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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
Acting Director William P. Tyson

MEMORANDUM

FROM: William P. Tyson

TO: All Department of Justice Attorneys

RE: Use of the U.S. Attorneys' Bulletin as a Clearinghouse of Helpful Information

There has been a growing need within the Department for a means by which attorneys could communicate with each other on matters of shared interest. Many of you have developed ideas or expertise in certain areas that could be of help to others but which, have not been communicated to attorneys outside your office.

In an attempt to meet this need a section of the U.S. Attorneys' Bulletin has been set aside to be used as a "clearinghouse" of information useful to all attorneys within the Department. Beginning with this issue you will find a new CLEARINGHOUSE section to be used for this purpose. Contributions are arranged by topic and an index of topics will be published annually.

Whenever you develop a particular technique with respect to investigation, preparation of indictments, preparation of exhibits, or any other advocacy skills or techniques, which may be of assistance to other Department attorneys, please communicate such information to this office in a form appropriate for publication in the USAB. In this way the Bulletin can become an effective means of exchanging very valuable information that should be of assistance to all of you.

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CLEARINGHOUSE

EVIDENCE CHARTS - S.D. OHIO

U.S. Attorney James Cisell, Southern District of Ohio, was successful in introducing a series of large charts in evidence in the case of United States v. Scales (case number 78-5322, U.S.A.C. 6th Circuit, March 8, 1979). The first chart summarized all the charges contained in the indictment. Each of the remaining charts summarized a count or an overt act, or both, by reproducing or making reference to some of the documentary proof already in evidence. The only references in the Exhibit that were not to documents admitted previously into evidence were several statements in the charts that union records did not contain certain information. Mr. Cissell has reproduced these charts in reduced size and has them available for anyone who may be interested. (FTS 684-3711).

FOREIGN STUDENTS RECRUITMENT - FORMS I-20

U.S. Attorney Frank Tuerkheimer has provided information which may be of assistance to any U.S. Attorney who initiates prosecution of criminal violations in the recruiting of foreign students (See my memo to all U.S. Attorneys on this subject dated March 30, 1979). Mr. Tuerkheimer has also called attention to an article which he wrote in the Columbia Law Review (Vol. 72:847, et seq., 1972) regarding Affidavits of Service signed in blank by process servers, which discusses problems similar to those raised by the signing of Form I-20 (an INS Certificate of Eligibility for Non-Immigrant Student Status). In particular, the case in note 33 is pertinent.

RICO MANUAL - S.D. CALIFORNIA

As noted in the 1978 Report of the United States Attorney for the Southern District of California, former Assistant U.S. Attorney Howard Matloff developed a fifty page "RICO" (Racketeering Influence and Corrupt Organizations) manual. This manual was developed by Mr. Matloff after his successful prosecution in United States v. Christian, et al., case number 77-0847, the first successful RICO prosecution west of the Mississippi involving narcotics. It seems to me that it might be helpful to other U.S. Attorneys and Assistant U.S. Attorneys to know that this information and expertise is available.

POINTS TO REMEMBER

TAX REFORM ACT OF 1976(26 U.S.C., Sec. 7609)

Section 1205 of the Tax Reform Act of 1976 (26 U.S.C., Sec. 7609) brought into the Internal Revenue Code new intervention procedures whereby taxpayers can stay third-party recordkeepers from complying with Internal Revenue Service summonses thereby forcing the United States to initiate judicial summons enforcement actions. We commented on one aspect of this new statute, the suspension of criminal and civil statutes of limitations, in 26 USAB 22, page 581.

As the number of these summons enforcement cases has increased, certain potential long-range problems have been identified. Frequently, a taxpayer may stay compliance, thereby forcing the Government to commence an enforcement action, but then fail to intervene in the action. Or the taxpayer or his counsel may, for a variety of reasons, "withdraw" the stay of compliance before or after initiation of the summons enforcement action, or having intervened in an action, withdraw his intervention or withdraw his objection to the summons for stated or unstated reasons. A frequent result in these instances is compliance by a third-party recordkeeper and a Rule 41 dismissal of the action by the Government or an order of dismissal by the Court on mootness or other grounds.

