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Bulletin

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UNITED STATES DEPARTMENT OF JUSTICE

Deirdre –
This seems to be very current – How did you accomplish this + will it keep up? ~~good work~~

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EXECUTIVE OFFICE FOR U.S. ATTORNEYS
Acting Director William P. Tyson

COMMENDATIONS

Paul Gorman of the Government Regulations and Labor Section, Washington, D.C., has been commended by R.J. Beaver, Commander, U.S. Coast Guard for his interest and effort in United States v. Allied Towing Corporation.

Assistant United States Attorney, Harold Z. Gurewitz, Eastern District of Michigan, has been commended by O. Franklin Lowie, Special Agent in Charge, Drug Enforcement Administration for his tireless efforts in the Wilson case.

Assistant United States Attorney, Kenneth Josephson, Western District of Missouri, has been presented the Shadow Box Award for Outstanding contributions to Federal Drug Law Enforcement, by Kenneth A. Durrin, Director of the Office of Compliance and Regulatory Affairs in Kansas. Mr. Josephson is commended for his outstanding efforts in United States v. McPike Drug, Inc.

Assistant United States Attorney, William H. McAbee II, Southern District of Georgia, has been commended by Gordon J. Rayner, Resident Agent in Charge, Drug Enforcement Administration, for his outstanding handling of the successful prosecution of ten defendants for narcotics violations. Mr. McAbee was ably assisted by Assistant United States Attorney David Roberson.

Assistant United States Attorney, Nancy Rice, District of Colorado, has been commended by Honorable Sherman G. Finesilver, U.S. District Court Judge for Colorado, for her thorough preparation and expertise in United States v. Louis Fernando Gomez, Jr.

Assistant United States Attorney, Susan R. Roberts, District of Colorado, has been commended by Honorable Sherman G. Finesilver, U.S. District Court Judge for Colorado, for her outstanding work in United States v. Don Wesley Hartline.

CIVIL DIVISION
Acting Assistant Attorney General Alice Daniel

Florida Medical Association v. Department of Health, Education and Welfare, No. 78-2910 (5th Cir. August 23, 1979) DJ 145-16-1397

Injunctions: Fifth Circuit Rejects Efforts To Circumvent Rule 65

The Florida Medical Association and the American Medical Association brought a class action suit designed to prevent the Secretary of Health, Education and Welfare from disclosing a list of all physicians who had treated medicare beneficiaries in 1977, their office addresses and the amounts of federal money received. Plaintiffs claimed that release of this information would irreparably impair various constitutional and statutory rights of privacy. Defendant claimed that it would facilitate public debate on national health insurance and medical cost containment legislation.

The District Court issued a temporary restraining order on behalf of the plaintiffs. However, when the order expired, the Court declined to rule on their motion for a preliminary injunction. Instead, the Court held that it had ancillary jurisdiction to preserve its power to decide the case by issuing an injunction under the All Writs Act which would preserve the status quo until such time as the Court could make the findings required, under Rule 65, F.R.C.P., for a preliminary injunction.

The Fifth Circuit accepted our characterization of the District Court's action as a blatant attempt to circumvent Rule 65. The Court of Appeals held that the ancillary jurisdiction doctrine and the All Writs Act do not empower a District Court to promulgate an ad hoc code of procedure whenever compliance with the Federal Rules proves difficult. The Court further accepted our narrow view of the ancillary jurisdiction doctrine and declined to even consider our opponent's suggestion that the order might constitute a valid de facto preliminary injunction in view of the District Court's flat refusal to assess the likelihood of success on the merits.

Attorney: Linda Cole (Civil Division)
FTS 633-3525

Peel v. Florida Department of Transportation, No. 77-1846 (5th Cir. August 13, 1979) DJ 151-17-324

Veterans Reemployment Rights: Tenth and Eleventh Amendments No Bar To Enforcement Against A State

In this case the Fifth Circuit held that the Tenth and Eleventh Amendments do not prevent a federal court from ordering a state to reinstate a former employee, with compensation for lost wages and benefits, under the Veterans Reemployment Rights Act, 38 U.S.C. 2021-2026 (1976).

