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TABLE OF CONTENTS

POINTS TO REMEMBER

BANK ROBBERY - FEDERAL STATUTE

In addition to offenses committed on bank property, cases reported under the Federal Bank Robbery Statute (18 U.S.C. 2113) include the robbery of bank messengers and the robbery of trucks of Brinks Armored Car Service. In White v. United States, 85 F.2d 268, and United States v. Jakalski, 237 F.2d 503, the courts held that robbery of a bank messenger and the robbery of a Brinks truck violated the Federal Bank Robbery statute. In White the messenger was an agent of the bank and in Jakalski the armored car service had a contract with the bank as a bailee for hire and the property taken belonged to a bank which was a member of the Federal Reserve System.

United States Attorneys should request an immediate FBI investigation in cases of this nature in order to determine whether the funds or securities taken belonged to or were in the care, custody control, management or possession of one of the financial institutions named in 18 U.S.C. 2113. Cases in this category may also involve a violation of 18 U.S.C. 659 if the money or other property taken by the robbers constituted an interstate or foreign shipment which had not reached its destination. Accordingly, the investigation should encompass not only the facts surrounding the hold-up, but should ascertain the contractural relationship between the bank and the messenger service and the duties and functions of such service, particularly with reference to the money or other property taken in the robbery.

Any questions regarding the institution of Federal prosecution in these cases should be submitted to the General Crimes Section.

(Criminal Division)

MILITARY SELECTIVE SERVICE ACT

DISMISSAL OF INDICTMENTS OR INFORMATIONS

It is the general policy of the Criminal Division to authorize dismissal of indictments charging failure to comply with orders for induction when the defendants are permitted to submit to processing for induction and are either accepted or rejected by the Armed Forces. This policy does not extend, however, to persons who may be willing to submit to physical examination but not to military service, nor does it extend to persons who attempt to compromise their guilt by making an offer to submit to induction knowing that in all probability they would be unacceptable for military service.

United States Attorneys should therefore be assured by the defendant's attorney or otherwise that the defendant is acting in good faith, especially if previously the defendant had been found to be acceptable. If there is reason to believe that a defendant would be rejected by the Army for any reason, the offer to report for induction should be rejected.

A similar policy applies to indictments charging conscientious objectors with failure to comply with orders to perform civilian work in lieu of induction.

Nevertheless, compliance with the instructions in Title 2 of the United States Attorneys Manual with respect to DISMISSALS is required.

(Criminal Division)

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The Administrative Division has notified us that D.J. 35 (Financial Statement of Debtor) is now available in Spanish. When ordering these forms please specify whether you wish them in English or English-Spanish.

CIVIL DIVISION

Assistant Attorney General William D. Ruckelshaus

COURTS OF APPEALS

ATOMIC ENERGY

CT. DECLINES TO ENJOIN NUCLEAR DETONATION PENDING APPEAL.

Richard L. Crowther, et al. v. Dr. Glenn T. Seaborg, et al. & Colorado Open Space Coordinating Council, etc. v. Austral Oil Co. (C.A. 10, Nos. 448-69, 449-69; September 2, 1969; D.J. 145-172-71)

Several individuals and an organization sought to enjoin the detonation of an underground nuclear device scheduled for September 4, 1969 in Colorado. The district court declined to issue a preliminary injunction finding that there was almost no likelihood of any harmful after effects, that every precaution had been taken to prevent such a result and that a delay would cost the United States some $31,000 per day. The Tenth Circuit affirmed, holding that the district court's findings were not clearly erroneous and that it had not abused its discretion in refusing to preliminarily enjoin the detonation. Additionally, the Court of Appeals noted that the appellants had not made a showing that they would be irreparably injured if the September 4, 1969, detonation were not enjoined.

Staff: Deputy Assistant Attorney General Carl Eardley (Civil Division)

RESERVISTS

CT. MAY NOT REVIEW DISCRETIONARY JUDGMENT OF MILITARY OFFICER IN GIVING RESERVIST UNEXCUSED ABSENCE FROM RESERVE MEETING FOR FAILURE TO WEAR PRESCRIBED UNIFORM.

Thomas J. Byrne, Jr. v. Stanley R. Resor, etc. (C.A. 3, No. 17,874; June 20, 1969; D.J. 25-62-2106)

Plaintiff, an Army Reservist called to active duty for two years less any period of prior active service, brought this action to compel rescission of the call-up order. The district court dismissed the complaint and the Court of Appeals for the Third Circuit affirmed.

