100601

33299
#A-17
CLOSED

CRIMINAL COMPLAINT NO. 72-0451
COURT DOCKET NO.
DJ FILE NO.

UNITED STATES ATTORNEY

WESTERN DISTRICT OF WASHINGTON

DIVISION SEATTLE COUNTY KING

DEFENDANTS:	ASSIGNED TO JERALD E. OLSON
1. COOPER, DAN aka D. B.	
2.	NATURE OF OFFENSE AIRCRAFT PIRACY; EXTORTION
3.	
4.	
5.	CODE SECTIONS 49 U.S.C. 1472; 18 U.S.C. 1951
6.	DATE OF OFFENSE
7.	GOVT. AGENCY FBI
8.	STAT. OF LIMITATIONS
DEFENSE COUNSEL:	BOND (AMOUNT, DATE AND SURETY)

ARREST ARRAIGNMENT PLEA

SEE ALSO FILE NO.

DATE	CODE	REMARKS	INITIALS

CLOSED
DATE
INITIALS

FPI-SS-3-5-70-30M-Sets-5209

GPO: 1971 O-415-075

Form USA-33
(Rev. 9-27-67)

DATE	REMARKS	INITIALS

WITNESSES

CRIMINAL RECORD

STAN — THERE ARE INQUIRIES RE
THE STATUTE OF LIMITATIONS
ON D.B. COOPER CASE — SO FAR
I HAVEN'T MADE ANY STATEMENTS —

I DON'T THINK WE SHOULD —
WE CAN AVOID BY SAYING
SOMETHING TO EFFECT THAT
"IT IS NOT POLICY TO GIVE
LEGAL OPINIONS" — OR — "QUESTION
TO BE FACED WHEN IT BECOMES
AN ISSUE" — — — .

FD-204 (Rev. 3-3-59)

UNITED STATES DEPARTMENT OF JUSTICE
Federal Bureau of Investigation

UNITED STATES ATTORNEY
Seattle, Washington

NOV 26 1975

CIVIL ☐ CRIM ☐ ADMIN ☐

Copy to: 1 - USA, Seattle

Report of: SA RONALD N. NICHOLS
Office: Seattle, Washington
Date: 11/24/75

Field Office File #: 164-81
Bureau File #: 164-2111

Title: UNKNOWN SUBJECT
NORTHWEST AIRLINES FLIGHT 305,
FROM PORTLAND, OREGON, TO
SEATTLE, WASHINGTON, 11/24/71

Character: CRIME ABOARD AIRCRAFT-HIJACKING;
EXTORTION

Synopsis: Investigation to identify unknown subject to date has been negative. Attorney JOHN F. BARG, U.S. Department of Justice, advised by letter, dated 8/11/75, that it was the position of the Department of Justice that the suspect in this case, also known as Dan Cooper, may be prosecuted without regard to the five year statute of limitations. Investigation continuing. ARMED AND DANGEROUS.

- P -

DETAILS:

Investigation to identify unknown subject to date, negative.

The following letter was received by the Seattle Division of the FBI, from Assistant United States Attorney JERALD E. OLSON, dated 8/14/75:

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBERS

JEO:jt

CR 72-0451

United States Department of Justice

MAILING ADDRESS:
P. O. BOX 1227
SEATTLE, WASHINGTON 98111

UNITED STATES ATTORNEY
WESTERN DISTRICT OF WASHINGTON
UNITED STATES COURT HOUSE
SEATTLE, WASHINGTON 98104

August 14, 1975

Mr. Philip T. Basher
Special Agent in Charge
Federal Bureau of Investigation
710 Federal Building
915 Second Avenue
Seattle, WA 98174

Troy 164-81-140

Attention: SA Ronald Nichols

Re: Unknown Subject, a/k/a DAN COOPER,
a/k/a D. B. COOPER
Our Ref: CR 72-0451

Dear Sir:

We provided a copy of a letter to the Department of Justice dated March 31, 1975 to Agent Nichols. That letter inquired as to the applicable statute of limitations on the D. B. Cooper skyjacking.

Enclosed is a copy of the Department's response which indicates that there is no statute and we may prosecute him at any time he may be found.

Very truly yours,

STAN PITKIN
United States Attorney

Jerald E. Olson
JERALD E. OLSON
Assistant U. S. Attorney

Encl.

CWB:JFB:mac
88-61-20

August 1 T, 1975

Mr. Stan Pitkin
United States Attorney
Seattle, Washington

Attention: Mr. Jerald E. Olson
Assistant U. S. Attorney

Dear Mr. Pitkin:

Reference is made to your letter of March 31, 1975, requesting our views on the applicability of the statutes of limitation to the matter of the D. B. Cooper aircraft hijacking.

As you pointed out in your letter, prosecution of Cooper may, upon his apprehension, be sustained after expiration of the five-year limitation period on two possible grounds: 1) he may be considered a fugitive for purposes of 18 U.S.C. 3290, and 2) there is no limitation on an offense punishable by death, pursuant to 18 U.S.C. 3281. It is our position that the provisions of section 3281 clearly apply to Cooper, and that he may be prosecuted if apprehended after November 24, 1976. Whether Cooper is a fugitive for purposes of section 3290 is not clear.

As you know, section 3281 provides that an indictment may be brought at any time on an offense punishable by death. In 1971 when Cooper committed air piracy, 49 U.S.C. 1472(i) contained a death penalty provision which was struck down in 1972. See Furman v.

Georgia, 408 U.S. 238 (1972) and United States v. Bohle, 346 F. Supp. 577 (N.D.N.Y. 1972). Following the Furman and Bohle decisions, Congress did not repeal the air piracy statute nor delete the death penalty provision. In 1974 the statute was amended to include a death penalty provision that Congress believed remedied the deficiencies set forth in Furman. It should be noted that the air piracy statute did not suffer from the constitutional infirmity delineated in United States v. Jackson, 390 U.S. 570 (1968); therefore, air piracy was punishable by death in 1971 when Cooper committed the hijacking.

Since the death penalty provision of 49 U.S.C. 1472(i) was valid law in 1971, section 3281 should apply to the Cooper matter, and free the government of the normal five-year limitation. See United States v. Coon, 411 F.2d 422 (8th Cir., 1969) and United States v. Watson, 496 F.2d 1125 (4th Cir., 1973). In the Watson case, the court held that 18 U.S.C. 1111 (murder) is a "capital crime" despite the unconstitutionality of its death penalty provision because Congress had not repealed the provision, and had not amended any of the statutes creating special procedural rules applicable to capital cases since the Furman decision. See also United States v. Massingale, 500 F.2d 1224 (4th Cir., 1974) in which the court held that by eliminating the death penalty provision in the kidnapping statute (18 U.S.C. 1201), Congress expressed the intent that kidnapping shall no longer be a capital offense for procedural purposes. The court's reliance on congressional intent is well placed. In enacting section 3281, Congress recognized society's interest in prosecuting certain serious crimes without regard to a time limitation. H.R. Rep. No. 1337, 76th Cong., 1st Sess. (1939). The inclusion in 1961 of a death penalty provision in the air piracy statute evidenced Congress' intent that section 3281 should apply to air piracy violations. See generally 1 Am. J. Crim. Law 318 (1972) which contains a discussion of the federal procedural implications of Furman v. Georgia.

Whether Cooper is a fugitive for purposes of section 3290 is not certain. A fugitive is one who, having committed a crime against the United States, flees from the jurisdiction of the court where the crime was committed, or leaves his usual place of abode and conceals himself within the court's jurisdiction. Jhirad v. Ferradina, 486 F.2d 442 (2d Cir., 1973) and Forthoffer v. Swope, 103 F.2d 707 (9th Cir., 1939). We do not know whether Cooper fled the court's jurisdiction or whether he is concealing himself within your jurisdiction. Consequently, the applicability of section 3290 should be evaluated when Cooper is ultimately apprehended, at which time it may be clear whether he has been a fugitive from justice.

In view of the above considerations, it is our position that Cooper may be prosecuted without regard to the five-year statute of limitations. Therefore, it is recommended that the FBI be advised to continue its investigation of the Cooper matter.

It is hoped that we have been of assistance to you in this matter.

Sincerely,

CARL W. BELCHER
Chief, General Crimes Section
Criminal Division

By:

JOHN F. BARG
Attorney

On 11/19/75, contact was made with the Seattle Post Intelligencer and it was determined that that papers Secret Witness Program is still in effect and they are continuing to offer a reward of $5,000 to information leading to the arrest and conviction of the perpetrator of this crime.

December 8, 1976

CR 76-2004
9:gw

Stan Pitkin, Esq.
United States Attorney
Western District of Washington
P. O. Box 1227
Seattle, Washington 98111

Re: United States v. John Doe, aka Dan Cooper,
No. CR 76-229, USDC Oregon

Dear Mr. Pitkin:

In Mr. Lezak's absence I have received your file on D. B. Cooper. We remain grateful for the material. It will be interesting to see whether this matter is ever carried further.

Sid Lezak is at this moment approaching the 18,000 ft. base camp at Mt. Everest in Nepal. Needless to say he will have some interesting reports of his doings on his return December 20.

With best personal regards, I remain,

Sincerely yours,

JACK G. COLLINS
First Assistant U.S. Attorney

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBERS

SP:scp
CR72-0451

United States Department of Justice

UNITED STATES ATTORNEY
WESTERN DISTRICT OF WASHINGTON
UNITED STATES COURT HOUSE
SEATTLE, WASHINGTON 98104

MAILING ADDRESS:
P. O. BOX 1227
SEATTLE, WASHINGTON 98111

December 3, 1976

RECEIVED
DEC 7 1976
U.S. ATTORNEY
PORTLAND, ORE.

Mr. Sidney I. Lezak
United States Attorney
District of Oregon
506 U. S. Courthouse
620 SW Main Street
Portland, Oregon 97205

Dear Sid:

Re: U. S. v. DAN COOPER, a/k/a D. B.

I was cleaning out my office and found the enclosed file. Thought it might be of more assistance to you than to me.

Best wishes.

Sincerely,

Stan

STAN PITKIN

Enclosure

I'll give you a buzz later and brief you on my doings.

FD-204 (Rev. 3-3-59)

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Copy to: 1 - USA, SEATTLE

Report of: RONALD N. NICHOLS
Office: SEATTLE
Date: 11/30/76

UNITED STATES ATTORNEY
Seattle, Washington

Field Office File #: 164-81
D.B.
Bureau File #: 164-2111

Title: UNKNOWN SUBJECT;
NORTHWEST AIRLINES FLIGHT 305
FROM PORTLAND, OREGON TO
SEATTLE, WASHINGTON
11/24/71

DEC 03 1976

CIVIL ☐ CRIM ☑ ADMIN ☐
RHW & JEO

Character: CRIME ABOARD AIRCRAFT - HIJACKING; EXTORTION

Synopsis:

On 5/17/76, Mrs. LOUISE HAUSER, Royal Globe Insurance Company, New York, furnished information concerning contacts by several persons who have requested reward information. Liaison has been established with the Royal Globe Insurance Company through the New York Division to obtain any information concerning future inquires. BENJAMINE G. GRIGGS, JR., Vice President-Assistant to President, Northwest Airlines (NWAL), Inc., advised it was NWAL's contention that the reward proposals which were publicized previously were no longer in effect. STAN PITKIN, U.S Attorney, Seattle, has stated it is the policy of his office to publicly claim the statute of limitations on this crime has not run. ARMED AND DANGEROUS.

- P -

DETAILS:

On 5/17/76, contact was made telephonically by the Seattle Division with the Royal Globe Insurance Company, 150 William Street, New York City, New York, as they are the insurance company that paid Northwest Orient Airlines approximately $180,000 as a result of captioned crime. LOUISE HAUSER, Claim and Loss Controller for the Royal Globe Insurance Company, advised she has received some inquiries from private citizens regarding a reward in this matter. Mrs. HAUSER thought it would be possible to make this information available to the FBI.

The Minneapolis Division advised by airtel dated 7/13/76 as follows:

For information of Seattle, BENJAMIN G. GRIGGS, JR., Vice President - Assistant to the President, Northwest Airlines (NWAL), Inc., was recontacted on 6/14/76 regarding the proposals mentioned in referenced airtel. As a result, GRIGGS again conferred with the President of NWAL and they again reiterated that they are strongly opposed to the FBI contacting their insurance company. Additionally, GRIGGS advised that he does not feel the insurance company's interests are completely in line with those of NWAL. GRIGGS reluctantly advised that he did not wish to reveal the names of the insurance company officials handling this matter and again stated that NWAL is concerned with the results that may occur with any additonal publicity regarding the hijacking.

GRIGGS stated that it was NWAL's contention that the reward proposals which were publicized previously were no longer in effect. GRIGGS stated that the Northwest employee who was most involved in the reward proposal has retired and it was DONALD NYROP's position that the reward had simply died out. President NYROP did not rule out the possibility that should some new information concerning a subject or suspect in this case come up, he would consider a reward payment.

Minneapolis has attempted to convince NWAL officials of the importance and urgency of this program but NWAL officials remain firm in their opposition to any further publicity.

Minneapolis Division advised by nitel dated 7/29/76 as follows:

JAMES A. ABBOTT, Legal Department, NWAL, Minneapolis, Minnesota, furnished information that NWAL had offered a reward of $25,000 for the arrest and conviction of the hijacker in this matter. ABBOT also stated the reward would remain valid through 12/31/76.

The following letter was written by United States Attorney STAN PITKIN to Mr. ALFRED L. HANTMAN, Chief of the General Crime Section, Criminal Division, Department of Justice:

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBERS
SP:csg
CR720451

United States Department of Justice
UNITED STATES ATTORNEY
WESTERN DISTRICT OF WASHINGTON
UNITED STATES COURT HOUSE
SEATTLE, WASHINGTON 98104

P.O. BOX 1227
SEATTLE, WASHINGTON 98111

August 24, 1976

Mr. Alfred L. Hantman
Chief, General Crimes Section
Criminal Division, FTRI Building
Department of Justice
Washington, D.C. 20530

Re: UNKNOWN SUBJECT, a/k/a Dan Cooper,
a/k/a D. B. Cooper;
Air Piracy - Hijacking - Extortion
Our: CR720451
Your: ALH:JJD:gvh; 88-61-20.

Dear Sir:

We wrote to you by letter dated April 20, 1976, indicating we had just received what would be the first of many inquiries prior to the five year anniversary date of the D.B. Cooper skyjacking of November 24, 1971. That inquiry and those that have followed and will follow are directed to the question of the status of the investigation; whether the statute of limitations has run; and what the consequences are.

We indicated in our letter of April 20 that we were responding to the effect that it was not our policy to make comments about investigations and it was not our policy to comment on legal issues (which includes comment on any statute of limitations issue). We felt this was preferable to stating we believed the statute was not tolled as Cooper might mistakenly feel the statute had run and come out (since his story is worth many dollars). We also felt it was preferable to make no comment rather than stating we believed the statute had run (when we believe it has not) in order to mislead Cooper into disclosing himself, if he is in fact alive.

The Federal Bureau of Investigation agreed with our position at the time and is presently of the feeling that this is still the more preferable position.

However, we have reconsidered our position and our re-evaluation has led us to conclude we should straight-out take the position the statute of limitations has not run. This approach has two advantages. First, it keeps us from having to play fencing games with the news media when reporters press for a statement. In fact, the continued interest and pointed questioning by the press really leaves us little option. Second, and really the most important reason, it supports the position that "D.B. Cooper" is no folk-hero Robin Hood who pulled off a coup and he will not get away with his crime, if in fact he is alive.

Earlier this week a local newspaper reporter, who apparently is doing a feature article on Cooper for Sunday release (in September), was advised by our office that we do not believe the statute of limitations has run.

We felt you should be aware of our position and thought perhaps you would brief the Public Information Office, since they might get inquiries, both directly and as a result of our position, and should be aware of our posture so that we can be consistent in our responses.

Very truly yours,

Stan Pitkin

STAN PITKIN
United States Attorney

Copy to:

Mr. John M. Reed
Special Agent in Charge
Federal Bureau of Investigation
710 Federal Building
915 Second Avenue
Seattle, Washington 98174

Attn: Mr. Ronald N. Nichols
Special Agent

On 10/18/76, Seattle Division advised the New York Division of the contact that had been made with LOUISE HAUSER, Claim and Loss Controller for the Royal Globe Insurance Company in New York. New York was advised to establish liaison with the Royal Globe Insurance Company in order to obtain any information concerning future reward inquiries that may come to the attention of the Royal Globe Insurance Company.

RHW:jt
CR72-0451

November 16, 1976

Mr. Alfred L. Hantman, Chief
General Crimes Section
Criminal Division
U.S. Department of Justice
Washington, D.C. 20530

Attention: John J. Dion, Attorney

Re: D.B. Cooper - Aircraft Piracy, Extortion

Dear Mr. Hantman:

Although I have reviewed the briefs which were filed in United States v. Doe, 401 F.Supp. 63 (E.D. Wisc. 1975) which you enclosed with your letter of November 10, 1976, I continue to hold the opinion that a "John Doe" indictment in the above-entitled case is not appropriate. As I have previously stated, this opinion is based upon the fact that there is at the present time, no firm idea as to who D. B. Cooper really is. The present fact situation is in contrast to that which the court encountered in United States v. Doe, in which, at the time of the indictment, law enforcement agents knew who the defendant was but simply lacked information with respect to his name other than "Leo." For this reason, I believe that a "John Doe" indictment would serve no purpose in the D. B. Cooper case.

It is also worth noting that, although the five-year statute of limitations, if applicable, is about to expire, the six-year statute of limitations for tax offenses will not expire for yet another year. Therefore, even if the government should fail in its argument that the offense committed by D. B. Cooper is a capital offense and accordingly has no statute of limitations, it will still be possible to fall back upon the stack of tax offenses, at least for an additional year.

For the reasons stated in this letter, this office is unwilling to pursue a "John Doe" indictment charging D. B. Cooper with aircraft piracy.

Very truly yours,

STAN PITKIN
United States Attorney

ROBERT H. WESTINGOUSE
Assistant U. S. Attorney

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

COPY RECEIVED

NOV 15 1976

UNITED STATES ATTORNEY
Seattle, Washington

Address Reply to the
Division Indicated
and Refer to Initials and Number

ALH:JJD:mep
88-82-0

November 10, 1976

Mr. Stan Pitkin
United States Attorney
Seattle, Washington

Attention: Mr. Robert H. Westinghouse
Assistant United States Attorney

Re: D. B. Cooper - Aircraft Piracy, Extortion

Dear Mr. Pitkin:

Reference is made to our recent correspondence concerning the advisability of seeking a "John Doe" indictment charging the above-captioned subject in connection with the November 24, 1971 skyjacking of Northwest Orient Airlines Flight 305.

By letter dated May 11, 1976 we advised that such an indictment containing a description of the subject would, in our opinion, be legally sustainable. Thus, we recommended presentation of the case to the grand jury in order to protect the prosecutive posture of the case. We maintain that the case of United States v. Doe, 401 F. Supp. 63 (E.D. Wisc. 1975) is supportive of our views on this issue. Enclosed for your review are copies of legal memoranda submitted to the court in that case.

Please advise as to your plans and views regarding the prosecution of this case.

Sincerely,

ALFRED L. HANTMAN, Chief
General Crimes Section
Criminal Division

By: John J. Dion
JOHN J. DION
Attorney

Enclosures

November 10, 1976

ALH:JJD:mep
88-82-0

Mr. Stan Pitkin
United States Attorney
Seattle, Washington

Attention: Mr. Robert H. Westinghouse
Assistant United States Attorney

Re: D. B. Cooper - Aircraft Piracy,
Extortion

Dear Mr. Pitkin:

Reference is made to our recent correspondence concerning the advisability of seeking a "John Doe" indictment charging the above-captioned subject in connection with the November 24, 1971 skyjacking of Northwest Orient Airlines Flight 305.

By letter dated May 11, 1976 we advised that such an indictment containing a description of the subject would, in our opinion, be legally sustainable. Thus, we recommended presentation of the case to the grand jury in order to protect the prosecutive posture of the case. We maintain that the case of United States v. Doe, 401 F. Supp. 63 (E.D. Wisc. 1975) is supportive of our views on this issue. Enclosed for your review are copies of legal memoranda submitted to the court in that case.

Please advise as to your plans and views regarding the prosecution of this case.

Sincerely,

ALFRED L. HANTMAN, Chief
General Crimes Section
Criminal Division

By:
JOHN J. DION
Attorney

Enclosures

UNTIED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, Plaintiff v. JOHN DOE a/k/a LEO, a white Male, Approximately 23 years old, approximately 5'7" tall, approximately 135 pounds, with black hair, brown eyes and a black mustache RAYMOND ZOCCOLA Defendants	)	CASE NO. 73-CR-266. An ancillary action pursuant to Rule 12, Fed. R. Crim. P.; Amend. 4 and 5, Const. U.S.

Attention: Honorable Myron L. Gordon, United States District Judge.

DEFENDANT'S MOTION TC DISMISS DEFECTIVE INDICTMENT

Now comes the defendant herein, properly named LEONARD TERRY MARCHESANI, who personally and by his attorney, J.J. Van De Graaf, Sr., hereby respectfully submits unto the Court his above-captioned motion Defendant seeks hereby to obtain an appropriate Order which shall dismiss the indictment heretofore returned against him in this cause by the Federal Grand Jury sitting in the Eastern District of Wisconsin, Milwaukee, Wisconsin, on date of September 17, 1973.[1]

As grounds for his within motion, the siad defendant humbly submits the following:

(1) that the so-called "John Doe" indictment filed against him in Case No. 73-CR-266 is fatally defective because,

(a) it failed to meet the consstitutional requirement of validity contemplated by the Fifth Amendment to the Constitution of the United States; and,

J. J. VAN DE GRAAF
ATTORNEY AND
COUNSELOR AT LAW
27930 HARPER AVENUE
ST. CLAIR SHORES,
MICHIGAN 48081
775-5210

[1] A true copy of the said indictment is attached hereto as APPENDIX "A".

(b) it permitted a "dragnet" arrest in flagrant disregard of the Fourth Amendment command that an arrest warrant must "particularly" describe "the person...to be seized," and further because,

(2) the constitutional infirmities of such an indictment divest this Court of jurisdiction over the person of this defendant for purpose of conducting trial proceedings on the charges contained therein.

WHEREFORE, the defendant herein, LEONARD TERRY MARCHESANI, here respectfully moves this Honorable Court to promptly enter its Order dismissing the indictment filed against him in Case No. 73-CR-266.

Respectfully submitted,

VAN DE GRAAF, CARPENTER & VAN DE GRAAF,
Attorneys and Counselors at Law.

BY: J J Van De Graaf, Sr
J. J. VAN DE GRAAF, SR.,
Bar No. P-21714,
Attorney for Defendant,
Lawyer's Building,
27530 Harper Avenue,
St. Clair Shores, Michigan 48081
Telephone: 313-775-5210.

DATED: JANUARY 29, 1975.

STATE OF MICHIGAN)
) SS.
COUNTY OF MACOMB)

Subscribed and sworn to before me, a notary public, this 29th day of January, 1975.

Christine R. Young
NOTARY PUBLIC, CHRISTINE R YOUNG
County of Macomb,
State of Michigan.

MY COMMISSION EXPIRES: SEPTEMBER 28, 1977

J. J. VAN DE GRAAF
ATTORNEY AND
COUNSELOR AT LAW
27530 HARPER AVENUE
ST. CLAIR SHORES,
MICHIGAN 48081
775-5210

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, Plaintiff,	INDICTMENT
vs.	
JOHN DOE a/k/a LEO, a white male, approximately 23 years old, approximately 5'7" tall, approximately 135 pounds, with black hair, brown eyes and a black mustache RAYMOND ZOCCOLA Defendants.	No. 73-CR-266 (T. 21, U.S.C., S. 841(a)(1)) (T. 18, U.S.C., S. 2)

THE SPECIAL GRAND JURY CHARGES:

That on or about June 27, 1973 at Lake Geneva, Walworth County, in the State and Eastern District of Wisconsin,

JOHN DOE a/k/a LEO, a white male, approximately 23 years old, approximately 5'7" tall, approximately 135 pounds, with black hair, brown eyes and a black mustache
RAYMOND ZOCCOLA

knowingly and intentionally did unlawfully possess with intent to distribute and did distribute approximately 29.40 grams (gross weight) of phencyclidine HCl, a Schedule III Controlled Substance; all in violation of Title 21, Section 841(a)(1), United States Code and Title 18, Section 2, United States Code.

A TRUE BILL:

Dated: September 17, 1973.

/s/ Eugene R. Kosidowski
Deputy Foreman

/s/ David J. Cannon
DAVID J. CANNON
United States Attorney

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA, Plaintiff v. JOHN DOE a/k/a LEO, a White male, approximately 23 years old, approximately 5'7" tall, approximately 135 pounds, with black hair, brown eyes and a black mustache RAYMOND ZOCCOLA Defendants	CASE NO. 73-CR-266, An ancillary action pursuant to Rule 12, Fed. R. Crim. P., Amend. 4 and 5, Const. U.S.

Attention: Honoable Myron L. Gordon, United States District Judge.

