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UNITED STATES DEPARTMENT OF JUSTICE

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NEWS NOTES

DEPARTMENT RELEASES FIGURES SHOWING NO EXECUTIONS IN 1968

May 16, 1969: The Department of Justice has announced that there were no executions in 1968.

It was the first year that there were no executions since the Federal Bureau of Prisons began its annual survey of civil executions in 1930. There were two in 1967, and 3,859 since the annual survey began.

As of December 31, 1968, the Bureau reported, a record 479 persons were under sentence of death, compared with 435 on the same date the previous year.

N.Y. BROKERAGE FIRM, FIVE OTHERS CHARGED WITH VIOLATION OF FED. RESERVE STATUTES

May 16, 1969: A New York stock brokerage firm, Coggeshall & Hicks, and five persons were indicted on charges of conspiring to circumvent the margin requirements of the Federal Reserve Board in the purchase of stock through numbered Swiss accounts.

Attorney General John N. Mitchell said a 13-count indictment, including two counts of perjury, was returned by a federal grand jury in U.S. District Court in New York City.

The indictment charges that the defendants conspired with Arzi Bank of Zurich, Switzerland, to arrange for Coggeshall & Hicks' officers, employees, and customers to purchase more than $20 million in stocks through the bank's account at the brokerage firm.

Through the bank, some of the defendants and their customers only put up 20 percent of the purchase price of stock, while the Federal Reserve Board required 70 to 80 percent during the period covered in the indictment, it alleged. Customers and employees concealed their identities by using numbered Swiss accounts to funnel the money through, it was also charged. Keefer and Donner were also charged with perjury in denying before the grand jury knowledge that persons connected with Coggeshall & Hicks maintained accounts at the Swiss bank. The trading resulted in commissions totaling $225,000 to the firm, the indictment said.

DEPARTMENT SEEKS RESTRAINING ORDER ON MISSISSIPPI ELECTION

May 17, 1969: The Department of Justice has asked a federal court to block a June 3 town election in Friars Point, Mississippi, unless a slate of Negro candidates is placed on the ballot. Attorney General John N. Mitchell said a civil suit, and a motion for either a restraining order or preliminary injunction, was filed in U.S. District Court at Greenville, Mississippi. The suit named as defendants Hazel P. Shannon, city clerk of Friars Point; the Friars Point Municipal Election Commission; and Sol Hirsberg, A.C. Meyers and Frank C. Robinson, members of the Commission.

The Commission changed the qualification procedure for candidates and the clerk failed to notify the Negroes of the change in time for them to be placed on the ballot, in violation of the Voting Rights Act of 1965 and the 15th Amendment to the Constitution, the suit said.

The change in procedure was made without the approval of the Attorney General, as required by the Voting Rights Act of 1965, and will "deny and abridge the right of Negroes to vote on account of their race by denying them the right to vote for the candidates of their choice", the suit said.

LEAA ANNOUNCES AWARDS TO 64 LAW ENFORCEMENT AGENCIES

May 20, 1969: Attorney General John N. Mitchell today announced the award of $230,000 to 64 law enforcement agencies to help finance their participation in the National Crime Information Center.

Mr. Mitchell said the awards were made by the Law Enforcement Assistance Administration and increase to more than $1 million the total funds given by LEAA to the Center since it was created by the FBI in 1967.

* * *

POINTS TO REMEMBER

PRETRIAL HEARINGS ON GENERAL ISSUE IN CRIMINAL CASES

In a number of recent instances defense counsel have attempted to turn hearings on motions attacking the indictment into pretrial hearings on the merits of the criminal charges involved. The United States Attorneys involved in most of these cases have been able to insist successfully that such matters must be resolved at the trial of the general issue. On one or two occasions, however, the court has been misled by the acquiescence of the United States Attorney in a hearing at which testimony was taken on the merits of the allegations in the indictment and the court has dismissed the indictment following such a pretrial hearing. All United States Attorneys are, accordingly, reminded that they must insist that the allegations of the indictment for pretrial motion purposes must be taken as true. Boyce Motor Lines v. United States, 342 U.S. 337, fn. 16; Universal Milk Bottle Service v. United States, 188 F.2d 959, 962 (C.A. 6). Strenuous objection should be raised to prevent the taking of evidence traversing the allegations of the indictment at any pretrial proceeding short of the trial itself.