Attorney: Leonard Schaitman (Civil Division)
FTS 633-3321

State of Colorado, et al. v. Veterans Administration, et al. Nos. 77-1746, 77-1747 and 77-1748 (10th Cir. July 11, 1979) DJ 145-151-436

Veterans Education Assistant Program: Tenth Circuit Upholds Constitutionality Of Program And Rules That Administrative Procedure Act Does Not Apply

Under the Veterans Educational Assistance Program, States participate by creating a State approving agency (38 U.S.C. 1771) for schools and courses which veterans may attend. Although the Veterans Program pays the educational assistance directly to the veterans, the schools are required to report attendance and are paid a fixed sum by the Veterans Administration for such reports. 38 U.S.C. 1785 provides that VA, having determined that an overpayment to a veteran resulted from the failure of the school to report, can collect overpayments made to the veteran from the school. The section also provides that such overpayments may be recovered "in the same manner as any other debt due the United States." Several Colorado schools, having been notified of claims, brought suit to enjoin their collection by the VA upon the ground that section 1785 was unconstitutional as an undue interference with the State and that the VA had failed to comply with the Administrative Procedure Act in determining the amounts claimed. The district court upheld the constitutionality of section 1785 but held that the determinations were void because VA had not followed the Administrative Procedure Act.

On appeal, the Tenth Circuit upheld the constitutionality of the statute. The court held that the arrangement between the State and Federal Government was accepted by the Colorado

State Legislature as "a matter of basic contract law," that any right to review the Administrator's determination of liability was "in the suit to collect," and that, accordingly, the Administrative Procedure Act did not apply.

Attorney: Harland F. Leathers (Civil Division)
FTS 633-4774

CRIMINAL DIVISION
Assistant Attorney General Philip B. Heymann

Summary of Significant Supreme Court Decisions from October Term, 1978.

Arkansas v. Sanders, 99 S.Ct. 2586.

SEARCH AND SEIZURE -- Search of Suitcase Seized From Automobile -- Police stopped an automobile on the highway and conducted a probable cause search of the car. In the course of the search they opened a suitcase found in the car and discovered marijuana in it. The Supreme Court held that the police should have obtained a warrant for the search of the suitcase, and that the "automobile exception" did not extend to a movable piece of luggage found in the car. Because the suitcase was not part of the car, the extent of its mobility was not affected by the mobility of the car after it was removed from the car. Accordingly, the Court held that there is no greater justification for warrantless searches of luggage taken from automobiles than of luggage taken from other places.

Bell v. Wolfish, 99 S.Ct. 1861.

DUE PROCESS -- Pretrial Detention -- Pretrial detainees at New York Metropolitan Correctional Center in New York City brought a class action challenging the constitutionality of various practices and conditions of confinement in that facility. The Supreme Court held that the proper standard for evaluating the constitutionality of conditions of pretrial detention is whether those restrictions or conditions amount to punishment of the detainee. Absent a showing of an expressed intent to punish, if a particular condition or restriction is reasonably related to a legitimate governmental objective, it does not constitute punishment. Using this test, the Court held that "double-bunking" (housing two detainees in rooms

designed for one), as practiced at the MCC, did not amount to punishment and did not violate the detainees' due process rights. Other institutional restrictions related to the maintenance of internal order and discipline are subject to the wide-ranging discretion of prison administrators. Their judgment should be upheld in the absence of substantial evidence that they have exaggerated their response to security problems.

Brown v. Texas, 99 S.Ct. 2637.

SEARCH AND SEIZURE -- Terry Stop for Identification Purposes -- Police stopped defendant, who was seen in an alley in a high crime area, and asked him to identify himself. He refused, and the officers arrested him for violating a Texas statute that made it a criminal act for a person to refuse to give his name and address to an officer who lawfully stopped him and requested the information. The Supreme Court held that the application of the Texas statute to justify the stop and require defendant to identify himself violated the Fourth Amendment because the officers lacked reasonable suspicion to believe appellant was engaged in criminal conduct and the stop was not based on any other objective criteria.

