U.S. Department of Justice
Executive Office for United States Attorneys

United States Attorneys' Bulletin

Published by:

Executive Office for United States Attorneys, Washington, D.C.
For the use of all U.S. Department of Justice Attorneys

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COMMENDATIONS

Assistant United States Attorney THOMAS M. COFFIN, District of Oregon, has been commended by United States Attorney M. James Lorenz, and by Mr. Norman A. Zigrossi, Special Agent in Charge. Mr. Coffin's outstanding performance in U.S. District Court, San Diego, California, resulted in the concluded prosecution of Michael Edward Kennedy involving the rape and murder of Maria Lopez De Felix, a Mexican National, at the San Ysidro Border Station.

Assistant United States Attorney W. RAY JAHN, Western District of Texas, has been commended by Mr. William H. Webster, Director of the Federal Bureau of Investigation. Through Mr. Jahn's fine performance, articulate negotiation skills and legal strategy, several guilty pleas were entered and several cooperating Government witnesses were developed in the prosecution of several major vendors and others associated with the Army-Air Force Exchange Service in the Western District of Texas.

Assistant United States Attorney GERHARD KLEINSCHMIDT, Northern District of Texas, has been commended by Mr. W. R. Newsome, Inspector in Charge of the United States Postal Service. Through Mr. Kleinschmidts's efforts, Johnny L. Williams, a former postal employee, was recently prosecuted for violation of making a false statement in order to obtain workman's compensation benefits.

Assistant United States Attorney DAVID MAURER, Eastern District of Michigan, has been commended by Mr. William J. Jones, Assistant General Counsel of the United States Postal Service. Mr. Maurer's skill, diligence and cooperation were material factors in the successful settlement in the civil case of Bennett v. U.S. Postal Service.

Assistant United States Attorney LEONA SHARPE, Southern District of New York, has been commended by Mr. John E. Shockey, Chief Counsel, for her excellent work done in representing the Comptroller of the Currency in the case of ADAPSO v. Citibank, Heimann. The case deals with the complicated and significant issue of data processing activities by national banks.

Assistant United States Attorney CARL E. STEWART, Western District of Louisiana, has been commended by Mr. J. Ransdell Keene, Regional Director of the U.S. Department of Agriculture. Mr. Stewart's excellent representation and high degree of professionalism resulted in the recent successful litigation of their extremely difficult civil Food Stamp case in which the plaintiff agreed to be disqualified from participation in the Food Stamp Program for one year without going to trial.

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CIVIL DIVISION
Acting Assistant Attorney General Thomas S. Martin

Liberty Mutual Insurance Co. v. Friedman, C.A. 4 No. 80-1078 (January 9, 1981) D.J. # 145-16-1328

EQUAL EMPLOYMENT OPPORTUNITY; GOVERNMENT CONTRACTORS: FOURTH CIRCUIT HOLDS THAT DEPARTMENT OF LABOR REGULATIONS EXTENDING THE APPLICATION OF EXECUTIVE ORDER 11,246 (WHICH REQUIRES FEDERAL CONTRACTORS TO UNDERTAKE AFFIRMATIVE ACTION) TO WORKER'S COMPENSATION INSURANCE UNDERWRITERS IS INVALID AS BEYOND THE SCOPE OF ANY AUTHORITY DELEGATED FROM CONGRESS TO THE PRESIDENT

Under Executive Order 11,246 contractors and subcontractors of the government are prohibited from discriminating in employment and required to take affirmative action to ensure equal employment opportunity. The Department of Labor has taken the position that insurance companies who underwrite workman's compensation insurance for companies who are government contractors are themselves "subcontractors" within the meaning of the Order and implementing regulations. In this action, Liberty Mutual sought a declaratory judgment that it was not covered by the Order.

Reversing a district court decision in favor of the government, a divided panel of the Fourth Circuit held that (1) Liberty Mutual is a subcontractor within the meaning of the regulations, but that (2) the Department acted outside any grant of legislative authority when it sought to impose the requirements of the Executive Order upon insurers. The case generated a substantial amici participation by all of the major insurance associations, who are resisting their characterization as government subcontractors for purposes of affirmative action and related requirements of the executive order program.