PLEA OF GUILTY

SUPREME COURT RULES THAT STRICT COMPLIANCE WITH RULE 11, F.R.Cr.P. IS MANDATORY BUT RULE APPLICABLE PROSPECTIVELY. PLEAS PRIOR THERETO NEED ONLY BE MADE KNOWINGLY AND VOLUNTARILY.

We call your attention to two recent decisions of the Supreme Court which are of importance, both with respect to the taking of guilty pleas now and with respect to collateral attacks on older guilty pleas. In McCarthy v. United States, No. 43, decided April 2, 1969, the Supreme Court held that there must be strict compliance with the requirements of Rule 11, F.R.Cr.P. It rejected the Government's argument that even if there had been less than complete observance of the rule, the plea should not be set aside if in fact it was shown to have been knowingly and voluntarily entered, and there was indeed a factual basis for it. The court held that "a defendant is entitled to plead anew if a . . . district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11." It is therefore important that each prosecutor make certain that Rule 11 has been complied with and call the attention of the court to any deficiencies in his questioning of a defendant when accepting a guilty plea. If, in the course of the court's inquiry, the defendant makes a statement that might prompt further clarification of whether he in fact has made a proper plea, trial counsel should bring the matter to the court's attention.

The McCarthy decision is applicable to pleas accepted after the date of decision April 2, 1969. Prior to that time the rule in every federal jurisdiction but the Ninth Circuit was that a failure to observe the ritual of Rule 11 did not require automatic vacation of a guilty plea challenged collaterally if the record established that the plea in fact was made knowingly and voluntarily. In Halliday v. United States, No. 642 Misc. O.T. 1968, decided May 1968, the Supreme Court in effect continued that rule as to pleas accepted before April 2, 1969. Thus, when a plea entered before April 2, 1969 is attacked as having been accepted without compliance with Rule 11, it remains open to the Government, to prove at a hearing, that the plea was in fact knowingly and voluntarily entered. See Kennedy v. United States, 397 F.2d 16 (C.A. 6), certiorari denied, May 5, 1969 (No. 921 Misc. O.T. 1968).

See: May 2, 1969, issue of the United States Attorneys Bulletin, pp. 395-396, for further report.

MARIHUANA PROSECUTIONS

Timothy F. Leary v. United States (No. 65-October Term, 1968; 37 L.W. 4397; D.J. 12-74-1325)

The Supreme Court, in an opinion handed down on May 19, 1969, following its rationale in Marchetti v. United States, 390 U.S. 62 (1968) and related cases, has held that invocation of the Fifth Amendment privilege against self-incrimination is a valid defense to a charge under 26 U.S.C. 4744(a). It also struck down the "knowledge" presumption of 21 U.S.C. 176a.

In view of this development indictments should no longer be returned charging violations of either Section 4744(a) or (2)(2). Further, since the "knowledge" presumption in Section 176a can no longer be relied on, indictments should not be returned charging a violation of this section unless there is sufficient direct or circumstantial evidence of knowledge of importation on the part of the defendant to warrant submission to the jury.

A detailed analysis of the Court's opinion in the Leary case and its companion, United States v. Covington, together with appropriate guidelines is presently being prepared and will be sent to all United States Attorneys as soon as possible. Meanwhile, consideration should be given to utilizing where possible Sections 4742(a), 4755(b) of Title 26 or Section 1403 of Title 18, United States Code, where the facts would so warrant.

Inquiries concerning procedures or policy in the interim should be directed to the Criminal Division, Narcotic and Dangerous Drug Section, by calling Ext. 3977 for offices east of the Mississippi and Ext. 3981 for those west of the Mississippi.

OBSCENE BROADCASTS OVER CITIZEN BAND AND AMATEUR FREQUENCIES. VIOLATION OF 18 U.S.C. 1464.

During the past several months, the Criminal Division has had occasion to review instances involving offensive transmission on both Citizen Band and other amateur radio frequencies.