DEFENDANT'S BRIEF

IN SUPPORT OF MOTION TO DISMISS DEFECTIVE INDICTMENT

Defendant herein, LEONARD TERRY MARCHESANI, personally and by his attorney, J. J. Van De Graaf, Sr., hereby respectfully submits unto the Court this, his brief in support of his foregoing motion to dismiss the defective indictment filed against him in Case No. 73-CR-266.

1. JURISDICTION

> "THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS, AND EFFECTS, AGAINST UNREASONABLE SEARCHES AND SEIZURES, SHALL NOT BE VIOLATED, AND NO WARRANTS SHALL ISSUE BUT UPON PROBABLE CAUSE, SUPPORTED BY OATH OR AFFIRMATION, AND PARTICULARLY DESCRIBING THE PLACES TO BE SEARCHED, AND THE PERSON OR THINGS TO BE SEIZED."
>
> \- AMEND, 4, CONST. U.S. (emphasis supplied.)

Jurisdiction is conferred on this Court by the provisions of Rule 12 of the Federal Rules of Criminal Procedure; by 18 U.S.C., Section 3231; and by the Fourth and Fifth Amendments to the Constitution of the United States.

J. J. VAN DE GRAAF
ATTORNEY AND
COUNSELOR AT LAW
27330 HARPER AVENUE
ST. CLAIR SHORES,
MICHIGAN 48081
775-5210

The Fifth Amendment, of course, contemplates prosecution by a valid indictment. But failing such, as evidenced here, Rule 12 (b)(2) provides, in pertinent part, as follows:

> "Defenses and Objections Which Must Be Raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment... may be raised only by motion before trial.... Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding."
> -Rule 12(b)(2), Fed. R. Crim. P.

By Order of this court entered January 17, 1975, defendant was given until January 31, 1975, to file pretrial motions in this cause. In compliance therewith, defendant hereby invokes the time computation benefits of Rule 45 (b) and (e), Fed. R. Crim. P.

2. ISSUE PRESENTED FOR DETERMINATION

The single issue presented for determination herein askes whether or not the so-called "John Doe" indictment filed against this defendant meets the test of validity contemplated by the Fifth Amendment to the Constitution of the United States of America? Defendant submits that it does not.

Quite plainly, the indictment filed in this case permitted a "dragnet" arrest of defendant contrary to the Fourth Amendment command that an arrest warrant must "particularly" describe "the person...to be seized." Furthermore, because this defendant was indicted and arrested under the fictitious name of "John Doe" along with another properly named defendant, to wit, Raymond Zoccola he has been unconstitutionally deprived of the equal protection of the laws.

3. BRIEF STATEMENT OF THE FACTS INVOLVED

In this case, the defendant, LEONARD TERRY MARCHESANI, has been loosely and vaguely identified and complained against by one Joseph Gutensohn, an under-cover federal narcotice agent assigned to duty in the Eastern District of Wisconsin. It is Agent Gutensohn's accusation that on June 27, 1973, defendant together with a certain Raymond Zoccola participated in the unlawful distribu-

J. J. VAN DE GRAAF
ATTORNEY AND
COUNSELOR AT LAW
27530 HARPER AVENUE
ST. CLAIR SHORES,
MICHIGAN 48081
775-5210

tion of approximately 29.40 grams of phencyclidine HCI (a narcotic drug) at Lake Geneva, Wisconsin. Oddly enough, the defendant herein was neither arrested then and there nor were his fingerprints or picture taken by any law enforcement officer for purpose of identification. Sometime thereafter, however, the Federal Grand Jury sitting in Milwaukee, Wisconsin, returned the instant indictment which specifically charged the subject violation of 21 U.S.C. 841 (2)(1) and 18 U.S.C. 2(a). Named as co-defendants the therein were the said Raymond Zoccola and a certain "John Doe", also known as "Leo," for whom the following loose and general description was given:[1]

> "JOHN DOE a/k/a LEO, a white male, approximately 23 years old, approximately 5'7" tall, approximately 135 pounds, with black hair, brown eyes and a black mustache.
> RAYMOND ZOCCOLA.
> (Indictment, Case No. 73-CR-266).

The indictment failed, however, to name any person as the object of the alleged unlawful distribution of the said drug.

Moreover, it was not until October 16, 1974 (approximately sixteen months after the commission of the offense), that this defendant was arrested and jailed in the County of Macomb, Eastern District of Michigan, Southern Division, on a "dragnet" John Doe warrant that stemmed from the John Doe indictment filed against him this casue. The only identification of him contained in either or both of those anemic documents erroneously names him as "John Doe," also known as "Leo," and describes him in terms that might very well fit tens of thousands of young men of Latin origin.

Nevertheless, two days after his arrest, to wit, on date of October 18, 1974, defendant was arraigned in the United States Court of Detroit, Michigan, on a petition for removal to the Eastern District of Wisconsin, Milwaukee, to stand federal trial for the said offense. The Honorable Barbara Hackett, United States Magistrate presiding, promptly enlarged defendant on ten thousand ($10,000) personal bail. A series of continuances of the said matter followed.

J. J. VAN DE GRAAF
ATTORNEY AND
COUNSELOR AT LAW
27730 HARPER AVENUE
ST. CLAIR SHORES,
MICHIGAN 48081
775-5210

[1]Defendant submits that he has never used the name "Leo", and that, he is Known to others either as "Leonard" or by his nickname "Foondi."

Now, more than eighteen months after the fact, the govervment still has not overcome the initial infirmity involved in defendant's arrest and, accordingly, he is entitled to have the instant invalide indictment dismissed.

4. LAW AND ARGUMENT INVOLVED

"NO PERSON SHALL BE...DEPRIVED OF LIFE, LIBERTY, OR PROPERTY WITHOUT DUE PROCESS OF LAW,..." - AMEND. 5, CONST. U.S.

The defendant herein proceeds, as he must, on the indisputable premise that the "best of good intentions cannot gloss over technical or fundamental deprivation of procedural or substantive rights." United States v. Seay, 432 F. 2d 395 (5th Cir. 1970). Most certainly, nothing that occures in contravention of the Constitution can confer jurisdiction on the court to hear and determine the cause. Johnson v. United States, 333 Fed. 2d 371 (10th Cir. 1964). And nothing at all that occurs after an invalid arrest, without probable cause to believe the defendant committed the offense (Wong Sun v. United States, 371 U.S. 471, 1963), can make the arrest lawful. United States v. Valentine, 202 F. Supp. 677 (D.C. Tenn. 1962); United States v. Hughes. 201 F. Supp. 615 (D.C. Pa. 1962), aff'd. 311 F. 2d 845. In Giordenello v. United States, 357 U.S. 480, 485-486, the Supreme Court held in a comparable vein that a complaint is defective when it does not provide any reasonable basis for the commissioner's determination under Rule 4, Fed. R. Crim. P. The same was held of the arrest warrant in the guideline case of Aguilar v. Texas, 378 U.S. 108 (1964). Defendant submits that the same holding should be made by this Court in respect of the indictment filed against him in this case.

It has long been held that mere zeal in tracking down crime is not enough. Experience counsels that safeguards must be exercised to insure against the dangers of the over-zealous as well as the despotic. McNabb v. United States, 318 U.S. 332 (1943). And, thus, the courts have consistently held up to the present time.

It is now settled law that when a defendant is indicted and arrested under the fictitious name of "John Doe" along with another named defendant, he is

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ATTORNEY AND
COUNSELOR AT LAW
27530 HARPER AVENUE
ST. CLAIR SHORES,
MICHIGAN 48081
775-5210

- state case = protection

unconstitutionally deprived of equal protection of the laws. Connor v. Picard, 434 F. 2d 673 (1st Cir. 1970). See West v. Cabell, 153 U.S. 78 (1894); United States v. Cruikshank, 92 U.S. 542, 558, "...the indictment... must descend to particulars." And, similarly, where a defendant was indicted and arrested under the name of "Richard Joseph Beedle a/k/a Richard Bedle," because the prosecutor had made a mistake in spelling the defendant's name, it was held to be reversible error since the alias "Bedle" could serve no useful purpose except to prejudice the defendant. United States v. Beedle, 463 F. 2d 721 (3rd Cir. 1972).

Moreover, there no longer exists any doubt that the Fifth Amendment contemplates a valide indictment capable of meeting the test of particularity formulated in the Fourth Amendment. Application of Jackson, 338 F. Supp. 1225 (D.C. Tenn. 1971). The indictment filed against the defendant in this case has plainly failed to meet that test.

5. CONCLUSION

WHEREFORE, this Honorable Court is respectfully moved, now and here, to grant the defendant, LEONARD TERRY MARCHESANI, the relief requested by him on page 2 of his foregoing motion.

Respectfully submitted,

VAN DE GRAAF, CARPENTER & VAN DE GRAAF,
Attorneys and Counselors at Law.

BY: J J Van de Graaf Sr

J. J. VAN DE GRAAF, SR.,
Bar No. P-21714,
Attorney for Defendant,
Lawyers Building,
27530 Harper Ave.,
St. Clair Shores, Michigan 48081
Telephone: 313-775-5210.

DATED: JANUARY 29, 1975.

J. J. VAN DE GRAAF
ATTORNEY AND
COUNSELOR AT LAW
27530 HARPER AVENUE
ST. CLAIR SHORES,
MICHIGAN 48081
775-5210

Filed 2/5/75

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

vs. 73-CR-266

JOHN DOE a/k/a LEO,

Defendant.

BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

On September 17, 1973, an indictment was returned against one Raymond Zoccola and "John Doe a/k/a Leo, a white male, approximately 23 years old, approximately 5'7" tall, approximately 135 pounds, with black hair, brown eyes and a black mustache". On October 16, 1974, the defendant, whose true name is Leonard Terry Marchesani, was arrested as the John Doe named in the indictment. Marchesani now moves to dismiss the indictment because the John Doe characterization is said to violate the Fifth Amendment.

Although the cases in the area are few, it is quite clear that Rule 4, Federal Rules of Criminal Procedure allows individuals to be named in an indictment by other than their true name. "The warrant shall be signed by the Magistrate and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty". See United States v. Swanner, 237 F. Supp.

69 (E.D. Tenn., 1964); United States v. Interbartolo, 192 F. Supp. 587 (D.C. Mass., 1961).

The instant indictment gave a detailed description of the defendant by approximate height, weight and age as well as hair and eye color, the notation of a mustache, and the alias "Leo". We suggest that this more than adequately complied with the strictures of Rule 4 and the existing case law. Unlike the situation presented in United States v. Swanner, supra, and there is no indication that this defendant has not used the alias "Leo" as alleged in the indictment. (The defendant's true first name is Leonard which, we submit, closely approximates Leo).

For the foregoing reasons, it is respectfully submitted that the defendant's motion to dismiss be denied.

Respectfully submitted,

WILLIAM J. MULLIGAN
United States Attorney

By:

/S/
DAVID B. BUKEY
Assistant United States Attorney

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBERS

JEO:csg

CR72-0451

United States Department of Justice

UNITED STATES ATTORNEY
WESTERN DISTRICT OF WASHINGTON
UNITED STATES COURT HOUSE
SEATTLE, WASHINGTON 98104

MAILING ADDRESS:
P. O. BOX 1227
SEATTLE, WASHINGTON 98111

November 12, 1976

Mr. Scholer Bangs
Industrial Consultant
362 East Michelle Street
West Covina, CA 91790

Dear Mr. Bangs:

In response to your letter dated November 9, 1976, we are now responding to the question of whether the statute has run or not. It is our position that the crime which D.B. Cooper committed was a capital offense at the time he committed it and therefore the statute of limitations has not run. The statute has subsequently been amended and as it presently stands, the crime, if committed today in the same manner, would not be capital. However, since it was capital at the time it is our position that there is no statute of limitations. The statute involved is 49 U.S.C. 1472.

Very truly yours,

STAN PITKIN
United States Attorney

JERALD E., OLSON
Assistant United States Attorney

SCHOLER BANGS
INDUSTRIAL CONSULTANT
362 E. MICHELLE STREET
WEST COVINA, CA 91790
(213) 330-3793

COPY RECEIVED

NOV 12 1976

UNITED STATES ATTORNEY
Seattle, Washington

November 9, 1976

Jerald E. Olson
Assistant United States Attorney
United States Court House
Seattle, WA 98104

Mr. Olson...

Last April 20 you replied to my April 16 letter inquiring about the status of the D.B. Cooper $200,000 'hijacking' from a Northwest Airlines plane on Thanksgiving Day 1971.

At the time you were unable to comment on whether Cooper, if living, will be 'home free' this coming Thanksgiving Day under provisions of a statute of limitations.

If you are now free to answer the question a reply by return mail will be appreciated... I have a request for an article as a wrap-up of the affair.

If still unable to tell me, whom should I contact (by phone as well as by address) for an accurate comment on whether Cooper will or will not be free to surface, and spend his $200,000, under which statute of limitations?

Cordially,

Scholer Bangs

Scholer Bangs

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBERS

SP:csg

CR720451

United States Department of Justice

MAILING ADDRESS:
P. O. BOX 1227
SEATTLE, WASHINGTON 98111

UNITED STATES ATTORNEY
WESTERN DISTRICT OF WASHINGTON
UNITED STATES COURT HOUSE
SEATTLE, WASHINGTON 98104

August 24, 1976

Mr. Alfred L. Hantman
Chief, General Crimes Section
Criminal Division, FTRI Building
Department of Justice
Washington, D.C. 20530

Re: UNKNOWN SUBJECT, a/k/a Dan Cooper,
a/k/a D. B. Cooper;
Air Piracy - Hijacking - Extortion
Our: CR720451
Your: ALH:JJD:gvh; 88-61-20.

Dear Sir:

We wrote to you by letter dated April 20, 1976, indicating we had just received what would be the first of many inquiries prior to the five year anniversary date of the D.B. Cooper skyjacking of November 24, 1971. That inquiry and those that have followed and will follow are directed to the question of the status of the investigation; whether the statute of limitations has run; and what the consequences are.

We indicated in our letter of April 20 that we were responding to the effect that it was not our policy to make comments about investigations and it was not our policy to comment on legal issues (which includes comment on any statute of limitations issue). We felt this was preferable to stating we believed the statute was not tolled as Cooper might mistakenly feel the statute had run and come out (since his story is worth many dollars). We also felt it was preferable to make no comment rather than stating we believed the statute had run (when we believe it has not) in order to mislead Cooper into disclosing himself, if he is in fact alive.

The Federal Bureau of Investigation agreed with our position at the time and is presently of the feeling that this is still the more preferable position.

However, we have reconsidered our position and our re-evaluation has led us to conclude we should straight-out take the position the statute of limitations has not run. This approach has two advantages. First, it keeps us from having to play fencing games with the news media when reporters press for a statement. In fact, the continued interest and pointed questioning by the press really leaves us little option. Second, and really the most important reason, it supports the position that "D.B. Cooper" is no folk-hero Robin Hood who pulled off a coup and he will not get away with his crime, if in fact he is alive.

Earlier this week a local newspaper reporter, who apparently is doing a feature article on Cooper for Sunday release (in September), was advised by our office that we do not believe the statute of limitations has run.

We felt you should be aware of our position and thought perhaps you would brief the Public Information Office, since they might get inquiries, both directly and as a result of our position, and should be aware of our posture so that we can be consistent in our responses.

Very truly yours,

Stan Pitkin

STAN PITKIN
United States Attorney

Copy to:

Mr. John M. Reed
Special Agent in Charge
Federal Bureau of Investigation
710 Federal Building
915 Second Avenue
Seattle, Washington 98174

Attn: Mr. Ronald N. Nichols
Special Agent

Form DJ-96a
(Rev. 6-22-66)

DEPARTMENT OF JUSTICE
ROUTING SLIP

TO: NAME	DIVISION	BUILDING	ROOM
1. Pringle ASAC FBI		FOB	
2.			
3.			
4.			

- ☐ SIGNATURE
- ☐ APPROVAL
- ☐ SEE ME
- ☐ RECOMMENDATION
- ☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE..........
- ☐ PREPARE REPLY FOR THE SIGNATURE OF..........
- ☐ COMMENT
- ☐ NECESSARY ACTION
- ☐ NOTE AND RETURN
- ☐ CALL ME
- ☑ PER CONVERSATION
- ☐ AS REQUESTED
- ☐ NOTE AND FILE
- ☐ YOUR INFORMATION

REMARKS

Here is a first draft of a letter I will not send until I've heard your views per our conversation please advise

FROM: NAME	BUILDING & ROOM	EXT.	DATE
Stan Pitkin - USA			

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBERS
SP:csg
CR720451

United States Department of Justice

UNITED STATES ATTORNEY
WESTERN DISTRICT OF WASHINGTON
UNITED STATES COURT HOUSE
SEATTLE, WASHINGTON 98104

MAILING ADDRESS:
P. O. BOX 1227
SEATTLE, WASHINGTON 98111

August , 1976

Draft.

Mr. Alfred L. Hantman
Chief, General Crimes Section
Criminal Division, FTRI Building
Department of Justice
Washington, D.C. 20530

Re: UNKNOWN SUBJECT, a/k/a Dan Cooper,
a/k/a D.B. Cooper;
Air Piracy - Hijacking - Extortion;
Our: CR72-0451
Your: ALH:JJD:gvh; 88-61-20.

Dear Sir:

We wrote to you by letter dated April 20, 1976, indicating we had just received what would be the first of many inquiries prior to the five year anniversary date of the D.B. Cooper skyjacking of November 24, 1971. That inquiry and those that have followed and will follow are directed to the question of the status of the investigation; whether the statute of limitations has run; and what the consequences are.

We indicated in our letter of April 20 that we were responding to the effect that it was not our policy to make comments about investigations and it was not our policy to comment on legal issues (which includes comment on any statute of limitations issue). We felt this was preferable to stating we believed the statute was not tolled as Cooper might mistakenly feel the statute had run and come out (since his story is worth many dollars). We also felt it was preferable to make no comment rather than stating we believed the statute had run (when we believe it has not) in order to mislead Cooper into disclosing himself, if he is in fact alive.

We have reconsidered our position and our re-evaluation leads us to conclude we should straight-out take the position the statute of limitations has not run. This approach has two advantages. First, it keeps us from having to play fencing games with the press when reporters press for a statement. Second, and really the most important reason, it supports the position that "D.B. Cooper" is no folk-hero Robin Hood who pulled off a coup and he will not get away with his crime, if in fact he is alive.

We felt you should be aware of our position and thought perhaps you would brief the Public Information Office, since they might get inquiries, both directly and as a result of our position, and should be aware of our posture so that we can be consistent in our responses.

Very truly yours,

STAN PITKIN
United States Attorney

Copy to: Mr. John M. Reed
Special Agent In Charge
Federal Bureau of Investigation
710 Federal Building
Seattle, Washington 98174

Attn: Mr. Ronald N. Nichols
Special Agent

RHW:jt
CR 720451

July 14, 1976

Mr. Alfred Hantman
Acting Chief, General Crimes Section
Criminal Division
U.S.Department of Justice
Washington, D.C. 20530

Attention: John J. Dion, Attorney

Re: D. B. Cooper - Aircraft Piracy, Extortion

Dear Mr. Hantman:

Your letter of May 13, 1976 has been referred to me. I have reviewed the cases which you have cited and I agree that, under certain circumstances, a "John Doe" indictment is appropriate. I question, however, whether such circumstances are presented in the D. B. Cooper case.

Although the F.B.I. has developed a detailed composite description and several artists' sketches of the subject, it is all too obvious from reading the investigative report that the evidence does not point to a single person but rather to a group of persons, all of which fit the description. In short, I do not believe that the investigation has narrowed its focus to a single subject to the extent that a "John Doe" indictment is possible. If this matter were presented to the grand jury, it would be impossible to satisfy the probable cause standard required to establish that a given individual had committed the offense. This contrasts sharply with the facts of United States v. Doe, 401 F. Sup. 63 (E.D. Wisc. 1975) in which a particular individual, whose identity was unknown, was indicted as "John Doe" a/k/a "Leo."

In conclusion, while I agree that the best approach would be to obtain an indictment in this case prior to the running of the five year statute, in order to avoid the argument that the prosecution is barred by the statute, I do not believe that it is possible to return such an indictment under the facts of this case. Your thoughts with respect to this matter will be appreciated.

Very truly yours,

STAN PITKIN
United States Attorney

ROBERT H. WESTINGHOUSE
Assistant U. S. Attorney

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the Division Indicated and Refer to Initials and Number

ALH:JJD:gvh
88-61-20

May 13, 1976

UNITED STATES ATTORNEY
Seattle, Washington

MAY 17 1976

CIVIL ☐ CRIM ☑ ADMIN ☐

Asou

Mr. Stan Pitkin
United States Attorney
Seattle, Washington

Attention: Mr. Jerald E. Olson
Assistant U. S. Attorney

Re: D. B. Cooper - Aircraft Piracy, Extortion

Dear Mr. Pitkin:

This is in response to your letter of April 13, 1976, concerning the legal basis for seeking a "John Doe" indictment against the above-captioned subject in order to toll the statute of limitations.

As you know, lengthy investigation has thus far been unsuccessful in establishing a positive identity of the subject who used the names D. B. Cooper and Dan Cooper in the November 24, 1971 skyjacking of Northwest Orient Airlines Flight 305. No fingerprints, handwriting or other uniquely identifying evidence has been developed. However, several witnesses to the incident including passengers and stewardesses have furnished descriptions of the subject. From these witnesses the FBI has developed a detailed composite description and artist's sketch of the subject. In our view a "John Doe" indictment identifying the defendant by means of the composite description is legally sustainable.

Support for our view is drawn from United States v. Doe, 401 F. Supp. 63 (E.D. Wisc. 1975). In that case an indictment charging "John Doe" aka "Leo" and including a physical description was upheld against constitutional attack. Finding that the description in the indictment sufficiently identified the defendant, the court held that the indictment adequately apprised the defendant of the offense and sufficiently protected him from the threat of double jeopardy. (See Russell v. United States, 369 U.S. 749 (1972)). Additionally, the court rejected the defendant's contention that the indictment constituted a denial of equal protection. It should be noted that the description contained in the indictment enumerated characteristics such as sex, height, weight, etc., but included no *per se* uniquely distinguishable features.

Connor v. Commonwealth, Mass. 296 N.E. 2d 172 (1973) was the culmination of protracted litigation concerning a "John Doe" indictment. (See Connor v. Picard, 434 F. 2d 673 (1st Cir. 1970), Picard v. Connor, 404 U.S. 270 (1971)). In that case the grand jury returned an indictment for murder against "John Doe" without describing the defendant in the indictment itself. The court held that the indictment was an impermissible delegation of the function of the grand jury to the prosecutor. Stating that the indictment as written was an indictment of the crime but not a particular defendant, the court inferred that an indictment containing a sufficient description could be sustained. "It must appear that there is a warrantable inference (emphasis added), from a consideration of the indictment's description of the accused, together with the proof concerning the proceedings before the grand jury that the grand jury indicted the defendant." 296 N.E. 2d at 172. (See also People v. Doe, 347 N.Y.S. 2d 1000 (1973).

Thus we recommend that your office seek a "John Doe" indictment containing the aliases and the composite description. Such action we believe would strengthen the government's position concerning the tolling of the statute of limitations.

Should you desire further assistance in this matter, please do not hesitate to contact us.

Sincerely,

ALFRED L. HANTMAN, Acting Chief
General Crimes Section
Criminal Division

By: John J. Dion
JOHN J. DION
Attorney

FD-204 (Rev. 3-3-59)

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

UNITED STATES ATTORNEY
Seattle, Washington

JUN - 1 1976

Copy to: 1 - USA, Seattle

CIVIL ☐ CRIM ☑ ADMIN ☐

Olson

Report of: SA RONALD N. NICHOLS Office: SEATTLE
Date: 5/27/76

Field Office File #: 164-81 Bureau File #: 164-2111

Title: UNKNOWN SUBJECT; NC
NORTHWEST AIRLINES FLIGHT 305
FROM PORTLAND, OREGON TO
SEATTLE, WASHINGTON
11/24/71

Character: CRIME ABOARD AIRCRAFT-HIJACKING; EXTORTION

Synopsis: Investigation to identify unknown subject to date has been negative. Assistant U. S. Attorney JERALD E. OLSON advised that a JOHN DOE warrant could not be obtained because the suspect of this case has not been suitably identified. A seminar was held 4/8-9/76 concerning this case at which time a suggestion was made to institute a publicity campaign for release in early November, 1976. ARMED & DANGEROUS.

-P-

DETAILS:

The following investigation to identify unknown subject to date, negative.

On 2/3/73, Assistant U. S. Attorney JERALD E. OLSON was contacted concerning this case and he advised that a JOHN DOE warrant could not be obtained in this matter because the subject of this case has not been "suitably" identified. OLSON explained that a JOHN DOE warrant is used when an individual is known, his habits and traits are known, however, his name is unknown. OLSON gave as an example a narcotics case where an individual who was known only by a nickname or perhaps as a frequentor of a certain bar or restaurant. OLSON stated that in these cases where you have a definite personality or definite descriptive data, JOHN DOE warrants are applicable.