Plaintiff argued that his commanding officer acted arbitrarily, capriciously and unreasonably in giving him an unexcused absence from

a September 29, 1968 drill on the sole ground that he had no belt. This unexcused absence, being the fifth such absence within a year, triggered the call-up order pursuant to Army Regulation 135-91(12)(a).

The Third Circuit noted that under Army Regulation 135-91(5)(d)(2) a Reservist, although he attends a drill, will nonetheless receive an unexcused absence "unless he is in the prescribed uniform, presents a neat and soldierly appearance and performs his assigned duties in a satisfactory manner as determined by the unit commander". Citing Orloff v. Willoughby, 345 U.S. 83, Smith v. Resor, 406 F.2d 141 (C.A. 2), and United States ex rel. Schonbrun v. Commanding Officer, 403 F.2d 371 (C.A. 2), the Court concluded that "/w/hile to a civilian the absence of a belt may seem a trifling matter and the consequences here may seem unduly harsh, it is not our function to review the discretionary judgment of a military officer made within the scope of his authority".

Plaintiff also challenged the decision of an Army physician that he was fit for active duty, but the Court similarly refused to "interfere" with this finding.

Staff: Morton Hollander and Judith S. Seplowitz
(Civil Division)

WAREHOUSEMEN - PRIORITIES

CLAIM OF WAREHOUSE RECEIPT HOLDER MUST BE SATISFIED IN FULL BEFORE CHATTEL MORTGAGEE MAY PARTICIPATE IN PROCEEDS FROM SALE OF GRAIN IN SHORT WAREHOUSE.

United States v. Haddix & Sons, Inc. (C.A. 6, No. 18,782; August 14, 1969; D.J. 120-37-90)

Commodity Credit Corporation stored corn in a Michigan grain elevator, and held warehouse receipts on this corn. Commodity issued a load-out order of 102,000 bushels of corn, and the warehouseman elected to exercise his option to purchase the corn instead of shipping it to Commodity. The warehouseman had found a buyer at a higher price, and borrowed $100,000 from a bank to finance its purchase from Commodity. The bank took a chattel mortgage on these 102,000 bushels.

On the date of the loan and at all times thereafter, the warehouse was short in an amount greater than 102,000 bushels of corn. Before the shortage was discovered, Commodity had received the $100,000 and the warehouseman had delivered a small amount of corn to the outside buyer, paying down the loan to the bank to $96,000. At this time a state-court

receivership was instituted, and the bank claimed the right to be satisfied first out of the proceeds from the sale of the grain remaining in the warehouse.

The district court held for the bank and the Government appealed. The Sixth Circuit reversed. It accepted our contention that the Michigan Farm Produce Storage Act, enacted to protect holders of warehouse receipts from loss in such situations, operated to insure Commodity's satisfaction before the bank could participate in the fund. The effect of the statute was held to be that a warehouseman may not make an effective conveyance except to the extent he owns grain over and above that which is represented by outstanding warehouse receipts. Therefore, the chattel mortgage in this case was "ineffective to give the Bank any interest whatsoever".

Staff: Stephen R. Felson (Civil Division)

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CRIMINAL DIVISION
Assistant Attorney General Will Wilson

COURTS OF APPEALS

MARIHUANA TAX ACT

CT. HOLDS LEARY v. UNITED STATES APPLICABLE PROSPECTIVELY YET, BECAUSE OF PECULIAR CIRCUMSTANCES, APPLIES LEARY IN CASE WHERE SELF-INCRIMINATION ISSUE WAS FIRST RAISED AT PROBATION REVOCATION HEARING.

United States v. Charles Stewart Scardino (C.A. 5, August 14, 1969; D.J. 12-19-136)

In the Scardino case, the defendant received a suspended sentence in the Northern District of Georgia and was placed on probation for three years after pleading guilty to unlawful possession of marihuana (26 U.S.C. 4744(a)). Almost two and one half years later, defendant, relying on Marchetti v. United States, 390 U.S. 39 (1968), and Grosso v. United States, 390 U.S. 62 (1968), contended at a parole revocation hearing that his sentence should be vacated since the statute under which he had been convicted violated his self-incrimination rights. The district court, relying on the Fifth Circuit Court of Appeals decision in the Leary case (383 F.2d 851), rejected defendant's contention and revoked his probation. (The Supreme Court had not yet rendered a decision in Leary at this time.) On appeal, the Fifth Circuit held that the principles announced in Leary v. United States, 395 U.S. 6 (1969), should be given only prospective application. However, the Court, noting that defendant's suspended sentence was not "final" until his self-incrimination contention had been disposed of, held that Leary was applicable to his case and directed dismissal of the indictment.