Since the decision is arguably in conflict with four other circuits the government is considering whether to seek rehearing en banc.

Attorney: Walter Dellinger (Civil Division)
FTS 633-2972

United States of America v. City of Palm Beach Gardens, C.A. 5 No. 79-1691 (January 26, 1981) D.J. # 137-18-344

LIMITATIONS; HILL-BURTON ACT: FIFTH CIRCUIT HOLDS NO STATUTE OF LIMITATIONS APPLICABLE TO ACTIONS TO RECOVER FUNDS PAID UNDER HILL-BURTON ACT

In this action, the government brought suit to recover funds paid to construct a publicly-owned hospital under Title II of the Public Health Service (Hill-Burton) Act after the hospital had been transferred from its original public owner to a for-profit owner. The district court dismissed the action as untimely on the grounds that it was not filed within the six-year limitations period provided by 28 U.S.C. 2415(b) for diversion of funds paid under a grant program.

The Fifth Circuit has just held that no statute of limitations applies to such actions, accepting the government's argument that the cause of action is purely statutory and the statute provides no time period within which the action be brought. The court also found 28 U.S.C. 2415(b) to be inapplicable on the ground that since the hospital was actually built, the funds were not diverted.

Attorney: Marleigh D. Dover (Civil Division)
FTS 633-1132

Martin v. Bergland, C.A. 10 No. 79-1571 (January 19, 1981) D.J. # 145-8-1147

EQUAL PROTECTION; DUE PROCESS; IRREBUTABLE PRESUMPTIONS: TENTH CIRCUIT HOLDS THAT SECRETARY OF AGRICULTURE'S REGULATION WHICH CONCLUSIVELY PRESUMES THAT HUSBAND AND WIFE ARE A SINGLE PERSON FOR PURPOSES OF FARM SUBSIDY PAYMENTS IS CONSTITUTIONAL

Plaintiffs Ethel and Don Martin maintain separate farming operations which had begun prior to their marriage to each other, and they participate in the Department of Agriculture's farm subsidy programs under the Agricultural Adjustment Act of 1938 as amended, 7 U.S.C. 1281-1392, 1421-1449. In 1976 they each applied for disaster payment and for deficiency payment in 1977. In both years Congress had provided a payment limitation of $20,000 per person but had left it to the Secretary of Agriculture to define "person." In a series of regulations, the Secretary has defined "person" according to relationships between individuals and the land and according to person-to-person relationships. In particular, 7 C.F.R. 795.11 defines husband and wife as one person for the purpose of the farm subsidy programs. Because of the husband/wife rule plaintiffs received a

total of $20,000 between them, but each would have qualified for more than the $10,000 had they not been married. They challenged the regulation in district court principally on equal protection and due process grounds, and, on appeal, also raised an adhesion contract claim.

The district court held the regulation constitutional. Finding no suspect classification and no substantial burden on plaintiffs' fundamental right to marry, the district court applied the rational basis analysis to the equal protection challenge and found the regulation reasonably based on the assumption of economic interdependence in marriage and reasonably related to the Congressional goal of preventing evasion of the payment limitations. Plaintiffs are admittedly atypical, but their atypicality does not render an otherwise general and rational rule invalid. The court rejected the due process challenge based on the conclusive presumption doctrine finding that the Supreme Court has approved such presumptions in economic regulation and payments from the treasury.

The Tenth Circuit has affirmed. It endorsed fully the district court's equal protection analysis. In addition, the Court held that in its view of the Supreme Court precedent the irrebuttable presumption doctrine is moribund; but in any event the doctrine would not invalidate the regulation here which presumes the economic interdependence of husband and wife in addition to the presumption of joint operation of the farm. The Court also rejected plaintiff's adhesion contract claim holding that even if voluntary participation in the program creates a contract, the regulation is not an unconscionable term of a contract. In any event participants in government programs are charged with knowing the law in effect when they enter into a government contract and with knowing that the law becomes a part of the contract.

