



U.S. Department of Justice  
Executive Office for United States Attorneys

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# United States Attorneys' Bulletin

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EXECUTIVE  
OFFICE FOR  
UNITED  
STATES  
ATTORNEYS

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COMMENDATIONS

Assistant United States Attorney JUDITH BARTNOFF, District of Columbia, was commended by Mr. Richard J. Riseberg, Assistant General Counsel for Public Health, Department of Health and Human Services, for her outstanding representation in Commonwealth of Puerto Rico v. Schweiker.

Assistant United States Attorneys JOHN D. BATES and MITCHELL R. BERGER, District of Columbia, were commended by Mr. Keith E. Eastin, Associate Solicitor of Conservation and Wildlife, Department of the Interior, for their excellent work in White House Vigil for the ERA v. Watt, which involves a constitutional challenge to the National Park Services' regulations concerning the use of signs and parcels on the White House sidewalk.

Assistant United States Attorneys RANDOLPH BAXTER and WILLIAM J. KOPP, Northern District of Ohio, were commended by W.G. Moore, Inspector in Charge, United States Postal Service, Cleveland, Ohio, for their successful defense of the government in a wrongful death action.

Assistant United States Attorney MITCHELL R. BERGER, District of Columbia, was commended by Mr. David O. Williams, Special Counsel to the Assistant Secretary of Labor, Employment and Training Administration, Department of Labor, for his excellent and thoughtful representation in a civil rights case.

Assistant United States Attorney WILLIAM J. BIRNEY, District of Columbia, was commended by Allie B. Lattimer, General Counsel, General Services Administration, for his fine job in handling a motion for a temporary restraining order and preliminary injunction in Anchorage Telephone Utility v. Gerald P. Carmen.

Assistant United States Attorney WILLIAM H. BRIGGS, JR., District of Columbia, was commended by Mr. William H. Coldiron, Solicitor, Office of the Secretary, Department of the Interior, for his advocacy skills and effective presentation of the facts and legal arguments in the litigation of Donohoe v. Watt.

Assistant United States Attorney NATHAN DODELL, District of Columbia, was commended by Mr. John A. Mintz, Assistant Director, Legal Counsel Division, Federal Bureau of Investigation, for his legal skills and vigorous representation of the FBI in the Freedom of Information and Privacy Act cases over the last several years.

Assistant United States Attorney ROBERT E.L. EATON, JR., District of Columbia, was commended by Mr. David M. Gibbons, Chief of the Environmental Branch, Executive Office of the President, Office of Management and Budget, for his highly competent representation of the government in an age discrimination suit against the Environmental Protection Agency.

Assistant United States Attorney JAMES D. JENSEN, Northern District of Ohio, was commended by Mr. Joseph E. Griffin, Special Agent in Charge, Federal Bureau of Investigation, Cleveland, Ohio, for his successful prosecution of Alvin Henry Bruce for bank robbery.

Assistant United States Attorneys CHARLES LEEPER and WILLIAM D. NUSSBAUM, District of Columbia, were commended by Mr. Clay W. Goldston, Deputy Chief of Police, D.C. Metropolitan Police Department, for their successful investigation and prosecution of a dangerous criminal for rape while armed, armed robbery, sodomy, burglary and several other offenses.

Assistant United States Attorney GALE MCKENZIE, Northern District of Georgia, was commended by Mr. Joseph H. Sherick, Inspector General, Department of Defense, for her successful prosecution of United States v. Wirt, a significant government fraud case involving millions of dollars.

Assistant United States Attorney REBECCA L. ROSS, District of Columbia, was commended by Mr. Richard H. Abbey, Chief Counsel of the Department of the Treasury, U.S. Customs Services, for her representation in the case of Smith v. Regan, a Title VII discrimination complaint.

Assistant United States Attorney ROBERT C. SELDON, District of Columbia, was commended by Mr. William H. DuRoss, III, Associate Solicitor for Employment and Training, Department of Labor, for his superb professional performance rendered in H.R.D.I. Inc. v. Donovan, a case involving a legal challenge to the Secretary's discretion to allocate discretionary grants and contract funding under the Job Training Partnership Act.

