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United States Attorneys

Bulletin

Published by Executive Office for United States Attorneys
Department of Justice, Washington, D.C.

Volume 24 April 16, 1976 Number 8

UNITED STATES DEPARTMENT OF JUSTICE

VOL. 24 April 16, 1976 NO. 8

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POINTS TO REMEMBER

ASSAULTS OCCURRING IN INDIAN COUNTRY

The Eighth Circuit has apparently agreed with the Ninth Circuit that looking to state law for the definition and punishment of assault with a dangerous weapon and assault resulting in serious bodily injury when committed by an Indian in Indian country causes an unconstitutional racial discrimination against Indian defendants. In United States v. Seth Henry Big Crow, No. 75-1164, decided October 7, 1975, the defendant was indicted for assault with a dangerous weapon, assault resulting in serious bodily injury, and burglary, under 18 U.S.C. 1153 and South Dakota law.

The Eighth Circuit reversed the conviction on Count Two, the assault resulting in serious bodily injury. The court reasoned that if the defendant had been a non-Indian who assaulted an Indian he could have only been prosecuted under 18 U.S.C. 113(d), which provides a maximum punishment of only six months and a $550 fine for an assault by "striking, beating, or wounding." South Dakota law provides for imprisonment for up to five years for an assault with intent to inflict great bodily injury.

The government argued that if the defendant had been a non-Indian, the same South Dakota law would have been applied through the Assimilative Crimes Act, 18 U.S.C. 13. The government contended that, since 18 U.S.C. 113(d) was obviously designed to cover the offense of simple battery, there was no federal statute directly proscribing an assault resulting in serious bodily injury. The court rejected this argument which essentially is the same one made in United States v. Chiago, 503 F.2d 1067, (9th Cir., 1974). See United States Attorneys Bulletin, Vol. 22, No. 24, November 29, 1974. Compare United States v. Analla, 490 F.2d 1204, where the Tenth Circuit upheld the constitutionality of Section 1153 regarding assault resulting in serious bodily injury even though 1153 was based on a racial classification because of the historical relationship between Indians and the federal government.

The Department is still looking for an appropriate case involving assault resulting in serious bodily injury to take the Supreme Court for a final determination of whether this offense is different from a simple battery under 113(d), and hence results in no improper discrimination against Indians. United States v. Healy, Cr. 74-83-HG, D. Montana, was such a case but an appeal of the dismissal was not timely filed. In

Healy the defendant severely beat the victim using only his fists, precluding assault with a dangerous weapon. The Department did not authorize certiorari in Big Crow because the defendant was also charged with assault with a dangerous weapon. The defendant beat the victim with a bed frame and a firearm as well as with his fists.

It continues to be the Department's position that assaults with a deadly weapon by Indians can be prosecuted but under 1153 and 113(c) rather than under 1153 and state law. The Ninth Circuit in denying a petition for rehearing in United States v. Cleveland, a companion case to Chiago, authorized this approach. 503 F.2d 1067, 1072.

The Department has drafted legislation that would cure the problems presented by the Cleveland, Chiago and Big Crow cases. It would make all assaults with a dangerous weapon and assaults resulting in serious bodily injury be defined and punished under federal law. A new section, (f), would be added to 18 U.S.C. 113 providing for assault resulting in serious bodily injury. The bill, S. 2129, passed the Senate, and the House Judiciary Committee ordered it favorably reported on April 6, 1976.

Meanwhile, United States Attorneys are encouraged to prosecute assaults with a dangerous weapon as outlined supra, and, in aggravated cases where the defendant does not use a weapon and no other statute applies (such as assault with intent to commit rape or assault with intent to kill) to contact the Criminal Division, General Crimes Section at extension 2745. Discussions with the Solicitor General's office indicate a reluctance to appeal further dismissals of assault resulting in serious bodily injury in light of Chiago and Big Crow. Nevertheless the Solictor's office has indicated that it will consider appeal and, if necessary, certiorari in a case presenting an attractive factual setting such as where the defendant is a non-Indian and the victim an Indian. The Criminal Division wants to ensure that United States Attorneys will have the backing of the Solictor before undertaking a prosecution of this type of assault.

The Department has also authorized certiorari in United States v. Antelope, 523 F.2d 400 (9th Cir. 1975). In Antelope an Indian defendant killed a white woman during a burglary. He was convicted of first degree murder under 18 U.S.C. 1153 and 2111. Federal law, of course, recognizes the felony murder doctrine. Idaho law, under which a non-Indian defendant would have been prosecuted, does not. The Ninth Circuit ruled

this an unconstitutional discrimination.

The Supreme Court granted the petition for certiorari on February 23, 1976. The Department will argue that Antelope presents a different problem from Cleveland, Chiago and Big Crow. It will point out that these three cases were concerned with disparity between the treatment of an Indian and a hypothetical non-Indian within federal Indian country jurisdiction. These cases do not support Antelope which in essense overturns a historically sound position that Congress may choose to limit federal jurisdiction to crimes involving an Indian as either victim or accused and to leave jurisdiction over wholly non-Indian crimes to the states.