Attorney: Freddi Lipstein (Civil Division)
FTS 633-1683

CIVIL RIGHTS DIVISION
Acting Assistant Attorney General James P. Turner

Tate v. Frey, CA Nos. C-75-0031 - L(A), C-79-0492 - L(A), C-79-0570 - L(A) (W.D. Ky.) DJ _____

Conditions of Confinement

During the week of February 2, 1981, the attorneys for the plaintiffs, challenging conditions in the Louisville, Kentucky jail, filed a motion asking the court to appoint the United States as amicus curiae. We requested the court to abstain from ruling on the motion pending our own independent review of the case to determine whether it was consistent with our priorities and resources. The court granted our request and allowed us until April 1, 1981 to report our conclusions.

Attorney: Adjoa Burrow (Civil Rights Division)
FTS 633-4583

Reed v. Rhodes, CA No. C 73-1300 (N.D. Ohio) DJ 169-57-18

School Desegregation

On February 6, 1981 the district court (Battisti, J.) granted the request of the Desegregation Administrator to establish four magnet schools beginning on February 16, 1981. This represents the first major educational innovation successfully proposed by the Administrator since his hiring in August 1980. The court also approved the Administrator's proposal for a comprehensive audit by the accounting firm of Ernst & Winney of the finances of the school system. The Administrator argued that the system's current $45 million deficit has made next to impossible the implementation of the educational components within the February 1978 remedial order.

Attorney: Michael Sussman (Civil Rights Division)
FTS 633-4755

Santana v. Collazo, CA No. 75-1187 (D.P.R.) DJ 168-65-1

Institutionalized Persons Act

Judge Torruella (San Juan, Puerto Rico) granted our motion to intervene as plaintiff. The ruling granting the motion, which was filed last September, represents the first time the United States has invoked its authority under the

Institutionalized Persons Act. Defendants had argued that Congress lacked the authority to enact such legislation.

Attorneys: Robert Dinerstein (Civil Rights Division)
FTS 633-3179
Yolanda Orozco (Civil Rights Division)
FTS 633-3578

United States v. Charleston County School District and the State of South Carolina, CA No. 81-50-8 (D.S.C.) DJ 169-67-63

Title IV of the Civil Rights Act

On February 9, 1981, the United States filed its response in opposition to Charleston County, South Carolina School District's motion to dismiss our complaint. Charleston had argued that the Attorney General failed to provide the school district a "reasonable time" in which to adjust allegedly unconstitutional conditions, and, therefore, improperly certified that the statutory predicates for any Title IV suit had been met. We responded that the clear language of the statute, its legislative history and every judicial consideration of the question support the non-reviewability of the Attorney General's certifications. Therefore, we asked the district court to reject local defendant's motion to dismiss.

Attorneys: Thomas Keeling (Civil Rights Division)
FTS 633-4713
Michael Sussman (Civil Rights Division)
FTS 633-4564
Gregg Meyers (Civil Rights Division)
FTS 633-4564

LAND AND NATURAL RESOURCES DIVISION
Acting Assistant Attorney General Anthony C. Liotta

Minnesota v. Clover Leaf Creamery, ____ U.S. ____, No. 79-1171 (S.Ct., January 21, 1981) DJ 90-1-24-21

Constitutional law; police power; State ban on non-returnable, nonrefillable plastic milk containers sustained.

The Court reversed the Minnesota Supreme Court, ruling that the State of Minnesota's ban on nonreturnable, nonrefillable plastic milk containers violated neither the Equal Protection nor Commerce Clauses of the United States Constitution. Agreeing with the position advanced by the United States as amicus curiae in support of the State, the Court ruled that the appropriate scope of judicial inquiry under the Equal Protection Clause is not whether "in fact" the ban will promote a more environmentally desirable packaging, but whether the state legislature could rationally have decided that the ban will promote increased use of environmentally acceptable alternatives. The Court noted that returnable containers are without a doubt environmentally superior. Turning to the Commerce Clause issue, the Court held that the ban is not discriminatory and any incidental burden on commerce caused by the ban is not clearly excessive in relation to local benefits. Justice Stevens dissented from the Court's equal protection ruling, arguing that the same constitutional standards of review do not apply to state courts as apply to federal courts, an argument the majority found "novel." Justices Powell and Stevens dissented from the majority's Commerce Clause ruling, finding the majority's consideration of the issue inappropriate since the Minnesota Supreme Court had not ruled on the question.