OLSON advised in the NORJAK matter, the Unsub is not suitably identified to present this case the grand jury in order to get a JOHN DOE warrant.

In addition to the above, Assistant U. S. Attorney OLSON stated that the statute of limitations concerning possession of stolen property runs from the day the theft occurred as long as the property is not converted into any other form. OLSON stated that this is a moot point; however, in his opinion if the Unsub in this matter has not converted the money than the statute of limitations for possession of stolen property would expire in five years from November 24, 1971.

The following letter was written by Assistant U. S. Attorney OLSON to Mr. ALFRED L. HANTMAN, a chief of the General Crimes Section, Criminal Division, Department of Justice:

UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBERS
JEO:csg
CR720451

[Unit]ed States Department of Justice

P. O. BOX 1227
SEATTLE, WASHINGTON 98111

UNITED STATES ATTORNEY
WESTERN DISTRICT OF WASHINGTON
UNITED STATES COURT HOUSE
SEATTLE, WASHINGTON 98104

April 20, 1976

Mr. Alfred L. Hantman
Chief, General Crimes Section
Criminal Division, FTRI Building
Department of Justice
Washington, D.C. 20530

Re: UNKNOWN SUBJECT, a/k/a Dan Cooper,
a/k/a D.B. Cooper;
Air Piracy - Hijacking - Extortion;
Our: CR72-0451
Your: CWB:JFB:mac; 88-61-20

Dear Sir:

We wrote to you under letter of April 13, 1976, to inquire as to any department comments on whether there was any legal basis for trying to obtain a "John Doe" indictment on the D.B. Cooper skyjacking case, which, it appears, is the only unsolved skyjacking case at this time.

Prior to that inquiry, by letter dated March 31, 1975, from us to your office; and by letter response from your office dated August 11, 1975, it was determined that the government's position is that there is no five year statute of limitation on any prosecution since the crime was a capital offense at the time of its commission.

We have just received what will undoubtedly be the first of many inquiries between now and the five year anniversary date on November 24, 1976, as to the status of the investigation and whether or not the statute will run and what the consequences are. We are responding to the effect that it is not our policy to make comments about investigations and it is not our policy to comment on legal issues (which includes comment on any statute of limitations issue). We feel this is preferable to stating we believe the statute is not tolled as Cooper may mistakenly feel the statute has run and come out (since his story is worth many dollars). We also feel it is preferable to make no comment rather than stating we believe the statute has run (when we believe it has not) in order to mislead Cooper into disclosing himself.

If the Department has a different position, please advise as we feel our office and the Department should take the same position to such inquiries.

Very truly yours,

STAN PITKIN
United States Attorney

Jerald E. Olson

JERALD E. OLSON
Assistant United States Attorney

Copy to: Mr. Ron Nichols
Special Agent
Federal Bureau of Investigation
710 Federal Building
Seattle, WA 98174

On April 8-9, 1976, a conference was held in San Francisco, California to determine the present status of this matter and in addition to develop new ideas to assist in the identification and location of the subject of this case. A suggestion was made at this conference to institute a publicity campaign for release in early November, 1976 widely publicizing a reward for any twenty dollar bill that is part of the ransom money turned into the FBI.

The Bureau advised by airtel dated 5/5/76 that this suggestion has been approved and efforts to initiate appropriate ground work steps are now being taken.

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

ALH:JJD:gvh
88-61-20

May 13, 1976

UNITED STATES ATTORNEY
Seattle, Washington

MAY 17 1976

CIVIL ☐ CRIM ☑ ADMIN ☐

Olson

Mr. Stan Pitkin
United States Attorney
Seattle, Washington

Attention: Mr. Jerald E. Olson
Assistant U. S. Attorney

Re: D. B. Cooper - Aircraft Piracy,
Extortion

Dear Mr. Pitkin:

This is in response to your letter of April 13, 1976, concerning the legal basis for seeking a "John Doe" indictment against the above-captioned subject in order to toll the statute of limitations.

As you know, lengthy investigation has thus far been unsuccessful in establishing a positive identity of the subject who used the names D. B. Cooper and Dan Cooper in the November 24, 1971 skyjacking of Northwest Orient Airlines Flight 305. No fingerprints, handwriting or other uniquely identifying evidence has been developed. However, several witnesses to the incident including passengers and stewardesses have furnished descriptions of the subject. From these witnesses the FBI has developed a detailed composite description and artist's sketch of the subject. In our view a "John Doe" indictment identifying the defendant by means of the composite description is legally sustainable.

AMERICAN REVOLUTION BICENTENNIAL 1776-1976

Support for our view is drawn from United States v. Doe, 401 F. Supp. 63 (E.D. Wisc. 1975). In that case an indictment charging "John Doe" aka "Leo" and including a physical description was upheld against constitutional attack. Finding that the description in the indictment sufficiently identified the defendant, the court held that the indictment adequately apprised the defendant of the offense and sufficiently protected him from the threat of double jeopardy. (See Russell v. United States, 369 U.S. 749 (1972)). Additionally, the court rejected the defendant's contention that the indictment constituted a denial of equal protection. It should be noted that the description contained in the indictment enumerated characteristics such as sex, height, weight, etc., but included no per se uniquely distinguishable features.

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Thus we recommend that your office seek a "John Doe" indictment containing the aliases and the composite description. Such action we believe would strengthen the government's position concerning the tolling of the statute of limitations.

Should you desire further assistance in this matter, please do not hesitate to contact us.

Sincerely,

ALFRED L. HANTMAN, Acting Chief
General Crimes Section
Criminal Division

By: John J. Dion
JOHN J. DION
Attorney

May 13, 1976

ALH:JJD:gvh
88-61-20

Mr. Stan Pitkin
United States Attorney
Seattle, Washington

Attention: Mr. Jerald E. Olson
Assistant U. S. Attorney

Re: D. B. Cooper - Aircraft Piracy, Extortion

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This is in response to your letter of April 13, 1976, concerning the legal basis for seeking a "John Doe" indictment against the above-captioned subject in order to toll the statute of limitations.

As you know, lengthy investigation has thus far been unsuccessful in establishing a positive identity of the subject who used the names D. B. Cooper and Dan Cooper in the November 24, 1971 skyjacking of Northwest Orient Airlines Flight 305. No fingerprints, handwriting or other uniquely identifying evidence has been developed. However, several witnesses to the incident including passengers and stewardesses have furnished descriptions of the subject. From these witnesses the FBI has developed a detailed composite description and artist's sketch of the subject. In our view a "John Doe" indictment identifying the defendant by means of the composite description is legally sustainable.

Support for our view is drawn from United States v. Doe, 401 F. Supp. 63 (E.D. Wisc. 1975). In that case an indictment charging "John Doe" aka "Leo" and including a physical description was upheld against constitutional attack. Finding that the description in the indictment sufficiently identified the defendant, the court held that the indictment adequately apprised the defendant of the offense and sufficiently protected him from the threat of double jeopardy. (See Russell v. United States, 369 U.S. 749 (1972)). Additionally, the court rejected the defendant's contention that the indictment constituted a denial of equal protection. It should be noted that the description contained in the indictment enumerated characteristics such as sex, height, weight, etc., but included no *per se* uniquely distinguishable features.

Connor v. Commonwealth, Mass. 296 N.E. 2d 172 (1973) was the culmination of protracted litigation concerning a "John Doe" indictment. (See Connor v. Picard, 434 F. 2d 673 (1st Cir. 1970), Picard v. Connor, 404 U.S. 270 (1971)). In that case the grand jury returned an indictment for murder against "John Doe" without describing the defendant in the indictment itself. The court held that the indictment was an impermissible delegation of the function of the grand jury to the prosecutor. Stating that the indictment as written was an indictment of the crime but not a particular defendant, the court inferred that an indictment containing a sufficient description could be sustained. "It must appear that there is a warrantable inference (emphasis added), from a consideration of the indictment's description of the accused, together with the proof concerning the proceedings before the grand jury that the grand jury indicted the defendant." 296 N.E. 2d at 172. (See also People v. Doe, 347 N.Y.S. 2d 1000 (1973).

Thus we recommend that your office seek a "John Doe" indictment containing the aliases and the composite description. Such action we believe would strengthen the government's position concerning the tolling of the statute of limitations.

Should you desire further assistance in this matter, please do not hesitate to contact us.

Sincerely,

ALFRED L. HANTMAN, Acting Chief
General Crimes Section
Criminal Division

By:
JOHN J. DION
Attorney

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the Division Indicated and Refer to Initials and Number

ALH:JJD:gvh
88-61-20

May 13, 1976

UNITED STATES ATTORNEY
Seattle, Washington

MAY 17 1976

CIVIL ☐ CRIM ☑ ADMIN ☐

Olson

Mr. Stan Pitkin
United States Attorney
Seattle, Washington

Attention: Mr. Jerald E. Olson
Assistant U. S. Attorney

Re: D. B. Cooper - Aircraft Piracy, Extortion

Dear Mr. Pitkin:

This is in response to your letter of April 13, 1976, concerning the legal basis for seeking a "John Doe" indictment against the above-captioned subject in order to toll the statute of limitations.

As you know, lengthy investigation has thus far been unsuccessful in establishing a positive identity of the subject who used the names D. B. Cooper and Dan Cooper in the November 24, 1971 skyjacking of Northwest Orient Airlines Flight 305. No fingerprints, handwriting or other uniquely identifying evidence has been developed. However, several witnesses to the incident including passengers and stewardesses have furnished descriptions of the subject. From these witnesses the FBI has developed a detailed composite description and artist's sketch of the subject. In our view a "John Doe" indictment identifying the defendant by means of the composite description is legally sustainable.

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Sincerely,

ALFRED L. HANTMAN, Acting Chief
General Crimes Section
Criminal Division

By: John J. Dion
JOHN J. DION
Attorney

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBERS

JEO:csg

CR720451

United States Department of Justice

UNITED STATES ATTORNEY

WESTERN DISTRICT OF WASHINGTON
UNITED STATES COURT HOUSE
SEATTLE, WASHINGTON 98104

MAILING ADDRESS:
P. O. BOX 1227
SEATTLE, WASHINGTON 98111

April 20, 1976

Mr. Alfred L. Hantman
Chief, General Crimes Section
Criminal Division, FTRI Building
Department of Justice
Washington, D.C. 20530

Re: UNKNOWN SUBJECT, a/k/a Dan Cooper,
a/k/a D.B. Cooper;
Air Piracy - Hijacking - Extortion;
Our: CR72-0451
Your: CWB:JFB:mac; 88-61-20

Dear Sir:

We wrote to you under letter of April 13, 1976, to inquire as to any department comments on whether there was any legal basis for trying to obtain a "John Doe" indictment on the D.B. Cooper skyjacking case, which, it appears, is the only unsolved skyjacking case at this time.

Prior to that inquiry, by letter dated March 31, 1975, from us to your office; and by letter response from your office dated August 11, 1975, it was determined that the government's position is that there is no five year statute of limitation on any prosecution since the crime was a capital offense at the time of its commission.

We have just received what will undoubtedly be the first of many inquiries between now and the five year anniversary date on November 24, 1976, as to the status of the investigation and whether or not the statute will run and what the consequences are. We are responding to the effect that it is not our policy to make comments about investigations and it is not our policy to comment on legal issues (which includes comment on any statute of limitations issue). We feel this is preferable to stating we believe the statute is not tolled as Cooper may mistakenly feel the statute has run and come out (since his story is worth many dollars). We also feel it is preferable to make no comment rather than stating we believe the statute has run (when we believe it has not) in order to mislead Cooper into disclosing himself.

Mr. Alfred L. Hantman
Re: Unknown Subject, a/k/a D.B. Cooper
April 20, 1976

If the Department has a different position, please advise as we feel our office and the Department should take the same position to such inquiries.

Very truly yours,

STAN PITKIN
United States Attorney

Jerald E. Olson

JERALD E. OLSON
Assistant United States Attorney

Copy to: Mr. Ron Nichols
Special Agent
Federal Bureau of Investigation
710 Federal Building
Seattle, WA 98174

JEO:csg
CR72-0451

April 20, 1976

Mr. Scholer Bangs
Industrial Consultant
362 East Michelle Street
West Covina, California 91790

Dear Mr. Bangs:

In response to your letter of April 16, 1976, I am afraid we cannot be of much help to you.

Since the D.B. Cooper matter is under investigation, it is not our policy to make comments about the results of investigation or about evidence we have or do not have. Likewise, it is our policy not to comment on any legal issues involved in the matter which includes the statute of limitations question raised by your letter.

Very truly yours,

STAN PITKIN
United States Attorney

JERALD E. OLSON
Assistant United States Attorney

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBERS
JEO:csg
CR720451

United States Department of Justice

UNITED STATES ATTORNEY
WESTERN DISTRICT OF WASHINGTON
UNITED STATES COURT HOUSE
SEATTLE, WASHINGTON 98104

MAILING ADDRESS:
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SEATTLE, WASHINGTON 98111

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If the Department has a different position, please advise as we feel our office and the Department should take the same position to such inquiries.

Very truly yours,

STAN PITKIN
United States Attorney

JERALD E. OLSON
Assistant United States Attorney

SCHOLER BANGS
INDUSTRIAL CONSULTANT
362 E. MICHELLE STREET
WEST COVINA, CA 91790
(213) 330-3793

UNITED STATES ATTORNEY
Seattle, Washington

APR 19 1976

CIVIL ☐ CRIM ☑ ADMIN ☐
JO

April 16, 1976

Stanley Pitkin
U.S. Attorney
U.S. Courthouse
Seattle, WA 98104

Mr. Pitkin

John Morrison, FBI agent, Los Angeles, has suggested that I write you for information he could not supply.

There is a possibility that I will be asked by an editor to do a round-up on the D.B. Cooper Nov. 24, 1971 Northwest Airlines hijack.

Am I correct that this coming Nov. 24 Cooper, if still living, will be home free under which statute of limitations?

If so, at what hour and date will it be effective?

What will be the effect of it? Will he be free from arrest and prosecution?

Also, will the $200,000 become his, to spend freely and without further attempts of recovery by Federal, airline, bank or insurance agencies?

Am I correct that under a Minnesota Supreme Court 1975 ruling Northwest Airlines' insurance company reimbursed the airline for $180,000 of the $200,000? If so, why just $180,000? And, what was/is the status of the unreimbursed $20,000?

At the effective moment of the Statute of Limitations will your office and the FBI both 'close' the case? Fully, or in what respects?

I understand that in seeking leads on the $200,000 your office, or FBI, circulated 34 pages of ransom note bill numbers. Have any of the bills appeared, anywhere?

Cordially,

Scholer Bangs

Scholer Bangs

cc: John Morrison

JEO:csg
CR720451

April 13, 1976

Mr. Alfred L. Hantman, Chief
General Crimes Section
Criminal Division, FTRI Building
Department of Justice
Washington, D.C. 20530

Re: UNKNOWN SUBJECT, a/k/a Dan Cooper,
a/k/a D. B. Cooper;
Air Piracy - Hijacking - Extortion;
Our: CR72-0451
Your: CWB:JFB:mac; 88-61-20

Dear Sir:

Under letter of March 31, 1975, we inquired as to a problem with the statute of limitations in the case that is known as the D. B. Cooper sky-jacking case. By letter dated August 11, 1975, under the signature of John F. Barg, we received a response from your office to our inquiry regarding the statute of limitations.

Another matter that has been brought to our attention is one that we thought we would refer to the department for comment. It involves the question of filing a "John Doe" action to toll the statute of limitations. It is clear that a "John Doe" complaint would not toll the statute of limitations. Only an indictment could toll the statute of limitations. It appears to us, however, based on the information and description that we have as to the identification of D.B. Cooper that it would not be proper and we could not ask the grand jury to return a "John Doe" indictment in this case.

In short, it appears to us that without the identification of the perpetrator of the sky-jacking, there is no legal basis on which an indictment could be returned. We would appreciate your comments on this.

Very truly yours,

STAN PITKIN
United States Attorney

JERALD E. OLSON
Assistant United States Attorney

CHAPTER 213—LIMITATIONS

[1] So in original. Does not conform to section catchline.

Historical Note

1951 Amendment. Act June 30, 1951, c. 194, § 2, 65 Stat. 107, added item "3291".

§ 3281. Capital offenses

An indictment for any offense punishable by death may be found at any time without limitation except for offenses barred by the provisions of law existing on August 4, 1939.

June 25, 1948, c. 645, 62 Stat. 827.

Historical and Revision Notes

Reviser's Note. Based on Title 18, U.S.C., 1940, ed., §§ 581a, 581b (Aug. 4, 1939, c. 419, §§ 1, 2, 53 Stat. 1198).

Sections 581a and 581b were consolidated into this section without change of substance. 80th Congress House Report No. 304.

Cross References

Fugitives from justice, no limitations applicable, see section 3290 of this title.

Library References

Criminal Law ⚷147.

C.J.S. Criminal Law § 225.

Notes of Decisions

Bank robbery 2
Construction 1
Kidnapping 3

1. Construction

This section providing that "an indictment for any offense punishable by death may be found at any time without limitation" encompasses any offense for which the death penalty may be imposed "punishable" being defined as "deserving of or liable to, punishment: capable of being punished by law or right". Coon v. U. S., C.A.Iowa 1966, 360 F.2d 550, certiorari denied 87 S.Ct. 145, 385 U.S. 873, 17 L.Ed.2d 100.

2. Bank robbery

Prosecution under section 2113(e) of this title for forcing banker to accompany defendant without banker's consent was not barred by five-year limitation of section 3282 of this title on theory that since death penalty was not assessed the crime

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S.Ct. 145, 385 U.S. 8

3. Kidnapping

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56, 19 Stat. 32; No
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2. Bank robbery

Prosecution under section 2113(e) of this title for forcing banker to accompany defendant without banker's consent was not barred by five-year limitation of section 3282 of this title on theory that since death penalty was not assessed the crime

was not a "capital offense" within meaning of this section providing that indictment for offense punishable by death may be found at any time without limitation, or on theory that imposition of death penalty would have constituted cruel and unusual punishment prohibited by U.S.C.A.Const. Amend. 8 since the death penalty for offense charged is within constitutional standards. Coon v. U. S., C.A.Iowa 1966, 360 F.2d 550, certiorari denied 87 S.Ct. 145, 385 U.S. 873, 17 L.Ed.2d 100.

3. Kidnapping

Under this section, providing that indictment for any offense punishable by death may be found at any time without limitation, under section 3282 of this title, prescribing a general limitation of three years, and under section 1201 of this title, authorizing death penalty if kidnapped person has not been liberated unharmed, if three years pass after a kidnapping, an indictment is barred if the victim has been released unharmed, within that period. U. S. v. Parrino, C.A.N.Y.1950, 180 F.2d 613.

Under this section, providing that an indictment for an offense punishable by death may be found at any time without limitation, under the general limitation of three years, and under section 1201 of this title, authorizing death penalty if kidnapped person has not been liberated unharmed, where only information about condition of kidnapped victim at time of his release was that a jury might have found that he was released harmed, the three year statute, section 3282 of this title, would be applied unless it was tolled by flight of accused. Id.

§ 3282. Offenses not capital

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

June 25, 1948, c. 645, 62 Stat. 828; Sept. 1, 1954, c. 1214, § 12(a), formerly § 10(a), 68 Stat. 1145, renumbered Sept. 26, 1961, Pub.L. 87–299, § 1, 75 Stat. 648.

Historical and Revision Notes

Reviser's Note. Based on section 746(g) of Title 8, U.S.C., 1940 ed., Aliens and Nationality, and on Title 18, U.S.C., 1940 ed., § 582 (R.S. § 1044; Apr. 13, 1876, c. 56, 19 Stat. 32; Nov. 17, 1921, c. 124, § 1, 42 Stat. 220; Dec. 27, 1927, c. 6, 45 Stat. 51; Oct. 14, 1940, c. 876, Title I, Subchap. III, § 346(g), 54 Stat. 1167 [Derived from June 29, 1906, c. 359, § 24, 34 Stat. 603]).

Section 582 of Title 18, U.S.C., 1940 ed., and section 746(g) of Title 8, U.S.C., 1940 ed., Aliens and Nationality, were consolidated. "Except as otherwise expressly provided by law" was inserted to avoid enumeration of exceptive provisions.

The proviso contained in the act of 1927 "That nothing herein contained shall apply to any offense for which an indictment has been heretofore found or an information instituted, or to any proceedings under any such indictment or information," was omitted as no longer necessary.

In the consolidation of these sections the 5-year period of limitation for violations of the Nationality Code, provided for in said section 746(g) of Title 8, U.S.C., 1940 ed., Aliens and Nationality, is reduced to 3 years. There seemed no sound basis for considering 3 years adequate in the case of heinous felonies and gross frauds against the United States but inadequate for misuse of a passport or false statement to a naturalization examiner. 80th Congress House Report No. 304.

1954 Amendment. Act Sept. 1, 1954 changed the limitation period from three years to five years.

Effective Date of 1954 Amendment. Section 12(b) of Act Sept. 1, 1954, formerly section 10(b), as renumbered by Pub. L. 87-299, § 1, provided that: "The amendment made by subsection (a) [amending this section] shall be effective with respect to offenses (1) committed on or after September 1, 1954, or (2) committed prior to such date, if on such date prosecution therefor is not barred by provisions of law in effect prior to such date."

connection with offense charged. U. S. v. Erdos, C.A.Va.1973, 474 F.2d 157.

Phrase "first brought" within this section means first brought in custody with liberty restrained. Id.

Defendant who was first arrested in Eastern District of Virginia upon return from Africa was subject to prosecution in such district for offense committed in United States embassy abroad, even though returning plane may have made stop in Massachusetts before arriving in Virginia. Id.

Under this section providing that offense committed on high seas may be prosecuted in district where any one of two or more joint offenders is arrested or "first brought," defendants who came by civilian flight from Vietnam to Hawaii without any form of on board restraint and neither of whom was arrested until during course of Coast Guard hearings in San Francisco were not "first brought" to Hawaii. U. S. v. Ross, C.A. Cal.1971, 439 F.2d 1355, certiorari denied 92 S.Ct. 686, 404 U.S. 1015, 30 L.Ed.2d 661.

9. —— Offenses committed on

Under this section providing that offense committed on high seas may be prosecuted in district where any one of two or more joint offenders is arrested or first brought but if one is not so arrested or brought an indictment or information may be filed in district of last known residence of any one, defendants, who were joint offenders, were properly tried in district in which one was arrested and of which, according to his testimony, he was a resident. U. S. v. Ross, C.A.Cal.1971, 439 F.2d 1355, certiorari denied 92 S.Ct. 686, 404 U.S. 1015, 30 L.Ed. 2d 661.

12. —— In foreign countries or waters

Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces authorized court-martial in Germany of American soldier stationed in Germany for rape of German national. Bell v. Clarke, C.A.Va.1971, 437 F.2d 200.

§ 3240. Creation of new district or division

1. Offenses prior to creation

Where place of alleged offense was within one district but before indictment was returned area was transferred into simultaneously created different district, grand jury of first district had jurisdiction to return indictment against defendant. Hayes v. U. S., C.A.Fla.1969, 407 F. 2d 189.

§ 3242. Indians committing certain offenses; acts on reservations

3. Offenses subject to federal jurisdiction—Generally

When Indian is prosecuted in federal court under Major Crimes Act of 1885, which was a predecessor of this section, he is not deprived of protection afforded by instruction on lesser included offense, assuming that evidence warrants such instruction; his right to such instruction does not infringe upon jurisdiction of Indian tribes by permitting unauthorized federal court prosecution. Keeble v. U. S., S.D.1973, 93 S.Ct. 1993, 412 U.S. 205, 36 L.Ed.2d 844.

CHAPTER 213—LIMITATIONS

§ 3281. Capital offenses

2. Bank robbery

A defendant's prosecution under statute proscribing robbery wherein a person is forced to accompany defendant was not barred by the statute of limitations on theory offense was not one punishable by death, even if provisions of the statute for imposition of death penalty were invalid, in view of fact statute of limitations applicable to defendant's prosecution was one in force at time of the prosecution, and at time of prosecution, violation with which defendant was charged was an offense punishable by death, and thus one which could be found at any time without limitation. Coon v. U. S., C.A.Iowa 1969, 411 F.2d 422.

§ 3282. Offenses not capital

Supplementary Index to Notes

Special limitation periods 22

1. Construction

Criminal statute of limitations are to be liberally interpreted in favor of repose. U. S. v. Marion, Dist.Col.1971, 92 S.Ct. 455, 404 U.S. 307, 30 L.Ed.2d 468.

2. Purpose

Purpose of this section is to limit exposure to criminal prosecution to certain fixed period of time following occurrence of those acts the legislature has decided to punish by criminal sanctions. Toussie v. U. S., N.Y.1970, 90 S.Ct. 858, 397 U.S. 112, 25 L.Ed.2d 156; U. S. v. Marion, Dist. Col.1971, 92 S.Ct. 455, 404 U.S. 307, 30 L.Ed.2d 468.

This section is designed to protect individuals from having to defend themselves against charges when basic facts may have become obscured by passage of time and to minimize danger of official punishment because of acts in the far distant past. Toussie v. U. S., N.Y.1970, 90 S.Ct. 858, 397 U.S. 112, 25 L.Ed.2d 156.