(Criminal Division)

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ENFORCEMENT OF FEDERAL CONFLICT OF INTEREST LAWS, 18 U.S.C. §§ 207, 208

Sections 207 and 208 of Title 18, United States Code, were enacted in 1962 as part of a general revision and strengthening of the federal bribery and conflict of interest statutes. P.L. 87-849, 76 Stat. 1119, October 23, 1962. Section 207 deals primarily with conflicts of interest involving former officers and employees of the Executive Branch or partners of present officers and employees of the Executive Branch, and Section 208 deals with conflicts of interest involving present officers and employees of the Executive Branch. These statutes support a number of important policy objectives including impartiality; fairness and equality of treatment toward those dealing with government; assurance that decisions of public importance will not be influenced by private considerations; efficiency and economy in carrying on the business of government; maintenance of public confidence in government; and prevention of use of public office for private gain. See Perkins, The New Federal Conflict of Interest Law, 76 Harv. L. Rev. 1113, 1118; The Association of the Bar of the City of New York, Special Committee on the Federal Conflict of Interest Law, Conflict of Interest and Federal Service, (Harv. 1960) pp. 6-7. The Criminal Division expects, therefore, vigorous and diligent pursuit of all conflict of interest matters and cases that arise under these and similar conflict of interest statutes.

It should be noted that specific criminal intent or a conscious purpose of wrongdoing is not an element of the Section 208 offense. United States v. Mississippi Valley Generating Company, 364 U.S. 520, 560-561 (1961); cf. United States v. Johnson, 419 F.2d 56 (4th Cir. 1969), cert. den. 397 U.S. 1010; United States v. Quinn, 141 F.Supp. 622 (D.C. N.Y. 1956). Nor is specific criminal intent or a conscious purpose of wrongdoing an element of the Section 207 offense. Cf. United States v. Mississippi Valley Generating Company, supra; United States v. Johnson, supra; and United States v. Quinn, supra. From the plain language of these statutes it is, furthermore, clear that pecuniary or some other gain by the offender is not an element of either offense. In light of the foregoing, obviously the fact that the offender did not intend to defraud the government, did not intend to do wrong, did not profit from his crime, and similar considerations are all immaterial to the determination of whether or not a conflict of interest violation was committed. Such considerations should not be used as the bases for declining prosecution of apparent conflict of interest violations.

The Public Integrity Section of the Criminal Division is assigned staff responsibility for the enforcement of the federal conflict of interest statutes found in Chapter 11 of Title 18, United States Code. Attorneys of this Section are available to assist with matters and cases in which these statutes may be involved.

(Criminal Division)

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ANTITRUST DIVISION
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DISTRICT COURT

SHERMAN ACT

MAGISTRATE RULES FOR GOVERNMENT ON DISCOVERY MOTIONS.

United States v. FMC Corporation, et al., (Cr. 75-141-G; March 15, 1976; DJ 60-122-94)

FMC Corporation and Donald Oskin, the only two defendants who have appeared in this criminal case, filed numerous joint motions for discovery. The government voluntarily agreed to provide defendants with virtually all of the documents which they requested under Criminal Rule 16(b). The government, however, opposed seven other discovery motions which defendants filed. These motions were: (a) To Permit Inspection of all Favorable or Helpful Materials under the Government's Control, (b) For Inspection and Copying of Grand Jury Testimony under Rule 6(e), (c) For a Bill of Particulars, (d) For a List of Government Witnesses, (e) For Disclosure of the Identity of Any Government Informant, (f) To Inspect and Copy Results of Scientific Tests or Experiments and (g) To Inspect and Copy the Grand Jury Lists.

After the submission of extensive memoranda on these various motions, oral argument was held on December 8, 1975 before Magistrate Willie J. Davis in the District of Massachusetts. On March 15, 1976, Magistrate Davis issued a Memorandum on Discovery denying each of the defendants' motions with the exception of the motion to inspect and copy grand jury lists, which motion was an adjunct to a motion to dismiss for prejudice in the selection of the grand jury.

The Magistrate's Memorandum, which acknowledged that the government agreed to exchange a list of witnesses 30 days in advance of trial, noted that "this should be acceptable, provided, of course, the defendants are willing to reciprocate." In refusing to order disclosure of

witnesses, however, the Magistrate observed that "there is the danger of economic retaliation" and commented that "this possibility is very real." With respect to the informant motion, the Magistrate indicated that his decision turned upon the fact that the government represented that the informant in this case did not play a material part in the alleged crime, was not present during its commission and would not be used as a witness. As to the motion for a Bill of Particulars, the Magistrate noted that "the government has agreed to furnish certain ones, including those showing that the conspiracy continued after the date of the amended Sherman Act" and, citing United States v. Leach, 427 F. 2d 1107 (1st Cir. 1970), said "no more need be given."

The defendants' motions for inspection of grand jury testimony and inspection of all favorable materials were both premised on the assertion that only defense counsel can adequately determine what information is covered by the Brady Doctrine. In denying the motion, the Magistrate observed that (a) there was not even an attempted showing of any particularized need, (b) the defendants' reliance upon Dennis v. United States, 384 U.S. 855 (1966) for the proposition that only defense counsel was competent to judge what information would serve a legitimate purpose in the preparation of a defense, "is misinformation." The Magistrate said that Dennis held only that an "advocate" could properly make the determination. "This does not necessarily mean defense counsel." Commenting that the defendants' argument would entitle them to rummage through the government's complete file, the Magistrate said "no constitutional requirement permits this type of unlimited access to government files. Moore v. Illinois, supra, (408 U.S. 786) p. 795." Finally, the Magistrate held that the problem of Brady material discovery questions is best handled by relying upon the good faith of the prosecution. For this, the Magistrate cited United States v. Eley, 335 F. Supp. 353 (N.D. Ga. 1972), United States v. White, 50 F.R.D. 70 (N.D. Ga. 1970) and United States v. Leichtfuss, 331 F. Supp. 723 (N.D. Ill. 1971).