Dalia v. United States, 99 S.Ct. 1682.

WIRETAPPING -- Covert Entries -- FBI agents secretly entered defendant's business office at midnight to install a court-authorized electronic bug in the ceiling. The Supreme Court held that the entry did not violate the Constitution or Title III of the Omnibus Crime Control and Safe Streets Act of 1968. It also held that although the entry was not specifically authorized in the eavesdropping order, it was reasonably within the scope of the court-authorized surveillance and therefore not prohibited by the Fourth Amendment. The Warrant Clause, the Court held, does not require that the means of

executing a search be specified, since the means of execution is subject to later judicial review as to its reasonableness.

Delaware v. Prouse, 99 S.Ct. 1391.

SEARCH AND SEIZURE -- Automobile Stops for License Checks -- Police stopped defendant's car for the purpose of checking his driver's license and registration, although there was no basis for suspicion that defendant was guilty of a violation. The Supreme Court found that spot license checks initiated at the discretion of police officers violate the Fourth Amendment. It therefore affirmed the suppression of the marijuana seized in the course of the stop. The Court noted that roadside truck weigh-stations and inspection checkpoints are permissible, as are other methods of routine documentary inspection that do not turn on the unbridled discretion of police officers.

Douglas Oil Co. v. Petrol Stop Northwest, 99 S.Ct. 1667.

GRAND JURIES -- Rule 6(e) -- Grand Jury Secrecy -- Plaintiffs in an Arizona anti-trust suit successfully petitioned the District Court for the Central District of California to release grand jury transcripts generated during an investigation of the defendants in that district. The Supreme Court held that the district court applied the proper standard in releasing the transcripts after plaintiff had demonstrated that its particularized need for disclosure outweighed the interest in grand jury secrecy. But, the Court held, it was the Arizona court not the California court that should have ruled on the motion for disclosure, once the California court had evaluated the continuing need for secrecy of the grand jury materials. The case provides little enlightenment on the difficult problems posed by Rule 6(e), but it does restate that the purposes of the rule of grand jury secrecy are applicable even after the grand jury has concluded its investigation.

Dunaway v. New York, 99 S.Ct. 2248.

SEARCH AND SEIZURE -- Removal to the Police Station for Questioning -- Police took defendant into custody without probable cause, transported him to the police station, and detained him there for interrogation. The Supreme Court held that this procedure violated the Fourth Amendment. It distinguished Terry v. Ohio and subsequent cases, which involved much more limited intrusions arising from on-the-street encounters between law enforcement officers and persons suspected of criminal activity. Regardless of whether the seizure amounted to an "arrest," it was a sufficiently intrusive procedure, the Court held, to require that it be justified by probable cause. The Court also concluded that defendant's custodial confession, although voluntary for purposes of the Fifth Amendment, was so closely connected to the illegal detention that suppression was required to promote the policies served by the Fourth Amendment.

Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 99 S.Ct. 2100.

DUE PROCESS -- Right to Parole -- State inmates sought due process protections at parole hearings. The Supreme Court held that due process rights do not attach simply because the government offers a statutory possibility of parole. However, the Court found that the Nebraska parole statute creates an expectation of parole, and the Court held that the Nebraska statute therefore created a liberty interest protected by due process guarantees. The procedural protections afforded by the Nebraska parole system were deemed sufficient to satisfy the Due Process Clause.

Lo-Ji Sales, Inc. v. New York, 99 S.Ct. 2319.

SEARCH WARRANTS -- Open-Ended Warrant -- A state police investigator purchased two sexually explicit movies at an "adult" bookstore. A local magistrate viewed the films, found probable cause to believe

that sale of the films violated the state obscenity law and signed a warrant to arrest the seller. The police investigator also informed the magistrate that other similar films and books were for sale at the store. The magistrate accordingly signed a warrant authorizing the police to seize any books or films that the magistrate would find obscene during a search of the store. The warrant did not list or specifically describe the items to be seized. The magistrate accompanied 10 police officers to the bookstore, viewed numerous books, films and magazines, and directed the officers to seize those articles he found to be obscene. The search lasted nearly six hours and resulted in the seizure of over 900 separate items. The Supreme Court held the warrant invalid under the Fourth Amendment because it allowed the officials conducting the search total discretion to determine what articles should be seized. The court found that the magistrate's presence at the search did not sufficiently protect Fourth Amendment concerns because he was acting as an adjunct law enforcement agent rather than as a neutral and detached judicial officer.