5. Generally

Questions of limitations are fundamentally matters of legislative not administrative decision. Toussie v. U. S., N.Y. 1970, 90 S.Ct. 858, 397 U.S. 112, 25 L.Ed. 2d 156.

8. Prearrest delay

Since actual prejudice to defense of criminal case may result from shortest and most necessary delay, the sound administration of justice requires delicate judgment in order to determine whether dismissal of prosecution based on circumstances of each case is required because of preaccusation delay. U. S. v. Marion, Dist.Col.1971, 92 S.Ct. 455, 404 U.S. 307, 30 L.Ed.2d 468.

The relevant statute of limitations provides safeguard against possible prejudice resulting from preaccusation delay. Id.

9. Indictment or information

Assuming that corporate and individual defendants were one and the same, and that timeliness of indictment chargside of the machine had to be removable so that the operators could comply with the manufacturer's cleaning instructions and with the law of the State of Missouri. Plaintiff had seen and worked with the machine with the cover both on and off. He was aware of the danger of sticking his hand into the place where it was injured. There was a perfectly safe place for him to remove the doubles at the rear of the machine. Under the controlling law of the State of Missouri plaintiff may not recover against the manufacturer.

Affirmed.

Darwin E. COON, Appellant,

v.

UNITED STATES of America, Appellee.

No. 19479.

United States Court of Appeals Eighth Circuit.

June 4, 1969.

Proceeding on motion to vacate sentence. The United States District Court for the Northern District of Iowa, William C. Hanson, J., denied relief and prisoner appealed. The Court of Appeals, Matthes, Circuit Judge, held that defendant's prosecution under statute proscribing robbery wherein a person is forced to accompany defendant was not barred by statute of limitations on theory offense was not punishable by death, even if provisions of the statute for imposition of death penalty were invalid, in view of fact statute of limitations applicable to defendant's prosecution was one in force at time of the prosecution, and at time of prosecution, violation with which defendant was charged was an offense punishable by death, and thus one which could be found at any time without limitation.

Affirmed.

Criminal Law ⚷147

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Darwin E. Coon, pro se.

Asher E. Schroeder, U. S. Atty., and Gene R. Krekel, Asst. U. S. Atty., Sioux City, Iowa, for appellee.

Before VAN OOSTERHOUT, Chief Judge, and MATTHES and HEANEY, Circuit Judges.

MATTHES, Circuit Judge.

Darwin Evert Coon, appellant, convicted of violating 18 U.S.C. § 2113(e),[1]

1. This statute, in pertinent part, makes it a crime to (a) forcibly take or attempt to take from the person or presence of another property or money in the custody of a bank; or enter or attempt to enter a bank with intent to commit a felony therein; (b) take and carry away, with intent to steal, any property or money of a bank, and (d) assault any person with a dangerous weapon while committing or attempting to commit any offense in (a) or (b). Subsection (e) provides:

"Whoever, in committing any offense defined in this section or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without is again seeking to vacate and set aside the judgment and sentence on the ground that the prosecution of the offense was barred by the statute of limitations when the indictment was returned.

The factual background antedating the present appeal is significant. After escaping from the Nevada State Prison on August 11, 1958, appellant and a companion, George Albert Mills, burglarized the Corn Belt State Bank at Correctionville, Iowa, on August 20, 1958, forcing the bank president to accompany appellant from his residence to the bank. Appellant and Mills were quickly apprehended. Attorneys were appointed to represent them, and on September 30, 1958, they were arraigned before Honorable Henry N. Graven, United States District Judge for the Northern District of Iowa. Both waived prosecution by indictment and pled guilty to a four count information charging violations of 18 U.S.C. § 2113(a), (b), (d) and (e). They received concurrent sentences of 20, 10, 20 and 20 years respectively on the four counts of the information.

On the same date, appellant pled guilty to a two count information charging escape from custody and conspiracy to escape in violation of 18 U.S.C. §§ 751 and 371, respectively. See our former opinion, Coon v. United States, 8 Cir., 360 F.2d 550, fn. 3, pp. 551–552 for circumstances relating to the attempted escape from the Sioux City, Iowa jail. Appellant was given two five year consecutive sentences on these counts. While serving these sentences, appellant on September 6, 1963, filed a motion in the nature of a writ of error coram nobis to set aside the judgment and sentence of September 30, 1958, entered on the conviction under 18 U.S.C. § 2113. He contended that since he had been charged and convicted of a capital offense (18 U.S.C. § 2113(e)) prosecution by indictment was required, could not be waived, and consequently his conviction under an information constituted a jurisdictional defect under Fed.R.Crim.P. 7(a), Smith v. United States, 360 U.S. 1, 79 S.Ct. 991, 3 L.Ed.2d 1041 (1959). The district court on October 21, 1963, granted appellant's motion and vacated the sentence and judgment.

On January 17, 1964, an indictment was returned charging appellant with the same offenses alleged in the earlier information. Appellant's court appointed counsel filed a motion to quash the indictment on the ground that the prosecution was barred by the five year statute of limitation.[2] The motion was sustained as to the first three counts (charging violations of 18 U.S.C. § 2113(a), (b) and (d)). But the district court held that since Count IV (§ 2113(e)) charged a crime punishable by death, the indictment could be returned at any time without limitation,[3] and denied the motion to dismiss Count IV. Subsequently a jury found appellant guilty. On May 20, 1965, the court entered judgment and imposed a 20 year sentence which provided that appellant would become eligible for parole pursuant to the provisions of 18 U.S.C. § 4208(a) (2). Thereafter on motion pursuant to 28 U.S.C. § 2255 and Rule 35, Fed.R.Crim.P., the district court on August 1, 1966, vacated the sentence for the reason that the judgment improperly incorporated the parole eligibility provisions of 18 U.S.C. § 4208(a) (2). On August 17, 1966, appellant was resentenced for a term of 10 years.[4]

the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct."

2. 18 U.S.C. § 3282 provides:
"Except as otherwise provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

3. 18 U.S.C. § 3281 reads: "An indictment for any offense punishable by death may be found at any time without limitation except for offenses barred by the provisions of law existing on August 4, 1939."

4. The district court, on the authority of Rivera v. United States, 318 F.2d 606

From the judgment of May 20, appellant appealed to this court contending that his prosecution was barred by the statute of limitations. He argued that since the Government did not request the death penalty and since the jury did not assess it, the crime was not a "capital offense" within the meaning of §§ 3281 and 3282. In rejecting his contention, Coon v. United States, *supra*, 360 F.2d at 553, we pointed out:

> "In contending for application of the five-year statute, appellant has conveniently changed his theory and argues in direct contradiction to the proposition he successfully urged in support of his writ of error coram nobis to set aside the first conviction; i. e., that the offense of which he was charged and convicted under § 2113(e) was a capital offense."

We reasoned that the courts must look to the charge as laid in the indictment and not to the ultimate result of the trial in determining whether an offense is "punishable by death" within the meaning of the statute of limitations. Since "[t]he clear and ordinary meaning of the words unquestionably encompasses any offense for which the death penalty may be imposed," we ruled that prosecution under 18 U.S.C. § 2113(e) was governed by 18 U.S.C. § 3281 and thus subject to no time limitation. Id. at 554. The Supreme Court denied certiorari. 385 U.S. 873, 87 S.Ct. 145, 17 L.Ed.2d 100 (1966).

Since that appeal, the Supreme Court has decided United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) and Pope v. United States, 392 U.S. 651, 88 S.Ct. 2145, 20 L.Ed.2d 1317 (1968). In *Jackson*, the Court held that the provision of the Federal Kidnaping Act, 18 U.S.C. § 1201(a), which provides that the defendant shall be punished by death if the kidnaped person has not been liberated unharmed and if the verdict of the jury so recommends, is not constitutionally enforceable. The holding was based on the view that such a provision allowing the jury, but not the judge, to impose a death sentence discouraged assertion of the Fifth Amendment right not to plead guilty and the Sixth Amendment right to demand a jury trial. In *Pope*, the Court vacated a death sentence imposed on a conviction of 18 U.S.C. § 2113(e) in light of the Solicitor General's concession that the death penalty provision "suffers from the same constitutional infirmity" that afflicted the Federal Kidnaping Act.

Based on the *Jackson* decision, appellant, on May 3, 1968, filed a § 2255 motion in the district court, once again contending that his 1964 conviction under § 2113(e) was barred by the limitation of § 3282. This motion was denied on August 6, 1968. Appellant's theory in the district court and here is that under *Jackson* and *Pope* his violation of § 2113 (e) is not an offense punishable by death, and therefore the five year statute of limitations governs the 1964 prosecution.

We find no merit in appellant's contention. The statute of limitations applicable to his prosecution was the one in force at that time. It provided that "[a]n indictment for any offense punishable by death may be found at any time without limitation * * *." 18 U.S.C. § 3281. Clearly at the time of appellant's prosecution, a violation of 18 U.S.C. § 2113(e) was such an offense. As we stated in the prior appeal: "The clear and ordinary meaning of the words unquestionably encompasses any offense for which the death penalty may be imposed." 360 F.2d 554. "[T]he courts look to the charge as laid in the indictment * * * in determining whether the offense under § 2113(e) is punishable by death within the meaning of the no-limitations statute." Id. The indictment here charged a crime punishable by death, and § 3281 was obviously the limi-

(9th Cir. 1963) and Robinson v. United States, 313 F.2d 817 (7th Cir. 1963) was of the view that 18 U.S.C. § 4208(a) (2) does not apply where the offense carries a mandatory sentence. Violation of 18 U.S.C. § 2113(e) entails a sentence of not less than 10 years.

tations statute applicable to appellant's prosecution.

Moreover, *Jackson* does not compel the result urged upon us. In voiding a death penalty provision similar to the one in § 2113(e), the Court specifically cautioned that elimination of the provision,

> "* * * in no way alters the substantive reach of the statute and leaves completely unchanged its basic operation. Under such circumstances, it is quite inconceivable that the Congress which decided to authorize capital punishment in aggravated kidnaping cases would have chosen to discard the entire statute if informed that it could not include the death penalty clause now before us. * * *
>
> "Thus the infirmity of the death penalty clause does not require the total frustration of Congress' basic purpose—that of making interstate kidnaping a federal crime. By holding the death penalty clause of the Federal Kidnaping Act unenforceable, we leave the statute an operative whole, free of any constitutional objection." 390 U.S. at 586, 591, 88 S.Ct. at 1219, 1221.

As is evident from these excerpts, the scope of the *Jackson* decision is limited to the constitutional infirmities attending imposition of the death penalty.[5] Here we are concerned not with a constitutional issue, but with the statute of limitations. "Generally speaking, limitation of the time for commencing the prosecution of a criminal charge is purely a matter of statute." O'Malley v. United States, 128 F.2d 676, 683 (8th Cir. 1942), *reversed on other grounds*, 317 U.S. 412, 63 S.Ct. 268, 87 L.Ed. 368 (1943). Thus in deciding which limitation is applicable, we must look directly to the statute. And in interpreting the statute of limitations, "the statute must be considered in the light of the situation as it existed and presumably was known to Congress at the time of the passage of the statute * * *." United States v. Beard, 118 F.Supp. 297, 299 (D.Md. 1954).

From the time of the enactment of the no limitations provisions through this appellant's prosecution for violation of § 2113(e) the latter offense was one within the meaning of § 3281. Consequently we conclude there is no basis for concluding at this time that the judgment and sentence should be vacated on the ground that § 3282, *supra*, was the controlling statute of limitations. To hold otherwise would be to give a perverted reading to the statutory scheme in existence at all pertinent times.[6]

Because the prosecution in this case was commenced and consummated prior to the *Jackson* decision we are not faced with and have not considered the question of which statute of limitations governs post-*Jackson* prosecutions under § 2113(e).

The judgment denying relief is affirmed.

5. While we do not base our decision on the retroactivity of the *Jackson* decision, we note that other courts have held that the only defendants who can claim prejudice because of their convictions under the statutes considered in *Jackson* and *Pope* are those who (1) pleaded guilty, (2) waived a jury trial, or (3) demanded a jury trial and are now under sentence of death. Parker v. United States, 400 F.2d 248, 252 (9th Cir. 1968); Robinson v. United States, 394 F.2d 823, 824 (6th Cir. 1968). And see Bailey v. United States, 405 F.2d 1352 (D.C. Cir. 1968); United States ex rel. Buttcher v. Yeager, 288 F.Supp. 906, 908–909 (D.N.J.1968). Of course, this appellant does not fall within any of these categories.

6. Further indication of the probability that Congress did not intend a prosecution such as this to fail because of a statute of limitations is found in the 1964 amendment to 18 U.S.C. § 3288. This statute now provides that where "an indictment or information filed after the defendant waives in open court prosecution by indictment is found * * * defective or insufficient * * * after the period prescribed by the applicable statute of limitations has expired," the defendant may be reindicted. Prior to 1964, the statute did not provide for reindictment when the defendant pled guilty to an *information* which was later found defective.

Darwin Evert COON, Appellant,
v.
UNITED STATES of America, Appellee.
No. 18057.

United States Court of Appeals
Eighth Circuit.
May 12, 1966.

Defendant was convicted under bank robbery statute of forcing a person to accompany defendant without consent, and from the judgment of the United States District Court, Northern District of Iowa, William C. Hanson, J., D.C., 242 F.Supp. 483, the defendant appealed. The Court of Appeals, Matthes, Circuit Judge, held, inter alia, that the prosecution was properly submitted to jury, and that the jury's verdict of guilt was responsive to the evidence.

Affirmed without prejudice to defendant to challenge legality of sentence in District Court.

1. Criminal Law ⇨1144(13)
In resolving question of whether a submissible case was made, Court of Appeals must review the evidence in light most favorable to prevailing party; that is, the court must determine whether the evidence in its most favorable aspect to the government is legally capable of allowing a jury to be persuaded of guilt.

2. Robbery ⇨26
Prosecution for forcing a banker to accompany defendant without consent while committing bank robbery offense was properly submitted to jury, and the jury's verdict of guilt was responsive to the evidence. 18 U.S.C.A. § 2113(e).

3. Robbery ⇨30
When an accused is charged under bank robbery statute with forcing a person to accompany him, without consent of such person, he is charged and may be tried for an offense that may be punishable by death notwithstanding fact that jury must so direct before extreme penalty can be assessed. 18 U.S.C.A. § 2113 (e).

4. Criminal Law ⇨147
The statute providing that "an indictment for any offense punishable by death may be found at any time without limitation" encompasses any offense for which the death penalty may be imposed, "punishable" being defined as "deserving of or liable to, punishment: capable of being punished by law or right". 18 U.S.C.A. § 3281.

See publication Words and Phrases for other judicial constructions and definitions.

5. Criminal Law ⇨1213
The action of Congress in fixing punishment for crime is subject to constitutional requirement that the penalty may not be cruel and unusual; that is so manifestly disproportionate to seriousness of offense or of such a nature that it shocks the conscience and sense of justice, but courts are reluctant to interfere with legislative judgment and discretion unless the penalty prescribed is clearly and manifestly cruel and unusual. U.S.C.A.Const. Amend. 8.

6. Criminal Law ⇨147, 1213
Prosecution under bank robbery statute for forcing banker to accompany defendant without banker's consent was not barred by five-year statute of limitations on theory that since death penalty was not assessed the crime was not a "capital offense" within meaning of statute providing that indictment for offense punishable by death may be found at any time without limitation, or on theory that imposition of death penalty would have constituted cruel and unusual punishment prohibited by the Eighth Amendment since the death penalty for offense charged is within constitutional standards. 18 U.S.C.A. §§ 2113(e), 3281, 3282; U.S.C.A.Const. Amend. 8.

7. Criminal Law ⇨189
Where defendant had waived prosecution by indictment and pleaded guilty to offenses charged in four-count information, and more than five years after the offenses had been committed the

court, on defendant's motion, set aside the judgment and sentence on ground that defendant had been convicted of a capital offense, and that prosecution by indictment was a prerequisite to hear the case, the reindictment and second judgment and sentence did not constitute double jeopardy. 18 U.S.C.A. §§ 3281, 3282.

8. Criminal Law ⇐1134(8)

Where district judge who, in imposing sentence for forcing banker to accompany defendant for purpose of committing bank larceny, provided that defendant should become eligible for parole at such time as board of parole might determine, and judge treated defendant's letter as a motion to vacate the sentence and entered order that in view of fact that time for reduction of sentence had expired and legality of sentence not being in doubt the motion was denied and no appeal was taken from such order, under circumstances question of legality of sentence was not properly before Court of Appeals for review. 18 U.S.C.A. §§ 2113 (e), 4208(a) (2); Fed.Rules Crim.Proc. rule 35, 18 U.S.C.A.

Charles R. Wolle, Sioux City, Iowa, for appellant.

Richard J. Vipond, Asst. U. S. Atty., Sioux City, Iowa, for appellee and on brief with Donald E. O'Brien, U. S. Atty., and Charles W. Ehrhardt, Asst. U. S. Atty., Sioux City, Iowa.

Before MATTHES, MEHAFFY and GIBSON, Circuit Judges.

MATTHES, Circuit Judge.

A jury found Darwin Evert Coon, appellant, guilty of violating Title 18 U.S. C.A. § 2113(e).[1] The court entered judgment imposing a prison sentence of twenty years and provided further that appellant shall become eligible for parole at such time as the Board of Parole may determine pursuant to Title 18 U.S.C.A. § 4208(a) (2).[2]

The facts antedating the filing of the indictment are significant.

The offenses, footnote 2, supra, were committed on August 20, 1958, by appellant and George Albert Mills. The offenders were apprehended shortly after the commission of the crimes. Lawyers were appointed by the court to represent them. On September 30, 1958, after arraignment, they waived prosecution by indictment and on that day a four-count information was filed in the United States District Court for the Northern District of Iowa, alleging commission of the same four offenses charged in the indictment returned in this prosecution. Coon and Mills entered a plea of guilty and received concurrent sentences of twenty years, ten years, twenty years, and twenty years, on Counts I, II, III and IV, respectively, of the information.

On September 6, 1963, more than five years after the offenses had been committed, appellant, while serving a ten-year sentence for jail break and assault, filed a motion in the nature of a writ of error coram nobis, to set aside the judgment and sentence of September 30, 1958.[3]

1. Section 2113(e) provides, in pertinent part:
"Whoever in committing any offense defined in this section * * * forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct."

2. Appellant was prosecuted under an indictment filed on January 17, 1964, which alleged four offenses: (1) entering the Corn Belt State Bank of Correctionville Iowa, on August 20, 1958, with intent to commit larceny therein, in violation of Title 18 U.S.C.A. § 2113(a); (2) stealing approximately $2,795 from the bank, in violation of § 2113(b); (3) assaulting and placing in jeopardy the life of Peter Stoltz Hart, by the use of dangerous weapons while committing the offenses alleged in Counts I and II, in violation of § 2113(d); (4) forcing Hart to accompany appellant without Hart's consent while committing the offenses alleged in Counts I, II and III in violation of § 2113(e).

3. The original files reveal that after appellant and Mills were apprehended for the offenses growing out of the bank larceny and kidnapping event, they were

Coon urged that he had been charged with and convicted of a capital offense (18 U.S.C.A. § 2113(e)), and relying upon Rule 7(a) F.R.Crim.P.; Smith v. United States, 360 U.S. 1, 79 S.Ct. 991, 3 L.Ed. 2d 1041 (1959), and other cases, contended that prosecution by indictment, rather than by information, was a prerequisite to the court's power to hear the case. The district court agreed. On October 21, 1963, the judgment and sentence of September 30, 1958, was vacated.

After the indictment herein was filed, the court appointed lawyers to represent appellant. They filed a motion to quash the indictment on the ground that prosecution of the four alleged offenses was barred by the five-year statute of limitations, Title 18 U.S.C.A. § 3282. After due consideration, the court, The Honorable William C. Hanson, in a memorandum opinion (unreported), held that Counts I, II and III of the indictment were barred, and dismissed those counts. The court further found, however, that Count IV was not barred because this count charged a capital offense and was not within the ambit of the five-year statute of limitations.

On this appeal, appellant contends: (1) the court erred in denying his motion for judgment of acquittal for the reason that the evidence failed to prove that appellant forced banker Hart to accompany him, without Hart's consent, to the bank in order that appellant could enter and commit larceny therein; (2) the prosecution is barred by the five-year statute of limitations; (3) the indictment, trial and sentence constitute double jeopardy; (4) the judgment entered by the court is illegal. We affirm.

SUFFICIENCY OF THE EVIDENCE

[1, 2] In resolving the question of whether a submissible case was made, we are required to view the evidence in the light most favorable to the prevailing party; i. e., we must determine whether the evidence in its most favorable aspect to the Government is legally capable of allowing a jury to be persuaded of guilt. National Dairy Products Corp. v. United States, 350 F.2d 321, 325 (8 Cir. 1965); Beatrice Foods Co. v. United States, 312 F.2d 29, 40 (8 Cir. 1963), cert. den., 373 U.S. 904, 83 S.Ct. 1289, 10 L.Ed.2d 199. So viewing the record, we conclude, without hesitation, that the case was properly submitted to the jury and that the jury's verdict is responsive to the evidence. Indeed, the evidence of guilt was strong and convincing.

Appellant and Mills escaped from Nevada State Prison on August 11, 1958, where they had been imprisoned for burglary and armed robbery.[4] They went to Correctionville, Iowa, for the avowed purpose of burglarizing or robbing Cotton Belt State Bank. After gaining entrance into the home of Peter Stoltz Hart, President of the bank, on the evening of August 20, 1958, appellant exhibited a loaded 45-caliber pistol and Mills an opened switchblade knife. Hart and his wife were threatened, their hands and feet were tied and a "gag" was placed in Mrs. Hart's mouth. Under threats of bodily harm, Hart furnished Mills the correct combinations to the bank vault. While Mr. and Mrs. Hart were held captive by appellant, Mills went to the bank and tried, without success, to open the vault. He returned

placed in a jail in Sioux City, Iowa. On August 23, 1958, Coon and Mills attempted a jail break and viciously assaulted and severely injured the jailer. They were prosecuted for these offenses in the United States District Court and under judgment of conviction appellant was sentenced to ten years imprisonment. He had not completed service of this sentence at the time he attacked the judgment of conviction of September 30, 1958.

4. Testifying in his own behalf, appellant admitted that he had previously been convicted of the following offenses: May 11, 1951, robbery in California; October 28, 1952, robbery; March 9, 1955, interstate transportation of stolen property; October 7, 1957, robbery in Nevada; September 30, 1958, escape from the Woodbury County (Sioux City) Jail.

to the Hart home in an angry mood, apparently believing that Hart had furnished him incorrect combinations. Hart, under fear of bodily harm, offered to go to the bank to open the vault. Instead of accepting this offer, appellant went to the bank, leaving the Harts as captives of Mills. Appellant too was unable to open the vault and upon his return he and Mills decided that Hart should be taken to the bank. This was done. Hart drove his automobile, and appellant, with the loaded pistol in his hand, sat next to Hart. Mills remained and kept Mrs. Hart under guard. After Hart opened the vault in the presence of appellant, who was still armed, they returned to the Hart home. Mr. and Mrs. Hart were taken to a bedroom, tied up again, and thereupon appellant and Mills left the Hart home. Appellant and Mills returned to the bank and took all of the available silver money, which amounted to approximately $2,795.

All of the above facts were established by the testimony of Government witnesses. Appellant did not deny being in the Hart home and holding the Harts as captives by use of the pistol and knife. He attempted, by his testimony, to convince the jury that Hart freely and voluntarily accompanied appellant to the bank and opened the vault doors. The jury obviously did not accept appellant's version and neither do we. Overwhelming evidence was introduced to prove that appellant and Mills resorted to force. Not only were Mr. and Mrs. Hart physically mistreated but they were subjected to threats of bodily harm during their three hours of captivity. Psychological coercion was exerted by the display of deadly weapons. Mr. Hart testified that "everything was against my will". Certainly a jury could reasonably find that Hart's offer to go to the bank, the ensuing trip, and his opening of the vault doors, resulted entirely from fear induced by a display of the knife and gun, and that he was forced to accompany appellant. Quite understandably, Hart would have taken any action to prevent bringing harm to his wife and himself. In summary, the evidence irresistibly points to the conclusion that Hart was forced to accompany appellant, without consent, in order to enable appellant to unlawfully enter the bank and to commit larceny therein.

STATUTE OF LIMITATIONS

Appellant contends that the prosecution is barred by the five-year statute of limitations. The statutes in question provide:

> § 3281. "An indictment for any offense punishable by death may be found at any time without limitation except for offenses barred by the provisions of law existing on August 4, 1939."

> § 3282. "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, *not capital*, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." (Emphasis supplied).

Appellant's position is that since the death penalty was not assessed under § 2113(e), the crime is not a "capital offense" within the meaning of the above statutes and is consequently subject to the five-year statute of limitations, § 3282. In contending for application of the five-year statute, appellant has conveniently changed his theory and argues in direct contradiction to the proposition he successfully urged in support of his writ of error coram nobis to set aside the first conviction; i. e., that the offense of which he was charged and convicted under § 2113(e) was a capital offense.[5]

5. In his application for writ of error coram nobis and argument in support thereof, appellant alleged that the "* * * information charged petitioner with an offense punishable by death under Section 2113(e) of Title 18 United States Code * * *. It is plain * * * that petitioner was charged by information with a capital offense * * *."