On March 25, 1976 defendants filed a joint motion seeking de novo determination by Judge Garrity of all these discovery motions arguing: (1) certain of these

discovery motions were not referred to the Magistrate in accordance with the local Magistrate rules, (2) certain of the motions were not properly subject to determination by the Magistrate, (3) the provision of the local rules which holds Magistrate decisions on discovery to constitute "the order of the court" is in conflict with the Federal Magistrate's Act, 28 U.S.C. §636(b). Defendants have requested leave for oral argument on their motion for de novo determination

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CIVIL DIVISION
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SUPREME COURT

FIRST AMENDMENT

SUPREME COURT UPHOLDS BAN ON CAMPAIGNING ON MILITARY BASES AND PRIOR RESTRAINT ON LEAFLETEERING.

Thomas U. Greer v. Benjamin Spock (Sup. Ct. No. 74-848, decided March 24, 1976; D.J. 145-4-2228).

Reversing the Third Circuit, the Supreme Court has just upheld (6-2) the Army's decision barring Dr. Benjamin Spock from campaigning on Fort Dix during the 1972 Presidential campaign. The majority held that military bases are not "public forums" for First Amendment purposes even though civilians generally are permitted on most areas of the bases. Further, the Court held that the tradition of a politically neutral military establishment under civilian control justifies the total ban of political campaigning on military bases.

The Court also upheld the military regulation prohibiting distribution of leaflets on military bases unless the leaflets have been submitted in advance to the commander and found not to present a clear danger to the loyalty, discipline, or morale of the troops. In contrast to its precedents in civilian First Amendment cases, the Court here upheld a prior restraint on speech based upon content without provision for judicial review.

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PUBLIC VESSELS ACT

SUPREME COURT HOLDS THAT THE "RECIPROCITY" REQUIREMENT OF THE PUBLIC VESSELS ACT IS FULLY EFFECTIVE, NOTWITHSTANDING LATER AMENDMENT TO THE SUITS IN ADMIRALTY ACT.

United States v. United Continental Tuna Corp. (Sup. Ct. No. 74-869, decided March 30, 1976; D.J. 61-12C-225).

Following a collision between a U.S. Navy destroyer and a Philippine-owned fishing vessel, the owner of the fishing vessel brought suit against the United States. Jurisdiction was alleged under both the Suits in Admiralty Act and the Public Vessels Act. The district court dismissed the suit, holding that the reciprocity requirement of the Public Vessels Act had not been satisfied in that the vessel's Philippine owner had failed to establish that Americans could sue in the Philippine courts under similar circumstances. The court of appeals reversed, ruling that the owner did not have to meet the requirements of the Public Vessels Act since it could maintain the suit independently under the Suits in Admiralty Act. The Supreme Court granted our petition for a writ of certiorari and, in a 7-1 decision, has just reversed the ruling of the Ninth Circuit. According to the Supreme Court, when a "public vessel" of the United States is involved, the requirements of the Public Vessels Act must be met before an action against the United States may be maintained. Although the Suits in Admiralty Act was amended in 1960 to contain broad language authorizing admiralty actions against the United States, the 1960 amendment was not intended to repeal the specific conditions which Congress in the Public Vessels Act imposed upon suits involving public vessels of the United States.

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SUPREME COURT

ARREST - VOLUNTARINESS OF CONSENT

WARRANTLESS PROBABLE CAUSE ARREST IN A PUBLIC PLACE IN THE ABSENCE OF EXIGENT CIRCUMSTANCES HELD TO COMPORT WITH THE FOURTH AMENDMENT.

FACTORS OF CUSTODY AND FAILURE TO INFORM THE ARRESTEE THAT HE CAN WITHHOLD CONSENT, STANDING ALONE, ARE INSUFFICIENT TO WARRANT A FINDING THAT CONSENT TO SEARCH WAS THE PRODUCT OF ILLEGAL COERCION, AND HENCE INVOLUNTARY.

United States v. Henry Ogle Watson, (Sup. Ct. No. 74-538, decided January 26, 1976.)

The respondent was convicted on two counts of possession of stolen mail in violation of 18 U.S.C. §1708. On August 17, 1972 a reliable informant contacted a postal inspector and informed him that respondent was in possession of a stolen credit card. Later that day the credit card was given to the postal inspector by the informant. The postal inspector verified that this card had been mailed but that it had never reached the intended customer. On learning that respondent had agreed to furnish additional credit cards, the postal inspector requested the informant to arrange a meeting with respondent.

On August 23, 1972 respondent met with the informant at a restaurant, and after the officers received a pre-arranged signal from the informant indicating that respondent was in possession of additional stolen credit cards, the officers entered the restaurant, placed respondent under arrest and removed him to the street. After giving respondent the required Miranda warnings, the postal inspector requested from respondent permission to inspect the latter's car, which was standing in plain view. After being informed that if anything was found it would go "against" him, respondent furnished the keys to his car and an envelope containing two credit cards in the name of other persons was found under a floor mat.

Prior to trial, respondent moved to suppress the cards, claiming that his arrest was illegal for want of probable cause and an arrest warrant and that his consent to search the car was involuntary because he had not been informed that he could withhold consent. The motion was denied.

A divided panel of the Court of Appeals for the Ninth Circuit reversed, ruling that the arrest of respondent contra-

vened the Fourth Amendment, notwithstanding that probable cause for the arrest existed, because the postal inspector failed to secure an arrest warrant although he concededly had time to do so. The court further ruled that under the totality of the circumstances, one of which was the illegality of the arrest, respondent's consent to search his car had been coerced and hence was not a valid ground for the warrantless search of the automobile. The Supreme Court, two justices dissenting, reversed.

