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BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In The Matter of the Application of

WT DOCKET NO. 95-11

HERBERT L. SCHOENBOHM

Kingshill, Virgin Islands

For Amateur Station
and Operator Licenses

DOCKET FILE COPY ORIGINAL

To: Administrative Law Judge Edward Lutton

MOTION TO DISMISS HEARING DESIGNATION ORDER OR IN THE ALTERNATIVE HOLD THE ACTION IN ABEYANCE UNTIL THE LEGALITY OF THE CONVICTION NOW BEFORE THE DISTRICT COURT, WHICH THE FCC HEARING ACTION IS BASED UPON, CAN BE DETERMINED.

COMES NOW licensee Herbert L. Schoenbohm, pro-se and moves for dismissal of this proceeding or in the alternative to hold the action in abeyance for the following reasons:

- (1) The judgement and commitment of Herbert L. Schoenbohm in United States v. Schoenbohm 91-108 D.V.I to one count of violation of Title 18 U.S. Code subsection 1029 (a) (1) was vacated on December 30, 1992 and has not been reinstated as a federal conviction.
- (2) The Defendant has petitioned the court for the consideration of a comprehensive writ of habeas corpus based, inter alia, that the conviction represents a violation of the U.S. Constitution as the;
 - (a) Indictment did not charge a crime under the statute as it did not allege an effect on interstate commerce or allege an actual account access or account debit as required by statute. United States v. Akpi, 993 F.2d 229 (4th Cir. 1993) (per curiam) (failure to allege an effect on interstate commerce as an essential element) and U.S. v. Brady, 13 F. 3rd 334 (10th Circuit 1993) (failure to allege an account

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access of a billable subscriber account)

- (b) The insufficient indictment lacking essential elements resulted in a jury charge that created an un rebuttable presumption thus depriving the Defendant his Constitutional right to a trial by a jury deciding all the essential elements of the offense. In re Winship, 397 U.S. 358 (1970); Also see, Sandstrom v. Montana, 442 US 510 (1979)
 - (c) The Government knowingly used false evidence to obtain the Defendant's conviction which was recognized by the Third Circuit Court of Appeals. As the result of a post appeal FOIA release the materiality of the knowing use of false evidence to the remaining count can now be established and fraud on the court by the government can now be proven.
 - (d) The judgement to the remaining count was entered on December 31, 1992 as a Virgin Island Territorial judgement with a changed caption as the Government of the Virgin Islands v. Herbert L. Schoenbohm. The offense for which the Defendant was charged is not cognizable under the laws of the United States Virgin Islands and as such the territorial judgement represents a constitutional violation. The Territorial Government of the United States Virgin Islands has not litigated against the Defendant. The defendants habeas writ thus secures relief from an illegal conviction, an illegal judgement, and an illegal order of confinement. The Territorial judgement on its face alone is nugatory.
- (3) The Commission's hearing designation order is erroneously based on the denial of a direct appeal wherein various issues such as Brady and Giglio violation were decided apart from the collateral and plain error issues now being considered. This litigation may make moot the present nexus for the Commission's action.
- (4) The Commission's designation order incorrectly cites Title 18 U.S. Code Subsection 1029 (a) (1). The significant part of the statute should read"shall, if the offense affects interstate or foreign commerce, be

punished as provided..." The error by the government at trial and the Commission in this action, of substituting "use in interstate commerce" rather than "affect on interstate commerce", is material to the proceeding because it demonstrates that the Defendant was convicted on a charge that was neither alleged in the indictment nor presented to the jury at trial. This action "offends the most basic notions of due process." Dunn v. United States, 99S Ct. 2190, (1979)

- (5) Whereas the designation order cites a Commission ruling initiated in 1990 which allows the action to cover non-broadcast licensees, (5 FCC Rcd 3252, 3253 (1990) and whereas the licensee was convicted for conduct that allegedly took place in 1987, accordingly the action of the Commission against the licensee would create the imposition of punishment retroactively, in violation of the U.S. Constitution.
- (6) Whereas the Commission's hearing designation order cites the requirement that the licensee has the burden of proof of establishing that the renewal of his license would be "in the public interest, convenience, and necessity." Accordingly, 47 C.F.R. Part 97.1, entitled "Basis and Purpose" lists five principles for the amateur service licensee and none require that an amateur service licensee be "in the public interest, necessity, and convenience." Accordingly the criteria established in the hearing designation order requires the licensee the

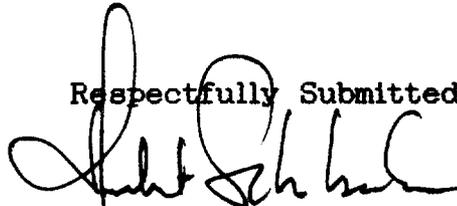
burden of proof of criteria not necessarily applicable to amateur radio service licences. Requiring the licensee, in the instant matter to meet a burden other amateur licensees are not subjected to, is a arbitrary and possibly capricious exercise of bureaucratic power.

The Commission's action is clearly based on a prima facie nullity. Additionally, the Commission's reliance on a criminal conviction that was obtained by violation of the law and contrary to basic constitutional guarantees would compound injustice and possibly result in additional litigation that could be avoided.

The Commission is urged to dismiss the action or hold the hearing designation order in abeyance until the relevant issues now before the District Court of the Virgin Islands can be determined, as they may render moot the Commission's present proceeding as against the licensee.

Date: March 30, 1995

Respectfully Submitted,



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I, Herbert L. Schoenbohm, certify that on May 30, 1995, a copy of the foregoing Motion for Dismissal of Hearing Designation Order, filed on behalf of Herbert L. Schoenbohm was sent by First Class Mail to:

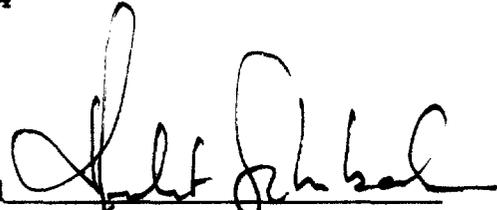
Secretary
Federal Communications Commission
1919 M Street
Washington, D.C. 20554

and

Tom Fitz-Gibbon, Esq.
Wireless Telecommunications Bureau
Federal Communications Commission
1919 M Street
Washington, D.C. 20554

Dated March 30, 1995

Signed



Herbert Schoenbohm