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Citations for the slip opinions are available on FTS 739-3754.

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POINTS TO REMEMBER

REVISED UNITED STATES ATTORNEYS' MANUAL

During the third week of January, the Attorney General and the Deputy Attorney General approved the remaining legal division titles of the revised United States Attorneys' Manual. Thus, the manual has been completely approved with the exception of a few chapters of Title I. The legal division titles are now being printed and distributed.

Your offices will be receiving hundreds of pages of material during February and the first part of March. As the Manual has effected some policy changes, it is imperative that these materials be distributed with in your office upon receipt.

You may now dispose of the old U.S. Attorneys' Manual.

(Executive Office)

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PLEADINGS: NEW SIZE PAPER FOR C.D. CALIF.

After January 1, 1977, documents which do not adhere to the requirements of Local Rule 4, C.D. Calif., as amended, (paper size for pleadings, amended pleadings, and other documents) will not be accepted by the Court.

(Executive Office)

COUNTERFEITING PROVISIONS (18 U.S.C. §§ 471-73) DO NOT REACH INSTANCES OF FORGED ENDORSEMENTS ON OBLIGATIONS OF THE UNITED STATES

In Watkins v. United States, the defendant's conviction of violating 18 U.S.C. § 473 by selling United States Savings Bonds with forged endorsements had been affirmed by the Fifth Circuit. On Watkins' petition for a writ of certiorari, S. Ct. No. 76-7005, the Solicitor General confessed error for the following reason. Prussian v. United States, 282 U.S. 676 (1931), held that a forged endorsement does not make an otherwise valid government obligation a forgery. Thus, absent a forged obligation or security, sections 471-73 of title 18, United States Code, are inapplicable.*

The draft indictments for 18 U.S.C. §§ 471-73 in the Guides for Drafting Indictments should be annotated to reflect the Prussian holding. Appropriate charges for forging endorsements on United States obligations and securities lie under 18 U.S.C. § 495. If there are any questions concerning either 18 U.S.C. §§ 471-73 or 18 U.S.C. § 495, please contact the General Crimes Section at FTS 739-4512.

(Criminal Division)

* * * *

SPEEDY TRIAL

Recent decisions indicate that federal courts are adopting a strict interpretation as to what constitutes a denial of a speedy trial to a defendant who spent time as a fugitive in a foreign country subsequent to the returning of an indictment. See United States v. Salzmann, ____ F.2d ____, No. 76-1357, (C.A. 2, Sept. 28, 1976); United States v. McConahy, 505 F.2d 770 (C.A. 7 1974); United States v. Judge, ____ F. Supp. ____, No. 70-294,(D. Mass. Dec. 3, 1976.)

To avoid a dismissal when the whereabouts of a fugitive is known, a conscientious effort should be made to advise every defendant outside of this country who may be unaware of charges

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* 18 U.S.C. § 495 could not support the conviction in Watkins as it did in Prussian.

nding against him and for whom extradition is either impossible or unwarranted that a warrant exists for his arrest and that the United States Government will provide for his transportation to this country. Contact the Government Regulations and Labor Section for assistance.

(Criminal Division)

* * *

OBSCENITY

It has been brought to our attention that apparently some confusion exists with regard to Department of Justice policy in obscenity cases. Questions have arisen with regard to whether such prosecutions may be initiated at the present time, and whether cases should be instituted in the district of receipt or the district of origination of the obscene material.

The Department has for the past several years consistently pursued, and continues to pursue, an aggressive policy of prosecution of large-scale interstate commercial distributors of obscene material, taking into consideration the overall prosecutive priorities of each United States Attorneys office as determined by manpower and other resource limitations. Generally, prosecution of local exhibitors or sellers should be left to local authorities. Furthermore, although neither Department policy nor applicable provisions of law prohibit the initiation of a prosecution in the district of origination or manufacture, prosecutions are generally brought in the district of receipt of the material on the theory that this is the most affected district, i.e., the district that the distributor has chosen as the target for his activities.

You are also reminded that the Government Regulations and Labor Section has supervisory responsibility for all obscenity cases and matters. Consultation with that Section is required before any criminal prosecution may be instituted.

These policy questions and other matters are dealt with more extensively in the forthcoming United States Attorneys Manual.

(Criminal Division)

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GARNISHMENT OF FEDERAL EMPLOYEE WAGES

With regard to Public Law 93-647 and the garnishment of Federal employee wages, the list appearing below supercedes the list of March 17, 1975, previously furnished by memorandum to all United States Attorneys. The military offices shown have been designated as the responsible offices for their respective services for the processing of all writs of garnishment or attachment.