As you know, Title 18, United States Code, Section 1464, provides criminal penalties of up to two years in jail or a $10,000 fine or both for uttering any obscene, indecent or profane language by means of radio. There are two appellate decisions interpreting the application of this section to broadcast speech and both are from the Ninth Circuit. See Duncan v. United States, 48 F.2d 129 (1931), cert. denied, 283 U.S. 863 and Gagliardo v. United States, 366 F.2d 720 (1966).

It is the Department's view that any criminal proceeding under 18 U.S.C. 1464 involving Citizen Band and amateur radio frequencies be reserved for incidents of such magnitude that an administrative sanction such as the loss or suspension of a license by the Federal Communications Commission under Title 47, United States Code, Section 312, would not be a sufficient penalty.

United States Attorneys are requested to refer any such matters to the Criminal Division, General Crimes Section, for review prior to the institution of grand jury proceedings.

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CIVIL DIVISION
Assistant Attorney General William D. Ruckelshaus

COURTS OF APPEALS

EMPLOYEE ACTIONS--CIVIL RIGHTS ACT--OFFICIAL IMMUNITY

FEDERAL EMPLOYEE WHO ALLEGES THAT STATE AND FEDERAL OFFICIALS CONSPIRED TO DEPRIVE HIM OF RIGHT TO HEARING, AND THAT TRANSFER WAS PUNITIVE IN NATURE, ENTITLED TO TRIAL TO ESTABLISH FACTS SURROUNDING HIS TRANSFER.

Dr. Harold D. Kletschka v. William J. Driver, et al. (C.A. 2, No. 32698; April 22, 1969; D.J. 151-50-464)

Plaintiff was a surgeon at a Veterans Administration hospital in Syracuse, New York, which was affiliated with the State Medical Center. His complaint alleged that, during and after a tour of military duty, the state and federal defendants (including VA, Civil Service Commission and State hospital officials) conspired to deprive him of certain research grants and to undermine his position, culminating ina transfer to Houston without a disciplinary hearing. He sought declaratory and injunctive relief, and several million dollars in damages for injury to his reputation, etc.

The district court granted summary judgment for all defendants on jurisdictional and official immunity grounds. On appeal, the Second Circuit refersed in part and remanded for trial. The Court agreed with the Government that the Administrative Procedure Act does not provide any basis for review of the VA decisions concerning the research grants, since those decisions were discretionary in nature. The Court further agreed that the statute protecting veterans' reemployment rights, 50 U.S.C. App. 459, did not require review of the decisions.

However, the Court also held that it could not determine on the basis of the defendants' affidavits whether the transfer was disciplinary in nature, in which case plaintiff would have been entitled to a hearing under 38 U.S.C. 4110. It therefore held that "plaintiff is entitled to introduce proof (in the district court) establishing that his transfer falls within the disciplinary classification, and, if he can so prove, he is entitled to appropriate declaratory and injunctive relief".

Finally, the Court held that the complaint stated a cause of action against the state defendants under the Civil Rights Act, 42 U.S.C. 1983. And, since the federal defendants might be shown at trial to have acted in

concert with the state defendants, a cause of action was also stated against them. With respect to our defense of official immunity, the Court stated that it "cannot be sustained until a court has knowledge of the exact nature of the defendants' actions and the precise scope of their official duties. The court can then address the legal question of whether the government's interest in the forthright performance of these duties requires that the officials be held immune from any liability based on their actions." Thus, our conclusory affidavits, ordinarily sufficient to prevent a trial in this area, were deemed insufficient. However, the Court seemed to hint that detailed affidavits, setting out all of the facts and directly refuting plaintiff's claim on the merits, might have been sufficient to allow affirmance of the district court's dismissal of plaintiff's damage claims.

Staff: Stephen R. Felson (Civil Division)

FEDERAL JURISDICTION

FOURTH AMENDMENT DOES NOT CREATE FEDERAL CAUSE OF ACTION FOR DAMAGES.

Webster Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics (C.A. 2, No. 32537; April 10, 1969; D.J. 145-3-891)

Plaintiff filed suit in a federal court, alleging that federal narcotics agents had violated his Fourth Amendment rights by entering his apartment and arresting him without a warrant. He sought damages against each of the agents in the amount of $15,000. The district court dismissed the action for want of federal jurisdiction and on the basis of the official immunity defense.