Thus, the question is: do the courts look to the charge as laid in the indictment or to the ultimate result of the trial in determining whether the offense under § 2113(e) is punishable by death within the meaning of the no-limitations statute?

[3, 4] It is beyond dispute that when an accused is charged, as here, with forcing a person to accompany him, without the consent of such person, he is charged and may be tried for an offense that may be punished by death.[6] To be sure, the jury must so direct before the extreme penalty can be assessed, but that circumstance does not alter the fact that the offense itself is one which may subject the offender to death. As we have seen, the no-limitation statute, § 3281, provides: "An indictment for any offense *punishable* by death may be found at any time without limitation", etc.[7] The clear and ordinary meaning of the words unquestionably encompasses any offense for which the death penalty may be imposed.

To hold, as appellant contends, that the death penalty must actually be assessed before an offense becomes "capital" within the meaning of the statutes under consideration, would lead to the absurd result of subordinating the administration of criminal justice to a formula that would dictate either death or freedom in all offenses proscribed by § 2113(e) where the indictment has not been found within five years from the date the offense was committed or from the date the five-year statute became operative.

We have carefully examined the authorities relied upon by appellant, United States v. Parrino, 180 F.2d 613 (2 Cir. 1950); People v. Turner, 31 Ill.2d 197, 201 N.E.2d 415 (1964); Walker v. State, 137 Ark. 402, 209 S.W. 86, 3 A.L.R. 968 (1919), and do not regard them as dispositive of our case. In our view, Smith v. United States, supra, 360 U.S. 1, 79 S.Ct. 991 (1959), a case arising under the Federal Kidnapping Act, 18 U.S.C.A. § 1201,[8] is analogous in principle. The Government, in a not dissimilar argument as the one urged here by the appellant, contended that a pretrial examination of the evidence must be made to determine whether the victim was released harmed before a specific kidnapping offense is "capital" for the purposes of Rule 7(a) of the F.R.Crim.P. and the mandate of the Fifth Amendment.[9]

The Supreme Court forcefully rejected this contention, Chief Justice Warren, in speaking for the majority, made these pronouncements:

> "When an accused is charged, as here, with transporting a kidnapped victim across state lines, he is charged and will be tried for an offense which *may* be punished by death. Although the imposition of that penalty will depend on whether sufficient proof of harm is introduced during the trial, that circumstance does not alter the fact that the offense itself is one which

6. The charging part of Count IV of the indictment conformed to § 2113(e). The elements of the charge were submitted to the jury in instructions which also required the jury to recommend for or against the assessment of the death penalty. It recommended against that penalty.

7. Webster's Third New International Dictionary, Unabridged, defines "punishable" to mean "deserving of, or liable to, punishment: capable of being punished by law or right."

8. (a) Whoever knowingly transports in interstate * * * commerce, any person who has been unlawfully * * * kidnapped * * * shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

9. Rule 7(a) of the F.R.Crim.P. provides:
"An offense which may be punished by death shall be prosecuted by indictment * * *."

The Fifth Amendment provides in part: "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * *."

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may be punished by death and thus must be prosecuted by indictment. In other words, when the offense as charged is sufficiently broad to justify a capital verdict, the trial must proceed on that basis, even though the evidence later establishes that such a verdict cannot be sustained because the victim was released unharmed. It is neither procedurally correct nor practical to await the conclusion of the evidence to determine whether the accused is being prosecuted for a capital offense. For the trial judge must make informed decisions prior to trial which will depend on whether the offense may be so punished."

See also, Kees v. United States, 304 F.2d 661 (7 Cir. 1962).

Although *Smith* did not posit the limitations issue, the rationale of the court in reaching the conclusion that the language of the charge controls in determining whether an accused has the constitutional right to be prosecuted by indictment does, in our view, apply to the question before us.

Appellant supports his contention that the offense is barred with the argument that imposition of the death penalty, under the facts of the case, would have constituted cruel and unusual punishment prohibited by the Eighth Amendment to the Constitution; that, therefore, the offense cannot be constitutionally characterized as capital for the purpose of the no-limitations statute.

[5] The action of Congress in fixing punishment for crime is, of course, subject to the constitutional requirement that the penalty may not be cruel and unusual; i. e., so manifestly disproportionate to the seriousness of the offense or of such a nature that it shocks the conscience and sense of justice. Weems v. United States, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910). The courts, however, have been reluctant to interfere with legislative judgment and discretion unless the penalty prescribed is clearly and manifestly cruel and unusual. Bailey v. United States, 74 F.2d 451 (10 Cir. 1934).

[6] After careful consideration of the appellant's contention, we are satisfied that there is no rational basis for holding that the death penalty for an offense under § 2113(e) is not within constitutional standards. See and compare, Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958); Hess v. United States, 254 F.2d 578, 585 (8 Cir. 1958); United States ex rel. Melton v. Hendrick, 330 F.2d 263 (3 Cir. 1964); Jackson v. Dickson, 325 F.2d 573, 575 (9 Cir. 1963), cert. den. 377 U.S. 957, 84 S.Ct. 1637, 12 L.Ed.2d 501.

DOUBLE JEOPARDY

[7] Although appellant contends that the reindictment and second judgment and sentence constitute double jeopardy, he frankly concedes "that the weight of authority supports the court's ruling."

In the recent case of United States v. Ewell and Dennis, 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed.2d 627 (Feb. 23, 1966), the Supreme Court stated:

> "It has long been the rule that when a defendant obtains a reversal of a prior, unsatisfied conviction, he may be retried in the normal course of events. United States v. Ball, 163 U.S. 662, 671–672, 16 S.Ct. 1192, 1195, 41 L.Ed. 300, United States v. Tateo, 377 U.S. 463, 465, 473–474, 84 S.Ct. 1587, 12 L.Ed.2d 448. The rule of these cases, which dealt with the Double Jeopardy Clause, has been thought wise because it protects the societal interest in trying people accused of crime, rather than granting them immunization because of legal error at a previous trial, and because it enhances the probability that appellate courts will be vigilant to strike down previous convictions that are tainted with reversible error. United States v. Tateo, supra, at 466, 84 S.Ct. at 1587."

The contention is rejected.

ILLEGAL SENTENCING

[8] The judgment of conviction entered on May 20, 1965, provided that

appellant shall become eligible for parole at such time as the Board of Parole may determine pursuant to § 4208(a) (2).[10] Appellant asserts that the court erred in overruling his "motion to vacate the sentence * * * which was illegal because of the inclusion of an unauthorized provision governing eligibility for parole". More specifically, the appellant contends that the provisions of Title 18 U.S.C. § 4208(a) (2) are not applicable to a § 2113(e) offense for the reason that this offense carries a mandatory minimum penalty of ten years.

At the time of imposition of sentence, Judge Hanson fully explained to appellant and his counsel the purpose of § 4208(a) (2) and his reason for incorporating the provisions thereof in the judgment. Appellant not only did not object, but apparently approved the court's action.

Seemingly, appellant was advised after he was incarcerated in the Federal Prison at Leavenworth, Kansas, that § 4208(a) (2) does not apply to a conviction under § 2113(e). This prompted appellant to write a letter to the district court under date of September 24, 1965, in which he requested the Judge to "do what is right and lawful in this matter". Judge Hanson treated the letter as a motion pursuant to Rule 35 F.R.Crim.P., and on October 1, 1965, entered an order reciting: "It appearing that the time for reduction of sentence has expired, and the legality of the sentence not being in doubt, it is hereby ordered that the motion be and the same is denied". No appeal was taken from this order. Under these circumstances, it is clear that the question of the legality of the sentence is not properly before us. We are not disposed to review an order of the court from which no appeal was taken. However, we deem it appropriate to observe that Rule 35 provides that: "The court may correct an illegal sentence at any time". We are satisfied that the district court did not have the benefit of the views of counsel on the question of the legality of the sentence as those views have been presented to us.

We have not fully explored the merits of the question, and our expressions are not intended to give any support for or against the validity of the sentence. Our position is: (1) the question is not properly here; (2) the district court, in the first instance, should be afforded the opportunity to consider and pass upon the issue.

We are satisfied appellant received a fair trial, the prosecution of the offense has not been barred, there has been no deprivation of appellant's constitutional rights, and the judgment should be affirmed, without prejudice to appellant to challenge the legality of the sentence in the district court.

John W. GARDNER, Secretary of Health, Education and Welfare, Appellant,

v.

Charles F. MOON, Appellee.

No. 18154.

United States Court of Appeals Eighth Circuit.

May 12, 1966.

Action for judicial review of a ruling of the administrative agency in the Department of Health, Education and Welfare. From an order of the United States District Court for the District of Nebraska, Richard E. Robinson, J., the Secretary

10. Section 4208(a) (2) provides that upon entering a judgment of conviction, the court having jurisdiction to impose sentence may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine.

held together cowling which fell from engine of aircraft in flight and for failure of its inspector to make careful inspection which would have disclosed such negligent reassembly of cowling. U. S. v. Lockheed Aircraft Service-International, Inc., D.C.N.Y.1962, 202 F.Supp. 665.

4. Inspection, refusal of

Under civil air regulations, a government air carrier inspector had absolute right at any time in performance of his duty to enter pilots' compartment of an aircraft making a regular scheduled flight, and pilot's refusal to admit inspector because there was no jump seat available in the compartment as required by rules of airline company was a violation of the civil air regulations subjecting airline company to penalty provided by former section 621 of this title. U. S. v. Northwest Airlines, D.C.Minn. 1946, 69 F.Supp. 482.

5. Jurisdiction of district court

Where government brought action in federal district court in Tennessee against Tennessee resident to recover civil penalty for alleged violation of safety regulation of Board, which violation allegedly took place in Arkansas, and service on defendant was effected within territorial limits of district court in Tennessee, such service was valid and vested federal court in Tennessee with jurisdiction of person of defendant, and if case was properly transferred to federal court in Arkansas, such court would likewise have jurisdiction of person of defendant, notwithstanding that case brought by government against defendant on same cause of action in federal court in Arkansas had been dismissed for invalidity of service. U. S. v. Reid, D. C.Ark.1952, 104 F.Supp. 260.

6. Evidence—Admissibility

An official report, made by government air carrier inspector the day after flight during which he was refused entrance to pilots' compartment took place, was admissible as original evidence for purpose of showing when and for what flight inspector requested a jump seat in pilots' compartment, as against contention that the report was a self-serving statement, where report was made when inspector could not have known that there would be any dispute as to what took place at air port and at a time when he did not know that any litigation would ensue from circumstances covered by the report. U. S. v. Northwest Airlines, D.C.Minn.1946, 69 F.Supp. 482.

7. —— Sufficiency

In actions to enjoin, and to recover penalties for, violations of former section 401 et seq. of this title and regulations thereunder, evidence was insufficient to establish that airport allegedly used by defendant in violation of regulations was not a designated landing area within such regulations prior to defendant's use thereof. U. S. v. Drumm, D.C.Nev.1944, 55 F.Supp. 151.

8. Punishment

Where violation of civil air regulations by airline company in refusing to admit government air carrier inspector in pilots' compartment of aircraft occurred as a result of a bona fide difference as to correct interpretation of the regulations, and good faith of airline company was not questioned, a civil penalty of $350 would be assessed instead of maximum penalty of $1000. U. S. v. Northwest Airlines, D.C.Minn.1946, 69 F.Supp. 482.

Violations of former section 401 et seq. of this title and regulations thereunder were permanently enjoined and $2,500 in penalties assessed, where 11 offenses were shown but all grew out of defendant's failure to hold a pilot's certificate or airworthiness certificate and defendant's flights were not commercial and he did not enter commercial air routes. U. S. v. Drumm, D.C.Nev.1944, 55 F.Supp. 151.

§ 1472. Criminal penalties—Generally

(a) Any person who knowingly and willfully violates any provision of this chapter (except subchapters III, V, VI, VII, and XII of this chapter), or any order, rule, or regulation issued by the Administrator or by the Board under any such provision or any term, condition, or limitation of any certificate or permit issued under subchapter IV of this chapter, for which no penalty is otherwise provided to pilots' compartment took place, was admissible as original evidence for purpose of showing when and for what flight inspector requested a jump seat in pilots' compartment, as against contention that the report was a self-serving statement, where report was made when inspector could not have known that there would be any dispute as to what took place at air port and at a time when he did not know that any litigation would ensue from circumstances covered by the report. U. S. v. Northwest Airlines, D.C.Minn.1946, 69 F.Supp. 482.

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in this section or in section 1474 of this title, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject for the first offense to a fine of not more than $500, and for any subsequent offense to a fine of not more than $2,000. If such violation is a continuing one, each day of such violation shall constitute a separate offense.

Forgery of certificates and false marking of aircraft

(b) Any person who knowingly and willfully forges, counterfeits, alters, or falsely makes any certificate authorized to be issued under this chapter, or knowingly uses or attempts to use any such fraudulent certificate, and any person who knowingly and willfully displays or causes to be displayed on any aircraft, any marks that are false or misleading as to the nationality or registration of the aircraft, shall be subject to a fine of not exceeding $1,000 or to imprisonment not exceeding three years, or to both such fine and imprisonment.

Interference with air navigation

(c) A person shall be subject to a fine of not exceeding $5,000 or to imprisonment not exceeding five years, or to both such fine and imprisonment, who—

(1) with intent to interfere with air navigation within the United States, exhibits within the United States any light or signal at such place or in such manner that it is likely to be mistaken for a true light or signal established pursuant to this chapter, or for a true light or signal in connection with an airport or other air navigation facility; or

(2) after due warning by the Administrator, continues to maintain any misleading light or signal; or

(3) knowingly removes, extinguishes, or interferes with the operation of any such true light or signal.

Offering, granting, or giving rebates or concessions

(d) Any air carrier, foreign air carrier, or ticket agent, or any officer, agent, employee, or representative thereof, who shall, knowingly and willfully, offer, grant, or give, or cause to be offered, granted, or given, any rebate or other concession in violation of the provisions of this chapter, or who, by any device or means, shall, knowingly and willfully, assist, or shall willingly suffer or permit, any person to obtain transportation or services subject to this chapter at less than the rates, fares, or charges lawfully in effect, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be subject for each offense to a fine of not less than $100 and not more than $5,000.

Failure to file reports; falsification of records

(e) Any air carrier, or any officer, agent, employee, or representative thereof, who shall, knowingly and willfully, fail or refuse to make a report to the Board or Administrator as required by this chapter, or to keep or preserve accounts, records, and memoranda in the form and manner prescribed or approved by the Board or Administrator, or shall, knowingly and willfully, falsify, mutilate, or alter any such report, account, record, or memorandum, or shall knowingly and willfully file any false report, account, record, or memorandum, shall be deemed guilty of a misdemeanor and, upon conviction thereof, be subject for each offense to a fine of not less than $100 and not more than $5,000.

Divulging information; information to Congressional committees

(f) If the Administrator or any member of the Board, or any officer or employee of either, shall knowingly and willfully divulge any fact or information which may come to his knowledge during the course of an examination of the accounts, records, and memoranda of any air carrier, or which is withheld from public disclosure under section 1504 of this title, except as he may be directed by the Administrator or the Board in the case of information ordered to be withheld by either, or by a court of competent jurisdiction or a judge thereof, he shall upon conviction thereof be subject for each offense to a fine of not more than $5,000 or imprisonment for not more than two years, or both: *Provided*, That nothing in this section shall authorize the withholding of information by the Administrator or Board from the duly authorized committees of the Congress.

Refusal to testify

(g) Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, or documents, if in his power to do so, in obedience to the subpena or lawful requirement of the Board or Administrator, shall be guilty of a misdemeanor and, upon conviction thereof, shall be subject to a fine of not less than $100 nor more than $5,000, or imprisonment for not more than one year, or both.

Transportation of explosives and other dangerous articles

(h) (1) Any person who knowingly delivers or causes to be delivered to an air carrier or to the operator of any civil aircraft for transportation in air commerce, or who causes the transportation in air commerce of, any shipment, baggage, or property, the transportation of which would be prohibited by any rule, regulation, or requirement prescribed by the Administrator under subchapter VI of this chapter, relating to the transportation, packing, marking, or description of explosives or other dangerous articles shall, upon conviction falsification of records

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thereof for each such offense, be subject to a fine of not more than $1,000, or to imprisonment not exceeding one year, or to both such fine and imprisonment: *Provided*, That when death or bodily injury of any person results from an offense punishable under this subsection, the person or persons convicted thereof shall, in lieu of the foregoing penalty, be subject to a fine of not more than $10,000 or to imprisonment not exceeding ten years, or to both such fine and imprisonment.

(2) In the exercise of his authority under subchapter VI of this chapter, the Administrator may provide by regulation for the application in whole or in part of the rules or regulations of the Interstate Commerce Commission (including future amendments and additions thereto) relating to the transportation, packing, marking, or description of explosives or other dangerous articles for surface transportation, to the shipment and carriage by air of such articles. Such applicability may be terminated by the Administrator at any time. While so made applicable, any such rule or regulation, or part thereof, of the Interstate Commerce Commission shall for the purposes of this chapter be deemed to be a regulation of the Administrator prescribed under subchapter VI of this chapter.

Aircraft piracy

(i) (1) Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished—

(A) by death if the verdict of the jury shall so recommend, or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order; or

(B) by imprisonment for not less than twenty years, if the death penalty is not imposed.

(2) As used in this subsection, the term "aircraft piracy" means any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft in flight in air commerce.

Interference with flight crew members or flight attendants

(j) Whoever, while aboard an aircraft in flight in air commerce, assaults, intimidates, or threatens any flight crew member or flight attendant (including any steward or stewardess) of such aircraft, so as to interfere with the performance by such member or attendant of his duties or lessen the ability of such member or attendant to perform his duties, shall be fined not more than $10,000 or imprisoned not more than twenty years, or both. Whoever in the commission of any such act uses a deadly or dangerous weapon shall be imprisoned for any term of years or for life.

Certain crimes aboard aircraft in flight

(k) (1) Whoever, while aboard an aircraft in flight in air commerce, commits an act which, if committed within the special maritime and territorial jurisdiction of the United States, as defined in section 7 of Title 18, would be in violation of section 113, 114, 661, 662, 1111, 1112, 1113, 2031, 2032, or 2111 of such Title 18 shall be punished as provided therein.

(2) Whoever, while aboard an aircraft in flight in air commerce, commits an act, which, if committed in the District of Columbia would be in violation of section 9 of the Act entitled "An Act for the preservation of the public peace and the protection of property within the District of Columbia", approved July 29, 1892, as amended (D.C. Code, sec. 22–1112), shall be punished as provided therein.

Carrying weapons aboard aircraft

(*l*) Except for law enforcement officers of any municipal or State government, or the Federal Government, who are authorized or required to carry arms, and except for such other persons as may be so authorized under regulations issued by the Administrator, whoever, while aboard an aircraft being operated by an air carrier in air transportation, has on or about his person a concealed deadly or dangerous weapon, or whoever attempts to board such an aircraft while having on or about his person a concealed deadly or dangerous weapon, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

False information

(m) (1) Whoever imparts or conveys or causes to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to do any act which would be a crime prohibited by subsection (i), (j), (k), or (*l*) of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(2) Whoever willfully and maliciously, or with reckless disregard for the safety of human life, imparts or conveys or causes to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to do any act which would be a crime prohibited by subsection (i), (j), (k), or (*l*) of this section, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Investigations by Federal Bureau of Investigation

(n) Violations of subsections (i) through (m), inclusive, of this section shall be investigated by the Federal Bureau of Investigation of the Department of Justice.

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Federal Bureau of Investigation

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Interference with aircraft accident investigation

(*o*) Any person who knowingly and without authority removes, conceals, or withholds any part of a civil aircraft involved in an accident, or any property which was aboard such aircraft at the time of the accident, shall be subject to a fine of no less than $100 nor more than $5,000, or imprisonment for not more than one year, or both. Pub.L. 85–726, Title IX, § 902, Aug. 23, 1958, 72 Stat. 784; Pub.L. 87–197, § 1, Sept. 5, 1961, 75 Stat. 466; Pub.L. 87–528, § 13, July 10, 1962, 76 Stat. 150; Pub.L. 87–810, § 4, Oct. 15, 1962, 76 Stat. 921.

Historical Note

1962 Amendments. Subsec. (a). Pub.L. 87–528 inserted "by the Administrator or by the Board" and included violations of section 1474 of this title within the subsection.

Subsec. (*o*). Pub.L. 87–810 added subsec. (*o*).

1961 Amendment. Subsecs. (i)–(n). Pub.L. 87–197 added subsecs. (i)–(n).

Effective Date. Section effective on the 60th day following the date on which the Administrator of the Federal Aviation Agency first appointed under this chapter qualifies and takes office, see section 1505 (2) of Pub.L. 85–726, set out as a note under section 1301 of this title. The Administrator was appointed, qualified and took office on Oct. 31, 1958.

Hazardous Substances. Federal Hazardous Substances Labeling Act as not modifying this section, see Pub.L. 86–613, § 17, July 12, 1960, 74 Stat. 380, set out as a note under section 1261 of Title 15, Commerce and Trade.

Legislative History: For legislative history and purpose of Pub.L. 87–197, see 1961 U.S.Code Cong. and Adm.News, p. 2563. See, also, Pub.L. 87–528, 1962 U.S. Code Cong. and Adm.News, p. 1844; Pub. L. 87–810, 1962 U.S.Code Cong. and Adm. News, p. 3175.

Cross References

Penalties for violation of security provisions, see section 1523 of this title.

Notes of Decisions

Library references

Aviation ⚿16, 252.
C.J.S. Aerial Navigation §§ 33, 34.

1. "Knowingly and willfully"

"Knowingly and willfully" violating provisions of this chapter or order thereunder embraces acts conscious and intentional, deliberate and voluntary, rather than merely negligent. U. S. v. Eastern Air Lines, Inc., D.C.Fla.1961, 192 F.Supp. 187.

Isolated newspaper advertisement of "lowest fares" as result of oversight and against explicit instructions of airline was not "knowing and willful" violation of Board order. Id.

2. Advertising, methods of

Airline's radio advertisements of "lowest daytime fares in history", which were completely surrounded by reference to airline's economy day coach flights and were accompanied by exhortation to fly airline's economy day coach "and save!" were knowing and willful violations of Board order to cease and desist from advertising "lowest fares" so long as any other carrier offered equal or lower fares, where two competing carriers offered identical fares. U. S. v. Eastern Air Lines, Inc., D.C.Fla.1961, 192 F.Supp. 187.

3. Separate offense

This section providing that if violation is continuing one, each day of violation craft was a "public aircraft" within meaning of that term as used in section 1301 (30) of this title and regulations issued under section 1421(c) of this title and exempting from regulatory control and from rules and regulations relating to civil aircraft any aircraft used exclusively in service of government, and defendant was not required to obtain a commercial operator's certificate, and was not subject to civil penalties for engaging in air commerce using aircraft of more than 12,500 pounds maximum certified take-off weight. U. S. v. Aero Spacelines, Inc., C.A.Cal.1966, 361 F.2d 916.

Airplane mechanics could be charged with violation of this chapter on basis of their failure to comply with procedures of airline not specifically affirmed by FAA. U. S. v. Garrett, D.C.Ga.1969, 296 F.Supp. 1302, affirmed 418 F.2d 1250, certiorari denied 90 S.Ct. 2239, 399 U.S. 927, 26 L.Ed.2d 792.

Implying civil remedy for damages would be foreign to congressional purposes for enactment of this chapter. Yelinek v. Worley, D.C.Va.1968, 284 F. Supp. 679.

Pilot who did not put on his oxygen mask when airplane was operating at altitude above flight level of 25,000 feet and co-pilot was away from his station at controls of airplane would be assessed civil penalty of $750. U. S. v. Duncan, D.C.Tex.1968, 280 F.Supp. 975.

9. Summary judgment

Where affidavit of United States showed that airman mechanic certificate authorizing defendant to perform periodic inspections on civil aircraft had been suspended and remained suspended, and that no petition for court review of order of suspension had ever been filed, and that after suspension defendant made and certified inspections, and no counter showing was made by defendant, summary judgment against defendant for civil penalties was proper. Rawdon v. U. S., C.A.Cal.1966, 364 F.2d 803, certiorari denied 87 S.Ct. 858, 386 U.S. 909, 17 L.Ed. 2d 783, rehearing denied 87 S.Ct. 1476, 386 U.S. 1043, 18 L.Ed.2d 619.

§ 1472. Criminal penalties

[See main volume for text of (a) to (h)]

Aircraft piracy

(i) (1) Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished—

(A) by imprisonment for not less than 20 years; or

(B) if the death of another person results from the commission or attempted commission of the offense, by death or by imprisonment for life.

(2) As used in this subsection, the term "aircraft piracy" means any seizure or exercise of control, by force or violence or threat of force or violence, or by any other form of intimidation, and with wrongful intent, of an aircraft within the special aircraft jurisdiction of the United States.

