

Federal Judge Dismisses 2 Counts Against Ex-New York F.B.I. Chief

By ARNOLD H. LUBASCH

Two of the five counts in the indictment of John J. Kearney, a former supervisor in the Federal Bureau of Investigation, were thrown out yesterday by a judge who disclosed at the same time that the Government had named the head of the F.B.I. office here as an unindicted conspirator in the case.

J. Wallace LaPrade, the bureau's top man in New York, was listed as one of 27 agents who allegedly conspired with Mr. Kearney, who is the only one charged as a defendant. A bureau spokesman said Mr. LaPrade had no comment on being named as a conspirator.

The list of co-conspirators was contained in a "bill of particulars" that the Government provided at the defense's request for additional details about the indictment of Mr. Kearney, who was charged with having directed the illegal opening of mail and tapping of telephones in a search for radical fugitives in New York.

In dismissing two counts against Mr. Kearney on the ground that they had been drawn up improperly, Judge Kevin Thomas Duffy disclosed the bill of particulars in Federal District Court in Manhattan. Judge Duffy, who is presiding over the Kearney case, also ruled that the Government must correct a third count in the indictment.

The judge's decision will not delay a trial of Mr. Kearney, according to Barnett D. Skolnik, an assistant United States Attorney in Baltimore who is the Justice Department's special counsel in charge of prosecuting the case.

"We are looking toward mid-June as a probable time for trying the case," Mr. Skolnik said.

He added that he could not comment on the decision because he had not yet had time to study it, but indicated that the Government was not likely to appeal the dismissal of the two counts.

Mr. Skolnik said the Government's options included seeking a new indictment that would conform with the judge's ruling or proceeding to trial with the remaining counts.

Attorney General Griffin B. Bell has said previously that he wants the Kearney case to go to trial before the Govern-

ment seeks possible indictments of other agents or bureau officials in connection with burglaries, wiretaps and mail openings. Mr. Kearney was believed to be the first F.B.I. agent indicted on felony charges.

Last December, the five lawyers who had been conducting the investigation for the Justice Department were replaced at their request because they opposed the decision to defer any other indictments pending the outcome of the Kearney case.

Edward Bennett Williams, Mr. Kearney's attorney, asked Judge Duffy to dismiss three of the five counts in the indictment on the ground that each count charged more than one offense, violating a rule that requires a separate count for each offense charged.

Judge Duffy ruled that two counts charging Mr. Kearney with numerous mail openings must be dismissed. He said one count alleging a number of wiretaps might be narrowed down to specify a single offense, but added that "there is some doubt" that the Government could succeed in doing this.

The defense is expected to challenge the two other counts in the indictment on other grounds later. These two counts allege a conspiracy to open mail and a conspiracy to tap telephones.

In his 15-page decision, Judge Duffy said, "It appears from the bill of particulars that the poor draftsmanship of the indictment was caused not only by its inherent imprecision, but also by a fundamental lack of proper investigation."

All the charges in the indictment refer to incidents in the early 1970's when Mr. Kearney was the supervisor of Squad 47, a group of agents searching for fugitives involved with a radical group known as the Weather Underground. Mr. Kearney, who is 55 years old, has since left the bureau and has become an assistant vice president of the Wells Fargo Armored Service Corporation.

Each of the five original counts in the Kearney indictment, which was filed last April, provides a sentence of up to five years in prison.