The problem potentially present in these cases is found in Section 7609(d)(2) which provides that the Internal Revenue Service may not examine summoned records where compliance has been properly stayed "except in accordance with an order issued by a court of competent jurisdiction authorizing examination of such records or with the consent of the person staying compliance."

In the situations described above, we clearly do not have an examination "in accordance with an order issued by a court of competent jurisdiction" and, depending on the individual factual circumstances and possible later judicial interpretation of them, we may not have "the consent of the person staying compliance." Since the summoned data (and presumably its fruits) may be the subject of subsequent motions to suppress at a much later time, in a different forum, in cases handled by different government lawyers, it seems prudent to attempt to head off these anticipated attacks and eliminate any potential taint problems. See United States v. Genser, 582 F. 2d 292 (C.A. 3, 1978); Donaldson v. United States, 400 U.S. 517 (1971).

Consequently, the Government should in each case brought for enforcement insist upon either (1) entry of an enforcement order, or (2) a formal, signed consent by the person staying compliance which unequivocably permits examination of the summoned data. A copy of this order or consent should be furnished the investigating agent along with the advice that it be permanently associated with his investigative file.

Please promptly advise the Chief of the Civil Trial Section for your region of any problems encountered in this area.

(Tax Division)

CIVIL DIVISION
Assistant Attorney General Barbara Allen Babcock

City of Blue Ash, Ohio v. McLucas, No. 77-3300 (5th Cir., April 17, 1979) DJ 145-173-102

Sixth Circuit Holds FAA Not Liable For Enforcement Of State And Local Obligations Incorporated In Environmental Impact Statement

A municipality wished to prevent jet aircraft from landing at an airport within its environs, even if the airport runways were to be expanded by an FAA grant sought by the county regional airport authority. Accordingly, the municipality entered into an agreement with the airport authority that the airport would remain closed to jet aircraft. This agreement was incorporated into the environmental impact statement filed by the FAA. After the runway construction was completed, however, the FAA published at the request of the airport authority a Notice to Airmen (NOTAM), which had the effect of opening the airport to jet aircraft meeting specified noise limitations. The city sued the FAA to enjoin publication of the notice. The district court dismissed the action. The Sixth Circuit affirmed, holding that there is no legally enforceable federal commitment to exclude jet aircraft and that the dispute should be resolved in the state courts.

Attorney: Eloise E. Davies (Civil Division)
FTS 633-3425

Dawson v. HUD, No. 77-1382 (5th Cir., April 11, 1979) DJ 145-17-1117

Uniform Relocation Act: Fifth Circuit Holds Uniform Relocation Act Inapplicable To Persons Displaced By Private Developers

Plaintiff was evicted by her landlord so that he could deliver an apartment building, in vacant condition, to a private developer. The developer, by previous agreement with HUD, received a federal subsidy to rehabilitate the structure and provide low-rent housing to the new moderate and low-income tenants. Plaintiff then sued HUD for benefits under the URA. The district court, however, denied plaintiff's claim, holding that the URA applies only when the displacement is for a governmental acquisition of real property. The Fifth Circuit has just affirmed. Thus, four circuits have now ruled for the government on this issue.

Attorney: Bruce G. Forrest (Civil Division)
FTS 633-3445

McGill v. EPA, No. 78-4353 (5th Cir., April 20, 1979) DJ 145-185-123

Non-Registrant Rights Before The EPA: Fifth Circuit Holds That Non-Registrant Cannot Challenge Pesticide Registrant's Voluntary Cancellation Of Registration Before EPA

Petitioners and intervenors, users of the pesticide Mirex, sought to overturn a settlement arranged between the EPA and the sole registrant of Mirex under which the registration for use and production of Mirex would be voluntarily cancelled and existing stocks of the pesticide would be depleted on a phased basis. The petition sought to require EPA to reopen and complete suspended hearings on the possible cancellation of the same Mirex registrations even without the further participation of the registrant. The court viewed the question as whether Congress, in enacting the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136 et seq., granted users who are not registrants the right to prevent such a settlement and to require completion of the hearing. The court of appeals recognized that Congress clearly intended to give non-registrants some rights under the statute, including some rights that are not often found in analogous statutes. It concluded, however, that Congress intended that non-registrants act only with the consent of registrants or only with respect to a commodity that would continue to be produced for some specified purpose. Since the sole registrant here had decided to cancel its Mirex registrations for all purposes, the Fifth Circuit determined that it was well within the discretion of EPA to suspend the Mirex cancellation hearings.