Michigan v. DeFillippo, 99 S.Ct. 2627.

SEARCH AND SEIZURE -- Validity of an Arrest Made in Good-Faith Reliance on an Ordinance Later Held Unconstitutional -- Defendant was stopped and asked to identify himself. He failed to do so and was arrested for violation of a city ordinance requiring persons lawfully stopped for questioning to identify themselves. In a search conducted incident to the arrest, police discovered drugs, and defendant was prosecuted on the drug offense (but not for violating the city ordinance). The ordinance was subsequently held unconstitutionally vague. The Supreme Court, however, upheld the conviction on the ground that the search incident to the arrest was the product of good-faith reliance by the police on a presumptively valid

ordinance. Because defendant's pre-arrest conduct clearly warranted further investigation and defendant's responses constituted a refusal to identify himself, the police had probable cause to arrest defendant for violating the ordinance. The arresting officer did not lack probable cause simply because the ordinance was subsequently held unconstitutional.

New Jersey v. Portash, 99 S.Ct. 1292.

SELF-INCRIMINATION -- Use of Immunized Testimony at Trial -- Defendant testified before the grand jury under a grant of immunity. The trial court ruled that if he took the stand at trial in his own defense, the prosecution would be permitted to impeach him with his immunized grand jury testimony. The Supreme Court held that immunized testimony is "compelled" and that it could not be used to impeach the defendant at trial without violating the Fifth Amendment. The Court had previously held that statements taken voluntarily, but in violation of Miranda v. Arizona, 384 U.S. 436 (1966), may sometimes be used for impeachment purposes (Harris v. New York, 401 U.S. 222 (1971); Oregon v. Hass, 420 U.S. 714 (1975)). Here, however, the testimony was given in response to a grant of legislative immunity and was thus "the essence of coerced testimony."

Several members of the Court expressed disapproval of the "advance ruling" procedure followed in this case, under which the defendant obtained a ruling from the Court as to the use of his immunized testimony before he took the stand. This procedure, according to several Justices, did not provide a sufficiently concrete setting in which to evaluate the defendant's claim of error.

North Carolina v. Butler, 99 S.Ct. 1755.

MIRANDA -- Waiver of Rights -- After being arrested by the FBI, defendant was advised of his Miranda rights, and he replied that he understood his rights and would talk with the agents. However, he declined to sign the standard FBI waiver-of-rights form. Defendant then made several incriminating statements. The North Carolina Supreme Court suppressed the statements, holding that defendant's refusal to sign the waiver form conclusively established non-waiver. The Supreme Court reversed, holding that an express waiver is not inevitably necessary to support a finding that the accused waived his Miranda rights, and that knowing and voluntary waiver may be inferred from the actions and words of the person interrogated.

Parker v. Randolph, 99 S.Ct. 2132.

CONFRONTATION CLAUSE -- Bruton Rule Applied to Interlocking Confessions -- Defendants were convicted, after a joint trial in a Tennessee court, of murder committed during the commission of a robbery. None of the defendants took the stand and their oral confessions, found by the trial court to have been freely and voluntarily given, were admitted into evidence through police officers' testimony. On review of theis habeas corpus petitions, the court of appeals set aside defendants' convictions on the ground that their Confrontation Clause rights under Bruton had been violated. The Supreme Court reversed, distinguishing Bruton. In a case such as this one, where there were interlocking confessions, the Court held that the admission of the confessions did not have the devastating effect on the defendants that was present in Bruton, and therefore it could not be assumed that the jury failed to follow the court's instructions limiting the use of each confession to the defendant who made it. The majority was split on the question whether the procedure followed did not constitute a violation of the Confrontation Clause or whether it was a violation that was harmless beyond a reasonable doubt.

