

Miami Realty Agent Cleared

By Timothy S. Robinson
Washington Post Staff Writer

A federal judge dismissed all charges against Miami real estate dealer Felipe De Diego in connection with the Ellsberg burglary yesterday, as pretrial hearings in the case moved into a sometimes-heated, day-long debate by attorneys for the remaining five defendants over the use of a "national security" defense to the alleged crime.

De Diego had been charged with one count of conspiracy to violate the civil rights of Dr. Lewis Fielding, who was Pentagon Papers codefendant Daniel Ellsberg's psychiatrist, by breaking into his office.

U. S. District Judge Ger-

hard A. Gesell said he was dropping the charges against De Diego because he had been given immunity by state prosecutors for his testimony about the crime, and it was "not practical" to hold the necessary hearings to determine whether federal prosecutors were using evidence against De Diego that had been tainted by their access to that immunized, state testimony.

The dismissal of charges against De Diego was one of 12 rulings Judge Gesell issued at the start of yesterday's hearings, and the only one in which he ruled in the defense's favor. Many of the motions had to do with minor legal points that paled in comparison to the na-

tional security defense issue argued yesterday, one on which Judge Gesell has not yet ruled.

That issue was described by William Frates, attorney for former White House aide John Ehrlichman, this way: "Is there a time when the country's welfare goes beyond the constitutional rights of an individual? Is national security an exception to the Fourth Amendment right against illegal searches and seizures?"

Judge Gesell pointed out, as he had previously, that there might be exceptions under national security if the President had explicitly ordered the break-in. However, all but one defense attorney have conceded that

the President was not aware of the burglary in advance.

Since the President had no prior knowledge, Judge Gesell said, the defendants were in another category altogether.

Referring often to previous rulings that "this shall be a government of laws, not of men," Judge Gesell asked repeated, pointed questions that indicated he felt national security could not be used as an absolute bar to prosecution for the break-in.

If the President wanted such a break-in for national security reasons, he would have to order it "explicitly . . . he can't do it by general orders in his home in San Clemente in a conversation even he can't recall later," Judge Gesell said at one point. President Nixon has said that he ordered White

THE WASHINGTON POST

in Ellsberg Case Break-in

House investigators, including Ehrlichman, to stop news leaks of classified information through use of his "constitutional and legal" means.

In response to defense arguments that the President was concerned about the leaks of certain documents and had delegated his constitutional authority to Ehrlichman and had implicitly, if not explicitly, approved the Ellsberg burglary, Gesell replied:

"It may be one thing to say the court could look at specific documents that bear on a reason for actions that defendants say they took; it's a wholly different thing to say it is up to the court to determine if the President could have had a rational basis for doing something he never did (approve the break-in itself.)"

Gesell said that while the President might have been legitimately concerned over leaks of classified documents, "we're talking about a search that goes smack against a person's constitutional rights" that was not approved by the President.

The defense is seeking access to many classified documents that it says it needs to prove why White House officials were concerned enough about Ellsberg that they initiated the process that led to the burglary at Ellsberg's psychiatrist's office.

While Judge Gesell said he is "not going to allow a romp through files" of intelligence agencies, he indicated he would allow access to specific documents requested by the defense.

In turn, he indicated that

he might allow defendants to present to the jury in the trial scheduled to begin on June 17 a general, limited national security justification for their actions.

Daniel Schultz, the attorney for defendants Bernard L. Barker and Eugenio Martinez, continued to press his claims that his clients were only following the orders of a White House official unindicted coconspirator E. Howard Hunt Jr., when they took part in the break-in, and that they thought their acts were legal.

Judge Gesell told Schultz that while he did not consider that grounds for dismissal of the case against them, he was "sympathetic toward your two clients . . . and I have some control over this matter at the time of sentencing if they are convicted."

Meanwhile yesterday, Judge Gesell:

- Refused to dismiss charges of lying to the FBI against Ehrlichman before trial, although indicating that he might still dismiss them after hearing the government's evidence during the trial.

- Said there was no reason for White House counsel J. Fred Buzhardt to testify during the hearing concerning what documents Ellsberg had access to at the time of the leaks of classified information. Judge Gesell instead told David I. Shapiro, attorney for former White House counsel Charles W. Colson, to find out about those documents informally from Buzhardt.

The pretrial hearings in the Ellsberg case will continue today.