Assistant United States Attorney ROBERT C. SELDON, District of Columbia, was commended by Mr. John E. Mullen, General Counsel, Agency for International Development, for his outstanding representation in American Foreign Service Association v. McPherson and Munroe v. AID.

Assistant United States Attorney KATHERINE V. TOOKS, Central District of California, was commended by Ms. Carol M. Fahey, Regional Director, Family Nutrition Program, Department of Agriculture, for her assistance and guidance in Hang Kong Ou v. United States. The efforts of Assistant United States Attorney TOOKS resulted in a favorable settlement for the Department of Agriculture.

Assistant United States Attorneys JOSEPH B. VALDER, DOUGLAS J. BEHR and CONSTANCE L. BELFIORE, District of Columbia, were recognized by Mr. Paul A. Buskirk, Special Agent in Charge of the Washington Field Office, U.S. Secret Service, for their assistance in monitoring a food stamp fraud investigation.

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

POINTS TO REMEMBER

Comparative Summary of United States Attorneys' Cash Collections

Beginning with this issue, the Debt Collection Section of the Executive Office for United States Attorneys will publish monthly in the Appendix of the Bulletin a "24-Month Comparative Summary of U.S. Attorneys' Cash Collections." The Debt Collection Section suggests that this summary table be used by U.S. Attorneys as a guidepost in the assessment of the effectiveness of their debt collection units. By substituting district monthly totals for cash collections, as derived from the monthly PROMIS or Docket and Reporting Activity Reports, and by making the necessary calculations and comparisons, U.S. Attorneys may compare the performance of their debt collection units with the national average for all U.S. Attorneys over a 24-month period. District reports identical to the summary table appearing in the appendix can be easily produced on word-processing equipment, and some of this equipment can be programmed to make the necessary calculations. The summary table will be expanded to 36 months when the necessary data becomes available, shortly after the end of fiscal year 1984.

(Executive Office)

Cumulative List of Changing Federal Civil Postjudgment Interest Rates

The Cumulative List of Changing Federal Civil Postjudgment Interest Rates, as provided in the amendment to the federal post-judgment interest statute, 28 U.S.C. §1961, is appended to this Bulletin.

(Executive Office)

Teletypes To All United States Attorneys

A listing of the teletypes sent during the period from April 19, 1984, through May 26, 1984, is attached as an appendix to this issue of the Bulletin. If a United States Attorney's office has not received one or more of these teletypes, copies may be obtained by contacting Ms. Theresa Bertucci, Chief of the Communications Center, Executive Office for United States Attorneys, at FTS 633-1020.

(Executive Office)

OFFICE OF THE SOLICITOR GENERAL  
Solicitor General Rex E. Lee

The Solicitor General has authorized the filing of:

A petition for a writ of certiorari with the Supreme Court on April 2, 1984, in El Paso Natural Gas Co. v. Sun Oil Co. The issue is whether lease sale agreements, transferring a large volume of proven but not substantially developed gas reserves from a natural gas producer to an interstate pipeline for use by the pipeline in supplying its interstate customers, constitute a sale of natural gas subject to the jurisdiction of the Federal Energy Regulatory Commission under the Natural Gas Act.

A petition for a writ of certiorari with the Supreme Court on April 3, 1984, in United States v. Albertini. The issue is whether the First Amendment prohibits the enforcement of 18 U.S.C. §1382, which makes it unlawful to reenter a military base after having been barred by the commanding officer, against a civilian who is subject to a valid bar order but reenters the base during an "open house" for the purpose of engaging in an antiwar demonstration.

A petition for a writ of certiorari with the Supreme Court on April 3, 1984, in United States v. Johns. The issue is whether the automobile search exception to the Fourth Amendment warrant requirement, as applied to searches of containers found in the course of an auto search in United States v. Ross, 456 U.S. 798 (1982), is rendered unavailable to law enforcement personnel if the container is not searched quite promptly after it is seized.