If the applicable State law in the State where the garnishment proceeding is initiated permits service of process by mail, it is recommended that process be served by certified or registered mail on the activity designated by the service of which a debtor is a member. The following activities have been designated by the services to receive service or process in garnishment proceedings which involve active duty, reserve, or retired members:

(1) Army

Commander
US Army Finance and Accounting Center
Attn: FINCR
Indianapolis IN 46249

(2) Air Force

Air Force Accounting and Finance Center
(AFAFC/AJQ)
Denver CO 80279

(3) Navy

Director
Navy Family Allowance Activity
Anthony J. Celebrezze Federal Building
Cleveland OH 44199

(4) Marine Corps

Commanding Officer
Marine Corps Finance Center
Kansas City MO 64197

(5) Coast Guard

Commandant (FPS-5)
U.S. Coast Guard Headquarters
Washington, D.C. 20590

CIVIL DIVISION
Assistant Attorney General Rex E. Lee

Ornato v. Hoffman, ___F.2d___(C.A. 2 No. 76-6125, decided December 2, 1976). DJ 145-4-3041.

Review of Military Decisions.

Under the "Berry Plan," certain medical doctors could be deferred from the draft in order to complete their residency if they committed themselves to a subsequent two-year tour of active duty as a doctor. The district court denied plaintiff, a Berry Plan doctor, a preliminary injunction preventing the Army from ordering him to active duty. The court of appeals affirmed, holding (1) the Army's denial of the request for an exemption from the active duty requirement on the basis of community hardship was a decision within the discretion of the Army and therefore ordinarily unreviewable by the courts; and (2) the denial of a request for a delay, if not also a decision within the discretion of the Army and unreviewable, was properly denied under the applicable Army regulation.

Attorney: Michael H. Dolinger, Assistant United States Attorney, S.D.N.Y., FTS 662-1959.

Vermont Low Income Advocacy Council, Inc. v. Usery, ___F.2d___ (C.A. 2 No. 76-6077, decided December 9, 1976). DJ 145-10-321.

Freedom of Information Act.

In this case of first impression construing the attorney fee provision of the Freedom of Information Act, 5 U.S.C. §552(a)(4)(E), the Second Circuit (per Circuit Judge Friendly) affirmed a district court order denying an application for attorney's fees. The court of appeals held that in order to qualify for fees a plaintiff must show at a minimum "that the prosecution of the action could reasonably have been regarded as necessary and that the action had substantial causative effect on the delivery of the information." The decision is significant because where government agencies have been unable to produce documents within the time limits specified in the FOIA amendments, 5 U.S.C. §552(a)(6), a number of district courts have awarded attorney fees without inquiry as to the necessity of the litigation or its effect on the production of documents. See e.g., Communist Party of the United States v. U.S. Department of Justice, (D.D.C. No. 75-1770, March 23, 1976, appeal pending C.A.D.C. No. 76-1746).

Attorney: Eloise E. Davies (Civil Division), FTS 739-3425.

Frey v. Commodity Exchange Authority, ____F.2d____ (C.A. 7 No. 74-1775, decided December 14, 1976). DJ 56-23-97.

Exhaustion of Administrative Remedies.

The Commodity Exchange Authority instituted administrative proceedings against plaintiffs charging them with manipulating the price of wheat futures on the Chicago Board of Trade. The district court enjoined further administrative proceedings until plaintiffs had been allowed prehearing discovery. On our appeal, the Court of Appeals reversed the district court injunction with directions to dismiss plaintiffs' suit for failure to exhaust their administrative remedies. The Court of Appeals held that plaintiffs had no right to challenge, in the district court, the denial of prehearing discovery until the administrative proceedings had been completed and a final administrative order had been entered.

Attorney: Ronald R. Glancz (Civil Division), FTS 739-3424.

Abrams v. Hills, ____F.2d____(C.A. 9 No. 76-2095, decided December 1, 1976). DJ 145-17-962.

National Housing Act.

Plaintiffs are tenants of a housing project receiving federal assistance under section 236 of the National Housing Act, 12 U.S.C. §1715z-1 (1970) (Supp. IV). They contended that the Secretary of HUD was under a mandatory duty to establish an operating subsidy program for the project pursuant to 12 U.S.C. §1715z-1(f)(3). Under that statute, subsidies are provided to housing projects to defray the owners' taxes and utilities costs, thereby reducing the tenants' rent. The Secretary maintains that she possesses discretion to implement the program, and declined to do so because the program is ineffective. The court of appeals, however, ruled that the statute rendered the program mandatory, and ordered the payment of operating subsidies in this case.