The Court ruled that a warrantless public arrest bottomed upon probable cause does not contravene the Fourth Amendment even where there is opportunity to obtain a warrant. The Court concluded that such an arrest constitutes the "constitutional standard" and that the preference for obtaining warrants of arrest would not be elevated to a constitutional rule where the judgment of the ". . . Nation and Congress has for so long been to authorize warrantless public arrests on probable cause. . .".

The Court further ruled that under the totality of the circumstances respondent's consent was not the product of illegal coercion. Although the fact of custody and the failure to inform the arrestee that he could withhold consent are factors which may be evaluated in assessing the voluntariness of a consent, a finding of illegal coercion from the presence of these factors alone would distort the voluntariness standard enunciated in Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

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BANK ROBBERY - POSSESSION OF PROCEEDS

ONE CONVICTED OF BANK ROBBERY IN VIOLATION OF 18 U.S.C. §2113(a), (b), and (d), CANNOT BE CONVICTED OF POSSESSION OF PROCEEDS UNDER § 2113(c), BUT WHERE POSSESSION COUNT SHOULD HAVE BEEN DISMISSED BY TRIAL JUDGE, PROPER REMEDY IS TO VACATE CONVICTION AND SENTENCE FOR POSSESSION, NOT A NEW TRIAL.

United States v. Gaddis, (Sup. Ct. No. 74-1141 Mar. 3, 1976)

In United States v. Gaddis, No. 74-1141, decided March 3, 1976, respondents were indicted for entering a federally insured bank with intent to rob it by force and violence (Count 1) and robbing the bank by force and violence (Count 2), in violation of 18 U.S.C. 2113(a); with possessing the funds stolen in the robbery (Count 3), in violation of § 2113(c); and with assaulting four people with dangerous weapons during the robbery (Counts 4-8), in violation of § 2113(d). Respondents were convicted and sentenced concurrently on all counts. The court of appeals reversed and ordered a new trial in light of Milanovich v. United States, 365 U.S. 551, in which this Court held (on the facts before it) that the trial judge should have instructed the jury that it could convict of either larceny or receipt of the proceeds (18 U.S.C. 641), but not both - and that a defendant convicted of both offenses in the absence of an "either/or" instruction was entitled to a new trial. In Gaddis the government argued that Milanovich was distinguishable since the "stealing" and "possessing" crimes in Milanovich were two clearly independent transactions, separated by a 17-day interval, and it would have been quite possible for the jury to conclude that the defendant engaged in one transaction but not the other; the government also argued that, to the extent Milanovich required a new trial in Gaddis, Milanovich should be overruled. (In Milanovich, a new trial was required since it was impossible to say on which count a properly instructed jury would have convicted.)

The Court in Gaddis, reversing the decision of the court of appeals, unanimously held (Stewart, J.) that while the court of appeals was correct in holding that a person convicted of robbing a bank in violation of 18 U.S.C. § 2113(a), (b), and (d), cannot also be convicted of receiving or possessing the

proceeds of that robbery in violation of 18 U.S.C. § 2113(c), the proper remedy was not a new trial, but a vacating of the conviction under the possession count. Distinguishing Milanovich, the Court noted that here, "except for the evidence of asportation during the robbery itself, there was nothing to show that the respondents had ever received or possessed the bank's funds" (Slip Op. 5). The trial judge should have dismissed the possession count, and his failure to do so can be fully corrected by vacating the convictions and sentences under that count. The Court also stated that, in cases where there is sufficient evidence to go to the jury on both "bank robbery" and "possession" counts, the district court must instruct the jury to consider the robbery counts first and to consider the possession count only if there is insufficient evidence establishing participation in the robbery. The Court apparently rejected the doctrine (see, e.g., United States v. Phillips, 518 F.2d 108 (C.A. 4) (en banc) petition for certiorari pending, Nos. 75-167 and 75-5457) that evidence of a defendant's participation in the robbery is a defense to a charge of possession (slip op. 6-7, n. 15).

In a concurring opinion, Mr. Justice White (joined by the Chief Justice) stated that the Court's opinion should not be read to reaffirm the Milanovich rule that a new trial is required when a defendant is convicted of robbery and possession in the absence of an "either/or" instruction and there is evidence to support both convictions. Mr. Justice White indicated that the Milanovich rule cannot be justified (slip op. 1): "If the jury is erroneously permitted * * * to consider and convict on the possession count as well [as the robbery count], such a conviction casts absolutely no light on the validity of the robbery conviction."

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CIVIL RIGHTS ACTION AGAINST STATE PROSECUTOR

STATE PROSECUTOR ACTING WITHIN SCOPE OF DUTIES IN INITIATING AND PURSUING A CRIMINAL PROSECUTION ABSOLUTELY IMMUNE FROM CIVIL LIABILITY UNDER 42 U.S.C. § 1983.

Imbler v. Pachtman, (Sup. Ct. No. 74-5435 March 2, 1976).

The subject case was a civil rights damage action brought under 42 U.S.C. §1983. The plaintiff, Imbler, was charged and convicted of murder in the California courts. After protracted collateral litigation, he was finally released by a federal district court on a writ of habeas corpus. Subsequently, he filed suit against the defendant state prosecutor, Pachtman, claiming that his conviction had been obtained through the knowing use of false testimony. The district court and court of appeals held that the defendant prosecutor was immune from liability under section 1983. This adjudication was affirmed by the Court.

Facially, section 1983 provides a cause of action against "every person" who under color of state law deprives another of a constitutional right. However, the Court noted that common-law immunities, "well grounded in history and reason," have frequently been held not to have been abrogated by Section 1983. See e. g., Tenney v. Brandhove, 341 U.S. 367 (legislators enjoy an absolute immunity for acts within their field of duty); Bradley v. Fisher, 13 Wall. 335 (judges); Pierson v. Ray, 386 U.S. 547 (policemen enjoy qualified immunity for acts predicated upon probable cause and good faith); Scheuer v. Rhodes, 416 U.S. 232 (high state officials enjoy a qualified immunity); Wood v. Strickland, 420 U.S. 308 (school officials enjoy a qualified immunity if they did not reasonably know their activities violated student rights).