A petition for a writ of certiorari with the Supreme Court on or before April 29, 1984, in United States v. Woodward. The issues are: (1) whether the felony of false statement (18 U.S.C. §1001), arising out of a notation by the entrant on a Customs form that he is not carrying more than \$5000 into the United States, is a lesser included offense of the misdemeanor (31 U.S.C. §§1058 and 1101, recodified a 31 U.S.C. §§5316 and 5322) of failing to file a disclosure form that is required when a person transports more than \$5000 into or out of the United States; and (2) if it is, whether the appropriate remedy is to set aside the section 1001 felony as the lesser included offense and leave standing the section 1101 misdemeanor as the greater offense.



A petition for a writ of certiorari with the Supreme Court on or before May 3, 1984, in Department of Education v. Kentucky. The issue is whether the Secretary may require a state to repay grant funds spent in violation of the Secretary's reasonable interpretation of arguably ambiguous statutory and regulatory conditions, where the expenditures were proper under the state's good faith interpretation of those conditions.

A protective petition for a writ of certiorari with the Supreme Court on or before May 4, 1984, in United States v. Hylin. The issue is similar to those pending before the Court in United States v. Varig, No. 82-1349, and United States v. United Scottish Ins. Co., No. 82-1350.

CIVIL DIVISION  
Acting Assistant Attorney General Richard K. Willard

O'Bryan v. Heckler, No. 84-5191 (D.C. Cir. Mar. 30, 1984). D.J.  
# CD-NEW.

D.C. CIRCUIT STAYS DISTRICT COURT ORDER  
REQUIRING THE FDA TO SEIZE DRUGS TO BE USED  
TO EXECUTE TEXAS MURDERER.

Plaintiff was sentenced by the Texas courts to die by lethal injection for murdering his own son; execution was set for 12:01 a.m., March 31, 1984. On March 30, he sued the Secretary of HHS to require her to seize the drugs to be used to carry out the execution. The district court entered an injunction against the Secretary, requiring the FDA to take all necessary steps to seize all drugs to be used by Texas to execute plaintiff. The district court relied on the court of appeals' recent decision in Chaney v. Heckler, 718 F.2d 1174 (D.C. Cir. 1983), which held that the FDA had abused its discretion in refusing generally to regulate drugs used for capital punishment.

We immediately appealed, noting (1) that the Supreme Court has stayed the issuance of the court of appeals' mandate in Chaney, and that the order in this case in any event went beyond what was required in Chaney, and (2) that the Fifth Circuit, on the previous day, had refused to stay O'Bryan's execution, in a suit brought under 42 U.S.C. §1983 and based on the Chaney decision. The court of appeals stayed the district court's order in the late afternoon, and in the evening the Supreme Court, by a 7-2 vote, refused to reinstate the district court order. O'Bryan was executed the next morning.

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CIVIL DIVISION  
Acting Assistant Attorney General Richard K. Willard

McKenna v. Weinberger, No. 83-1334 (D.C. Cir. Mar. 2, 1984). D.J.  
# 35-16-1661.

D.C. CIRCUIT AFFIRMS DISCHARGE OF DEFENSE  
INTELLIGENCE AGENCY ANALYST IN SEX DISCRIMI-  
NATION CASE.

In this case the female plaintiff resigned under threat of discharge from her position as an intelligence analyst at the Defense Intelligence Agency ("DIA"). She brought suit, claiming that the discharge threat was motivated by sex discrimination in violation of Title VII of the Civil Rights Act or, alternatively, that it was in retaliation for her complaints about discriminatory treatment. She also claimed that, in its efforts to discharge her, the DIA failed to follow its own procedures in violation of section 706 of the Administrative Procedure Act. After a trial on the merits, the district court ruled in favor of the agency on the first two claims and held that the exclusive remedy provisions of Title VII precluded suit under the APA.

The D.C. Circuit affirmed the district court's findings on the discrimination and retaliation claims even though plaintiff had "presented evidence of the pervasive sexism in the office environment" and her complaints, which were "not trivial . . . in the aggregate, could have supported a reasonable inference of sex discrimination." The affirmance thus reinforces application of the clearly erroneous standard to a lower court's findings in Title VII cases and creates a precedent for upholding agency action based on legitimate reasons despite some evidence of discrimination in the work environment.