Attorneys: S.G. Staff; Richard J. Lazarus, Jacques B. Gelin, and Anne H. Shields (Land and Natural Resources Division) FTS 633-1442/2762/2714

Delaware Valley Citizens' Council for Clean Air v. Pennsylvania, ____ F.2d ____, Nos. 80-2474 and 2475 (3rd Cir., January 8, 1981) DJ 90-5-2-4-29

Standing; Proposed intervenors lack standing to appeal.

Several Pennsylvania state legislators moved in district court to intervene in these actions which sought to compel the state to establish a vehicle emission inspection program. The district court never ruled on the motions to intervene but did modify an earlier consent decree. The proposed intervenors filed a notice of appeal from entry of the modified consent decree. In a one-sentence, unpublished order, the court of appeals dismissed the appeal based on our argument that the appellants were not parties below and therefore had no standing to appeal.

Attorneys: Jerry L. Jackson and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-2772/2762

In Re Certain Lands Being Condemned for the Big Cypress National Preserve and More Than Three Thousand Owners Represented by the Firm of Brigham, Reynolds, Byrne and Moore, P.A., ____ F.2d ____, No. 80-5915 (5th Cir., January 13, 1981) DJ 33-10-773-2500

Mandamus to dismiss condemnation commission denied.

The court denied without opinion a petition by landowners for a writ ordering District Judge Clyde Atkins to dismiss the three-person commission (plus one alternate) appointed to determine just compensation for tracts in the Big Cypress National Preserve in Southern Florida. Of the 48,000 tracts included in the Preserve, more than 6,000 are currently pending before the commission. The petitioners argued that a series of summary calendar trials in 1979-80 for unrepresented landowners unfairly "tainted" the commission and represented landowners are now unable to obtain adequate compensation. They also claimed "bias" in favor of the government resulting from ex parte contracts between the commission and the U.S. Attorney.

Attorneys: Thomas L. Riesenberg and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-4519/2762

Andersen v. Cumming, ____ F.2d ____, No. 80-5543 (9th Cir., January 16, 1981) DJ 90-1-0-7500

Rule 54(b); Failure of District Judge to make express certification in order requires remand.

Interior terminated a lease on Indian lands in Arizona for material breach of the lease. The lessee refused to leave and sought injunctive relief against the agency in federal district court. Interior then counterclaimed for trespass and ejectment and recovery of the crop proceeds during the period of trespass. The district court granted the government's motion to dismiss the lessee's complaint on the ground that the lessee failed to exhaust his administrative remedies. The court then entered a second order granting the government partial summary judgment on the trespass and ejectment claim. The judge refused to certify the first order under Rule 54(b), but certified the second order. The court of appeals held that it could not review the trespass and ejectment order without also reviewing the earlier order dismissing the lessee's complaint: it was unclear, the court said, that the district judge, by certifying the second order, intended thereby to certify the first order as well. The matter was therefore remanded to the district court. On remand, the district judge, declaring that it was his intention (though unstated) to certify both orders for appeal, instantly proceeded to certify the earlier order.

Attorneys: Thomas L. Riesenberg and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-4519/2762

Simanonok v. Costle, ____ F.2d ____, No. 80-5283 (5th Cir., January 8, 1981) DJ 80-5-1-6-174

Jurisdiction; Order remanding case to state court not an appealable order.

The plaintiff filed a complaint in federal court alleging, inter alia, that EPA acted in violation of the Clean Water Act by providing federal funding for the Manatee County, Florida, sewer system and sewer treatment plant. Simanonok also sought removal of a state court proceeding in which the state court held him in contempt of its order directing him to discontinue use of his septic tank and to attack to the county sewer system. Simanonok appealed when the federal district court denied his removal petition and remanded the state proceedings to state court. The court of appeals, in a "Do not publish" opinion, held that the order remanding the state action to state court was not an appealable order. No issues concerning the federal defendants were involved in the appeal.