Prosecutors at common-law were accorded an absolute immunity from civil action for acts committed in the scope of their presecutorial duties, and the courts of appeal have been almost unanimous in applying this common law immunity to suits brought under Section 1983. The Court determined that this immunity was wholly justified in view of the complex and sensitive nature of the prosecutor's functions. To subject a prosecutor to civil suit would serve to constrain the exercise of his broad discretion, resulting in ineffectual administration of justice and the spectre of evidence not being presented for fear that later adjudication would characterize it as improperly presented. In addition, courts themselves might hesitate to rule in favor of defendants in close cases when cognizant that such rulings might

result in civil charges being leveled against a prosecutor who in good faith sought to pursue a matter. Finally, the mere fact of a party having to defend himself against such civil suits would serve to deflect his energies from his basic prosecutorial functions.

In view of these policy considerations, the Court determined that even a qualified immunity would not provide sufficient protection to the judicial system and the prosecutorial function, and that accordingly ". . . in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under Section 1983."

The Court left one important area open for future litigation, however. Specifically, it acknowledged the distinction drawn by some courts between prosecutorial duties directly related to the judicial system and those which cast the prosecutor ". . . in the role of an administrator or investigative officer rather than that of advocate." Whether and when a line between these functions should be delineated and whether a lesser immunity should apply are questions specially reserved by the Court for future adjudication. The instant case, involving allegations of improperly presented evidence, clearly involved a prosecutor functioning in an advocate's role.

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JENCKS ACT

NO "WORK PRODUCT" EXCEPTION TO JENCKS ACT

Goldberg v. United States (Sup. Ct. No. 74-6293, decided March 30, 1976).

The Supreme Court held in this case that there is no "work product" privilege which per se immunizes a prosecutor's trial preparation notes from production under the Jencks Act (18 U.S.C. 3500). The Court did not, however, rule that such notes are necessarily producible; rather, it held that, like any other material reflecting a prior interview with a government witness, their production depends upon whether they were signed or otherwise adopted or approved by the witness in accordance with §3500(e)(1) or constituted a substantially verbatim recital of his oral statement in accordance with §3500(e)(2). The Court, moreover, recognized that in preparing a witness for trial a prosecutor "will necessarily inquire of the witness to be certain that he has correctly understood what the witness had said." It ruled that "[s]uch discussions of the general substance of what the witness has said do not constitute adoption or approval of the lawyer's notes within §3500(e)(1)"; the adoption or approval requirement "clearly is not met when the lawyer does not read back, or the witness does not read, what the lawyer has written" (slip opinion at 15-16, n. 19). In resisting demands for their notes, therefore, prosecutors should be prepared to show that the notes merely summarize the information imparted by the witness during trial preparation conferences and that only the substance of the information but not the language in which it was recorded in the notes was checked with the witness for accuracy.

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RIGHT TO COUNSEL

NEITHER SIXTH AMENDMENT NOR DUE PROCESS CLAUSE OF FIFTH AMENDMENT CONFERS RIGHT TO COUNSEL AT SUMMARY COURT MARTIAL.

Middendorf, Secretary of the Navy v. Henry, (Sup. Ct. No. 74-175, decided March 24, 1976).

In Middendorf v. Henry, the Court held, in a 5 to 3 opinion, that an accused at a summary court martial--which can award up to 30 days confinement--has no constitutional right to counsel. The Court held that there is no Sixth Amendment right to counsel in a summary court martial since the proceeding is not a "criminal prosecution" (Cf. Gagnon v. Scarpelli, 411 U.S. 788; In re Gault, 387 U.S. 1). The majority opinion emphasized that the offenses tried by summary courts are generally minor "Military" offenses which carry little popular opprobrium and that the penalties are not comparable to civilian sentences. The majority opinion also emphasized that the summary court martial is not an adversary proceeding, but rather is presided over by a court officer required to protect the interests of both parties. Accordingly, the fact that a summary court can impose confinement does not trigger a Sixth Amendment right to counsel under Argeisinger v. Hamlin, 407 U.S. 25, and related civilian cases.

The Court held further that the Due Process Clause of the Fifth Amendment does not require counsel at summary court. Congress intended the summary court to conduct a brief, informal hearing. Requiring counsel would convert that Court into a more formal and time consuming procedure. The Court also found it significant that an accused facing a summary court martial could elect to be tried by a special court martial (at which counsel would be provided). Thus, the Court found no reason to overturn the congressional decision to make the summary court martial a non-adversary proceeding since the congressional plan was a reasonable accomodation of the competing private and governmental interests at stake.

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RIGHT TO COUNSEL

TRIAL COURT'S INSTRUCTION TO DEFENDANT NOT TO TALK TO COUNSEL DURING RECESS VIOLATED DEFENDANT'S RIGHT TO COUNSEL.

Geders v. United States (Sup. Ct. No. 74-5968, decided March 30, 1976)

The Supreme Court decided, 8-0, in Geders v. United States, that a trial court's instruction to defendant not to talk to counsel during the 17-hour overnight recess between defendant's direct and cross-examination deprived defendant of his Sixth Amendment right to counsel. While the Court noted that the trial judge has broad discretion in the manner in which the trial is conducted, including the sequestration of witnesses, it held that a defendant who testifies is in a different position. The majority avoided overruling United States v. Leighton, 386 F.2d 822 (C.A. 2), certiorari denied, 390 U.S. 1025, dealing with a similar order that occurred during a brief noon recess, by noting that the period in Geders during which the restrictive order was operative was much longer. Justices Marshall and Brennan, concurring, would have applied the reasoning of the majority to "any order barring communication between a defendant and his attorney, at least where that communication would not interfere with the orderly and expeditious progress of the trial."