Attorneys: Mark Gallant (Formerly of the Civil Division)
Joseph Scott (Civil Division)
FTS: 633-3395

Marshall v. Burlington Northern, Inc., No. 75-3184 (9th Cir., April 19, 1979) DJ 223076-464

Agency Jurisdiction: Dispute Over Agency's Jurisdiction Should Initially Be Ruled Upon By The Agency

Burlington Northern denied an OSHA industrial hygienist entry into its facility, contending that because the Federal Railroad Administration declared its intention to promulgate health and safety regulations affecting Burlington's employees, the FRA and not OSHA had jurisdiction. The district court denied the Secretary of Labor's petition to compel entry on the grounds that the FRA had pre-empted OSHA's jurisdiction by

declaring an intent to exercise its statutory authority in establishing and enforcing occupational health and safety standards affecting Burlington's employees. On appeal, the Ninth Circuit reversed, holding that Burlington had prematurely raised, and the district court improperly considered, the question of OSHA's jurisdiction. Since it was not clear that exhaustion of administrative remedies would result in irreparable injury, that the agency lacked jurisdiction, or that the agency's special expertise would be of no use in resolving the question, the doctrine of exhaustion of administrative remedies required that the jurisdictional dispute be initially ruled upon by the Occupational Safety and Health Review Commission. The rationale of this decision is applicable to other cases and will be very useful to us in resisting time-consuming and unnecessary judicial review of non-final agency action.

Attorney: Marleigh Dover Lang (Civil Division)
FTS 633-3449

Warth v. Department of Justice and U.S., No. 77-1733 (9th Cir., April 24, 1979) DJ 145-12-2799

Trial Transcript In Possession Of Department Of Justice Held Not An "Agency Record" Subject To Disclosure Under The Freedom Of Information Act

The Ninth Circuit has just affirmed the district court's dismissal of an action seeking to compel the Department of Justice to disclose, under the Freedom of Information Act (FOIA), a copy of a criminal trial transcript in the possession of the United States Attorney. The Department of Justice took the position that the transcript was a judicial record, not an "agency record" under the FOIA, and that plaintiff should obtain access to the transcript by applying to the Court Reporter for a copy pursuant to the usual procedures (including payment of transcription fees) for obtaining transcripts from the Court. The Ninth Circuit flatly held that the possession of a court document by an executive agency does not transform it into an "agency record" under the FOIA, and that the FOIA imposes no obligation upon agencies to produce any court records in its possession. Since the Court concluded that a trial transcript is a court record, it affirmed dismissal of the action.

Attorney: Leonard Schaitman (Civil Division)
FTS 633-3321

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May 25, 1979

CIVIL RIGHTS DIVISION
Assistant Attorney General Drew S. Days, III

United States v. Thurston County, Nebraska, No. 78-0-380, (D. Neb., May 9, 1979) DJ 180-45-13

Voting Rights of Native Americans

The United States filed this action pursuant to 42 U.S.C. Sections 1971(c) and 1973j(d), on August 30, 1978, alleging that Thurston County, Nebraska, and its County Board of Supervisors violated the Fourteenth and Fifteenth Amendments and 42 U.S.C. Sections 1971 and 1973 by changing from a single-member district to an at-large system of election for the County Board. This is the first voting dilution suit brought to obtain single-member districts on behalf of Native Americans.

On May 9, 1979, Judge Richard Robinson entered a consent decree which provides for the most extensive relief of which we are aware in a dilution suit. The county is divided into the 7 single-member districts that we proposed, 2 of which are over 75 percent Indian in population (the county is 30 percent Indian). Elections will be held for both Board members from the Indian districts in June of 1980. The Board agrees to retain single-member districts after the reapportionment on the basis of the 1980 census. Radio and newspaper publicity in Indian and Anglo media of the terms of the consent decree are required prior to candidate qualification deadlines, and prior to the primary and general elections in 1980. Deputy registrars are ordered to conduct voter registration for specified time periods at the tribal headquarters of the Winnebago and Omaha tribes prior to the primary and general elections in 1980.

