United States Attorneys

Bulletin

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

VOL. 17 NOVEMBER 21, 1969 NO. 30

UNITED STATES DEPARTMENT OF JUSTICE

COMMENDATIONS

United States Attorney Roland Hazard, Canal Zone, has received a commendation from L.H. Silberman, Solicitor of Labor, for his assistance in the Atlantic Bus Service and Pacific-Ford cases.

United States Attorney Frederick B. Lacey, District of New Jersey, was commended by J. Robert Murphy, Acting District Director, Internal Revenue Service, Newark, New Jersey, for his preparation and presentation in the Judge Polack income tax trial.

Assistant United States Attorney Russell Neisig, Southern District of Texas, was commended by the Secret Service for preventing defense counsel from prematurely obtaining information concerning a confidential witness for the Government and other information beyond the scope of probable cause.

* * *

POINTS TO REMEMBER

ASSAULTS AMONG INMATES OF FEDERAL CORRECTIONAL INSTITUTIONS

In recent months attention has been given to the problem of serious assaults by inmates of Federal correctional institutions upon fellow prisoners. There is often a reluctance on the part of some inmates to report or give full information to the prison authorities regarding assaults because of a fear of reprisals by other inmates. Such situations can lead to mounting antagonisms and tensions resulting in more deadly assaults and homicides. The Criminal Division has requested that Bureau of Prisons personnel report to the FBI information regarding all assaults which involve any of the following elements: use of any type of weapon; homosexual motivation; participation by more than one assailant; assaults and injury requiring medical treatment; and assaults involving racial alignments.

United States Attorneys in whose districts Federal correctional institutions are located are requested to be alert to these matters in their work with the wardens of the institutions, as well as the local FBI office, so as to encourage prompt reporting and prosecution of inmate assaults such as those described above.

UNITED STATES ATTORNEYS ON DUTY

Set out below is a list of additional U.S. Attorneys on duty and their headquarters:

Florida, M.	*John L. Briggs	Jacksonville, Fla.
North Carolina, E.	*Warren Coolidge	Raleigh, N.C.
Washington, W.	Stanley G. Pitkin	Seattle, Washington
West Virginia, No.	*Leslie D. Lucas, Jr.	Wheeling, W. Va.

* * *

*Court appointed

ANTITRUST DIVISION

Assistant Attorney General Richard W. McLaren

DISTRICT COURT

SHERMAN ACT

CT. ORDERS RELEASE OF GRAND JURY TRANSCRIPTS AND DEBRIEFING MEMORANDA TO TREBLE DAMAGE PLAINTIFFS ARISING FROM GRAND JURY INVESTIGATION.

State of Illinois v. Harper & Row Publishers, Inc., et al. and related cases (No. 67 C 1899; October 7, 1969; D.J. 60-26-26)

On October 7, 1969, Judge Bernard M. Decker entered a memorandum opinion ordering the release of nine grand jury transcripts and all but two debriefing memoranda to treble damage plaintiffs in more than 40 cases arising from a grand jury investigation and civil injunctive cases which the Antitrust Division brought against 18 publishers in 1967. The civil injunctive cases were settled by consent decrees. The treble damage cases have been consolidated for discovery purposes and assigned to Judge Decker.

On July 31, 1969, damage plaintiffs moved to inspect the grand jury transcripts of nine witnesses who had been deposed and two witnesses who were either dead or too sick to be deposed and to inspect debriefing memoranda that summarized grand jury testimony. The Government opposed any wholesale release of grand jury testimony stating that such testimony should be released discretely and only upon a showing of particularized need and after an in camera inspection. The Government took no position on the debriefing memoranda.

Grand Jury Transcripts

The court denied disclosure of the grand jury testimony of the two persons who were either deceased or too sick to be deposed since there was no showing of particularized need. The court released the grand jury testimony of the nine persons who had been deposed after an in camera inspection and a finding that each person during his deposition lacked memory on critical events to which he had testified more extensively before the grand jury, and that a comparison of each person's grand jury testimony with his deposition testimony showed material discrepancies on important facts. The nine transcripts in their entirety were released since they contained no extraneous matters. Disclosure was limited to counsel for use only to interrogate deponents with no right to copy the

transcripts and with the requirement that the transcripts be returned to the court when their use had been completed.