On appeal, the Second Circuit affirmed. After an exhaustive analysis, it held that a federal damage action could not be inferred from the Fourth Amendment's strictures against unreasonable searches and seizures. It thus followed (upon a different rationale) Bell v. Hood, 71 F. Supp. 813 (S.D. Calif., 1947), on remand from 327 U.S. 678 (1946), and numerous other cases which had accepted the Government's position without discussion.

Since the only basis claimed by plaintiff for federal jurisdiction was held not to exist, the Court did not consider his state-law actions (trespass, etc.), and also did not reach our immunity defense. Of course, if plaintiff chooses to refile the action in the appropriate state court, the official immunity issue would then be reached, either in the state court or in a federal court after removal by the federal officials.

Plaintiff has filed a petition for certiorari.

Staff: Stephen R. Felson (Civil Division)

LONGSHOREMEN'S ACT

POSTHUMOUS ILLEGITIMATE CHILD IS PERMISSIBLE BENEFICIARY UNDER LONGSHOREMEN'S ACT.

Texas Employers' Insurance Association, et al. v. Shea (C.A. 5, No. 25715; April 10, 1969; D.J. 83-75-24)

Elizabeth Clark, a minor, applied for benefits under the Longshoremen's Act, 33 U.S.C. 901 et seq., claiming that, as a natural child of a deceased longshoreman, she was entitled to benefits even though she was illegitimate and was born five months after her wageearner-father's death. The employer claimed that while the Act expressly authorized benefits to be paid to a legitimate child born posthumously, and to an illegitimate who was acknowledged by and dependent upon the deceased before he died, it did not authorize benefits to be paid to a child who was both posthumous and illegitimate. The Deputy Commissioner awarded benefits and the district court affirmed.

In upholding the award of benefits the Fifth Circuit ruled that a posthumous illegitimate child is a permissible beneficiary under the Longshoremen's Act. The Court rejected the employer's contentions that an unborn child could neither be acknowledged by, nor dependent upon its father. Viewing these matters as factual, and recognizing the limited scope of review, the Court said that the Deputy Commissioner's findings on this score were supported by substantial evidence.

Staff: Robert M. Heier (Civil Division)

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CRIMINAL DIVISION
Assistant Attorney General Will R. Wilson

COURTS OF APPEALS

FEDERAL FOOD, DRUG, AND COSMETIC ACT

SPECIFIC INTENT THAT ARTICLES WERE TO BE USED FOR DRUG PURPOSES NOT ELEMENT OF OFFENSE.

United States v. Guardian Chemical Corp. and Alfred E. Globus (C.A. 2, Nos. 32789, 32790; April 15, 1969; D.J. 21-52-237)

Following trial before a jury in the U.S. District Court for the Eastern District of New York, defendants were convicted of introducing a misbranded drug into interstate commerce in violation of 21 U.S.C. 331(a). The product in question, Renacidin, was originally produced for use in cleansing milk pasteurizing apparatus, but had gained wide acceptance by the medical profession as a means of irrigating catheters and treating kidney stones.

Affirming the lower court conviction, the Court of Appeals for the Second Circuit brushed aside the defendants' contention that a lack of evidence on the issue of specific intent compelled the direction of an acquittal. Placing great reliance on United States v. Dotterweich, 320 U.S. 277 (1943), the Court re-emphasized the proposition that "(A)wareness of wrongdoing on the part of the defendants need not be proved" to make out a violation of 21 U.S.C. 331(a). Furthermore, even if intent were an element of the crime, which it is not, the evidence in this case clearly established that the time it was introduced into interstate commerce.

Staff: United States Attorney Vincent T. McCarthy; Assistant United States Attorneys Robert Kraft and Jerome C. Ditore (E.D. N.Y.)

NARCOTICS

PREJUDICE TO DEFENDANT MUST BE SHOWN TO RAISE CONSTITUTIONAL ISSUES FOR FIRST TIME ON APPEAL.

Marshall v. United States (C.A. 9, No. 21,226; April 9, 1969; D.J. 12-12C-86)

On December 2, 1965, an informant of the old Federal Bureau of Narcotics made a buy of marihuana while wired for sound. For the first time on appeal, the defendant-seller argued that the testimony of the "tuned-in" agent ought not have been admitted into evidence. Since there was no objection at trial, the Ninth Circuit said it would reach the Fourth Amendment issue only if from the record it could find a miscarriage of justice. Noting that defense counsel tried to use the questioned testimony, the Circuit Court found no such miscarriage had occurred.