The D.C. Circuit also held that the preclusive effect of Title VII is limited to claims of illegal discrimination and does not extend to plaintiff's claim of arbitrary treatment, but found nothing in the record to support her claim and dismissed it as unproven.

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CIVIL DIVISION  
Acting Assistant Attorney General Richard K. Willard

Williams v. FBI, No. 83-6204 (2d Cir. Mar. 20, 1984). D.J. # 145-12-3991.

SECOND CIRCUIT HOLDS THAT ALL FBI INVESTIGATORY RECORDS ARE "COMPILED FOR LAW ENFORCEMENT PURPOSES" AND COME WITHIN EXEMPTION 7 OF THE FREEDOM OF INFORMATION ACT.

In response to a Freedom of Information Act request concerning the FBI's investigation of the Coalition for the Defense of the Panthers, an organization composed of various groups in New Haven, Connecticut, including the Yale Divinity School Association and the Yale Student Health Organization, the FBI protected the identities of sources and others in its files under Exemption 7, 5 U.S.C. §552(b)(7). The district court ordered disclosure because it found that the records were not "compiled for law enforcement purposes," the threshold requirement of Exemption 7.

We appealed, and the Second Circuit reversed the district court decision, accepting our argument that the threshold language is simply "a broad, descriptive classification" and "is not a restriction on the use of the exemption." Thus, the Second Circuit ruled that FBI investigatory records are entitled to the protection of Exemption 7, as a matter of law, "whether or not the reviewing judicial tribunal believes there was a sound law enforcement basis for the particular investigation."

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CIVIL DIVISION  
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Williams v. Collins, No. 82-4434 (5th Cir. Apr. 2, 1984). D.J. #  
157-40-164.

FIFTH CIRCUIT HOLDS ORDER DENYING DISMISSAL  
ON GROUND OF ABSOLUTE IMMUNITY FOR COMMON  
LAW TORTS IS IMMEDIATELY APPEALABLE; AND,  
DEFENDANTS ACTING WITHIN THE SCOPE OF THEIR  
AUTHORITY ARE ENTITLED TO SUMMARY JUDGMENT ON  
THE ISSUE OF ABSOLUTE IMMUNITY.

Plaintiff sued nine federal officials who participated in personnel and administrative proceedings which led to his separation from federal employment, alleging the commission of common law and constitutional torts. The district court dismissed the Bivens claims, but denied defendants' motion to dismiss the common law torts on absolute immunity grounds. On the fifty-seventh day after entry of the order, notice of appeal, in the name of the United States only, was filed for defendants, initiating an immediate appeal pursuant to 28 U.S.C. §1291 and the collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

On appeal, the court made several rulings of major importance to the government. First, the court ruled that the notice of appeal was not fatally defective for having named only a non-party, the United States, as appellant. Next, the court adopted the Ninth Circuit's reading of Rule 4(a), Fed. R. App. P., holding that the 60-day notice of appeal filing period applies when a plaintiff's claims against government employees arise out of governmental activity and the individual defendants were acting under color of authority, or if any party in the case is represented by a government attorney. Finally, the court ruled that denials of absolute immunity are immediately appealable under Cohen. In so doing, the court rejected the necessity of establishing that a "serious and unsettled" question of law exists before an immediate appeal from a denial of absolute immunity can be heard, on the ground that absolute immunity protects a defendant from trial as well as from liability.

CIVIL DIVISION  
Acting Assistant Attorney General Richard K. Willard

Addressing the issue of defendants' immunity, the court then ruled that federal officials enjoy absolute immunity from common law tort liability for actions within the scope of their authority, and that "all that is necessary [for immunity] is that 'the action of the federal official bear some reasonable relation to and connection with his duties and responsibilities' . . . and that the action . . . is connected with a 'discretionary function.'" Finding that all defendants had been exercising discretionary functions and that there was no genuine issue of material fact as to whether the actions of which plaintiff complained bore a reasonable relation to defendants' duties, the court reversed the order of the district court and remanded for entry of an order granting the motion for summary judgment.