The court further ruled that additional transcripts would be released without an in camera inspection upon a showing of similar recalcitrance and unexplained failures to remember. The court stated the need for secrecy here was minimal; that the only applicable policy reason for secrecy was the encouragement of free future disclosure of antitrust violations by individuals; and that the court believed that the Dennis case had significantly eroded this reason. The court also found that the defendants had obtained the substance of the grand jury testimony in debriefing memoranda and that there was no policy justification for withholding the transcripts from damage plaintiffs. The court commented that the plaintiffs might be entitled to examine the transcripts prior to deposing the witnesses but that Procter & Gamble might make such a ruling appropriate for certification under 28 U.S.C. 1292(b), thus delaying the litigation.

Debriefing Memoranda

After the plaintiffs had moved to inspect the debriefing memoranda, the memoranda were filed with the court in sealed envelopes accompanied by statements specifying how the memoranda had been prepared. Some defendants objected to any unsealing by the court. The Judge did not open the envelopes but stated he construed ambiguities and ommissions in the accompanying statements against those defendants. Defendants opposed disclosure, claiming attorney-client and work-product privileges.

Attorney-Client Privilege

The court said that a personal or corporate attorney-client relationship could exist. As to the first, the court found no factual support for such a personal relationship since the attorneys (1) had not rendered personal legal advice after the witnesses completed their grand jury testimony; (2) had not advised them on other personal matters; or (3) had not billed the witnesses for their services. The court found that the lawyers were counsel for the witnesses' corporate employers and the debriefing was done as a favor to the corporations.

As to the corporate attorney-client privilege, the court stated that such privilege was limited to consultations between a lawyer representing a corporation and a responsible member of corporate management or control group while seeking legal advice on those corporate affairs on which the corporate official was in a position to influence the decision. The court held that two debriefing statements were so privileged, but that the rest of the debriefing memoranda were not privileged because they were

created to assist a corporation in defending against possible litigation and that the sales executives, regional managers, etc. who submitted the information for the debriefing statements did not participate in deciding the company's litigation problems.

Work Product

The court held that a lawyer who functions as an investigator by asking questions and recording the answers of the grand jury witnesses, as distinguished from a lawyer who records legal strategy or legal analysis, is performing a non-legal service and his work product is not protected. Where a lawyer, in part, records his own recollections, observations, comments, and impressions about a witness' report, those parts may constitute work product, but are subject to production upon a showing of good cause or special circumstances which justify invading the attorney's thought processes. Because of the passage of six to ten years since the alleged conspiracies were particularly active, the lapses in memory of deposition witnesses, and the fact that plaintiffs are public bodies with a responsibility to protect the taxpayers' finances, the court also ordered production of debriefing statements, including those parts containing recollections, observations, comments, and impressions of the lawyer about the witness' report.

Staff: Lawrence C. Roskin (Antitrust Division)

* * *

CRIMINAL DIVISION
Assistant Attorney General Will Wilson

COURTS OF APPEALS

MARIHUANA - SMUGGLING

REQUIREMENT THAT IMPORTED MARIHUANA AT CUSTOMS STATION BE DECLARED NOT VIOLATIVE OF PRIVILEGE AGAINST SELF-INCRIMINATION.

Robert Lyle Walden, Jr. v. United States (C.A. 5, October 2, 1969; D.J. 12-74-1716)

The defendant was convicted of conspiracy and smuggling marihuana and facilitating its transportation and concealment in violation of 21 U.S.C. 176a. He contended on appeal that the declaration and invoicing required under the statute violated his privilege against self-incrimination; and he could not have transported the marihuana after importation, for, not having passed the inspection station, the importation was never completed.