(3) An attempt to commit aircraft piracy shall be within the special aircraft jurisdiction of the United States even though the aircraft is not in flight at the time of such attempt if the aircraft would have been within the special aircraft jurisdiction of the United States had the offense of aircraft piracy been completed.

Interference with flight crew members or flight attendants

(j) Whoever, while aboard an aircraft within the special aircraft jurisdiction of the United States, assaults, intimidates, or threatens any flight crew member or flight attendant (including any steward or stewardess) of such aircraft, so as to interfere with the performance by such member or attendant of his duties or lessen the ability of such member or attendant to perform his duties, shall be fined not more than $10,000 or imprisoned not more than twenty years, or both. Whoever in the commission of any such act uses a deadly or dangerous weapon shall be imprisoned for any term of years or for life.

Certain crimes aboard aircraft in flight

(k) (1) Whoever, while aboard an aircraft within the special aircraft jurisdiction of the United States, commits an act which, if committed within the special maritime and territorial jurisdiction of the United States, as defined in section 7 of Title 18, would be in violation of section 113, 114, 661, 662, 1111, 1112, 1113, 2031, 2032, or 2111 of such Title 18 shall be punished as provided therein.

(2) Whoever, while aboard an aircraft within the special aircraft jurisdiction of the United States, commits an act, which, if committed in the District of Columbia would be in violation of section 9 of the Act entitled "An Act for the preservation of the public peace and the protec-

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Pilot who did not put on his oxygen mask when airplane was operating at altitude above flight level of 25,000 feet and co-pilot was away from his station at controls of airplane would be assessed civil penalty of $750. U. S. v. Duncan, D.C.Tex.1968, 280 F.Supp. 975.

9. **Summary judgment**

Where affidavit of United States showed that airman mechanic certificate authorizing defendant to perform periodic inspections on civil aircraft had been suspended and remained suspended, and that no petition for court review of order of suspension had ever been filed, and that after suspension defendant made and certified inspections, and no counter showing was made by defendant, summary judgment against defendant for civil penalties was proper. Rawdon v. U. S., C.A.Cal.1966, 364 F.2d 803, certiorari denied 87 S.Ct. 858, 386 U.S. 909, 17 L.Ed.2d 783, rehearing denied 87 S.Ct. 1476, 386 U.S. 1043, 18 L.Ed.2d 619.

alties

ain volume for text of (a) to (h)]

Aircraft piracy

mits or attempts to commit aircraft piracy, as punished—

nent for not less than 20 years; or

of another person results from the commission ssion of the offense, by death or by imprisonment

ubsection, the term "aircraft piracy" means any ntrol, by force or violence or threat of force or form of intimidation, and with wrongful intent, special aircraft jurisdiction of the United States. mmit aircraft piracy shall be within the special e United States even though the aircraft is not ch attempt if the aircraft would have been with- isdiction of the United States had the offense of leted.

flight crew members or flight attendants

oard an aircraft within the special aircraft ju- States, assaults, intimidates, or threatens any light attendant (including any steward or stew- so as to interfere with the performance by such his duties or lessen the ability of such member his duties, shall be fined not more than $10,000 than twenty years, or both. Whoever in the act uses a deadly or dangerous weapon shall be of years or for life.

crimes aboard aircraft in flight

le aboard an aircraft within the special aircraft d States, commits an act which, if committed ime and territorial jurisdiction of the United on 7 of Title 18, would be in violation of section 1112, 1113, 2031, 2032, or 2111 of such Title provided therein.

oard an aircraft within the special aircraft ju- States, commits an act, which, if committed in would be in violation of section 9 of the Act preservation of the public peace and the protec-

tion of property within the District of Columbia", approved July 29, 1892, as amended (D.C.Code, sec. 22–1112), shall be punished as provided therein.

Carrying weapons or explosives aboard aircraft

(*l*) (1) Whoever, while aboard, or while attempting to board, any aircraft in, or intended for operation in, air transportation or intrastate air transportation, has on or about his person or his property a concealed deadly or dangerous weapon, which is, or would be, accessible to such person in flight, or any person who has on or about his person, or who has placed, attempted to place, or attempted to have placed aboard such aircraft any bomb, or similar explosive or incendiary device, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(2) Whoever willfully and without regard for the safety of human life, or with reckless disregard for the safety of human life, shall commit an act prohibited by paragraph (1) of this subsection, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(3) This subsection shall not apply to law enforcement officers of any municipal or State government, or the Federal Government, who are authorized or required within their official capacities to carry arms, or to persons who may be authorized, under regulations issued by the Administrator, to carry deadly or dangerous weapons in air transportation or intrastate air transportation; nor shall it apply to persons transporting weapons contained in baggage which is not accessible to passengers in flight if the presence of such weapons has been declared to the air carrier.

[See main volume for text of (m)]

Aircraft piracy outside special aircraft jurisdiction of the United States

(n) (1) Whoever aboard an aircraft in flight outside the special aircraft jurisdiction of the United States commits "an offense", as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft, and is afterward found in the United States shall be punished—

(A) by imprisonment for not less than 20 years; or

(B) if the death of another person results from the commission or attempted commission of the offense, by death or by imprisonment for life.

(2) A person commits "an offense", as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft when, while aboard an aircraft in flight, he—

(A) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act; or

(B) is an accomplice of a person who performs or attempts to perform any such act.

(3) This subsection shall only be applicable if the place of takeoff or the place of actual landing of the aircraft on board which the offense, as defined in paragraph (2) of this subsection, is committed is situated outside the territory of the State of registration of that aircraft.

(4) For purposes of this subsection an aircraft is considered to be in flight from the moment when all the external doors are closed following embarkation until the moment when one such door is opened for disembarkation, or in the case of a forced landing, until the competent authorities take over responsibility for the aircraft and for the persons and property aboard.

Investigations by Federal Bureau of Investigation

(o) Violations of subsections (i) through (n), inclusive, of this section shall be investigated by the Federal Bureau of Investigation of the Department of Justice.

Interference with aircraft accident jurisdiction

(p) Any person who knowingly and without authority removes, conceals, or withholds any part of a civil aircraft involved in an accident, or any property which was aboard such aircraft at the time of the accident, shall be subject to a fine of no less than $100 nor more than $5,000, or imprisonment for not more than one year, or both.

As amended Pub.L. 91–449, § 1(3), Oct. 14, 1970, 84 Stat. 921; Pub.L. 93–366, Title I, §§ 103, 104, Title II, § 203, Aug. 5, 1974, 88 Stat. 410, 411, 417.

1974 Amendment. Subsec. (i)(1). Pub. L. 93-366, § 104(a), substituted provisions authorizing the imposition of imprisonment for not less than 20 years, or the death penalty or life imprisonment, where the death of another person resulted from the commission or attempted commission of the offense, for provisions authorizing the imposition of the death penalty if the verdict of the jury so recommended, or, in the case of guilty plea, or a not guilty plea where the defendant waived a jury trial, if the court in its discretion so ordered, or imprisonment for not less than 20 years, if the death penalty was not imposed.

Subsec. (i)(2). Pub.L. 93–366, § 103(a), added "or by any other form of intimidation" following "threat of force or violence".

Subsec. (i)(3). Pub.L. 93–366, § 104(b), added subsec. (i)(3).

Subsec. (*l*). Pub.L. 93-366, § 203, reorganized former provisions by designating prohibited activities as cl. (1) and, as so designated, added requirement that weapon is, or would be, accessible in flight and expanded activities subject to penalties to include placing, attempting to place, etc., aboard the aircraft any bomb, or similar explosive or incendiary device, and designating exceptions as cl. (3) and, as so designated, added exception relating to weapons not accessible to passengers in flight if their presence was declared to the air carrier, and added provisions designated as cl. (2).

Subsec. (n). Pub.L. 93–366, § 103(b), added subsec. (n). Former subsec. (n) was redesignated as (*o*).

Subsec. (*o*). Pub.L. 93-366, § 103(b), (c), redesignated former subsec. (n) as (*o*) and, as so redesignated, substituted "(n)" for "(m)". Former subsec. (*o*) was redesignated as (p).

Subsec. (p). Pub.L. 93–366, § 103(b), redesignated former subsec. (*o*) as (p).

1970 Amendment. Subsecs. (i), (j) and (k). Pub.L. 91–449 substituted "within the special aircraft jurisdiction of the United States", for "in flight in air commerce" in subsecs. (i), (j) and (k), wherever appearing.

Transfer of Functions. All functions, powers, and duties of the Federal Aviation Agency and of the Administrator and other offices and officers thereof, and all functions, powers, and duties of the Civil Aeronautics Board and of the Chairman, members, offices, and officers thereof under subchapters VI and VII of this chapter were transferred to and vested in the Secretary of Transportation by Pub.L. 89–670, Oct. 15, 1966, 80 Stat. 931, which created the Department of Transportation. See sections 1655(c), (d) and 1657(f), (g), of this title.

Legislative History. For legislative history and purpose of Pub.L. 91–449, see 1970 U.S.Code Cong. and Adm.News, p. 3996. See, also, Pub.L. 93–366, 1974 U.S. Code Cong. and Adm.News, p. —.

Supplementary Index to Notes

¼. Constitutionality

This section making it a crime to hijack an aircraft is not unconstitutionally vague. U. S. v. Bohle, C.A.Ind.1971, 445 F.2d 54.

Provision of this section proscribing imparting or conveying false information, knowing the information to be false, concerning an attempt or alleged attempt to do any act which would be a crime prohibited by statutory provisions, including provision pertaining to aircraft piracy, does not violate right of free speech under U.S.C.A.Const. Amend. 1. Taylor v. U. S., D.C.Fla.1973, 358 F.Supp. 384.

Subsection (i) of this section is unconstitutional insofar as it permits either judges or juries to impose the death penalty. U. S. v. Bohle, D.C.N.Y.1972, 346 F. Supp. 577.

½. Purpose

One of the purposes of the aircraft piracy amendment to this section was to provide a solution to the jurisdictional problems involved in fixing a locus for a crime committed in transit and in arresting a deplaning passenger who may have engaged in criminal activity over the territory of a different state. U. S. v. Healy, Ga.1964, 84 S.Ct. 553, 376 U.S. 75, 11 L.Ed.2d 527.

Purpose of this section prohibiting boarding of commercial aircraft while carrying concealed dangerous weapon is to prevent hijacking of commercial airliners. U. S. v. Ware, D.C.Okl.1970, 315 F. Supp. 1333.

1. "Knowingly and willfully"

Proof of knowing possession is required for conviction under this section making it an offense for person with concealed or dangerous weapon to attempt to board aircraft. U. S. v. Brown, D.C.Mo.1974, 376 F.Supp. 451.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,* vs. MICHAEL WAZNEY, *Appellant.*	No. 75-2842 OPINION

[February 2, 1976]

Appeal from the United States District Court for the Central District of California

Before: ELY and GOODWIN, Circuit Judges, and PECKHAM,* District Judge.

ELY, Circuit Judge:

Wazney appeals his conviction under a six-count indictment charging that he forged the endorsements on certain United States Savings Bonds and then uttered those forged bonds, all in violation of 18 U.S.C. §495. We affirm.

The offense for which appellant was convicted was committed on September 18th and 19th, 1969. In February, 1971, the District Attorney's office of a California county requested that the Federal Bureau of Investigation (FBI) seek a warrant against appellant for interstate flight to avoid prosecution on an unrelated charge. Pursuant to that warrant, the FBI engaged in an extensive investigation throughout the country in attempting to locate and apprehend appellant. In September, 1973, a warrant was issued for the arrest of appellant on the federal charges for which appellant now stands convicted. In an effort to apprehend appellant under this second warrant, the Secret

*Honorable Robert F. Peckham, United States District Judge, San Jose, California, sitting by designation.

Service conducted a further intensive investigation through personal interviews, record checks, and physical surveillance. In June, 1974, an attorney began a series of negotiations on behalf of appellant with the state District Attorney's office. These negotiations led to appellant's surrender to state authorities on March 7, 1975. Shortly thereafter appellant was arraigned on the federal charges. At the arraignment appellant stated in response to a question by the magistrate that he had been aware, prior to his arrest, that there had been an outstanding warrant against him. The indictment on the forgery charge was issued on March 18, 1975.

Appellant filed a motion to dismiss the indictment on the ground that it had not been issued prior to the expiration of the 5-year statute of limitations. 18 U.S.C. § 3282. The motion was denied by the District Court, and the correctness of that ruling, *vel non,* is the problem for our resolution.

The prosecution contends that the statute of limitations does not apply to appellant because his conduct brings him within the terms of 18 U.S.C. § 3290, which provides: "No statute of limitations shall extend to any person fleeing from justice." We agree.

There is some disagreement among the Circuits as to the interpretation that should be given the statutory words, "fleeing from justice." The Courts of Appeal of the District of Columbia and Eighth Circuits have held that mere absence from the jurisdiction in which the offense occurred is enough to toll the statute of limitations. *King v. United States,* 144 F.2d 729, 731 (8th Cir.), *cert. denied,* 324 U.S. 854 (1944); *McGowen v. United States,* 105 F.2d 791 (D.C. Cir.), *cert. denied,* 308 U.S. 552 (1939). On the other hand, the First, Second, and Fifth Circuits have held that intent to avoid arrest or prosecution must be proved before section 3290 will apply. *Jhirad v. Ferrandina,* 486 F.2d 442 (2d Cir. 1973); *Donnell v. United States,* 229 F.2d 560 (5th Cir. 1956); *Brouse v. United States,* 68 F.2d 294 (1st Cir. 1933); *Greene v. United States,* 154 F. 401 (5th Cir.), *cert. denied,* 207 U.S. 596 (1907); *Porter v. United States,* 91 F. 494 (5th Cir. 1898).

We adopt the rule of the First, Second, and Fifth Circuits that, in order to establish that an accused was "fleeing from justice" within the meaning of section 3290, the prosecution must meet the burden of proving that the accused concealed himself with the intent to avoid arrest or prosecution. As commonly used, the word "fleeing" connotes the performance of some volitional act. *See Jhirad, supra,* 486 F.2d at 444. Moreover, it would not further the purposes of section 3290 to toll the statute of limitations when there has been no intent to avoid arrest or prosecution. The statute of limitations is made inapplicable whenever an accused flees from justice because the failure to prosecute is attributable to the unacceptable conduct of the accused. The accused should not be held responsible, however, for unintentional and innocent delays, such, for example, as one caused by an open move to a new residence where the accused is readily accessible to careful law enforcement officers. *See Donnell, supra,* 229 F.2d at 564. Finally, although the Supreme Court has never faced this issue squarely, it can be inferred from the Court's opinion in *Streep v. United States,* 160 U.S. 128 (1895), that intent to avoid prosecution is an essential element of "fleeing from justice." *See Jhirad, supra,* 486 F.2d at 455, and *Donnell, supra,* 229 F.2d at 562-63.

There is substantial evidence on the record before us to support the conclusion that appellant had the requisite intent to avoid arrest or prosecution. By his own admission, appellant was aware, prior to his arrest, of an outstanding warrant against him. Yet appellant continued to conceal himself. An extensive investigation by the authorities failed to locate appellant, and by engaging in negotiations with state officials through his attorney, appellant clearly made known his intent to remain hidden from the authorities until a satisfactory settlement of the state charges against him could be reached.[1] This knowledge by appellant that he was wanted by the police, coupled with his failure to submit to arrest, is enough to establish the requisite specific intent to avoid arrest or prosecution.

Appellant next contends that the evidence was insufficient to support a finding that he physically left the territorial jurisdiction of the District Court. Indeed, except for some multiple

[1]Assuming that appellant was intentionally avoiding prosecution only for the period during which his attorney was negotiating with the district attorney's office, we conclude that, given the dates of appellant's offense and arrest, prosecution was timely.

hearsay in one of the affidavits filed in opposition to appellant's motion to dismiss, there was no proof that appellant had ever left the area in which the crime was committed. Physical absence from the jurisdiction is not, however, essential to toll the statute of limitations under section 3290. It is enough that an accused leaves his usual place of abode and conceals himself for the purpose of avoiding arrest or prosecution. *Ferebee v. United States,* 295 F. 850 (4th Cir. 1924). *See United States v. Farrell,* 87 F.2d 957, 960 (9th Cir.), *cert. denied,* 302 U.S. 683 (1937). *But see Greene v. United States,* 154 F. 401, 411 (5th Cir.), *cert. denied,* 207 U.S. 596 (1907). In modern large and heavily populated districts it is almost as easy to avoid arrest or prosecution by concealing oneself within the district as by fleeing the district.

The record on this appeal clearly shows that appellant concealed himself for the purpose of avoiding arrest or prosecution. The exact location that appellant chose to conceal himself is of no importance since the effect would have been the same regardless of whether he had chosen to leave the jurisdiction or had remained within the territorial boundaries of the district in which the crime was committed.

We therefore hold that the indictment against appellant was not barred by the statute of limitations. Thus, the motion to dismiss the indictment was properly denied.

AFFIRMED.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 2-5-76—400

James J. CONNOR

v.

COMMONWEALTH.

Supreme Judicial Court of Massachusetts, Suffolk.

Argued March 5, 1973.

Decided May 9, 1973.

Defendant filed petition in the Supreme Judicial Court for the County of Suffolk, for a writ of error challenging manner in which he had been indicted. Reservation and report of the petition was made to the full court without decision by Hennessey, J. The Supreme Judicial Court, Hennessey, J., held that murder indictment wherein defendant was referred to only as "John Doe, the true name and a more particular description of the said John Doe being to the said Jurors unknown," was insufficient to show that grand jury found probable cause against defendant and was fatally defective, even though defendant's name was subsequently substituted in place of "John Doe" upon motion by the Commonwealth.

Judgment reversed, verdict set aside and indictment dismissed with direction.

1. Indictment and Information ⚷81(1), 159(4)

Murder indictment wherein defendant was referred to only as "John Doe, the true name and a more particular description of the said John Doe being to the said Jurors unknown," was insufficient to show that grand jury found probable cause against defendant and was fatally defective, even though defendant's name was subsequently substituted in place of "John Doe" upon motion by the Commonwealth; overruling, to the extent of inconsistencies, Commonwealth v. Gedzium, 259 Mass. 453, 156 N.E. 890 and Commonwealth v. Doherty, 353 Mass. 197, 229 N.E.2d 267. M.G.L.A. c. 277 § 19; M.G.L.A.Const. pt. 1, art. 12; 28 U.S.C.A. § 2254.

2. Indictment and Information ⚷1

"The law of the land," within constitutional provision that no person shall be arrested, imprisoned, or deprived of life, liberty or estate but by judgment of his peers or the law of the land, establishes the right of every citizen to be secure, in case of high offenses, from accusation and trial before probable cause is established by the presentment and indictment of a grand jury. M.G.L.A.Const. pt. 1, art. 12.

See publication Words and Phrases for other judicial constructions and definitions.

3. Indictment and Information ⚷81(1)

Indictment must include words of description which have particular reference to the person whom the Commonwealth seeks to convict; no matter how extensively or specifically defendant is described in grand jury proceedings, the constitutional requirement can be met only by sufficient description in the indictment itself. M.G.L.A. c. 277 § 19; M.G.L.A.Const. pt. 1, art. 12.

4. Indictment and Information ⚷159(4)

Purpose of statute allowing true name of a defendant indicted by a fictitious or erroneous name to be inserted in record at any subsequent stage of the proceedings is to prevent one who ought to be indicted from hampering the grand jury in performance of their duty by screening his name and other identifying characteristics. M.G.L.A. c. 277 § 19; M.G.L.A.Const. pt. 1, art. 12.

5. Indictment and Information ⚷159(4)

Indictment is not required to show full or true name of defendant, but in orer that a defendant's name may properly be inserted in the record under the authority of statute pertaining to persons who have been indicted by fictitious or erroneous names, it must appear that there is a warrantable inference, from a consideration of the indictment's description of the accused, together with proof concerning the proceedings before the grand jury, that the grand jury indicted the defendant. M.G.L.A. c. 277 § 19; M.G.L.A.Const. pt. 1, art. 12.

6. Indictment and Information ⚿159(4)

On motion to insert in the record the true name of a defendant who has been indicted under a fictitious or erroneous name, it is appropriate and desirable that the proceedings before grand jury should be shown by the presentation of testimony, affidavits or a transcript of those proceedings. M.G.L.A. c. 277 § 19; M.G.L.A. Const. pt. 1, art. 12.

7. Costs ⚿317

Where, on appeal from conviction, indictment was found to be fatally defective, defendant was entitled to costs. M.G.L.A. c. 250 § 12.

James J. Twohig, Boston, for petitioner.

Charles E. Chase, Asst. Atty. Gen., for the Commonwealth.

Before REARDON, QUIRICO, HENNESSEY, KAPLAN, and WILKINS, JJ.

HENNESSEY, Justice.

This is a petition for a writ of error which was filed by Connor in this court after the United States Supreme Court ruled, in Picard v. Connor, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971), that it would not pass upon Connor's contention that the Massachusetts indictment process had denied him the equal protection of the laws. It declined to rule because the issue had never been presented before the Supreme Judicial Court of Massachusetts. This court previously considered the case in Commonwealth v. Doherty, 353 Mass. 197, 229 N.E.2d 267.

At issue is the validity of an indictment for murder which described the accused as merely "John Doe." The record of the case was later amended by inserting Connor's name. A single justice of this court reserved and reported the instant petition to the full court without decision.

On May 1, 1965, Robert W. Davis was shot to death. On August 4, 1965, the grand jury for Suffolk County returned an indictment for murder in the first degree against Donald E. Landry otherwise known as Emo Landry and "John Doe, the true name and a more particular description of the said John Doe being to the said Jurors unknown." Shortly after the return of the indictment, Connor was arrested. Other indictments were returned against William R. Doherty and Janice M. Doherty charging them with being accessories before and after the fact of Davis's murder.

On August 9, 1965, the prosecutor filed a motion—under the provisions of G.L. c. 277, § 19—to amend the indictment by substituting the name of James J. Connor in place of "John Doe." The motion was allowed by a judge of the Superior Court, after a hearing at which no evidence was introduced.

On August 10, 1965, the docket entry of August 9 was "corrected so as to read as follows: Commonwealth files motion to amend indictment. Court . . . having determined that true name of John Doe has been discovered to be James J. Connor, orders the name James J. Connor to be entered on record as true name." Again, no evidence was presented at the hearing upon this motion. Connor filed motions to quash and to dismiss the indictment. Subsequently the motions were denied and Connor's exceptions were saved.

The case was tried in March of 1966 and Connor was found guilty of murder in the first degree with a recommendation by the jury that the death penalty not be imposed. Appeal was taken to this court and the conviction was affirmed. Commonwealth v. Doherty, 353 Mass. 197, 229 N.E.2d 267 (1967). A petition for certiorari was denied on March 11, 1968. Connor v. Massachusetts, 390 U.S. 982, 88 S.Ct. 1103, 19 L.Ed.2d 1280.

Connor then filed a petition for a writ of habeas corpus in the United States District Court for the District of Massachusetts. The District Court held a hearing and dismissed the petition. Connor v. Picard, 308 F.Supp. 843 (D.Mass.). On appeal the United States Court of Appeals for the First Circuit reversed, having found that the Massachusetts indictment process, as applied to the petitioner, denied him the equal protection of the laws. Connor v. Picard, 434 F.2d 673 (1st Cir.).

The United States Supreme Court granted the Commonwealth's petition for a writ of certiorari, and on December 20, 1971, that court reversed the decision of the Court of Appeals (Picard v. Connor, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438), but declined to pass upon the merits of the equal protection argument since Connor had failed to exhaust his available State remedies. See 28 U.S.C. § 2254 (1970).

Subsequently, Connor filed this petition for a writ of error alleging that the manner in which he was indicted denied him the equal protection of the laws.

[1] 1. Connor argues before us, not only the equal protection issue arising under the Constitution of the United States, but also that the indictment and his subsequent conviction were void under art. 12 of the Declaration of Rights of the Massachusetts Constitution. The argument under art. 12 was previously presented by Connor, and considered by this court, in the appeal. See Commonwealth v. Doherty, 353 Mass. 197, 205–207, 229 N.E.2d 267. The judgment against Connor was affirmed by a divided court, with two dissenting Justices voting to reverse the judgment, set aside the verdict, and quash the indictment.[1]

We hold that, under art. 12 of the Declaration of Rights of our Constitution, the indictment against Connor was fatally defective, and all subsequent proceedings taken in reliance upon the indictment were void. In so far as the case of Commonwealth v. Doherty, *supra*, reached contrary conclusions (see 353 Mass. at 205–207, 229 N.E.2d 267) we overrule that case. In view of our conclusions, there is no necessity for us to consider Connor's argument relating to the equal protection provision of the Constitution of the United States.

Apparently, the Superior Court judge who allowed the amendment of the record by the insertion of Connor's name relied upon the case of Commonwealth v. Gedzium, 259 Mass. 453, 457, 156 N.E. 890, as did the majority of this court in considering Connor's appeal. The conclusions of the *Gedzium* case were supportive of the indictment procedure used here. We now overrule the *Gedzium* case to the extent that it is inconsistent with our present opinion.