Staff: Former Acting United States Attorney Allen L. Chancey, Jr.; Assistant United States Attorney Robert L. Smith (N.D. Ga.)

CT. HOLDS LEARY v. UNITED STATES NOT APPLICABLE TO MARIHUANA TAX ACT TRANSFER VIOLATIONS.

Bruce M. Bartol v. United States (C.A. D.C., August 5, 1969; D.J. 12-16-447)

In the Bartol case, defendant was convicted in the U.S. District Court for the District of Columbia of seven counts relating to the illegal transfer of marihuana (26 U.S.C. 4742(a)) and seven counts relating to unlawful possession of marihuana (26 U.S.C. 4744(a)). Relying on the

Supreme Court's decision in Leary v. United States, 395 U.S. 6 (1969), the U.S. Court of Appeals for the District of Columbia, in a per curiam opinion, reversed defendant's conviction on the unlawful possession counts (26 U.S.C. 4744(a)). However, finding the "transfer counts" (26 U.S.C. 4742(a)) beyond the reach of Leary, the Court affirmed defendant's conviction on those counts.

Staff: Former United States Attorney David G. Bress; Former Assistant United States Attorney Frank Q. Nebeker (Dist. of Col.); Assistant to the Solicitor General Philip A. Lacovara

NARCOTICS

UNTIMELY TO RAISE FIFTH AMENDMENT PRIVILEGE ON CORAM NOBIS.

Frank Edward Sepulveda v. United States (C.A. 10, No. 232-68; August 11, 1969; D.J. 12-76-573)

The Tenth Circuit held that it is untimely in a petition for a writ of coram nobis to raise the privilege against self-incrimination to 26 U.S.C. 4744(a). The petitioner in this case was convicted of a violation of this statute in 1954, and in 1960 he was convicted of another violation of the marihuana laws. Having been sentenced for the second conviction under the multiple offense provisions of 26 U.S.C. 7237, he was seeking here to have the first conviction set aside by means of coram nobis proceedings.

The Court distinguished the principle of timeliness established by the Supreme Court in Leary and Covington from the principle of waiver applied in Grosso v. United States, 390 U.S. 62 (1968). It held that the timeliness principle "was set out in relation to the state of the proceedings in the trial court, and not in relation to the defendant's knowledge of the law or the then state of the law". It also held that under the circumstances it was not necessary to consider the question of the retroactivity of Leary and Covington.

Staff: United States Attorney James L. Treece; Assistant United States Attorney James R. Richards (D. Colo.)

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LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Shiro Kashiwa

COURTS OF APPEALS

CONDEMNATION

SET OFF OF BENEFITS: PROXIMITY TO GOVT. PROJECT, IN ITSELF, IS NOT A BENEFIT; EXPERT TESTIMONY WITHOUT SUFFICIENT OBJECTIVE FACTS AS FOUNDATION REJECTED; NO DISCOVERY ALLOWED OF APPRAISAL REPORT OF WITNESS NOT CALLED; JURY CANNOT BE TOLD OF PRIOR CONSULTATION WITH APPRAISER NOT CALLED; EXPERT OPINION CANNOT BE BASED SOLELY ON OPINION OF ANOTHER EXPERT.

United States v. 6816.5 Acres of Land, More or Less, in Rio Arriba County, State of New Mexico; William A. Maddox, et al. (C.A. 10, No. 10164; May 27, 1969; D.J. 33-32-244-79)

On July 21, 1965, the United States instituted condemnation proceedings to acquire 6,816.5 acres of land out of a 33,150-acre ranch in Rio Arriba County, New Mexico, for use in connection with the Heron Reservoir, a part of the San Juan-Chama Reclamation project. One issue at the trial to determine compensation was whether the project would increase the value of the remainder of the land not taken, thereby creating benefits which would reduce the award of compensation. The court agreed with the Government's appraisers that there were benefits.