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COURTS OF APPEALS

ENVIRONMENT

FEDERAL WATER POLLUTION CONTROL ACT; VALIDITY OF REGULATIONS PROMULGATED BY ENVIRONMENTAL PROTECTION AGENCY ESTABLISHING EFFLUENT LIMITATION GUIDELINES FOR EXISTING SOURCES AND STANDARDS OF PERFORMANCE FOR NEW SOURCES FOR PLASTICS AND SYNTHETICS POINT SOURCE CATEGORY.

FMC Corporation, et al. v. Train (C.A. 4, Nos. 74-1386, 74-1400, 74-1502, 74-1503, 74-1504, 74-1505, 74-1729, 74-1761, 74-1762, 74-1763, 74-1764, and 74-1765; March 10, 1976; D.J. 90-5-1-7-17).

On petitions to set aside regulations issued by EPA establishing "effluent limitation guidelines" for existing sources and "standards of performance" for new sources for the Plastics and Synthetics Point Source Category adopted pursuant to the Federal Water Pollution Control Act, as amended, the court held that EPA is free to exercise reasonable discretion in establishing single-number limitations with respect to ranges, that the regulations are not defective because they are based on data obtained only from a small number of plants, that there was no error in EPA's assessment of costs in establishing the 1983 effluent limitations guidelines and new source standards of performance, that EPA did not fail to perform its statutory duty in consideration of cost and landfill problems associated with solid waste disposal, that there are substantial questions as to the hydraulic flows chosen for the 1977 limitations and thus remanded for re-examination by EPA, that the 1983 limitations with respect to hydraulic flows are remanded since there is no evidence in the record to sustain these regulations, that there is not sufficient information to support the new source standards and therefore these regulations will be remanded to provide the required technological guidance, that EPA acted in accordance with law in its designation of chemical oxygen demand (COD) as a pollution parameter, that the 1977 COD limits and the new source COD limits are set aside, that any present inaccuracy in the 1983 COD limits can be corrected by EPA prior to their implementation and therefore these limits will be left in force for the present, that EPA's position with respect to the 1977 Total Suspended Solids (TSS) measures is supported by the record and will be upheld,

that EPA failed to establish the technology necessitated for the new source TSS limits and therefore are remanded, and that EPA was not arbitrary or capricious in establishing variability factors in the treatment of wastes.

Staff: Glen R. Goodsell (Land and Natural Resources Division); Bruce M. Diamond (Environmental Protection Agency).

ENVIRONMENT

FWPCA; EPA'S EFFLUENT LIMITATIONS AND STANDARDS OF PERFORMANCE FOR THE LEATHER TANNING FINISHING INDUSTRY REMANDED FOR RECONSIDERATION.

Tanners' Council of America, Inc. v. Russell E. Train (C.A. 4, Nos. 74-1740 and 74-1753, decided March 10, 1976; D.J. 90-5-1-7-95).

The leather tanning and finishing industry filed a petition to review effluent limitation guidelines and new source standards of performance promulgated under the Federal Water Pollution Control Act Amendments of 1972. The court's statutory interpretation of the Act and EPA's authority thereunder is contained in DuPont v. Train, C.A. 4, No. 74-1261, issued the same day. The Tanners' Council opinion involves only the technical validity of EPA's regulations for this industry. The court struck down, as unsupported by the administrative record, the 1977 effluent limitations and the new source standards of performances but upheld the 1983 effluent limitations. In upholding the 1983 guidelines the court recognized that such guidelines are designed to "mandate an advance in pollution technology."

Staff: Kathryn A. Oberly and Eva R. Datz (Land and Natural Resources Division); Nancy Speck (formerly of Environmental Protection Agency).

HIGHWAYS

INTERIOR HAS AUTHORITY TO UNILATERALLY DESIGNATE SITES OF STATE OR LOCAL SIGNIFICANCE FOR THE NATIONAL REGISTER AND OVERCOME STATE'S DETERMINATION THAT A SITE HAD ONLY "MARGINAL" SIGNIFICANCE.

Stop H-3, et al. v. Coleman (C.A. 9, No. 75-1532, March 8, 1976; D.J. 90-1-4-548).

A number of organizations and individuals filed suit against the Secretary of Transportation to restrain him from financing a proposed six-lane highway, H-3, through the Moanalua Valley on the Hawaiian island of Oahu. Plaintiffs claimed the valley was an "historic site of * * * State or local significance" under Section 4(f) of the Highway Act, 49 U.S.C. sec. 1653(f). That Act forbids the Secretary of Transportation from approving federal funds for a highway that will "use" land from an historic site of national, state or local significance unless the Secretary determines that no "feasible and prudent" alternative route exists, and then only if there has been "* * * all possible planning to minimize harm * * *" to the historic site. Based on a determination by state officials that the Moanalua is only of "marginal" historic significance, DOT argued that Section 4(f) did not apply to the routing of H-3 through the valley. The district court agreed with DOT and dissolved its previously-granted injunction. 389 F.Supp. 1102.

