained by admittedly illegal electronic surveillance to determine for himself whether it provided leads to evidence offered against him at the trial. In upholding the District Judge's exercise of discretion the Court distinguished Alderman:

> Here the problem is uncomplicated by any policy of suppression of the fruits of illegal activity or any need to cloak the victim with the means of assurance that he was not prejudiced in his trial as a result of information illegally obtained by government agents. Here there is no suggestion that the prosecutor's file contained anything obtained directly or indirectly by any illegal activity. The defendant, at best, simply wished an opportunity for a fishing expedition, and, at the worst, to identify prospective government witnesses who might be subject to intimidation. The Alderman principle has no application here.

Staff: United States Attorney Claude V. Spratley, Jr. and Assistant United States Attorney Roger T. Williams (E.D. Va.)

DISTRICT COURT

DUAL PROSECUTION

18 U.S.C. 659 CLEARLY INDICATES THAT CONGRESS DID NOT DESIRE DUAL STATE AND FEDERAL PROSECUTION FOR SAME THEFT FROM INTERSTATE SHIPMENT REGARDLESS OF CHRONOLOGY OF WHICH JURISDICTION GOES TO TRIAL FIRST.

United States v. Paul Calvin Evans (D. N.J., November 19, 1968; D.J. 15-48-368)

On February 16, 1966 defendant Evans was indicted for theft from an interstate shipment in violation of 18 U.S.C. 659. The first trial resulted in a hung jury and the second resulted in a conviction and on June 22, 1966

Evans was sentenced to two years. Evans appealed, and while his appeal was pending, he was tried by local authorities on larceny charges arising out of the identical facts upon which the Federal indictment was based. On November 29, 1967 Evans was acquitted of the local charge and during 1968 the Court of Appeals for the Third Circuit reversed Evans' Federal conviction and remanded for a new trial. The district court then dismissed the indictment citing that part of 18 U.S.C. 659 which reads: "A judgment of conviction or acquittal on the merits under the laws of any state shall be a bar to any prosecution under this section for the same act or acts."

The Solicitor General decided no appeal should be taken from the dismissal of this indictment, not because 18 U.S.C. 659 was thought to be a bar in this peculiar chronology, but because taking an appeal would run contrary to Department policy against dual prosecution under Petite v. United States, 361 U.S. 529 and Abbate v. United States, 359 U.S. 187, as set forth in a Department of Justice news release of April 6, 1959 and accompanying Memorandum to United States Attorneys.

This policy is to the effect that after a state prosecution there should be no Federal trial for the same act or acts unless the reasons are compelling. It goes on to assert that cooperation between Federal and state prosecutive officials is essential to smooth functioning of the Federal system, and that prosecution should occur in the jurisdiction where the public interest is best served.

Therefore, we are drawing attention to this decision, not because we feel it is good law, but to emphasize our previously iterated policy against dual Federal and state prosecutions and to urge that whenever a crime has a local flavor, prosecution be left to the local authorities unless there are compelling and overriding Federal interests involved. This is particularly true for violations of 18 U.S.C. 659, 2312 and 2314.

Staff: United States Attorney David M. Satz, Jr. and Assistant United States Attorney Wilbur H. Mathesius (D. N.J.)

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INTERNAL SECURITY DIVISION
Assistant Attorney General J. Walter Yeagley

DISTRICT COURT

ENTICING DESERTION

United States v. James Patrick Hayes, Jr. (D. Mass., March 18, 1969; D.J. 146-28-2577)

On March 18, 1969, a grand jury in Boston, Massachusetts returned a sealed one-count indictment against James Patrick Hayes, Jr., charging him with violating 18 U.S.C. 1381. The indictment alleges that in January, 1967 Hayes attempted to entice an Army enlisted man, Robert Keese, to desert from the Army by making representations as to the means and facilities for deserting and by furnishing money and transportation to aid Keese in leaving the United States.

On March 21, 1969 FBI agents arrested Hayes in Cambridge, Massachusetts. He was arraigned at Boston on April 1, 1969, at which time he entered a "not guilty" plea and was released on $1,000 personal recognizance bond. The trial date has not been set.

This is the first case under Section 1381 involving an alleged attempt to entice a member of the Armed Forces to desert from the service and leave the United States.

Staff: United States Attorney Paul F. Markham;
Assistant United States Attorney William J.
Koen (D. Mass.); and James P. Morris
(Internal Security Division)

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