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Judge Dismisses Charges Against Nixon Tax Lawyer

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LOS ANGELES, Oct. 9—Federal District Judge Warren J. Ferguson dismissed today all charges against Frank DeMarco Jr., the former tax attorney for Richard M. Nixon, on the ground that the conduct of the Watergate Special Prosecutor had deprived Mr. DeMarco of a fair trial.

Mr. DeMarco, a former law partner of Herbert Kalmbach, who served a prison term for his role in Watergate activities, was accused of making false statements to the Internal Revenue Service and of obstructing a Congressional inquiry into Mr. Nixon's taxes.

Judge Ferguson indicated that the Government's failure to provide the defense with notes about a meeting of prosecutors, Mr. DeMarco and his lawyer, Charles McNelis, and with a subsequent memo on the case

written by Jay Horowitz, an assistant Watergate Special Prosecutor, was improper.

It was a dramatic and curious case ending to a complicated case that involved a controversial 1969 tax deduction Mr. Nixon received for a donation of his Vice Presidential papers, a deduction that was eventually disallowed.

Judge Ferguson's ruling was announced in the same building where another Federal judge, Matthew Byrne, citing similar grounds, threw out the Government's case against Daniel Ellsberg and Anthony Russo, who had been charged with making the Pentagon papers available to the press. That decision was made two years ago.

Mr. DeMarco was accused of preparing backdated documents,

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including a deed to some of Mr. Nixon's Vice-Presidential papers. The indictment against the lawyer charged that he knew Mr. Nixon's 1969 gifts of papers to the National Archives had not been made before a change in Federal tax law eliminating deductions for such gifts. It alleged that Mr. DeMarco and Ralph Newman, a Chicago appraiser, prepared documents showing that the gift had been made before the deadline, then lied about it.

Mr. Newman has also been indicted in the case and is to be tried separately. Edward L. Morgan, a former White House aide, pleaded guilty last year to participating in a criminal conspiracy to create a fraudulent \$576,000 tax deduction for Mr. Nixon. The deduction was disallowed in April, 1974.

In his remarks this morning, Judge Ferguson said, "There's no question in my mind DeMarco didn't prepare a deed in 1969 and didn't talk to Newman till late 1969 or to Morgan till late 1969," about the donation of Mr. Nixon's papers.

Key Issue

Judge Ferguson stressed that the key issue, without hearing Mr. DeMarco's defense, was "whether he willfully, knowingly and intentionally lied." He added: "The jury can't find him guilty without finding this beyond a reasonable doubt."

The judge said that while the jury was out of the courtroom late yesterday afternoon, he learned that the Government had information that raised questions about what Mr. DeMarco had, in fact, said during the meeting with the prosecutors on Aug. 3, 1974. The information, he said, went to the "pivotal" issue of intent.

The controversy focused on the testimony of Anthony J. Passaretti, a former Internal Revenue Service agent, who stated in testimony Tuesday and yesterday that in his presence Mr. DeMarco had admitted to Mr. Horowitz and Henry Hecht, another Watergate special prosecutor, that he had "knowingly and willfully" lied to investigators about his role in getting Mr. Nixon the tax deduction.

Out of the presence of the jury, though, Mr. Passaretti conceded that Mr. DeMarco had qualified some of his admissions at the meeting so as to make them "useless."

Additionally, Mr. Horowitz's memo, written on Aug. 7, 1974, to James Vornberg, his superior at the Special Prosecutor's office, said that Mr. DeMarco had



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Frank DeMarco Jr.

made the admissions "through his attorney." This referred to the fact that after Mr. DeMarco allegedly made the admissions, the meeting recessed for about 20 minutes, then Mr. McNelis returned and said that his client would answer "yes" if asked whether he had lied "knowingly and willfully."

Judge Ferguson said today that if there were doubts about the validity of Mr. DeMarco's "confession" — as opposed to remarks that may have been made by McNelis — the doubts should have been brought to the attention of the court. In such a case, he added, Mr. Passaretti would not have been allowed to testify about Mr. DeMarco's alleged confession.

The judge said that Mr. McNelis would have had to take the stand to clear up the situation, and that if he did so and said that he had made a confession for the defendant, Mr. DeMarco's case would have been prejudiced.

Mr. Horowitz said that any further Government action in the case would depend on consultations he had with Henry Ruth, chief of the Watergate Special Prosecution Force. He added, however, that the Government had appealed today an earlier decision by Judge Ferguson to drop one count against Mr. DeMarco.