Attorneys: Robert L. Klarquist and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-2731/2762

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OFFICE OF LEGISLATIVE AFFAIRS
Acting Assistant Attorney General Michael W. Dolan

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

FEBRUARY 4, 1981 - FEBRUARY 17, 1981

Nominations. On February 5, 1981, the Senate Judiciary Committee conducted a hearing on the nomination of Edward C. Schmults to be Deputy Attorney General. Senator Weicker and the nominee testified. The Committee unaminously reported the nomination to the full Senate. The Senate confirmed the nomination on February 6, 1981.

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Federal Rules of Criminal Procedure

Rule 35(b). Correction or Reduction of Sentence. Reduction of Sentence.

Defendant appeals from denial of a Rule 35 motion made exactly 120 days after her probation was revoked and original sentence reimposed, contending that the district court erred in dismissing the motion for lack of jurisdiction on the ground that the 120 day time limit of Rule 35 within which a court may reduce a sentence commences with the imposition of the original sentence and not with the reimposition of the balance of the sentence upon probation revocation.

Declining to follow the only Federal decision addressing this precise question, United States v. Kahane, 527 F.2d 491 (2d Cir. 1975) (as reported at 24 USAB 345 (No. 7; 4/2/76)), the Court of Appeals concluded that both the goal of equal treatment for similarly circumstanced offenders and the general policies of Rule 35 would best be served by construing the Rule to allow offenders 120 days following revocation of probation and reimposition of a previously suspended sentence to petition for a reduction of their term of imprisonment. The Court stated that neither the language of Rule 35 which provides that a "court may reduce a sentence within 120 days after the sentence is imposed . . ." nor the history of the 1966 amendment specifying that "[t]he court may also reduce a sentence upon revocation of probation as provided by law" contradicted its conclusion.

(Vacated and remanded.)

United States v. Luvenia Johnson, 634 F.2d 94 (3d Cir. October 30, 1980)

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Federal Rules of Criminal Procedure

Rule 6(e)(4). The Grand Jury. Recording and Disclosure of Proceedings. Sealed Indictments.

The Court of Appeals held in United States v. Watson, 599 F.2d 1149 (2d Cir. 1979) (as reported at 27 USAB 657 (No. 22; 11/9/79)), that an indictment filed five months before the running of the statute of limitations, sealed pursuant to Rule 6(e)(3) (now Rule 6(e)(4) as a result of the 1979 amendment to this Rule), and not unsealed until 16 months after the limitations period had expired, must be dismissed whenever the defendant can show substantial actual prejudice occurring any time during the entire period between the date of the crime and the unsealing of the indictment. The Court affirmed the convictions of two co-defendants, but found prejudice against the remaining defendant, Muse, due to his loss of memory.

On rehearing, the en banc Court affirmed Muse's conviction, holding that in determining prejudice the relevant time period is no longer than the time between the sealing of the indictment and its unsealing and that defendant had no basis for claiming that prejudice occurred during that time.

(Affirmed.)

United States v. John Muse, 633 F.2d 1041 (2d Cir. October 22, 1980)

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Federal Rules of Criminal Procedure

Rule 32(c)(1). Sentence and Judgment. Presentence Investigation. When Made.

Defendant challenged the legality of his sentence for narcotics offenses, contending, inter alia, that since the presentence report contained false and misleading information upon which the sentencing judge relied, the judge's failure to allow the defendant or his counsel to examine the report constituted reversible error.

The Court noted that the 1975 amendments to Rule 32(c)(1) require the sentencing judge to allow defendant or his attorney to review the report before sentencing, but pointed out that defendant in this case was convicted and sentenced before the effective date of the amendments. The Court had previously held that the 1975 amendments to Rule 11, contained in the same legislation, were not to be applied retroactively, and saw no reason to apply a different rule with respect to the amendments to Rule 32(c)(1). Therefore, the case was governed by the rule which was in effect prior to the amendments, under which the decision whether to disclose was a matter entirely within the discretion of the sentencing judge, unless he explicitly relied on information in the report in assessing a sentence. The Court found that the defendant failed to meet his burden of showing such reliance on misinformation, and concluded that the sentencing judge did not abuse his discretion in not disclosing the report.

(Affirmed in part, reversed in part, and remanded.)

United States v. John William Clements, 634 F.2d 183 (5th Cir. January 12, 1981)