The entire description of the accused persons in the indictment was as follows: "Donald E. Landry, otherwise known as Emo Landry, and John Doe, the true name and a more particular description of the said John Doe being to the said Jurors unknown." These words are to be considered in the light of art. 12 of the Declaration of Rights and in the light of G.L. c. 277, § 19. Under art. 12, "[N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." General Laws c. 277, § 19, provides: "If the name of an accused person is unknown to the grand jury, he may be described by a fictitious name or by any other practicable description, with an allegation that his real name is unknown. An indictment of the defendant by a fictitious or erroneous name shall not be ground for abatement; but if at any subsequent stage of the proceedings his true name is discovered, it shall be entered on the record and

1. Although the report of the case, at 353 Mass. 197, 229 N.E.2d 267, shows a quorum of only five Justices, court records show that all seven Justices participated in the decision.

may be used in the subsequent proceedings, with a reference to the fact that he was indicted by the name or description mentioned in the indictment."

The Commonwealth relies, of course, on the reasoning of the majority opinion in the *Doherty* case. This reasoning is that the grand jury intended to indict a man who acted a particular and described part in the alleged murder; that the record of the case could be amended by order of the Superior Court judge to show Connor's name as the accused; that the judge could and did act on the district attorney's representations that Connor was the man described in the testimony before the grand jury and designated as John Doe; that the district attorney made these representations by presenting his motion to insert Connor's name in the record; that under the *Gedzium* case it is no longer necessary that the indictment itself give "the best description possible of the person to be arrested." 353 Mass. at 206–207, 229 N.E.2d at 273, quoting from Commonwealth v. Crotty, 10 Allen 403, 404–405.

[2] We cannot concur with these conclusions. They negate art. 12 of the Declaration of Rights, which mandates among other things that no subject shall be convicted of crime and punished but by "the law of the land." Plainly the law of the land, derived from the ancient immunities and privileges of English liberty, establishes the right of every citizen to be secure, in case of high offences, from accusation and trial before probable cause is established by the presentment and indictment of a grand jury. Jones v. Robbins, 8 Gray 329, 344. See Commonwealth v. Woodward, 157 Mass. 516, 32 N.E. 939; Commonwealth v. Harris, 231 Mass. 584, 587, 121 N.E. 409. Our law has established the "great principle asserted by the Declaration of Rights . . . that no man shall be put to answer a criminal charge until the criminating evidence [against him] has been laid before a grand jury, and they have found probable cause." Commonwealth v. Holley, 3 Gray 458, 459. The rule is firm that "'. . . no person . . shall be held to answer for a capital or otherwise infamous crime . . . unless he shall have been previously charged on the presentment or indictment of a grand jury.' 2 Kent Com. 12." Jones v. Robbins, *supra*, 8 Gray at 344–345. These principles have been affirmed in both the *Gedzium* and the *Doherty* cases (259 Mass. at 459, 156 N.E. 890; 353 Mass. at 207, 229 N.E.2d 267).

[3] It is an inescapable conclusion that the indictment must contain words of description which have particular reference to the person whom the Commonwealth seeks to convict. No matter how extensively or specifically the defendant was described in grand jury proceedings, the constitutional requirement can be met only by a sufficient description in the indictment itself. The *Gedzium* case emphasized that the record and not the indictment is amended under c. 277, § 19, and that "[t]he procedure is somewhat analogous to specifications." 259 Mass. at 457, 156 N.E. at 891. We regard the distinction as insignificant because the essential point is that there is no sufficient showing that the grand jury found probable cause against this defendant.

[4–6] This is not to say that the indictment must show the full or true name of the defendant. General Laws c. 277, § 19, serves a purpose consistent with art. 12 in its provision that a defendant's true name may be inserted in the record "at any subsequent stage of the proceedings." The purpose of the statute is salutary, to the end that, in so far as art. 12 of the Constitution permits, one who ought to be indicted is prevented from hampering the grand jury in the performance of their duty by screening his name and other identifying characteristics. See Commonwealth v. Gedzium, 259 Mass. 453, 461, 156 N.E. 890. See also Commonwealth v. Dedham, 16 Mass. 141; Commonwealth v. Lewis, 1 Metc. 151; Turns v. Commonwealth, 6 Metc. 224, 235; Commonwealth v. Butler, 1 Allen 4; Commonwealth v. Darcey, 12 Allen 539; Commonwealth v. Fredericks, 119 Mass. 199. Nevertheless, in order that a defendant's name may properly be inserted in the record under the authority of the statute it must appear that there is a warrantable inference, from a consideration of the indictment's description of the accused, together with the proof concerning the proceedings before the grand jury,[2] that the grand jury indicted the defendant.

To hold otherwise is to vest the grand jury's ultimate power in the judge. We need not comment at this time as to the minimum descriptive content required in any indictment, or the sufficiency of partial names, or aliases traceable to the defendant, or other words of description such as, "by stating his occupation, his personal appearance and peculiarities, the place of his residence, or other circumstances by which he can be identified." Commonwealth v. Crotty, 10 Allen 403, 405; Commonwealth v. Gedzium, 259 Mass. 453, 457, 156 N.E. 890, and cases cited. We need not reach such discussion because the description of the accused here as merely "John Doe" expressed no more than the grand jury's intention to accuse a man, otherwise unspecified, of the crime of murder. The comments in the dissenting opinion (Kirk, J. joined by Spiegel, J.) in the *Doherty* case (353 Mass. at 217–218, 229 N.E.2d at 279) are apt: ". . . The name 'John Doe' gives no clue to identity. Standing alone it is synonymous with anonymity. The indictment of John Doe is the indictment of anyone. The indictment of anyone is the indictment of no one. The indictment of no one is an indictment in blank. The indictment as returned, therefore, subjected Connor to a public trial before the grand jury had determined in the first instance that probable cause existed to believe that *he* committed the crime charged in the indictment. . . . To hold that the 'John Doe' indictment under which Connor was tried and convicted is authorized by G.L. c. 277, § 19, would effectively nullify the limitations on criminal proceedings contained in G.L. c. 277, § 63. The procedure would permit a grand jury to return an indictment whenever they had probable cause to believe that a crime had been committed without any inquiry into *who* committed the crime. It would no longer suffice that a person who has committed a crime remain undetected for the period of time set forth in G.L. c. 277, § 63. It would also be necessary that the acts constituting the crime likewise be not detected for the prescribed period."

[7] 2. The judgment against Connor is reversed, the verdict against him is set aside, and the indictment in so far as it has reference to him is dismissed. He is to be brought forthwith before a judge of the Superior Court and, unless it appears that he should be held upon some existing process other than the instant indictment, he is to be discharged forthwith from custody. He is awarded costs against the Commonwealth to be paid by the county of Suffolk. G. L. c. 250, § 12.

So ordered.

In re Consent to ADOPTION OF A MINOR.

Supreme Judicial Court of Massachusetts, Suffolk.

Argued Feb. 5, 1973.

Decided May 7, 1973.

Consolidated cases involving challenge to an adoption. In one case a petition was made to vacate the adoption, which was denied by the Probate Court, Suffolk County, Wilson, J. In the second case a

2. It is appropriate and desirable that the proceedings before the grand jury should be shown by the presentation of testimony, affidavits, or a transcript of those proceedings. See the *Doherty* case, 353 Mass. at 206, 229 N.E.2d 267.

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alker v. Field Enterprises,
1 632 (10th Cir. 1964), the
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that it cannot be considered as regularly doing business in Wyoming so as to allow jurisdiction under Wyo.Stat. § 5–4.2(a)(iv).

From the foregoing, I hold that the Wyoming Long-Arm Statute is insufficient in its elasticity to acquire jurisdiction over Times Mirror and that the contacts of Times Mirror in Wyoming were of such limited extent that it cannot be considered as regularly doing business in Wyoming.

UNITED STATES of America, Plaintiff,

v.

John DOE a/k/a Leo, a white male, approximately 23 years old, approximately 5′ 7″ tall, approximately 135 pounds, with black hair, brown eyes and a black mustache, Defendant.

No. 73–CR–266.

United States District Court,
E. D. Wisconsin.

June 17, 1975.

Defendant moved to dismiss indictment charging him with violation of narcotics laws. The District Court, Warren, J., held that indictment, which was directed against "John Doe," which included alias "Leo," and which enumerated various other particulars concerning the race, sex, age, height, weight, hair color, eye color and peculiar facial characteristics of the defendant, was sufficient to identify defendant and did not constitute a delegation of duty of grand jurors.

Motion denied.

1. Constitutional Law ⊂⊃253(2)

Concept of equal protection, as embodied in the Fourteenth Amendment, is applicable to the activities of the federal government through the provisions of the Fifth Amendment. U.S.C.A.Const. Amends. 4, 5, 14.

2. Indictment and Information ⊂⊃81(1)

Description present in indictment which was directed against "John Doe," which included alias "Leo," and which enumerated various other particulars concerning the race, sex, age, height, weight, hair color, eye color and peculiar facial characteristics of the defendant, was sufficient to identify defendant and did not constitute a delegation of duty of grand jurors. U.S.C.A.Const. Amends. 5, 14.

3. Constitutional Law ⊂⊃250.2(1)

Aberrational implementation of proper criminal procedures does not give rise to an equal protection claim absent a showing of intentional or purposeful discrimination. U.S.C.A.Const. Amend. 14.

4. Drugs and Narcotics ⊂⊃103, 105

Indictment, which gave proper notice that two designated individuals were charged with distribution of a particular quantity of phencyclidine HCl, a schedule III substance, at a specific place on a specific date in violation of two certain sections of the United States Code, contained essential elements of offense intended to be charged and apprised defendant of what he had to be prepared to meet; and fact that party to whom distribution had been made was not named was insufficient to warrant dismissal of the prosecution. 18 U.S.C.A. § 2; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

5. Drugs and Narcotics ⊂⊃103

Indictment, which charged that defendant and another knowingly and intentionally unlawfully possessed with intent to distribute and distributed a specific quantity of phencyclidine HCl, a schedule III controlled substance, in violation of certain statutes was adequate to permit defendant to raise it as a defense to further prosecutions based upon same transaction. 18 U.S.C.A. § 2;

Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

Terry E. Mitchell, Asst. U.S. Atty., Milwaukee, Wis., for plaintiff.

John D. Murray, Coffey, Murray & Coffey, Milwaukee, Wis., for Raymond Zoccola.

James R. Andary, Detroit, Mich., for Leonard Marchesani and John Doe.

MEMORANDUM AND ORDER

WARREN, District Judge,

On September 17, 1973, a special grand jury returned an indictment against the individual named above and one Raymond Zoccola. Said indictment charges that both persons knowingly and intentionally did unlawfully possess with intent to distribute and did distribute a specific quantity of phencyclidine HCl, a Schedule III controlled substance, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.

On October 16, 1974, one Leonard Terry Marchesani was arrested in Macomb County, Michigan, pursuant to a warrant issued on the indictment here at issue; on January 20, 1975, after various motions had been presented in both the Eastern District of Wisconsin and the Eastern District of Michigan, transfer of this prosecution to the district of arrest was denied by order of The Honorable John W. Reynolds, Chief Judge of the United States District Court for the Eastern District of Wisconsin.

The case is presently before this Court for resolution of a motion to dismiss the indictment, filed on behalf of Marchesani on January 31, 1975. Having duly considered the pleadings, memoranda and documents that constitute the written record in this case, as supplemented by the briefs that have been filed on behalf of both Marchesani and the United States, and being otherwise duly advised, the Court concludes that defendant Marchesani cannot prevail in this regard and his motion to dismiss this prosecution is to be denied.

I

Counsel for the defendant attacks the manner in which the Government has identified the accused in the indictment at issue here; in his motion to dismiss and the brief in support thereof he argues that the issuance of an indictment that is directed against an individual described only by the fictitious name "John Doe", an alleged alias, and a summary of certain physical characteristics, is precluded by the fourth and fifth amendments to the United States Constitution as well as by the equal protection clause of the fourteenth amendment to the United States Constitution.

[1] The Court recognizes that the concept of equal protection of the laws, as embodied in the fourteenth amendment, is applicable to the activities of the federal government through the provisions of the fifth amendment. See: *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). Notwithstanding this fact, however, the Court can find no protections guaranteed this accused under the terms of the Federal Constitution that have been breached in the context of this case.

The most substantial authority cited by the defendant in support of the claims presented here is the recent decision by Judge Bailey Aldrich in *Connor v. Picard*, as reported at 434 F.2d 673 (1st Cir., 1970). In this decision it was held that a Massachusetts statutory scheme was unconstitutional where it permitted an indictment to be returned against a person identified only as "John Doe, the true name and a more particular description of the said John Doe being to the said jurors unknown", and then later altered by the court when the true identity of the accused was ascertained. Judge Aldrich found that by naming the accused in so ambiguous a fashion, the grand jury had in fact "delegated" the duty of determining which person was to be prosecuted for a partic-

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ular crime to the law enforcement officers charged with the task of making the arrest; because of the otherwise universal commitment to grand jury indictment in felony prosecutions in the Commonwealth of Massachusetts, the Court was of the opinion that such delegation was an unconstitutional and impermissible discrimination.

While this Court stands in full accord with the result reached in *Connor v. Picard, supra*, the law recited in that opinion would appear to be insufficient to require a dismissal of the indictment at issue here.

Initially, the Court would note that the case at bar appears to be factually distinguishable from *Connor v. Picard.* Because this indictment describes the accused in a more particularized fashion, no "delegation" seems to be present; Judge Aldrich himself inferred that the procedures then at issue before him might be permissible in some cases where the grand jury had supplied a description of the accused that was more detailed than the mere recitation of the fictitious name "John Doe". *Connor v. Picard, supra*, 434 F.2d at p. 675.

In addition, counsel for the defendant fails to notice that *Connor v. Picard* was reversed by the United States Supreme Court because the plaintiff had failed to exhaust available state judicial remedies within the meaning of 28 U.S.C. § 2254. *Picard v. Connor*, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). When Connor later appealed to the Supreme Judicial Court of Massachusetts, it was held that an indictment under a fictitious name was constitutionally permissible so long as the grand jury included a sufficient description of the accused within the indictment itself. *Connor v. Commonwealth*, Mass., 296 N.E.2d 172, 175 (1973).

In view of these subsequent events, the Court must conclude that the opinion upon which the defendant relies has diminished somewhat in precedential value. Other courts have since indicated that an indictment which refers to the accused by a fictitious name is not constitutionally impermissible so long as the individual is otherwise adequately identified, in accordance with *Connor v. Commonwealth, supra. See: People v. Doe*, 75 Misc.2d 736, 347 N.Y.S.2d 1000 (1973).

The principles described in the foregoing opinions would seem to comport with the traditional views of the federal courts—*U. S. v. Doe*, 127 F. 982 (N.D. Cal., 1904); *Duffy v. Keville*, 16 F.2d 828 (D.Mass., 1926)—and would appear to follow what many authorities believe to be acceptable standards of criminal jurisprudence. *See:* 42 C.J.S. Indictments and Informations § 127(f) (1944).

[2] The Court finds that the description present in the indictment at issue here is sufficient to identify this defendant and in no way constitutes a delegation of the duty of the grand jurors. Said indictment includes the alias "Leo"—the defense submits that Marchesani is known to others as "Leonard"—and it enumerates various other particulars concerning the race, sex, age, height, weight, hair color, eye color and peculiar facial characteristics of the accused; the Court is of the opinion that more need not be required.

[3] The determination that this method of indictment is legitimate would seem to dispel the contentions raised by the defendant on the basis of the equal protection clause of the fourteenth amendment; it is well settled that aberrational implementation of proper criminal procedures does not give rise to an equal protection claim absent a showing of intentional or purposeful discrimination. *See: U. S. ex rel. Curtis v. Warden of Green Haven Prison*, 463 F.2d 84 (2nd Cir., 1972), citing *Snowden v. Hughes et al.*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944). The defendant does not urge, nor would the facts of this case sustain a finding of such illicit Government conduct here.

II

Recent decisions of the United States Supreme Court have focused upon two particular protections which an indictment is intended to guarantee. *See, e. g., Russell v. U. S.*, 369 U.S. 749, 763, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1972), and *Hamling v. U. S.*, 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974).

In accordance therewith this Court must determine, first, whether the indictment in this case contains the essential elements of the offense intended to be charged and apprises the defendant of what he must be prepared to meet, and secondly whether the language of the indictment is sufficient to protect the defendant from the threat of double jeopardy. *U. S. v. De Stefano*, 476 F.2d 324 (7th Cir., 1973).

[4] The Court can find no deficiencies in this regard: the indictment gives proper notice that two designated individuals are charged with distribution of a particular quantity of phencyclidine HCl, a Schedule III controlled substance, at a specific place on a specific date in violation of two certain sections of the United States Code. The fact that the party to whom distribution had been made is not named is insufficient to warrant dismissal of the prosecution. *See, e. g., U. S. v. Ferra*, 427 F.2d 1348 (5th Cir., 1970), citing *Collins v. Markley*, 346 F.2d 230 (7th Cir., 1965), *cert. denied*, 382 U.S. 946, 86 S.Ct. 408, 15 L.Ed.2d 355 (1965).

[5] The Court also finds no threat of double jeopardy. The language of the indictment is adequate to permit this defendant to raise it as a defense to further prosecutions based upon the same transaction; this situation is far from that where one individual is prosecuted pursuant to an indictment specifically naming another. *Cf: U. S. v. Leader Cheese Co.*, 353 F.Supp. 875 (E.D.Wis., 1973). In view of these circumstances, the indictment must be held to be valid.

III

For the reasons set out in the foregoing memorandum opinion, the Court concludes that the indictment at issue here violates no provision of the United States Constitution and is not otherwise invalid; the motion to dismiss the indictment and the prosecution that is based thereon must be and is hereby denied.

The defendant will appear before this Court for his arraignment and plea at 1:30 P.M. on Monday, June 30, 1975.

WEST KEY NUMBER SYSTEM

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
and
Josephine McGee, Plaintiff-Intervenor,
v.
KALLIR, PHILIPS, ROSS, INCORPORATED, a New York Corporation, Defendant.

Nos. 74 Civ. 3234, 75 Civ. 401.

United States District Court,
S. D. New York.
July 31, 1975.

Action was commenced on a charge of retaliatory conduct on the part of employer. The District Court, Edward Weinfeld, J., held that evidence served to establish that employer engaged in retaliatory conduct by discharging employee for engaging in activities which were otherwise protected by law, that conduct whereby employee allegedly interrupted her superior at a preliminary presentation of a purported advertising campaign to an executive account serviced by employer could not be used as a basis for justifying discharge where evidence abundantly established that alleged be-

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James J. CONNOR, Petitioner, Appellant,
v.
Philip J. PICARD, Respondent, Appellee.
No. 7537.

United States Court of Appeals,
First Circuit.
Dec. 10, 1970.

Habeas corpus proceeding. The United States District Court for the District of Massachusetts W. Arthur Garrity, Jr., J., dismissed petition, and petitioner appealed. The Court of Appeals, Aldrich, Chief Judge, held that procedure whereby grand jury indicted four named persons and "John Doe, the true name and a more particular description of the said John Doe being to the said jurors unknown," and defendant was then arraigned on such indictment after Commonwealth Court, having determined true name of John Doe to be that of defendant, ordered that defendant's name be entered on record denied defendant equal protection, in view of Commonwealth's otherwise universal commitment to grand jury indictments in felony cases.

Vacated and remanded with instructions.

1. Habeas Corpus ⟹45.3(9)

Where petitioner for federal habeas corpus relief had presented state court with opportunity to apply controlling legal principles to facts bearing on petitioner's constitutional claim, such was sufficient to meet requirement that petitioner exhaust state remedies, though petitioner did not present constitutional question to state court in particular focus in which federal opinion was directed.

2. Constitutional Law ⟹250

Procedure whereby grand jury indicted four named persons and "John Doe, the true name and a more particular description of the said John Doe being to the said jurors unknown," and defendant was then arraigned on such indictment after Commonwealth Court, having determined the true name of John Doe to be that of defendant, ordered that defendant's name be entered on record denied defendant equal protection, in view of Commonwealth's otherwise universal commitment to grand jury indictments in felony cases. U.S.C.A.Const. Amend. 14; M.G.L.A. c. 277, § 19.

James J. Twohig, Boston, Mass., for petitioner-appellant.

Lawrence P. Cohen, Asst.Atty.Gen., with whom Robert H. Quinn, Atty. Gen., John J. Irwin, Jr., Asst. Atty. Gen., Chief, Criminal Division, and Garrett H. Byrne, Dist. Atty., Suffolk County, were on brief, for respondent-appellee.

Before ALDRICH, Chief Judge, McENTEE and COFFIN, Circuit Judges.

ALDRICH, Chief Judge.

A Massachusetts grand jury indicted Donald Landry, three other named defendants, and "John Doe, the true name and a more particular description of the said John Doe being to the said jurors unknown," in connection with the killing of one Robert Davis. Subsequently petitioner Connor was found in Landry's apartment and arrested. On motion presented to the Superior Court by the district attorney, the following order was entered over petitioner's objection.[1] "Court having determined that the true name of John Doe has been discovered to be James J. Connor, orders the name of James J. Connor to be entered on the record." This procedure was authorized by a Massachusetts statute, Mass. G.L. c.

1. We make note of the objection because we are not to be taken as intimating that a Massachusetts defendant cannot waive what we herein hold is his right to be properly indicted.

277, § 19.[2] Petitioner was arraigned on the indictment. After unsuccessful attempts by him to inspect the grand jury minutes to ascertain whether there was evidence implicating him in the killing, the case went to trial and petitioner was convicted of first degree murder. His state appeal challenging, *inter alia*, the validity of the indictment, failed. Commonwealth v. Doherty, 1967, 353 Mass. 197, 229 N.E.2d 267 (two justices dissenting). He then brought a habeas corpus petition in the district court and, when he failed there as well, this appeal followed.

[1] Petitioner did not present the constitutional question to the Massachusetts court in the particular focus in which this opinion is directed. We suggested it when the case reached us, and invited the Commonwealth to file a supplemental brief. Not unnaturally its first contention was to assert that petitioner had not exhausted his state remedy, citing Needel v. Scafati, 1 Cir., 1969, 412 F.2d 761, cert. denied 396 U.S. 861, 90 S.Ct. 133, 24 L.Ed.2d 113 and Subilosky v. Commonwealth, 1 Cir., 1969, 412 F.2d 691. We find these cases inapposite. This opinion considers neither facts, as in *Needel*, nor precedent, an in *Subilosky*, that were not available to the Massachusetts court when petitioner was before it. Petitioner presented the court with "an opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim." United States ex rel. Kemp v. Pate, 7 Cir., 1966, 359 F.2d 749, 751; *cf.* Wilbur v. Maine, 1 Cir., 1970, 421 F.2d 1327. That is enough to satisfy the requirements of the exhaustion of the doctrine. Sullivan v. Scafati, 1 Cir., 1970, 428 F. 2d 1023, 1024 n. 1. We therefore turn to the merits.

[2] The Commonwealth's initial brief asserts that "* * * properly viewed, petitioner's sole argument is no more than one that there was insufficient evidence before the grand jury showing that petitioner was Landry's accomplice. Such a claim, however, does not warrant judicial review. [Citations omitted.] There are sound policy reasons underlying the rule that an accused cannot challenge the sufficiency of the evidence before the grand jury." This misstates the issue. Petitioner is not challenging the validity of the grand jury determination. On the contrary, the grand jury itself has said that there was insufficient evidence to indict him, and we accept that as true. *See* Commonwealth v. Gedzium, 1927, 259 Mass. 453, 458, 156 N.E. 890. The question is whether, since the jury concededly did not find probable cause, petitioner has a constitutional complaint. We assume there is no general due process right to require that prosecution be preceded by an indictment. Lem Woon v. Oregon, 1913, 229 U.S. 586, 33 S.Ct. 783, 57 L.Ed. 1340; Hurtado v. California, 1884, 110 U.S. 516, 4 S.Ct. 292, 28 L.Ed. 232 see Beck v. Washington, 1962, 369 U.S. 541, 545, 82 S.Ct. 955, 8 L.Ed.2d 98 *cf.* Ocampo v. United States, 1914, 234 U.S. 91, 34 S.Ct. 712, 58 L.Ed. 1231. The issue is whether, in view of the extent to which Massachusetts affords this protection to others, the procedure by which petitioner was brought to trial deprived him of the Fourteenth Amendment's guarantee of equal protection of the laws.

The Massachusetts court has defined the requirements of the Commonwealth's Constitution.

> "The great principle asserted by the Declaration of Rights is that no man shall be put to answer a criminal

2. "If the name of an accused person is unknown to the grand jury, he may be described by a fictitious name or by any other practicable description, with an allegation that his real name is unknown. An indictment of the defendant by a fictitious or erroneous name shall not be ground for abatement; but if at any subsequent stage of the proceedings his true name is discovered, it shall be entered on the record and may be used in the subsequent proceedings, with a reference to the fact that he was indicted by the name or description mentioned in the indictment." Mass.G.L. c. 277, § 19.

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Commonwealth v. Holley, 1855, 3 Gray 458, 459 (Shaw, Ch. J.).