The County is also certified for coverage pursuant to Sections 3(a) and 3(c) of the Voting Rights Act for a period of 5 years, so that all voting examiners and observers may be utilized. The County is permanently enjoined from abridging or interfering with the right to vote of Indian citizens.

Attorneys: John P. MacCoon (Civil Rights Division)
FTS 633-3811

Christine B. Nicholson (Civil Rights Division)
FTS 633-3873

United States v. City of Los Angeles, No. 77-3460 and Blake v. City of Los Angeles, Nos. 77-3595 and 77-3601 DJ Nos. 170-12C-96, 170-12C-66

Title VII

The Court of Appeals, Ninth Circuit has recently issued two opinions which clarify the appropriate standard of proof of discrimination by a government agency under Title VII. In United States v. City of Los Angeles, the Court of Appeals vacated the injunction issued by the district court in an employment suit against the City of Los Angeles filed under Title VII and the Crime Control and Revenue Sharing Acts. The Court of Appeals rejected the district court's holding that proof of a Title VII violation by a government agency required proof of discriminatory intent. Similarly, in Blake v. City of Los Angeles, a Fourteenth Amendment and Title VII suit alleging sex discrimination by the Los Angeles police through the use of a minimum height requirement and a physical agility test, the Court of Appeals held that the district court, in holding that Title VII required proof of discriminatory intent when the defendant was a government agency, was incorrect.

Attorney: Mark Gross (Civil Rights Division)
FTS 633-2195

City of Dallas, Texas v. United States, CA No. 78-1666 DJ No. 166-73-13

Voting - Section 5

On May 5, 1979, the three-judge court entered an order denying plaintiffs' motion for summary judgment; in this lawsuit the City sought Section 5 preclearance for the City Council apportionment plan. In the same order, the Court found that the ruling in Lipscomb v. Wise, 399 F. Supp. 782, 792-98 (N.D. Texas 1975) is not res judicata and does not collaterally estop defendants from challenging the instant plan as diluting the voting power of minority voters in Dallas. Additionally on May 4, 1979, attorneys from the Voting Section met with Dallas city officials in order to explore the possibilities of settlement in the present action.

Attorneys: Carmen Jones (Civil Rights Division)
FTS 724-7395
Robert Rodrigues (Civil Rights Division)
FTS 724-7190

LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General James W. Moorman

Save Our Wetlands v. Bell, ____ F.2d ____, No. 78-2704 (5th Cir. April 18, 1979) DJ 90-5-1-6-39

Res Judicata

In Save Our Wetlands v. U.S. Army Corps of Engineers, 549 F.2d 1021 (1977), cert. denied, 434 U.S. 83, the Fifth Circuit held that the plaintiff's action, alleging that the Corps violated NEPA by issuing a dredge and fill permit without filing an EIS, was barred by laches. Plaintiff then filed another action stemming from the same controversy and the district court found the new suit to be barred by res judicata. The court of appeals affirmed without opinion.

Attorneys: Robert L. Klarquist and Carl Strass (Land and Natural Resources Division) FTS 633-2731/4427 and Assistant United States Attorney Robert Boese (E.D. La.)

Idaho v. Andrus, ____ F.2d ____, Nos. 77-1300 and 77-1517 (9th Cir. April 19, 1979) DJ 90-1-2-1034

Public Lands; Carey Act

The district court had issued an opinion and declaratory judgment which could be interpreted as holding that the State of Idaho is entitled to approximately 2.4 million acres of desert land for Carey Act development and that the Secretary of the Interior is required to set aside land for that purpose. (The Carey Act is a statute for the development of desert land of the public domain. The land is conveyed to the various states which in turn convey it to individual settlers.) The court of appeals affirmed in a one sentence order, based on the district court opinion.

Attorneys: Edward J. Shawaker, Jacques B. Gelin and Raymond N. Zagone (Land and Natural Resources Division) FTS 633-2813/2762/2748

County of Patrick v. United States, ____ F.2d ____, No. 78-1215 (4th Cir. April 20, 1979) DJ 90-1-5-1706

Quiet Title Actions; Easement of Access

Landowners had an easement of access, at grade, across the Blue Ridge Parkway to a secondary road. The United States shut off the landowners' access to the Parkway and their easement at grade, forcing them to use an underpass, and to have access only to the secondary road. The government argued that there was only nominal injury because their easement was only to cross the Parkway, not to enter or exit from it. The Fourth Circuit ruled that they were entitled to Parkway access. There are many similar easements on the Parkway. The landowners undoubtedly will feel that they have a bonanza, the capacity to build a subdivision or shopping plaza with direct Parkway access. This is doubtful because the easement is very narrow, and its convertability to multi-family use is still open to challenge.