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Kalamazoo Spice Extraction Co. v. The Provisional Military Government of Socialist Ethiopia, No. 82-1521 (6th Cir. Mar. 9, 1984). D.J. # 145-0-1221.

SIXTH CIRCUIT REVERSES DISTRICT COURT DECISION  
THAT ACT OF STATE DOCTRINE PRECLUDES CLAIM BY  
PRIVATE CORPORATION AGAINST GOVERNMENT OF  
ETHIOPIA.

This was an appeal from a district court judgment which dismissed Kalspice's counterclaim. The district court held that the act of state doctrine, as interpreted by the Supreme Court in Banco Nacional De Cuba v. Sabbatino, 376 U.S. 398 (1964), precluded judicial inquiry into the validity of an expropriation by the Ethiopian government of shares in an Ethiopian business entity held by Kalspice.

## CIVIL DIVISION

Acting Assistant Attorney General Richard K. Willard

We filed an amicus curiae brief urging reversal of the district court's decision on the ground that in Sabbatino the Supreme Court created a "treaty exception" to the act of state doctrine. Under the treaty exception, we argued, the courts of the United States can entertain actions against foreign sovereigns where there is a "treaty or other unambiguous agreement" which provides controlling legal principles for the resolution of disputes with the foreign sovereign. Here, we argued, the 1953 Treaty of Amity with Ethiopia is just such a treaty, and its language requiring "prompt payment of just and effective compensation" provides the controlling legal principle under which judicial inquiry into an expropriation can be undertaken. Relying heavily on our views, the court of appeals reversed the district court's ruling.

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LAND AND NATURAL RESOURCES DIVISION  
Assistant Attorney General F. Henry Habicht, II

Buccaneer Point Estates Inc. v. United States, No. 82-5921 (11th Cir. Mar. 26, 1984) D.J. # 90-5-1-6-86.

CWA; 1975 LETTER BARS CORPS FROM REQUIRING  
DEVELOPER TO OBTAIN SECTION 404 PERMIT.

The court of appeals reversed the lower court, holding that a Florida developer need not obtain a 404 permit under the Clean Water Act before completing a project. The court refused to characterize its decision as estopping the government. However, in terming the requirement for a 404 permit a "retroactive application of the Corps regulations" (slip. op. at 2274), the court nevertheless speaks of the developer's "justified" reliance on a 1975 letter. The letter was written by the Corps prior to NRDC v. Callaway, 392 F. Supp. 568 (D. D.C. 1975), pursuant to which the Corps was ordered to require 404 permits for filling in wetlands above the MHWL.

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United States v. Overlie, No. 83-1213 (8th Cir. Mar. 28, 1984)  
D.J. # 90-2-4-921.

INDIANS' PER CAPITA SHARES OF JUDGMENT FUNDS  
NOT SUBJECT TO WITHHOLDING AND GARNISHMENT.

The court of appeals held that the United States was not authorized to withhold and garnish the per capita shares of judgment funds awarded to members of the Three Affiliated Tribes of the Fort Berthold Reservation. The individuals had all defaulted on SBA or Farmers Home Administration loans, and the government sought to satisfy, at least in part, judgments outstanding against these individual tribal members by having their judgment shares deposited in their Individual Indian Money accounts. The court of appeals rejected the district court's finding that, while the withholding of funds was not permitted



LAND AND NATURAL RESOURCES DIVISION  
Assistant Attorney General F. Henry Habicht, II

under the judgment distribution plan, 25 C.F.R. §115.9, 25 U.S.C. §119 and Federal Rules of Civil Procedure 64, when read together, represented a "long-standing policy of allowing the Secretary to set aside funds for payment of debts owed to the United States . . ." (slip. op. at 4). (In Kennerly v. United States, decided by the Ninth Circuit last year, the court there found that Kennerly's interest in his IIM account funds was a property interest subject to due process protection and the government could not touch his IIM funds to satisfy loans owed by Kennerly to his tribe.)

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United States v. Context-Marks Corporation, No. 82-5444 (11th Cir. Mar. 29, 1984) D.J. # 62-18-152.