Attorneys: Robert E. Kopp and Robert S. Greenspan (Civil Division), FTS 739-3256.

Sierra Club v. United States Postal Service, ____F.2d____ (C.A. 9 No. 74-1830, decided December 15, 1976). DJ 145-5-3582.

Review of Postal Service Determinations.

The Sierra Club brought suit challenging a Postal Service determination that the club is not an educational organization and is thus not entitled to preferential postal rates. The court of appeals affirmed the district court's grant of summary judgment for the Postal Service, holding that there is a

strong presumption in favor of a Postal Service determination of this sort and that the scope of review is limited to whether the determination is "'clearly wrong,' amounting to an abuse of discretion." The court also held that the procedure followed by the Postal Service in making the determination met due process requirements.

Attorney: Richard Locke, Assistant United States Attorney, N.D. Calif., FTS 556-6434.

Local 3489, United Steelworkers of America, AFL-CIO v. Usery, Secretary of Labor (____ U.S. ____, No. 75-657, decided January 12, 1977). DJ 156-26S-131.

Union Elections.

The Supreme Court has affirmed, 6-3, the Seventh Circuit's decision upholding the Secretary of Labor's contention that the United Steelworkers' rule, limiting eligibility for local union office to members who have attended at least one half of the local's regular meetings for three years prior to an election, violates the Labor Management Reporting and Disclosure Act. That Act expressly provides that every union member in good standing shall be eligible to be a candidate and to hold office subject to "reasonable qualifications". The Court thus resolved in our favor the existing conflict between Circuits--the Sixth Circuit had held the identical rule valid; the First, Third, Seventh and District of Columbia Circuits had invalidated similar rules.

Attorney: Eloise E. Davies (Civil Division), FTS 739-3425

Knebel v. Hein (____ U.S. ____, Nos. 75-1261 & 75-1355, decided January 11, 1977). DJ 147-28-10.

Food Stamps.

A three judge district court invalidated regulations of the Department of Agriculture which included as income, for purposes of computing food stamp eligibility and benefits, non-tuition cash grants from the government earmarked for educational purposes. In this case, the grant was $44 per month for transportation expenses, to enable a welfare recipient to attend nurses training school. Including the grant in income resulted in increasing the family's food stamp costs by $20 per month. On our appeal, the Supreme Court reversed, unanimously holding that the regulations were reasonable, and not violative of equal protection.

Attorney: Michael F. Hertz (Civil Division), FTS 739-3418

Weissman v. CIA, (____ F.2d ____, C.A.D.C. No. 76-1566, decided January 6, 1977). DJ 145-1-440.

Freedom of Information Act.

Weissman sought all documents relating to him compiled by the CIA. The agency refused to release some documents compiled when the agency had investigated Weissman with the thought of employing him as a covert agent. The district court upheld our nondisclosure, on the basis of our litigation affidavits. On appeal, the D.C. Circuit upheld the district court's reliance on the litigation affidavits, and held that much of the material was nondisclosable by virtue of the CIA statute, which is an Exemption 3 statute. The court held, however, that the CIA could not rely upon Exemption 7, because the CIA charter forbids the agency to perform law enforcement duties in the United States.

Attorney: Frank A. Rosenfeld (Civil Division), FTS 739-5325

Bituminous Coal Operators' Assn. v. Secretary of the Interior (____ F.2d ____, C.A. 4, Nos. 76-1190 & 76-1191, decided January 4, 1977). DJ 236-45-119.

Federal Coal Mine Health and Safety Act.

In a case now on appeal, a D.C. district court held that the Secretary of the Interior could not cite independent coal mine construction contractors for their violations of mine safety standards under the Federal Coal Mine Health and Safety Act. The Secretary accordingly instituted a policy of citing the mine operators (owners and lessees) for these violations. An organization of such operators brought suit in Virginia challenging this policy. The Fourth Circuit has just affirmed dismissal of that suit, accepting our position that the Secretary may cite either the contractor or the owner or lessee under the Act.

Attorney: John M. Rogers (Civil Division), FTS 739-4792

CRIMINAL DIVISION
Assistant Attorney General Richard L. Thornburgh

United States v. Thomas W. Donovan, Vanis Ray Robbins, Dominic Ralph Buzzacco, Jacob Joseph Lauer, and Joseph Francis Merlo, 45 U.S.L.W. 4115 (No. 75-212, decided January 18, 1977).