Attorneys: Assistant United States Attorney Monty Tucker (W.D. Va.) and Carl Strass (Land and Natural Resources Division) FTS 633-2744

Minnehaha Creek Watershed District, et al. v. Hoffmann, ____ F.2d ____, No. 78-1448 (8th Cir. April 23, 1979) DJ 90-5-1-1-593

Navigable Waters; Corps of Engineers Regulations

Several Minnesota state special service districts, together with the State itself as intervenor, and an association of Lake Minnetonka residents obtained a district court injunction. The injunction forbade the Corps of Engineers from regulating the placement of wharves and piers in Lake Minnetonka and Minnehaha Creek under Section 10 of the 1899 River and Harbor Act, 33 U.S.C. 403, and from regulating the placement of dams and rip-rap in the lake and creek by means of the "dredge-and-fill" permit system established by Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. 1344. The Eighth Circuit affirmed the injunction against Section 10 regulation, because Congress, in the 1899 River and Harbor Act, did not extend federal regulatory power under the Commerce Clause to wholly intrastate bodies of water unlinked by a navigable waterway to navigable waters in other states. The Eighth Circuit reversed the injunction against Section 404 regulation. Noting that all parties agreed that Congress, in the Federal

Water Pollution Control Act, expanded its control of activities to cover intrastate activities, the court of appeals held that dredge-and-fill regulations by the Corps could cover the placement of dams and rip-rap. The court also set aside the district court's invalidation of 33 C.F.R. 323.2(u) of the Corps' regulations.

Attorneys: Maryann Walsh and Dirk D. Snel (Land and Natural Resources Division) FTS 633-4168/2769

Putman v. Corps of Engineers, ____ F.2d ____, No. 78-1549 (6th Cir. April 12, 1979) DJ 90-1-4-1838

Corps of Engineers Regulations

The Sixth Circuit affirmed, in a one line order, the judgment of the district court, which had held that the plaintiffs were not entitled to grandfather rights under certain Corps regulations. The regulations prohibited the maintenance of boathouses equipped with facilities "conducive to human habitation," but allowed existing permitted facilities so equipped to remain. The plaintiffs are the owners of such boathouses, but their permits had been revoked prior to the issuance of the grandfather clause regulations. However, they had been given a grace period of five years during which they could keep their boathouses on the lake and during which the grandfather clause regulation was issued. They contended that this grace period amounted to a permit. The district court had held that the boathouses were not permitted facilities during the grace period and therefore they were not entitled to grandfather status. Although affirming the judgment of the district court, the court of appeals also stated that the district court had "expressed no opinion" on the question of the applicability of the grandfather rights clause and that it also expressed no opinion on this issue. We are requesting a modification of the opinion regarding these statements.

Attorneys: Robert W. Frantz and Robert L. Klarquist (Land and Natural Resources Division) FTS 633-3906/2731

Westinghouse Electric Corp., et al. v. U.S. Nuclear Regulatory Commission, ____ F.2d ____ Nos. 78-1188 (3rd Cir. April 19, 1979) DJ 90-1-4-1790

Administrative Law, Atomic Energy Act, NEPA

In December 1977, NRC suspended its decisionmaking processes concerning proposed recycle of spent nuclear fuel and use of plutonium obtained by this recycle as a fuel in nuclear power plants. This suspension, to last two years while international studies of alternative fuel cycles are completed, followed the President's suggestion that plutonium recycle be deferred while ways are found to reduce or eliminate the potential for diversion of this plutonium by foreign governments or terrorists into nuclear bombs. NRC's suspension affected both an informal rulemaking proceeding, on the use of such recycled, plutonium-enriched fuel ("mixed oxide" fuel), and several adjudicatory proceedings on applications by Westinghouse and others for licenses and permits for nuclear fuel reprocessing plants.