The Ninth Circuit reversed, holding that the Secretary of the Interior has jurisdiction to name properties to the National Register that have state or local historic significance, that Interior's published finding that Moanalua "may be eligible" for inclusion in the National Register of Historic Places is equivalent to a finding that the valley "is eligible"for inclusion in the National Register; and that Interior's finding cannot be vitiated by the state's finding that the valley has only "marginal" significance. The court rejected three of DOT's contentions. One, that 4(f) applied only to properties actually listed in the National Register, or some similar local register. Two, that since DOT has not requested Interior to make the determination of eligibility, Interior lacked authority on its own to do so. Three, that DOT's approval of the EIS on H-3 constituted compliance with 4(f). Accordingly,the court remanded and directed DOT to comply with 4(f) with respect to the Valley and Pohaku Ka Luahine, a petroglyph rock, originally located in the valley (but subsequently moved a short distance) which is in the National Register.

Judge Wallace, concurring and dissenting, disagreed with the majority's conclusion that Interior has authority, concurrent with local and state officials, under the National Historic Preservation Act, to unilaterally determine the

state and local (as opposed to national) significance of places in passing on nominations to the National Register, and that nothing in the record here allowed Interior to make such determination. Judge Wallace also doubted that plaintiffs had established that the highway, which would pass 100 to 200 feet of the rock, would "use" the rock within the meaning of 4(f); he would remand only with respect to these issues.

Staff: Former Assistant United States Attorney, Warren J. Higa (D. Hawaii).

FORECLOSURE

FORECLOSURE BY FEDERAL AGENCY; PREMATURE DISMISSAL UNDER RULE 12(b)(6), F.R.CIV.P.; CONSTITUTIONAL ADEQUACY OF ADVANCE NOTICE TO BORROWERS; EFFECTIVENESS OF BORROWERS' WRITTEN WAIVER OF NOTICE TO BE TESTED BY DISTRICT COURT'S FACTUAL INQUIRY AS TO WHETHER WAIVER WAS VOLUNTARILY AND KNOWINGLY GIVEN; DISMISSAL OF FEDERAL AGENCY'S EVICTION ACTION UNDER RULE 12(b)(6) HELD PREMATURE.

United States v. Wynn (C.A. 5, No. 75-3145, March 18, 1976; D.J. 90-1-4-1305).

A federal lending agency, the Farmers Home Administration of the United States Department of Agriculture (FmHA), purchased its defaulting borrowers' home at a non-judicial foreclosure sale following the procedures in Georgia state statutes as authorized by the instrument executed by the borrowers as part of the security for the federal loan. Thereafter, FmHA as the new owner sued in federal district court to evict the borrowers. The borrowers claimed that FmHA had given them constitutionally deficient notice prior to FmHA's accelerating the maturity of the total loan debt and commencing foreclosure. However, in one of the instruments signed by the borrowers at the loan's inception, they "ostensibly waived" whatever due process rights they might have had to notice and hearing before acceleration and foreclosure (Slip Op. 2341).

The notice from FmHA consisted of a form letter stating that, because of default, the entire loan was due and payable; unless, within 10 days, the borrowers could show why FmHA was in error, foreclosure would commence. The borrowers' answering letter "included inquiries about the cancellation of fire insurance and the resulting increase in

payments and expressed hope that they would not lose their home" (Slip Op. 2340). Without any subsequent correspondence, FmHA commenced to foreclose.

Prior to any answer or trial, the borrowers moved to dismiss FmHA's eviction suit for alleged failure to state a claim upon which relief could be granted under Rule 12(b)(6), F.R.Civ.P. The district court granted dismissal in "a cryptic three-sentence order" (Slip Op. 2340) which stated that "it appears to be quite doubtful" that FmHA "has complied with the requirements of due process as now understood;" FmHA was instructed to "begin anew the notice, acceleration, foreclosure and eviction process." The district court made no finding or conclusion concerning the borrowers' written waiver of notice. FmHA appealed.

The court of appeals, per curiam, held that the district court's dismissal was premature because "the record does not conclusively establish that the procedure employed was constitutionally infirm" (Slip Op. 2341). To justify dismissal under Rule 12(b)(6), F.R.Civ.P., it must appear "beyond doubt" that FmHA had no set of facts in support of its claim to entitle it to relief. Here the original loan instrument contained written waivers of notice whose validity turns on the facts surrounding their execution by the borrowers.

Unless the district court concluded that the notice waivers were "ineffective," it could not fault FmHA as to adequacy of its notice, and, without a factual inquiry, it was "improper for the district court to presume that the government will be unable to demonstrate that defendants made a voluntary, intelligent and knowing waiver of their rights" (Slip Op. 2341).

The court of appeals remanded the case to enable FmHA to "discharge its burden of proof on the waiver issue" by submitting additional facts concerning the parties' relative bargaining power, the borrowers' ability to understand the contractual language, and other relevant factors.

The court of appeals also instructed the district court that if it (Slip Op. 2341)

finds no effective waiver present and reenters a judgment denying relief, an opinion which expressly delineates any constitutional deficits in the procedures followed by the FmHA in the present foreclosure might eliminate a second appeal and certainly would facilitate effective review of this important question.

Pursuant to Fifth Circuit Rule 18, this appeal was decided without oral argument.

Staff: Assistant United States Attorney H. Palmer Carr (M.D. Ga.); Brent Ward, Dirk D. Snel (Land and Natural Resources Division).

PUBLIC LANDS; TAYLOR GRAZING ACT

SECRETARY'S AUTHORITY TO SUSPEND OR REVOKE A GRAZING LICENSE UNDER THE TAYLOR GRAZING ACT; WILLFUL VIOLATIONS OF INTERIOR REGULATIONS ASSESSED BY CIVIL STANDARD.