One of the Government's two appraisers stated that there would be "special benefits" created by the Heron Reservoir because the remaining property would have "approximately seven and a half miles of frontage along the new reservoir" or "about three-fourths of the Heron Reservoir" and that therefore there would be a demand for the portion of the remainder fronting on the reservoir for "cabin site, recreation uses and subdivisions". The other Government appraiser also testified that there would be "special benefits" created by the lake frontage based on his "experience in observing land sales around the reservoirs, because this landowner will own a major portion of the privately owned land around this Heron Reservoir". Both appraisers stated that they relied on comparable sales, but neither one testified to any specific sales. The Government hydrologist, whose testimony was relied on by both the Government and the landowners, testified that the reservoir would not be completed until 1971 and that as many as 10 years might elapse before the reservoir would reach the minimum level. In addition, testimony was introduced that the recreation facilities to be constructed by the Government, including a concrete ramp essential for

boat launching, will be several miles from the landowners' remaining property and that much of the remainder (none of which is directly on the proposed reservoir pool) would have no view of the water.

On the basis of this evidence the Court reversed, holding that the Government's appraisers erred in assuming that the landowners would have an unlimited right of access because:

> The United States as the owner in fee will have the legal right to fence the reservoir or otherwise prevent access to the water. The landowners will have no greater rights than the general public. Thus, the right of access in itself will affect the value of the special benefit arising by reason of the lake side property's potential for homesite development. * * * /Emphasis supplied/

The Court also held that the evidence "as to the value of special benefits is too speculative to be meaningful".

The Court, in dealing with other issues raised on appeal, condemned the expression of an expert opinion based on the opinion of another expert, relying on Taylor v. B. Heller & Co., 364 F.2d 608 (C.A. 6, 1966), which relies on Manufacturers' Accident Indemnity Co. v. Dorgan, 58 Fed. 945 (C.A. 6, 1893), condemning the use of expert testimony based solely on the opinion of another expert. In addition, the Court rejected expert testimony which does not contain any objective basis in fact and refused to allow discovery of the appraisal report of an appraiser which the Government did not choose to call. It also refused to allow comment to the jury, directly or indirectly, on the failure to call an appraisal witness.

Staff: Frank B. Friedman (Land & Natural Resources Division)

EVIDENCE OF PROPOSED SUBDIVISION USE FOR LAND TAKEN WRONGFULLY EXCLUDED IN JUDGE-TRIED CASE; EVIDENCE OF POTENTIAL SALE OF HOMESITES ON PORTION OF LAND TAKEN WRONGFULLY EXCLUDED; STANDARDS ARGUED BY GOVT. FOR DETERMINING HIGHEST AND BEST USE OF PROPERTY; ELIMINATION OF SPECULATIVE EVIDENCE AND ELIMINATION OF ENHANCED VALUE CREATED BY GOVT.'S PROJECT APPROVED BY CT.

United States v. 1,291.83 Acres of Land, More or Less, Situate in Adair & Taylor Counties, Commonwealth of Kentucky, Raymond Tye Faulkner, Jr. & Cora M. Faulkner (C.A. 6, No. 18552; June 6, 1969; D.J. 33-18-210-386)

The landowners appealed from a decision by the U.S. District Court for the Western District of Kentucky in a condemnation case rejecting any evidence in support of the landowners' contention that the property taken for use in connection with the Green River Reservoir Flood Control Project should have been valued as potential homesites rather than as a farm. The landowners offered a proposed subdivision plan which would have required an expenditure of approximately $39,000 for additional roadways to permit the development of the entire parcel of land. The landowners also offered additional testimony that other property bordering on roads in the area of the subject farm had been sold for homesite purposes at substantial prices. The court refused to allow them to present this testimony on the basis of the decision of the U.S. Court of Appeals for the Sixth Circuit in United States v. 2,635.04 Acres in Allen & Barren Counties (Berry), 336 F.2d 646, 648-649 (1964). The Court of Appeals reversed, indicating that although it appeared that the proposed subdivision on most of the property was highly speculative, the evidence should have been allowed to be presented in this judge-tried case. The judge could then have rejected it on that ground. The Court held that evidence as to potential sale of homesites on the portion of the farm abutting on the roads did not appear to be so speculative and should have been allowed to be presented for consideration under proper standards which the appellate court correctly outlined in great detail. The Court also sets forth in detail the standards for determining the highest and best use of a property, elimination of speculative evidence, and elimination of evidence of enhanced value created by the Government's project.

Staff: Frank B. Friedman (Land & Natural Resources Division)

PUBLIC LANDS

OIL AND GAS LEASES.