Petitions for review were filed challenging the suspension on various grounds under the Atomic Energy Act and on the failure to prepare an environmental impact statement under NEPA.

The Third Circuit, after a lengthy discussion of 28 U.S.C. 2112(a) in which it determined that it was the proper court to hear the petitions, upheld the Commission's actions in all respects and dismissed the petitions. Concerning the Atomic Energy Act, the court held that NRC: (1) has discretion to impose such a moratorium on the rulemaking and the licensing proceedings; (2) did not have to afford an adjudicatory hearing prior to the suspension order; (3) did not violate its statutory independence from the President when it accepted the President's views after analyzing them; and (4) was not precluded from awaiting completion of the international fuel cycle studies merely because NRC was not involved in those studies. As to NEPA, the court concluded that NRC was not required to prepare an EIS prior to the suspension decision because NEPA does not require preparation of an EIS to allow deferral of preparation on another EIS (GESMO). Further, the court concluded that requiring preparation of an EIS before allowing suspension of ongoing agency proceedings would impermissibly intrude on the agency's

role in the NEPA process as described in Kleppe v. Sierra Club 427 U.S. 390.

Attorneys: NRC Staff; John J. Zimmerman and Dirk D. Snel (Land and Natural Resources Division) FTS 633-4519/2769

FEDERAL RULES OF EVIDENCE

Rule 404(b). Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes. Other Crimes, Wrongs, or Acts.

The Second Circuit reversed defendant's conviction of one count of possession with intent to distribute and distribution of heroin. Defendant had exchanged one ounce of heroin for four pounds of quinine with an undercover DEA agent. At trial, evidence was introduced which showed that the defendant when arrested three days after the transaction with the DEA agent, was in possession of heroin cut with quinine. The original heroin transferred to the DEA agent had been mixed with sugar and starch. The Government contended that the similar act evidence was admissible under Rule 404(b) to prove the defendant's identity as a participant in the heroin-quinine exchange and to corroborate the undercover agent's testimony that the exchange had occurred.

The Court of Appeals found the evidence was not admissible to prove identity since the defendant offered to concede that he had in fact received the quinine from the Government agent. Furthermore, the Court found the evidence insufficiently corroborative since the necessary inference would rest upon a finding that the defendant was a person of "bad character or [had a] propensity to commit the crime in issue." The Court noted the mere fact that the later seized heroin mixture contained quinine as a dilutant hardly identifies the quinine as that supplied by the DEA agent. To be directly corroborative of the agent's testimony, it would be necessary to show that the quinine was the same quality and chemical analysis as the quinine furnished by the agent. The Court concluded that in the absence of any evidence of any comparative chemical analysis demonstrating that the samples were sufficiently identical to warrant an inference that they came from the same source, the probative value of the other-crime evidence was entirely too ephemeral to permit its introduction as corroborative evidence.

(Reversed.)

United States v. Robert DeVaughn, ___ F.2d ___, No. 78-1358 (2nd Cir., April 5, 1979).

FEDERAL RULES OF EVIDENCE

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice. Confusion or Waste of Time.

Rule 404(b). Character Evidence Not Admissible to Prove Conduct, Exceptions; Other Crimes. Other Crimes, Wrongs or Acts.

Defendant appealed his conviction for robbing a federally-insured bank, contending inter alia that the district court committed reversible error in permitting the Government to use evidence of the defendant's participation in other crimes to prove criminal intent. Defendant claimed that use of this evidence was improper because the trial judge failed to specifically enter findings that probative value of the evidence outweigh its prejudice and conviction, because it was unnecessary to the Government's case, and most importantly because it was not "clear and convincing".

Rule 403, the Court stated, requires the trial judge to balance the probative value of the evidence against its potential for unfair prejudice. While the Court suggested that the practice of entering a written finding as to this balance should be encouraged, the Court held that the failure to enter such a finding does not require reversal of the conviction.

The Court also rejected defendant's second argument that the admission of prior crime evidence was so unnecessary to the Government's case that it was error to admit it, holding that the evidence contributed to more dependable proof of the defendant's knowledge and intent and was therefore "reasonably necessary" to the Government's case. Moreover, the Court noted an appellate court is obligated to afford substantial defense to the evidentiary ruling of the trial court. Additionally, the Court concluded that the other-crimes evidence presented was sufficiently clear and convincing to be submitted to the jury since direct proof of the defendant's participation in the prior crimes was presented rather than mere circumstantial inferences of participation.