Diamond Ring Ranch Co. v. Morton, et al. (C.A. 10, No. 75-1201, decided Feb. 4, 1976; motion for rehearing or modification denied March 22, 1976; D.J. 90-1-1-2326).

The owner of the Diamond Ring Ranch Co., while allegedly spraying only his own fee land with the herbicide 2-4D to kill sagebrush, also sprayed 16,000 acres of Taylor Grazing Act land out of 20,000 acres actually sprayed. In so doing, the owner failed to apply for a permit from the Bureau of Land Management before undertaking the spraying, while also certifying to the Department of Agriculture both before and after the spraying that he was entitled to a federal subsidy (.50¢ an acre under the Agricultural Stabilization and Conservation Program) for spraying his own fee land. The Taylor Grazing Act lands, for which the owner had a license under Section 3 of the Act, was immediately adjacent to his fee land and constituted a substantial portion of his ranch operation.

After discovering discoloration and decay of the sagebrush some months after the spraying, BLM charged the owner with willfully spraying the land without authorization,

and requested a suspension of his license for three years. The Hearing Examiner sustained the finding of willfulness, imposed a one-year suspension but "suspended" the imposition of the penalty on the condition there be no similiar future conduct on the part of the owner or his employees. On appeal to the Interior Board of Land Appeals (IBLA), the penalty originally requested by BLM was reinstated and the finding of willfulness affirmed.

The Ranch Co. filed suit in the United States District Court for the District of Wyoming (Judge Ewing Kerr). The court found (1) the Ranch Co. acted in good faith and committed an unintentional error, (2) the Secretary does not have the authority under the Act to suspend or revoke a license, but may only impose a $500 criminal fine for willful wiolations, and (3) the penalty actually imposed was arbitrary and carpicious. The Government appealed.

The Tenth Circuit reversed the court below, finding that under the civil standard for willfulness, the owner of the Ranch Co. violated BLM regulations and the Taylor Grazing Act does permit the suspension or revocation of a Section 3 license. The court agreed, however, that the actual penalty imposed (suspension of the license) was arbitrary and capricious. It therefore directed the district court to direct "the Secretary to adopt the findings and order of the Hearing Examiner" which "in our view * * * was reasonable and much more in keeping with the underlying facts * * *."

The Government filed a petition for rehearing or modification of this last part of the decision, arguing that under the APA the court may only set aside the Secretary's decision for reconsideration, but not direct him to select a particular penalty that the court finds reasonable. The petition was denied.

Staff: Neil T. Proto and Gary Randall (Land and Natural Resources Division).

ENVIRONMENT

NEPA; ANTI-INJUNCTION STATUTE.

Mary Stockslager, et al. v. Carroll Electric Cooperative Corporation, et al. (C.A. 8, No. 75-1752, January 7, 1976; D.J. 90-1-4-1245).

This involved an action by an environmental organization and several landowners to enjoin construction of electric lines across or near lands of some of the plaintiffs in which the defendant electric company was receiving federal funds for the project. The complaint alleged that the project would adversely affect the environment and that the electric company failed to file with the Government a NEPA statement. The district court dismissed the complaint of certain plaintiffs against whom the electric company had already filed state condemnation proceedings on the grounds of the anti-injunction statute, 28 U.S.C. sec. 2283. The district court also enjoined the electric company from construction on lands not subject to state condemnation proceedings. The injunction was conditioned upon the plaintiffs posting a $10,000 bond.

The court of appeals remanded the case, holding that the court of appeals does not have jurisdiction to decide the dismissal of several of the plaintiffs since such an order is not appealable in the absence of certification under Rule 54(b), F.R.Civ.P.; that the amount of the injunction bond rests within the sound discretion of the trial court and no abuse of that discretion was shown here; and that the anti-injunction statute prohibits interference with state court proceedings subject to certain narrow exceptions, of which NEPA is such an exception, and authorizes an injunction in this instance.

Staff: Glen R. Goodsell and Nicholas S. Nadzo (Land and Natural Resources Division).

DISTRICT COURT

TREATIES

BOUNDARY WATER TREATY OF 1909; CLAIM FOR EROSION DAMAGE TO RIPARIAN OWNER RESULTING FROM GREAT LAKES WATER LEVEL REGULATION BARRED BY SOVEREIGN IMMUNITY, FAILURE TO JOIN INDISPENSABLE PARTY AND DISCRETIONARY FUNCTION EXEMPTION OF TORT CLAIMS ACT.

Miller, et al. v. United States (E.D. Mich., No. 3156, March 11, 1976; D.J. 90-1-2-967).

Plaintiffs, landowners along Lake Huron, brought an action against the United States as a result of erosion damage to their land allegedly caused by diversion of water from Lake Superior into the Lower Great Lakes, making their water levels "unnaturally high." Great Lakes water levels are controlled by the United States and Canada pursuant to the Boundary Water Treaty of 1909. It is that treaty under which plaintiffs' cause of action allegedly arose. The court held as to the three causes of action: (1) The plaintiffs were not "direct beneficiaries" of the treaty between the two sovereigns, and therefore presumably lack standing; moreover, plaintiffs had somehow failed to exhaust administrative remedies available to them through the International Joint Committee; (2) The Tucker Act claim must fail for the State of Michigan was an indispensable party which had not been joined; it and not the United States becomes "title holder to all lands lying beneath navigable waters within its boundaries," i.e., the newly eroded land submerged beneath the waters of Lake Huron; and (3) The discretionary function exemption of the Tort Claims Act requires dismissal of the count based on tort.

Staff: John Germeraad, Assistant United States Attorney (S.D. Ill.) (formerly with Land and Natural Resources Division), and Assistant United States Attorney Haskell Shelton (E.D. Mich.).