Atlantic Richfield Co. v. Walter J. Hickel, Secy. of the Interior, et al. (D. Wyo., No. 5277; August 22, 1969; D.J. 90-1-18-829)

On August 22, 1969, Judge Ewing T. Kerr handed down an opinion sustaining a decision of the Secretary of the Interior which requires payment to the United States by Atlantic Richfield of approximately $4,400,000 representing unpaid royalties on two public land oil and gas leases in the Lost Soldier field in Wyoming. (The sum of $3,209,763.30 mentioned in the court's memorandum is the amount found to be due in the original demand letter sent on November 22, 1961. Additional royalties accruing since that time bring the total to the previously mentioned sum of $4,400,000.)

The case involved primarily a matter of interpreting the Act of August 8, 1946, 60 Stat. 950, 30 U.S.C. 226c. Shortly after passage of that Act, the then holder of the leases, Sinclair Oil & Gas Company,

obtained from the Geological Survey a geological determination which it construed as permitting, under the provisions of the 1946 legislation, payment of a royalty of 12-1/2%, rather than the higher step-scale royalty provided in the leases, on any future production from the two formations involved in the geological determination. For 20 years, the Department of the Interior billed the lessee and accepted payment on the basis of the lower royalty.

In November 1961, the Geological Survey, referring to a 1954 Solicitor's opinion interpreting the 1946 Act, asserted that the lesser royalties had been accepted in error and demanded payment of the sum previously mentioned, $3,209,763.30, as unpaid royalties. On appeal, the Secretary of the Interior sustained that demand in a decision dated June 20, 1968. This action seeking judicial review of the Secretary's decision was instituted in September of 1968. Although Atlantic Richfield raised, and the Secretary's decision rejected, an estoppel defense, Judge Kerr, after deciding the basic statutory interpretation issue in favor of the Government's contentions, held that he did not have to reach the estoppel question. Summary judgment in favor of the defendants has been entered.

Staff: United States Attorney Richard V. Thomas (D. Wyo.); Thomas L. McKevitt (Land & Natural Resources Division)

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TAX DIVISION

Assistant Attorney General Johnnie M. Walters

COURT OF APPEALS

LACK OF RESPONSIBILITY

CT. UPHOLDS AUTHORITY OF TRIAL JUDGE TO REQUIRE DEFENDANT TO SUBMIT TO PSYCHIATRIC EXAMINATION WHEN HE RAISES ISSUE OF LACK OF RESPONSIBILITY ON GROUNDS OF MENTAL DISORDER.

United States v. Baird (C.A. 2; August 4, 1969; D.J. 5-51-9884)

The defendant, a stockbroker, was convicted on five counts of failure to file returns, in violation of 26 U.S.C. 7203. He was sentenced to three months imprisonment and a $5,000 fine.

Shortly before trial the Government moved for an examination by a Government selected psychiatrist since there was reason to believe that the defense would present the testimony of a psychiatrist on the question of criminal responsibility. Defense counsel stated at the time that he did not know whether such a defense would be used. Thus, the Court denied the Government's application. On the third day of the trial, however, a psychiatrist testified for the defendant on the criminal responsibility issue. The Government renewed its application and examination by the Government selected psychiatrist was directed by the Court.

The trial court limited the Government psychiatrist's testimony to the issue of criminal responsibility and did not permit the expert to repeat anything said to him by the defendant which bore on the issue of the defendant's guilt or innocence of the offenses charged. However, self serving lack of wilfulness statements of the defendant were injected into the record through the testimony of the defense psychiatrists. These were admitted as exceptions to the hearsay rule since they were verbal acts forming a basis for the psychiatric opinions. They were not admitted to show the truth or falsity of the statements.

The Court of Appeals rejected appellant's self-incrimination argument and held that "***a defendant who raises a defense based on criminal responsibility is estopped from making an effective objection to the Government's proceeding in this fashion when he, himself, has relied upon the same evidence-admissibility theory under the circumstances such as those in the present case". The Court of Appeals further commented that the trial court excluded from evidence any statements of Baird to the Government psychiatrist related to Baird's guilt or innocence and, hence, he suffered no prejudice.

The Court held that a district court has inherent power to order a psychiatric examination of a defendant under circumstances such as those in this case. The Court cited as authority United States v. Driscoll, 399 F.2d 135 (C.A. 2, 1968); Pope v. United States, 372 F.2d 710 (C.A. 8, 1967); Alexander v. United States, 380 F.2d 33 (C.A. 8, 1967); United States v. Albright, 388 F.2d 719 (C.A. 4, 1968); and Winn v. United States, 270 F.2d 326 (C.A. D.C., 1959).

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys Gary P. Naftalis, Albert J. Gaynor and Charles P. Sifton (S.D. N.Y.)

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