(Affirmed.)

United States v. Wayne Joseph Dolliole, ___ F.2d ___, No. 78-1697 (7th Cir., April 20, 1979).

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 23(a). Trial by Jury or by the Court.
Trial by Jury.

Defendant, who was convicted in a nonjury trial of distributing cocaine, appealed contending that his waiver of jury trial under Rule 23(a) was constitutionally invalid. The motion for post-conviction release was based on the fact that the district judge who presided at his bench trial had earlier presided at the jury trial of a codefendant. The defendant maintained that his lack of knowledge of this critical fact, compounded by the trial judge's failure to inform him of this fact prior to the trial, made his waiver one not intelligently given, thus unconstitutionally denying him due process and his right to jury trial.

The Court of Appeals affirmed the conviction. To accept the defendant's theory, the Court explained, would require a very special reading of the effect of all Rule 23(a) jury waivers given in advance of the trial date. In effect, it would require that they be reconfirmed by interrogation undertaken sua sponte by the judge presiding at trial to ensure that the waiver earlier given remained voluntarily and intelligently given in the face of any personal predilictions or special knowledge of the trial judge that might conceivably have influenced the waiver had these been known to the defendant at waiver time. According to the Court, Rule 23(a) does not impose a continuing duty upon the trial judge to reconfirm the validity of a waiver approved by another district judge.

(Affirmed.)

United States v. Warwick Mason Wyatt, 591 F.2d 260 (4th Cir., January 2, 1979).

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 6(e). The Grand Jury. Secrecy of Proceedings and Disclosure.

Defendants, all either state or Federal employees, appealed from their convictions for violations of 18 U.S.C. 1341 and 1001. The charges resulted from their having made false statements about their income in order to obtain benefits from the Illinois Department of Public Aid. On appeal, the defendants argued that their indictments should be dismissed because the secrecy requirements of Rule 6(e) were violated. Specifically, their objections related to: (1) disclosures of grand jury evidence to personnel of the Federal Bureau of Investigation without a court order; (2) disclosures to state and Federal personnel pursuant to court order on the premise that a grand jury investigation is not a "judicial proceeding" and that the court orders were overbroad; and (3) disclosures made to them by state and Federal personnel without a court order.

The Court of Appeals rejected these arguments. It pointed out that although at the time of the investigation Rule 6(e) permitted disclosure without a court order only to "attorneys of the government," the Rule could not have been intended to preclude disclosure to other Department of Justice personnel whose expertise was required and who had been sworn in as agents of the grand jury to assist in an extremely complex investigation. The Court further found that Rule 6(e) permits disclosure orders not only "in connection with" but also "preliminarily to" a judicial proceeding, and that the court orders were not overbroad since while the orders did not state specifically who the recipients of the materials would be the orders contained instructions limiting the use to be made of the materials.

The Court of Appeals also upheld the disclosure to the defendants of documents subpoenaed by the grand jury, although no court order authorizing disclosure had been made. During the final stages of the investigation each of the defendants had been confronted with their own public assistance applications, endorsed warrants, and employment records. Each then signed a written confession. On appeal, the defendants contended that these confessions should be suppressed because a court order was necessary to release evidence once it had appeared before the grand jury. The Court of Appeals disagreed, noting that unlike testimony, the documents in question here, were created for purposes other than the grand jury investigation, and were not "otherwise sheltered from the defendants' inspection by any form of privilege."

(Affirmed.)

United States v. Bobbie Stanford, et al., 589 F.2d 285 (7th Cir., December 14, 1978).

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ADDENDUM

UNITED STATES ATTORNEYS' MANUAL--BLUESHEETS

The following Bluesheets have been sent to press in accordance with 1-1.550 since the last issue of the Bulletin.

DATE	AFFECTS USAM	SUBJECT
5/11/79	9-2.025	Trade Secrets Act--Prosecution Under 18 U.S.C. 1905
5/11/79	9-2.133	Criminal Division Consultation Required Before Institution of Proceedings: Trade Secrets Act

(Executive Office)

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