Defendant also argued that his conviction under the Marihuana Tax Act was in violation of the Marchetti Trilogy. The Court of Appeals pointed out that one of the jury's verdicts had found defendant guilty of selling illegally imported marihuana in violation of 21 U.S.C. 176a, and that the sentences were concurrent. Thus the conviction was affirmed.

Staff: United States Attorney Wm. Matthew Byrne, Jr.
(C. Calif.)

NARCOTICS - BODY SEARCHES

"CLEAR INDICATION" DEFINED.

United States v. Castle (C.A. 9, No. 23,587; April 11, 1969; D.J. 12-8-729)

A recent problem has arisen -- what constitutes a clear indication that, if a doctor enters a suspect's body, he will find contraband therein.

In the instant case, an informant, seven or eight times previously reliable, said that the defendant in the company of another would be coming to Nogales, Arizona, to purchase heroin. The defendant and his companion did arrive, and after some suspicious activity crossed into Mexico. When he returned to the United States, Customs Agents performed a strip search. They found defendant's rectum unusually clean and smeared with vasoline. They also knew defendant as a trafficker in and a user of narcotics. Thus they authorized a body search by a reputable doctor using accepted medical procedures. Heroin was discovered in a contraceptive in the rectum.

This the Ninth Circuit held was a "clear indication". It is a good definition.

Staff: United States Attorney Edward E. Davis and
Assistant United States Attorney Jo Ann Diamos
(D. Ariz.)

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TAX DIVISION

Assistant Attorney General Johnnie M. Walters

DISTRICT COURT

TAXES

FEDERAL TAXES ARE "LEGALLY DUE AND OWING" FOR PURPOSES OF DISCHARGEABILITY UNDER SECTION 17 OF THE BANKRUPTCY ACT, AS AMENDED IN 1966, AS OF THE DUE DATE FOR FILING THE RETURN AND PAYING THE TAX.

In the Matter of Joseph A. Kopf (E.D. N.Y., No. 65-B-310; May 1, 1969; D.J. 5-52-11084)

This decision represents an initial judicial interpretation of the phrase "legally due and owing" in the 1966 amendments to Section 17 of the Bankruptcy Act, in relation to the dischargeability of federal taxes. The district court, reviewing a Referee's order which discharged certain federal taxes as having been legally due and owing more than three years preceding bankruptcy, reversed and held that the federal income taxes in question became "legally due and owing" on April 15 following the end of the taxable year rather than on December 31, the termination date of the taxable period.

On April 1, 1965, Joseph A. Kopf filed a petition in bankruptcy. The Government's claim for taxes included liabilities for the taxable years 1961 through 1964. The Referee disallowed the claim for the year 1961, holding that the tax became "legally due and owing" on December 31, 1961, more than three years prior to the April 1, 1965, petition. The Government argued that the operative date to begin a computation of the three-year period was April 15, 1962, and accordingly the taxes would be within the three-year exemption specified in Section 17(a)(1), as amended.

Judge Bartels rejected the theory that the accrual of the tax liability as of the end of the taxable period was tantamount to the tax being "legally due and owing" as intended in the amendments to Section 17. The court carefully distinguished cases which have adopted the accrual theory for the purposes of determining proveability of claims in bankruptcy from the present case dealing with dischargeability. (See State of New Jersey v. Anderson, 203 U.S. 483; In re International Match Corp., 79 F.2d 203 (C.A. 2).)

The court noted that the Internal Revenue Code specifies the due date for payment of taxes (Section 6151) and that interest does not begin to accrue unless the taxes are not paid by the last date prescribed for payment.

(Section 6601). In analyzing the phrase, the court observed that when the word "due" is used in connection with "owing", the logical meaning is equivalent to "payable". Otherwise, the use of "due" would become tautological. Consequently, the court held that the federal taxes were legally due and owing on the date prescribed for payment of the tax by the provisions of the Code.

Staff: United States Attorney Vincent T. McCarthy; Assistant United States Attorney Howard E. Babbush (E.D. N.Y.); and John S. Kingdon (Tax Division)

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