Because of this requirement, Massachusetts indictments are, with the possible exception of the John Doe procedure, amendable only with respect "to matters of form and not as to matters of substance." Commonwealth v. Snow, 1930, 269 Mass. 598, 606, 169 N.E. 542, 545.[3] In sustaining the present statute in 1927, the Massachusetts court acknowledged that legislative authority to interfere with the protection of the grand jury system was limited to "minor detail or unessential formalities." Commonwealth v. Gedzium, ante, 259 Mass. at 459, 156 N.E. 890. It justified the procedure by stating, without elucidation, that the addition of the defendant's name was neither an amendment, nor completing an indictment "in blank." Id. at 457, 461, 156 N.E. 890.

We are not concerned with the soundness of the conclusion that the John Doe procedure is not in conflict with the Massachusetts Declaration of Rights, but we are concerned with its consequences. There can be no doubt as to the substantiality of the loss to a defendant of the protection afforded by a requirement that there must be an indictment before he can be brought to trial. The grand jury is "designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity." Ex parte Bain, 1887, 121 U.S. 1, 11, 7 S.Ct. 781, 786, 30 L.Ed. 849. Nor can we doubt that petitioner was denied that protection. Entering a defendant's name on the record could be termed a matter of form only if the grand jury had already sufficiently described him so that adding the true name was, in fact, only a formal matter.[4] Absent such identification, the court's assertion in Gedzium that there was no reason to suppose that the grand jury "did not have in mind a particular person," 259 Mass. at 460, 156 N.E. at 892, might, with due respect, be termed sophistical. Of course the jury had in mind a particular person, viz., the person who committed the crime. It had nothing in mind, however, to indicate the criminality, to use the court's word in *Holley*, of the petitioner. We must agree with the view of the dissenting justices in petitioner's case. See 353 Mass. at 216–218, 229 N.E.2d 267. Petitioner faced trial not as the result of a determination of his criminality by the grand jury, but because, relying on the special statutory procedure, the jury delegated this decision to others.[5]

3. Compare Commonwealth v. Cooper, 1928, 264 Mass. 378, 162 N.E. 733 (arson; words "wilfully and maliciously" cannot be added) and Commonwealth v. Snow, ante (extortion; identity of person threatened cannot be changed), with Commonwealth v. DiStasio, 1936, 294 Mass. 273, 1 N.E.2d 189 (murder; true name of victim designated as "John Doe" can be attached where indictment alleged date and place of commission of crime). *See also* Commonwealth v. Crotty, 1865, 10 Allen 403.

4. In Commonwealth v. Crotty, 1865, 10 Allen 403, the Massachusetts court suggested that if the document—there a warrant—although using a fictitious name, described the defendant's "occupation, his personal appearance and peculiarities, the place of his residence, or other circumstances by which he can be identified," it might be "sufficient to indicate clearly" who was intended. Id. at 405.

5. We may observe that under the Massachusetts John Doe practice not only is it never established that any newly discovered evidence relied upon by the prosecuting attorney in naming a defendant would have been sufficient to persuade the grand jury, there appears to be no obligation on his part to produce any

We come, then, to the question: whether there is adequate justification for the difference in treatment Massachusetts accords defendants like petitioner and those who are brought to trial on regular indictments. If the difference is to withstand constitutional scrutiny it must be based upon classifications which, at a minimum, are rationally related to a permissible state purpose. *See, e. g.*, Walters v. City of St. Louis, 1954, 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660; Skinner v. Oklahoma ex rel. Williamson, 1942, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655; Lindsley v. Natural Carbonic Gas Co., 1911, 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369. The Commonwealth has suggested only one justification for its procedure. The court in *Gedzium* said, 259 Mass. at 461, 156 N.E. at 892–893,

> "[T]he grand jury ought not to be hampered in the performance of its duty because one, who ought to be indicted, has been able to screen his name, occupation and residence from general knowledge, to disguise his lineaments and peculiarities and to hide his personal appearance and his identifying characteristics so that no adequate discription of him can be given when his definite existence as a human being is disclosed and established."

Having in mind that in *Gedzium*, as here, there was no indication that the actor had used any form of disguise, the court's rhetoric is merely a euphemism for the absence of evidence. A more frank, though obviously less palatable, statement of its position would be that while, where the actor is known to the grand jury, he cannot be charged unless it finds the evidence against him sufficient; if he is not known because, like criminals generally, he has neglected to reveal his identity, this relieves the Commonwealth of the necessity of obtaining any grand jury finding of cause.

As a basis for classification, the *Gedzium* rationale is not even minimally persuasive. Even if it should appear that the actor made a deliberate attempt to "hamper" the grand jury, to say that conduct on his part justifies the denial of customary rights to whatever person the prosecuting attorney might thereafter choose as a defendant bridges the very question at issue. One might equally say that a robbery defendant should not be allowed to assert inability to afford counsel in view of all the money he stole.

We see no end served by the statute except prosecutorial convenience. However, the Commonwealth properly does not argue that the mere fact that, for no definable reason—whether deliberate, fortuitous, or inadvertent—it sought an indictment before it had sufficient basis for one, should relieve it of the necessity of returning to the grand jury when it had a better case. As a ground for distinguishing between defendants, this is clearly inadequate. *See* Developments in the Law—Equal Protection, 82 Harv.L.Rev. 1065, 1081 (1969).

With all deference, the Massachusetts court has approved a procedure similar to the one it condemned in Commonwealth v. Crotty, n. 4 ante, as comparable to the detested pre-Revolutionary general warrant. It is no better merely because the delegation was made by a grand jury rather than by a magistrate. In the light of the Commonwealth's otherwise universal commitment to grand jury indictments in felony cases, we must conclude that the arbitrary decision to make such a delegation in petitioner's case was constitutionally impermissible discrimination.

The judgment of the district court dismissing the petition is vacated. The case is remanded with instructions to grant the writ unless, within a reasonable time set by the district court, the petitioner is indicted by the Commonwealth.

new evidence at all. So far as the statute provides, he is apparently at liberty merely to conclude that the grand jury was over-cautious in rejecting what he originally presented.

PICARD *v.* CONNOR

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 70-96. Argued November 17, 1971—Decided December 20, 1971

A grand jury returned a murder indictment against a named individual "and John Doe, the true name and a more particular description of the said John Doe being to the said Jurors unknown." After respondent's arrest the indictment was amended pursuant to state law to substitute respondent's name for "John Doe." The highest state court affirmed respondent's subsequent conviction, rejecting his challenge to the legality of the indictment made on the ground that the amending procedure did not comply with the statute. Respondent subsequently filed a petition for a writ of habeas corpus in the District Court, which dismissed the petition. The Court of Appeals reversed, holding that the procedure by which respondent was brought to trial was violative of equal protection. The court rejected petitioner's contention that respondent, who had not previously raised the equal protection issue, had not exhausted available state judicial remedies as required by 28 U. S. C. § 2254, holding that respondent had presented the state court with "an opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim." *Held:* The substance of a federal habeas corpus claim must in the first instance be fairly presented to the state courts, and since on the record and argument before it the State's highest court had no fair opportunity to consider and act upon the equal protection claim, the Court of Appeals erred in holding that respondent had exhausted his state remedies. Pp. 275–278.

434 F. 2d 673, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 278.

John J. Irwin, Jr., Assistant Attorney General of Massachusetts, argued the cause for petitioner. With him on the brief were *Robert H. Quinn*, Attorney General,

Ruth I. Abrams and *Charles E. Chase*, Assistant Attorneys General, and *Garrett H. Byrne*.

James J. Twohig, by appointment of the Court, 402 U. S. 993, argued the cause and filed a brief for respondent.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Court of Appeals for the First Circuit, reversing the District Court's dismissal of respondent's petition for a writ of federal habeas corpus,[1] held that "the procedure by which [respondent] was brought to trial deprived him of the Fourteenth Amendment's guarantee of equal protection of the laws." 434 F. 2d 673, 674 (1970). The Court of Appeals acknowledged that respondent had not attacked his conviction on the equal protection ground, either in the state courts or in his federal habeas petition:

> "[Respondent] did not present the constitutional question to the Massachusetts court in the particular focus in which this opinion is directed. We suggested it when the case reached us, and invited the Commonwealth to file a supplemental brief. Not unnaturally its first contention was to assert that [respondent] had not exhausted his state remedy . . . ." *Ibid.*

The Court of Appeals rejected that contention and held that respondent had exhausted available state judicial remedies, as required by 28 U. S. C. § 2254,[2] because he

[1] 308 F. Supp. 843 (Mass. 1970).

[2] Title 28 U. S. C. § 2254 provides in pertinent part:

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is had "presented the [state] court with 'an opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim.'" *Ibid.* We granted certiorari to consider that ruling in light of the command of § 2254. 402 U. S. 942 (1971). We hold that the State's objection should have been sustained, and we therefore reverse for further proceedings, see *Slayton* v. *Smith*, *ante*, p. 53, without reaching the merits of the constitutional question decided by the Court of Appeals.[3]

A Massachusetts grand jury returned an indictment for murder against Donald Landry "and John Doe, the true name and a more particular description of the said John Doe being to the said Jurors unknown." After respondent's arrest, the indictment was amended in a proceeding pursuant to a fictitious-name statute, Mass. Gen. Laws Ann., c. 277, § 19,[4] to substitute respondent's name for "John Doe." The Massachusetts Supreme Judicial Court affirmed respondent's subsequent conviction, *sub nom. Commonwealth* v. *Doherty*, 353 Mass. 197, 229 N. E. 2d 267 (1967). Among other grounds of appeal, respondent challenged the legality of the indictment. The gist of respondent's argument, which he also asserted during various trial proceedings, was that the amending procedure did not comply with the statute as construed by the Massachusetts courts, with the result that he had not been lawfully indicted for the crime. See *Commonwealth* v. *Gedzium*, 259 Mass. 453, 156 N. E. 890 (1927).[5] The only suggestions of a claimed denial of a federal right were statements in respondent's brief questioning the continuing validity of the holding in *Gedzium* that the provision of the Fifth Amendment that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" was inapplicable to the States. *Id.*, at 457, 156 N. E., at 891; see *Hurtado* v. *California*, 110 U. S. 516 (1884).[6] We have examined the

either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

[3] Respondent does not contend that there are no available state judicial remedies through which he can present the equal protection claim. It appears that Massachusetts provides postconviction procedures adequate to adjudicate that claim, either by motion for a new trial, Mass. Gen. Laws Ann., c. 278, § 29; see *Earl* v. *Commonwealth*, 356 Mass. 181, 248 N. E. 2d 498 (1969), or by writ of error, Mass. Gen. Laws Ann., c. 250; see *Cortellesso* v. *Commonwealth*, 354 Mass. 514, 238 N. E. 2d 516 (1968); *Crowell* v. *Commonwealth*, 352 Mass. 288, 225 N. E. 2d 330 (1967); *Shoppers' World, Inc.* v. *Board of Assessors*, 348 Mass. 366, 376 n. 9, 203 N. E. 2d 811, 819 n. 9 (1965).

[4] "If the name of an accused person is unknown to the grand jury, he may be described by a fictitious name or by any other practicable description, with an allegation that his real name is unknown. An indictment of the defendant by a fictitious or erroneous name shall not be ground for abatement; but if at any subsequent stage of the proceedings his true name is discovered, it shall be entered on the record and may be used in the subsequent proceedings, with a reference to the fact that he was indicted by the name or description mentioned in the indictment."

[5] Although the Massachusetts Constitution does not expressly provide for grand jury indictments, the Massachusetts courts have construed Art. XII of the Declaration of Rights to require that "'no person . . . shall be held to answer for a capital or otherwise infamous crime . . . unless he shall have been previously charged on the presentment or indictment of a grand jury.'" *Jones* v. *Robbins*, 74 Mass. 329, 344–345 (1857).

[6] In arguing his first assignment of error:

"[T]he dismissal in the *Gedzium* case of the applicability of the Fifth Amendment provision . . . would appear to be in need of reexamination, in the light of the development by the United States pretrial, trial, and appellate papers and do not discover any indication of an attack upon the prosecution under the indictment as violative of the Equal Protection Clause of the Fourteenth Amendment.[7]

Supreme Court . . . of the doctrine of applicability of guarantees of the Federal Bill of Rights to the states by virtue of the Fourteenth Amendment." Brief for Connor in the Massachusetts Supreme Judicial Court 13.

In arguing his third and fourth assignments of error:

"As set forth *supra* in the argument in support of the first Assignment, the indictment of 'John Doe' was a nullity because it was a general indictment, not limited to any identifiable individual. Since this is a capital case, the defendant Connor was prosecuted in violation of his constitutional right to due process in that he was put to trial without having been indicted by a Grand Jury." *Id.*, at 14.

[7] Nor did respondent's federal habeas petition assert a denial of equal protection. The petition alleges that "[h]e was brought to trial without indictment or presentment in violation of the Fifth Amendment and of the Massachusetts Constitution, . . . [of] the statutory provisions of [the fictitious-name statute], and of the rule of the common law that an indictment in a capital case . . . forbids any amendment to such an indictment." In his memorandum in support of the petition, respondent argued that the Massachusetts indictment procedure "must be administered in accordance with the principles pertaining to the Grand Jury as established by the law of the land, i. e., in accordance with due process as created by the common law and adopted by our Constitution. . . . In accordance with these principles, since the indictment did not name nor describe [respondent], it was, as to him, a nullity, and remained so after amendment." The District Court, noting that respondent had "argued indiscriminately on the basis of the statutes and constitution of the Commonwealth of Massachusetts, as well as upon federal grounds," 308 F. Supp., at 845 n. 2, considered respondent's contention to be "that the amendment of the indictment to substitute Connor's name for John Doe was a violation of the Fifth Amendment." The court rejected that contention on the ground "that the due process clause of the Fourteenth Amendment does not make applicable to the states the grand jury requirement of the Fifth Amendment." *Id.*, at 845.

It has been settled since *Ex parte Royall*, 117 U. S. 241 (1886), that a state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus. See, *e. g., Nelson* v. *George*, 399 U. S. 224, 229 (1970); *Irvin* v. *Dowd*, 359 U. S. 394, 404–405 (1959); *Ex parte Hawk*, 321 U. S. 114 (1944). The exhaustion-of-state-remedies doctrine, now codified in the federal habeas statute, 28 U. S. C. §§ 2254 (b) and (c),[8] reflects a policy of federal-state comity, *Fay* v. *Noia*, 372 U. S. 391, 419–420 (1963); *Bowen* v. *Johnston*, 306 U. S. 19, 27 (1939), "an accommodation of our federal system designed to give the State the initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Wilwording* v. *Swenson*, *ante*, p. 249, at 250. We have consistently adhered to this federal policy, for "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Darr* v. *Burford*, 339 U. S. 200, 204 (1950) (overruled in other respects, *Fay* v. *Noia*, *supra*, at 435–436). It follows, of course, that once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied. See, *e. g., Wilwording* v. *Swenson*, *supra*, at 250; *Roberts* v. *LaVallee*, 389 U. S. 40, 42–43 (1967); *Brown* v. *Allen*, 344 U. S. 443, 447–450 (1953).

We emphasize that the federal claim must be fairly presented to the state courts. If the exhaustion doctrine is to prevent "unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution," *Ex parte Royall*, *supra*, at 251, it is not sufficient merely that the federal habeas applicant has

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[8] See n. 2, *supra*.

been through the state courts. The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts. Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts. See *Darr* v. *Burford*, *supra*, at 203; *Davis* v. *Burke*, 179 U. S. 399, 401–403 (1900).

Respondent challenged the validity of his indictment at every stage of the proceedings in the Massachusetts courts. As the Court of Appeals pointed out, 434 F. 2d, at 674, this is not a case in which factual allegations were made to the federal courts that were not before the state courts, see, *e. g.*, *United States ex rel. Boodie* v. *Herold*, 349 F. 2d 372 (CA2 1965); *Schiers* v. *California*, 333 F. 2d 173 (CA9 1964), nor a case in which an intervening change in federal law cast the legal issue in a fundamentally different light, see, *e. g.*, *Blair* v. *California*, 340 F. 2d 741 (CA9 1965); *Pennsylvania ex rel. Raymond* v. *Rundle*, 339 F. 2d 598 (CA3 1964). We therefore put aside consideration of those types of cases. The question here is simply whether, on the record and argument before it, the Massachusetts Supreme Judicial Court had a fair opportunity to consider the equal protection claim and to correct that asserted constitutional defect in respondent's conviction. We think not.

Until he reached this Court,[9] respondent never contended that the method by which he was brought to trial

[9] The decision of the Court of Appeals prompted respondent, for the first time in any court, to advance the argument in this Court that "since indictment is the only process provided for the finding of probable cause in Massachusetts prior to trial, its denial as

denied him equal protection of the laws. Rather, from the outset respondent consistently argued that he had been improperly indicted under Massachusetts law and, to the extent he raised a federal constitutional claim at all, that the indictment procedure employed in his case could not be approved without reference to whether the Fifth Amendment's requirement of a grand jury indictment applied to the States. He adverted to the Fourteenth Amendment solely as it bore upon that submission.[10] The equal protection issue entered this case only because the Court of Appeals injected it.

We are thus unable to agree with that court that respondent provided the Massachusetts "court with 'an opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim.'" 434 F. 2d, at 674. To be sure, respondent presented all the facts. Yet the constitutional claim the Court of Appeals found inherent in those facts was never brought to the attention of the state courts. The Supreme Judicial Court dealt with the arguments respondent offered; we cannot fault that court for failing also to consider *sua sponte* whether the indictment procedure denied respondent equal protection of the laws. Obviously there are instances in which "the ultimate question for disposition," *United States ex rel. Kemp* v. *Pate*, 359 F. 2d 749, 751 (CA7 1966), will be the same despite variations in the legal theory or factual allegations urged in its support. A ready example is a challenge to a confession predicated upon psychological as well as physical coercion. See *Sanders* v. *United States*, 373 U. S. 1, 16 (1963). Hence,

Connor's case alone was undoubtedly a violation of Connor's federal rights not only as to due process, but also equal protection, under the Fourteenth Amendment, as stated by the Chief Judge of the Circuit Court." Brief for Respondent 15.

[10] Respondent reiterated these contentions in his federal habeas petition. See n. 7, *supra*.

we do not imply that respondent could have raised the equal protection claim only by citing "book and verse on the federal constitution." *Daugharty* v. *Gladden*, 257 F. 2d 750, 758 (CA9 1958); see *Kirby* v. *Warden*, 296 F. 2d 151 (CA4 1961). We simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts. The claim that an indictment is invalid is not the substantial equivalent of a claim that it results in an unconstitutional discrimination. See *Rose* v. *Dickson*, 327 F. 2d 27, 29 (CA9 1964); *Morris* v. *Mayo*, 277 F. 2d 103 (CA5 1960). The judgment of the Court of Appeals is therefore reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

With all respect, I think that in this case we carry the rule of exhaustion of state remedies too far. Connor's name was added to the indictment after it was returned by the state grand jury, he being substituted for "John Doe." He raised in his brief before the Supreme Judicial Court of Massachusetts his claim that such a substitution denied him that quantum of due process required by the Fourteenth Amendment "in that he was put to trial without having been indicted by a Grand Jury."[1] He did not refer to the Equal Protection Clause which is also a part of the Fourteenth Amendment. But that is a nicety irrelevant to the maintenance

[1] The Court properly says that respondent tendered the validity of *Commonwealth* v. *Gedzium*, 259 Mass. 453, 156 N. E. 890, to the Supreme Judicial Court of Massachusetts. That, however, was in his first assignment of error. But in his third and fourth assignments of error he alleged that he was prosecuted "in violation of his constitutional right to due process in that he was put to trial without having been indicted by a Grand Jury."

of healthy state-federal relations on which the Court makes the present decision turn. The concept of due process is broad and expansive, and "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." *Bolling* v. *Sharpe*, 347 U. S. 497, 499. We have thus held that the denial of equal protection, *viz.*, invidious discrimination, may be "so unjustifiable as to be violative of due process." *Ibid.*[2] As MR. JUSTICE BRENNAN said in *Boddie* v. *Connecticut*, 401 U. S. 371, 388 (concurring opinion), "The question that the Court treats exclusively as one of due process inevitably implicates considerations of both due process and equal protection." That is likewise true here.

Moreover, a due process point is plainly raised where an accused claims that no grand jury found "probable cause" to indict him, that its only finding concerned someone unknown at the time.

If Connor had complained of a coerced confession, or of perjured testimony, and the facts on which he relied

[2] The overlap is, of course, not total. *Bolling* v. *Sharpe*, 347 U. S. 497, 499. But the extent to which the two concepts merge has been a subject of debate since Representative John A. Bingham of Ohio, an architect of the Fourteenth Amendment, used the phrases "due process" and "equal protection" interchangeably on the floor of Congress. Cong. Globe, 39th Cong., 1st Sess., 1088–1089. See, *e. g.*, Wilson, The Merging Concepts of Liberty and Equality, 12 Wash. & Lee L. Rev. 182, Antieau, Equal Protection Outside the Clause, 40 Calif. L. Rev. 362, Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341. Compare *Douglas* v. *California*, 372 U. S. 353, and *Griffin* v. *Illinois*, 351 U. S. 12, with *Gideon* v. *Wainwright*, 372 U. S. 335, and *Powell* v. *Alabama*, 287 U. S. 45.

There is apparently a similar controversy in India, whose constitution also contains both a due process and equal protection clause. See, *e. g.*, Narain, Equal Protection Guarantee and the Right of Property Under the Indian Constitution, 15 Int. & Comp. L. Q. 199.

were developed in the state court, the constitutional questions would surely have been sufficiently raised without reference to the precise constitutional provisions involved. The situation here is no different.[3]

[3] *Daugharty* v. *Gladden*, 257 F. 2d 750 (CA9), which the Court cites, is instructive. Daugharty was an indigent state prisoner. He appealed the denial of state habeas corpus to the intermediate state appellate court, but that court dismissed the appeal because Daugharty could not afford to supply an appellate transcript. He then moved the state supreme court for an order requiring that he be supplied a transcript free of charge, and when that motion was denied, sought federal habeas corpus. The District Judge denied the application for a writ on the grounds Daugharty had failed to exhaust state remedies. Despite the fact that Daugharty never even mentioned the Fourteenth Amendment, much less the Equal Protection Clause, the Court of Appeals held that his motion in the state supreme court satisfied the exhaustion requirement.

"In moving the Oregon Supreme Court for an order requiring that a transcript be supplied without expense to him, Daugharty called attention to his inability to pay for such a record. This provided that court with all of the facts necessary to give application to the constitutional principle upon which appellant relies. . . . [E]xhaustion of state remedies is not to be denied because the Fourteenth Amendment was not specifically mentioned." *Id., at* 758.

Analogously, the Court of Appeals said in the instant case:

"Petitioner did not present the constitutional question to the Massachusetts court in the particular focus in which this opinion is directed. We suggested it when the case reached us, and invited the Commonwealth to file a supplemental brief. Not unnaturally its first contention was to assert that petitioner had not exhausted his state remedy, citing Needel v. Scafati, 1 Cir., 1969, 412 F. 2d 761, cert. denied 396 U. S. 861, . . . and Subilosky v. Commonwealth, 1 Cir., 1969, 412 F. 2d 691. We find these cases inapposite. This opinion considers neither facts, as in *Needel*, nor precedent, as in *Subilosky*, that was not available to the Massachusetts court when petitioner was before it. Petitioner presented the court with 'an opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim.' United States ex rel. Kemp v. Pate, 7 Cir., 1966, 359 F. 2d 749, 751; *cf.* Wilbur v. Maine, 1 Cir.,

The judges to whom that issue of law is tendered are learned men who we must assume are knowledgeable as to the meaning of due process. A law student who tendered a brief that left due process at large would certainly not be worthy of an "A." But the nicety of analysis which we associate with scholarship has no functional role to play in this area of exhaustion of state remedies. When we go to that extreme, we make a trap out of the exhaustion doctrine which promises to exhaust the litigant and his resources, not the remedies.

I fear that our reluctance to backstop the Court of Appeals in the present case is symptomatic of this Court's trend to sidestep all possible controversies so, as it hopes, to let them disappear. Of course we should remit a litigant to his state tribunal if facts have emerged which were not known at the time of the trial or if intervening decisions have outdated the earlier state decision. No such situation exists here. The facts are simple and uncontested: Connor's name was substituted for John Doe after the indictment was returned. The point of law is clear now and will be no clearer on the remand. Its vulnerability tested by due process was as obvious when the case was before the Supreme Judicial Court of Massachusetts as it now is. I think the Court of Appeals acted responsibly in ruling on it. We should decide the merits here and now. Endless repetitive procedures are encouraged by today's ruling on exhaustion of remedies. I would bring this litigation to an end today by applying the exhaustion-of-remedy rule to terminate rather than multiply procedures that now engulf the state-federal regime.

1970, 421 F. 2d 1327. That is enough to satisfy the requirements of the exhaustion . . . doctrine. Sullivan v. Scafati, 1 Cir., 1970, 428 F. 2d 1023, 1024 n. 1. We therefore turn to the merits." 434 F. 2d 673, 674.