CWA; CORPS PRECLUDED FROM REQUIRING DEVELOPER TO APPLY FOR SECTION 404 PERMIT.

The court of appeals affirmed the district court's holding that a Florida developer need not apply for a 404 permit under the Clean Water Act before filling in wetlands above the Mean High Water Line (MHWL) because to do so "would be a retroactive application of Corps regulations . . ." (slip. op. at 4). The developer had placed fill in a 52-acre tract located below the MHWL in December 1972 without first obtaining a permit. The Corps issued a cease and desist order in January 1973. While the developer then applied for an after-the-fact permit, the Corps was precluded from issuing one since the State of Florida refused to issue a water quality certification. The litigation challenging the State's denial did not end until November 1977. In the interim, the Corps, pursuant to the decision in Natural Resources Defense Council v. Callaway, 392 F. Supp. 568 (D. D.C. 1975), revised its regulations to require a 404 permit for work above the MHWL as well as for work below. The court of appeals adopted the view of the district court that, had the Corps not issued the cease and desist order in 1973, the developer would have been able to fill the land above the MHWL before the change in Corps regulations in 1975 in response to a court order.

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LAND AND NATURAL RESOURCES DIVISION  
Assistant Attorney General F. Henry Habicht, II

United States v. Clarence Moore, No. 82-5478 (6th Cir. Apr. 4, 1984) D.J. # 90-1-18-2603.

SURFACE MINING CONTROL AND RECLAMATION ACT  
ASSESSMENT FOR VIOLATION OF ACT SUSTAINED.

Unanimously agreeing that oral argument was unnecessary, the court of appeals entered an order upholding the district court's grant of summary judgment to the United States in this action to recover assessments against Moore for violation of the Surface Mining Control and Reclamation Act. Citing Blackhawk Mining Co. v. Andrus, 711 F. 2d 753 (6th Cir. 1983), the court held, contrary to Moore's contention, that the requirement that assessments be paid into escrow before an operator is entitled to a full hearing before an administrative law judge is constitutional. The court also dismissed Moore's contention that he had not knowingly waived his right to a hearing, since the administrative record contained a letter informing Moore of the escrow payment requirement.

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TAX DIVISION  
Assistant Attorney General Glenn L. Archer, Jr.

United States v. Nealy, \_\_\_\_\_ F.2d \_\_\_\_\_ (4th Cir. Mar. 12, 1984).  
D.J. # 5-84-855

26 U.S.C. §7206(2) CONVICTION OF ENGINEER IN  
COAL TAX SHELTER PROSECUTION AFFIRMED

On March 12, 1984, the Fourth Circuit affirmed convictions pursuant to 18 U.S.C. §371 and 26 U.S.C. §7206(2) in a coal tax shelter case in West Virginia against W. Garland Nealy, the producer of an engineering report which "greatly inflated" or "fraudulently stated" the extent of available coal reserves. Citing, inter alia, United States v. Siegel, 472 F. Supp. 440, 444 (N.D. Ill. 1979), United States v. Wolfson, 573 F.2d 216, 225 (5th Cir. 1978) and United States v. Crum, 529 F.2d 1380, 1382-83 (9th Cir. 1976), the Fourth Circuit held that a conviction for aiding the presentation of a false income tax return pursuant to 26 U.S.C. §7206(2) does not require the actual preparation of a return, but rather requires merely the knowing participation in proving information that results in a materially fraudulent tax return. As the Fourth Circuit encompasses the State of West Virginia, the situs of many coal mines and, accordingly, many coal tax shelters within its jurisdiction, the case has particular significance for all tax shelter prosecutions.

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## FEDERAL RULES OF EVIDENCE

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

Defendant was convicted of cocaine violations. On appeal, defendant contends that his admission to an undercover agent that he had once flown a DC-3 to Colombia and back was extrinsic act evidence inadmissible under Rule 404(b) which provides that evidence of other acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. The government argues that defendant's flight statement is part of the res gestae and not extrinsic, but even if the statement were extrinsic it would be admissible under Rule 404(b) because it is relevant to the issue of defendant's intent and its probative value substantially outweighs any prejudice resulting from its admission.