Rakas v. Illinois, 99 S.Ct. 421.

SEARCH AND SEIZURE -- "Standing" by an Automobile Passenger to Object to Search of the Automobile -- After receiving a robbery report, police officers stopped the suspected getaway automobile in which defendants were passengers. The automobile was searched. A sawed-off rifle was seized from beneath the front passenger seat and rifle shells were seized from a locked glove compartment. The Supreme Court held that petitioners were not entitled to challenge the search of the vehicle. The Court reaffirmed the principle that Fourth Amendment rights are personal rights which may not be asserted vicariously. It rejected the notion that the "target" of a search, i.e., the person against whom the search is directed, may contest the admission of evidence secured by a search of another's premises or property. Narrowing its prior holding in Jones v. United States, 362 U.S. 257 (1960), the Court ruled that not everyone "legitimately on the premises" has a legitimate expectation of privacy in the premises, and that petitioners, who asserted neither a property nor a possessory interest in the automobile searched or the property seized, were not entitled to challenge the search.

This case has sparked considerable interest, and has been cited widely. The Court emphasized that because the proponent of a motion to suppress has the burden of proving a violation of his own Fourth Amendment rights, "standing" must be established by the defendant. The Court also noted once again that the continuing vitality of the "automatic standing" rule of Jones v. United States, 362 U.S. 257 (1960), is open to question.

Sandstrom v. Montana, 99 S.Ct. 2450.

INSTRUCTIONS -- Mann Instruction -- The defendant was found guilty of "deliberate homicide" in that he "purposely or knowingly" caused the victim's death. On the issue of petitioner's

purpose or knowledge, the trial court instructed the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts." The Supreme Court held the instruction unconstitutional because it improperly shifted the burden of persuasion to the defendant on the issue of intent. The jury may have interpreted the instruction as constituting either a burden-shifting presumption or a conclusive presumption, the Court held, and under either interpretation the instruction was invalid. The opinion does not suggest that there is any problem with the more common federal instruction that the jury may infer that the defendant intended the natural and foreseeable consequences of his acts.

Smith v. Maryland, 99 S.Ct. 2577.

SEARCH AND SEIZURE - Pen Registers -- Telephone company installed, in its own office, a "pen register" to record the numbers dialed from defendant's telephone. Defendant moved to suppress evidence obtained as a result of the pen register, claiming that the warrantless use of the device violated the Fourth Amendment. The Supreme Court held that installation and use of the pen register was not a "search" within the meaning of the Fourth Amendment, and therefore no warrant was required. The Court reasoned that telephone users have no reasonable expectation of privacy in the numbers they dial because they know that the telephone company has facilities for recording those numbers for a variety of legitimate purposes. Therefore when the defendant voluntarily conveyed that information to the telephone company, he assumed the risk that the telephone company would reveal the information to the police.

United States v. Addonizio, 99 S.Ct. 2235.

COLLATERAL ATTACK -- Sentencing -- Several federal prisoners alleged that a postsentencing change in the policies of the United States Parole Commission resulted in their imprisonment beyond the period intended by the sentencing judge. They

sought modification of their lawful sentences by collateral attack pursuant to 28 U.S.C. 2255. The Court held that the alleged error was not cognizable under Section 2255 because it was neither constitutional nor jurisdictional in magnitude and was not otherwise of such a fundamental character that it rendered the entire proceeding irregular and invalid. Since Congress has entrusted release decisions to the Parole Commission's discretion and not to the courts, it would undermine the congressional purpose to permit a prisoner to use collateral attack to challenge Commission decisions that are inconsistent with judicial expectations.

United States v. Batchelder, 99 S.Ct. 2198.