The Court of Appeals held that 21 U.S.C. 176a, unlike the wagering statutes, did not expose the defendant to state prosecution or even Federal prosecution because had he declared the marihuana at the inspection station, he would have complied with the law.

As to his second contention, the Court states that: "(A)s soon as he passed through Custom's primary inspection area without declaring and invoicing the marihuana, he was in violation of 21 U.S.C. 176a. That Customs agents would have allowed him to declare the marihuana at a secondary inspection area indicates only that Walden had two chances to comply with the statute."

Staff: United States Attorney Anthony J.P. Farris; Assistant United States Attorneys Ronald J. Blask and James R. Gough (S.D. Texas)

MILITARY SELECTIVE SERVICE ACT

ASSIGNMENT OF CONSCIENTIOUS OBJECTOR TO PERFORM CIVILIAN WORK AT AN INSTITUTION OPERATED BY RELIGIOUS SECT OF ANOTHER PERSUASION IS NOT UNCONSTITUTIONAL.

United States v. William Crosby Crouch (C.A. 5, No. 26946; September 4, 1969; D.J. 25-33-540)

Affirming the conviction of a Jehovah Witness for failure to report for civilian work at a hospital operated on a non-sectarian basis by an organization of Baptist churches, the Court of Appeals held that such assignment did not violate the First Amendment's Establishment Clause prohibition on aid to religious groups. The Court further held that such hospital assignment, which qualified as "appropriate civilian work" under 32 C.F.R. 1660.1, was not rendered inappropriate as to the defendant on the mere showing that it was operated by a sect differing from his own, and did not constitute an invalid restraint on his free exercise of religion.

Staff: United States Attorney Donald E. Walter and Assistant United States Attorney Q.L. Stewart (W.D. La.)

NARCOTICS

18 U.S.C. 545 IS NOT LESSER INCLUDED OFFENSE IN INDICTMENT FOR VIOLATION OF 21 U.S.C. 174.

Juan Nepomuceno Olais-Castro v. United States (C.A. 9, No. 22,988; July 25, 1969; D.J. 12-12-4203)

Appellant was charged with violating 21 U.S.C. 174, and contended on appeal that the trial court's refusal to give a requested instruction that the jury could convict the defendant of the lesser included offense of smuggling merchandise into the United States, in violation of 18 U.S.C. 545, was erroneous.

The Ninth Circuit found that 18 U.S.C. 545 was not a lesser included offense within 21 U.S.C. 174 by applying two basic principles, (1) the lesser offense must not require an element in addition to those needed to constitute the greater offense, and (2) the lesser offense must be included within, but not completely encompassed by, the greater offense. The Court found the essential elements of 21 U.S.C. 174 to be: (1) "defendant imported and brought into the United States from Mexico, (2) heroin, a narcotic drug, (3) knowing that he was importing heroin, (4) contrary to 21 U.S.C. 173."

18 U.S.C. 545 is divisible into two paragraphs, each of which constitutes a different form of the offense. The essential elements of the offense under the first paragraph are: "(1) the defendant knowingly, (2) willfully, (3) with intent to defraud the United States, (4) smuggled or clandestinely introduced into the United States, (5) any merchandise, (6) which should have been invoiced"; and the essential elements of the second paragraph are: "(1) defendant fraudulently or knowingly, (2) imported or brought into the United States, (3) any merchandise, (4) contrary to law." Contrary to law means contrary to any existing law.

The first paragraph of Section 545 is not a lesser included offense within Section 174 since it contained the additional essential elements of willfulness, intent to defraud the United States, and the invoicing requirement. With respect to the second paragraph of Section 545, the Court considered two situations regarding the element of contrary to law. The first situation--substituting the language failure to unload and declare merchandise when it is brought across the border--is not a lesser included offense within Section 174 since this type of proof is not necessary to prove a violation of Section 174. Second, if the language contrary to 21 U.S.C. 173 is substituted, the essential elements are identical, and neither can be a lesser included offense.

Staff: Former United States Attorney Edwin L. Miller, Jr. (S.D. Calif.)

* * *