Electronic Surveillance: Identification of Targets, Inventory Notice; Suppression

The Supreme Court held in this case that although the government had violated two provisions of the wiretap statute, suppression of the wiretap evidence was not required. First, the Court held (45 U.S.L.W. at 4119) that 18 U.S.C. 2518(1)(b)(iv) requires "that a wiretap application must name an individual if the Government has probable cause to believe that [he] is engaged in the criminal activity under investigation and expects to intercept [his] conversations over the target telephone" (emphasis added), thus, rejecting our argument that only the "target" or "targets" of the overhearing need be named. The Court further held (id. at 4120) that, after the wiretap has been completed, the government must classify all persons whose conversations have been intercepted and provide that information to the issuing judge, so that he may perform his statutory duty (18 U.S.C. 2518(8)(d)) of causing the filing of inventory notice -- again this was not done in this case.

Following this determination as to the statute's requirements, the Court held that the government's failure to comply had been inadvertent and accordingly ruled that 18 U.S.C. 2518(10)(a) did not require suppression for either violation. First, suppression for violation of the identification requirement, apparently, would be required only when the government "knowingly failed to identify [a person] for the purpose of keeping relevant information from the [issuing judge] that might have prompted [him] to conclude that probable cause was lacking," or, presumably, might have caused him not to issue the intercept order for any other reason (id. at 4121, n. 23). (Although the Court did not say so, if it is subsequently determined that we erred in omitting a particular person's name, the application should be amended nunc pro tunc and the appropriate indexes of intercept applications should be amended). Second, suppression for violation of the inventory requirement might be required if the government "knowingly sought to prevent the [issuing judge] from serving inventory notice on particular parties (id. at 4122, n. 26). Finally, we presume that suppression hearings for alleged violations of either of the Donovan requirements, should not be held unless the motions to suppress allege the intentional violations described above.

Attorney: Marc Richman
Criminal Division
FTS 739-4669

United States v. Frank D. Stanley and Mario Gonzalez-Garcia; United States v. The O/S National, etc., ____ F.2d ____, Nos. 76-1947, 2136 (C.A. 9, Nov. 5, 1976).

Border Search of Vessel

These consolidated cases involved the search of a ship leaving the United States approximately nine miles off the California shore. The stop and search of the vessel, and the subsequent discovery of approximately 11,000 pounds of marijuana on board, resulted from an investigation by a Bodega Bay Deputy Sheriff. He determined that a large quantity of marijuana had been loaded or unloaded at a pier in Bodega Bay. Further inquiries led the officer to believe that the vessel The O/S National was involved, and the Deputy Sheriff then enlisted the aid of the U. S. Customs and Coast Guard to stop the vessel.

The Ninth Circuit agreed with the District Court that the officers lacked probable cause to search the National. However, the Court reversed the granting of the motion to suppress and concluded that the search was a valid border search. The Court of Appeals held that, at least in cases where a statute criminalizes exportation without a license (as with narcotics and certain weapons), the crossing of the three-mile international border leaving the United States does not prevent the search from qualifying as a border search. If other border search criteria are met (for example, founded suspicion), a search within the 12-mile customs waters limits is a functional border search and is reasonable within the Fourth Amendment. However, the Government must show to a reasonable certainty that the border (in this case, the three-mile limit) was transgressed.

Staff: Billie A. Rosen
Criminal Division
FTS 739-3072

United States v. Amos William Corley, No. 76-2096, ____ F.2d ____, (D.C. Cir., decided December 29, 1976).

Speedy Trial Act

The United States Court of Appeals for the District of Columbia Circuit ruled that the exclusions of section 3161(h)

apply to the 90-day interim time limit for detained defendants under section 3164. The court declined to follow the Ninth Circuit's decision in United States v. Tirasso, 532 F.2d 1298 (9th Cir. 1976); instead, relying on United States v. Mejias, 417 F. Supp. 579 (S.D. N.Y.), affd. on other grounds, sub nom., United States v. Martinez, 538 F.2d 921 (2d Cir. 1976), and United States v. Masko, 415 Supp. 1317 (W.D. Wis. 1976), the court upheld the district court's ruling that delays attributable to pretrial motions and illness of the trial judge were excludable.

Attorneys: Carl S. Rauh (D.D.C.) FTS 426-7511
E. Lawrence Barcella, Jr. (D.D.C.)
FTS 426-7511