FIREARMS -- Overlapping Statutes -- Defendant, a convicted felon, was found guilty of illegally receiving a firearm, in violation of 18 U.S.C. 922(h). He was sentenced to five years' imprisonment, the statutory maximum. The court of appeals remanded for resentencing, holding that because 18 U.S.C. 922(h) and 18 U.S.C. App. 1202(a) both prohibit receipt of a firearm, the defendant could not lawfully be sentenced to more than two years' imprisonment, the maximum sentence under 18 U.S.C. App. 1202(a). The Supreme Court reversed, holding that the two statutes are independent, and that even though they overlap substantially, there is no constitutional or statutory bar to having a greater maximum penalty available under one statute then under the other. Nor does the disparity in sentencing provisions grant the prosecutor undue discretion in the charging decision. Short of selective enforcement based on a forbidden criterion such as race, religion, or other arbitrary classification, the decision whether to prosecute and what charge to file rests in the prosecutor's discretion.

United States v. Caceres, 99 S.Ct. 1465.

EXCLUSIONARY RULE -- Government Failure to Comply with Internal Regulations -- Internal Revenue Service regulations require that IRS agents obtain prior

authorization from the agency before surreptitiously recording face-to-face conversations between themselves and others. The agent in this case did not obtain prior authorization, and on that ground, the court of appeals suppressed the tape recordings of the conversations between the agent and the defendant. The Supreme Court reversed. It held that the exclusionary rule did not require the suppression of the taped conversations solely because the conversations were obtained in violation of an internal agency regulation. The recording itself did not violate the Constitution or any statute, the Court noted. Nor did the agent's violation of internal agency regulations violate defendant's due process rights. The defendant did not in any way rely on the regulations, nor did their violation in any way affect his conduct. Fashioning a remedy for violations of Executive Branch regulations is primarily the responsibility of the Executive Branch, the Court held.

United States v. Helstoski, 99 S.Ct. 2432.

SPEECH OR DEBATE CLAUSE -- The defendant, a former Congressman, was indicted for taking bribes in exchange for introducing private immigration bills. The district court and court of appeals held that under the Speech or Debate Clause, the government could not introduce any evidence relating to the performance of any legislative acts. That is, the lower courts held that the government could not show that the defendant introduced the bills in question, nor could it introduce evidence of discussions and correspondence referring in any way to prior legislative acts. The Supreme Court affirmed. It held that while a promise by a Member of Congress to perform an act in the future is not itself a legislative act -- and could therefore be introduced at trial -- the government cannot introduce evidence tending in any way to prove the commission of a legislative act in the past. The Court also held that the defendant had not waived

his protection under the Speech or Debate Clause -- even assuming that an individual legislator can waive the privilege. Finally, the Court held that the federal bribery statute, 18 U.S.C. 201, was not a sufficiently specific statute to constitute a congressional waiver of the protection of the Speech or Debate Clause for individual Members.

Helstoski v. Meanor, 99 S.Ct. 2445.

APPEAL -- Speech or Debate Clause -- Defendant Helstoski sought mandamus in the court of appeals after the district court denied his motion to dismiss his indictment. The Supreme Court held that mandamus was not the appropriate remedy, because direct appeal was available from the pretrial order denying Helstoski's motion to dismiss on Speech or Debate Clause grounds. The Speech or Debate Clause, like the Double Jeopardy Clause (see Abney v. United States, 431 U.S. 651 (1977)), was designed to protect defendants not only from the consequences of litigation, but from the hardship of going to trial. Accordingly, Speech or Debate Clause claims are subject to interlocutory appeal rather than being appealable only after the entry of a final judgment in the case.

United States v. Timmreck, 99 S.Ct. 2085.

COLLATERAL ATTACK -- Guilty Plea -- At defendant's guilty plea proceeding the district court failed to mention the mandatory special parole term required by the statute under which he was convicted. Defendant's conviction became final, and he subsequently moved to vacate his sentence under 28 U.S.C. 2255 on the ground that by failing to mention the mandatory special parole term, the district court had violated Rule 11 of the Federal Rules of Criminal Procedure. The Supreme Court held that a conviction based on a guilty plea is not subject to collateral attack on the basis of a purely formal violation of Rule 11. The error in this case, the Court held, did not constitute the "complete miscarriage of justice," nor was it "inconsistent with the rudimentary demands of fair procedure." Accordingly, there was no basis for permitting collateral attack on the conviction.