The Court of Appeals held that defendant's flight statement was entirely unrelated to the transaction at issue and was subject to Rule 404(b). Using the U.S. v. Beechum, 582 F.2d 898 (1979), interpretation of Rule 404(b), which stated that a court must determine that the extrinsic offense evidence is relevant to an issue other than defendant's character and the evidence must possess probative value that is not substantially outweighed by undue prejudice, the court held that the trial court erred in admitting the evidence since it did not determine that the evidence was relevant to defendant's intent to commit the crime charged; however, since there was other substantial evidence to support defendant's conviction and the defendant suffered no prejudice by reason of this error, the court affirmed.

(Affirmed.)

United States v. Robert D. Chilcote, 724 F.2d 1498 (11th Cir. Feb. 13, 1984).

## FEDERAL RULES OF EVIDENCE

## Rule 609(a). Impeachment by Evidence of Conviction of Crime. General Rule.

During trial for cocaine violations, defendant called a witness codefendant to testify regarding the codefendant's participation in the drug transaction and to deny any part by the defendant. The witness had pled guilty to conspiracy but had not been sentenced. On cross-examination, the government sought to impeach the witness' testimony with evidence of his guilty plea and defendant did not object. On appeal, defendant raises as error the introduction of this guilty plea under Rule 609(a) which provides that for purposes of attacking the credibility of a witness, evidence that he had been convicted of a crime shall be admitted if the crime was punishable by death or imprisonment in excess of one year and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant.

The Court of Appeals noted that when a codefendant witness' guilty plea is introduced to impeach that witness under Rule 609, care must be taken to ensure that evidence is used only to impeach credibility of the witness and not as substantive evidence against the defendant. In affirming defendant's conviction, the court stated that the codefendant witness' guilty plea was not improperly used or unduly emphasized where defendant did not object to the introduction of the evidence or request jury instructions and where defendant himself capitalized on introduction of this plea during trial and in closing argument. As to whether a guilty plea standing alone without imposition of sentence may be used to impeach a witness under Rule 609, the court held it would deny relief here even if testimony as to the guilty plea were entered in error because it did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

(Affirmed.)

United States v. Robert D. Chilcote, 724 F.2d 1498 (11th Cir. Feb. 13, 1984).

See discussion of Rule 404(b) in Chilcote case which is also in this issue of the Bulletin.

24-MONTH COMPARATIVE SUMMARY OF U.S. ATTORNEYS' CASH COLLECTIONS  
(March 1, 1982 through February 29, 1984)

| <b>CRIMINAL</b>  |                     |                     |                 |
|------------------|---------------------|---------------------|-----------------|
| Cash Receipts    |                     |                     |                 |
| Month            | 82 - 83             | 83 - 84             | % Change        |
| <b>March</b>     | <b>\$ 2,895,342</b> | <b>\$ 2,099,760</b> | <b>(27.48)†</b> |
| April            | 3,623,527           | 6,130,917           | 69.20           |
| <b>May</b>       | <b>2,671,948</b>    | <b>2,435,264</b>    | <b>(08.86)</b>  |
| June             | 2,798,487           | 3,104,237           | 10.93           |
| <b>July</b>      | <b>2,077,293</b>    | <b>5,598,537</b>    | <b>169.51</b>   |
| August           | 4,502,892           | 2,899,271           | (35.61)         |
| <b>September</b> | <b>3,421,458</b>    | <b>6,407,632</b>    | <b>87.28</b>    |
| October          | 5,501,985           | 5,422,644           | (01.44)         |
| <b>November</b>  | <b>1,540,581</b>    | <b>7,695,363</b>    | <b>399.51</b>   |
| December         | 2,926,059           | 6,106,913           | 108.71          |
| <b>January</b>   | <b>6,441,614</b>    | <b>10,201,709</b>   | <b>58.37</b>    |
| <b>February</b>  | <b>3,538,503</b>    | <b>3,194,953*</b>   | <b>(09.71)</b>  |
| <b>Total</b>     | <b>\$41,939,689</b> | <b>\$61,297,200</b> | <b>46.16</b>    |

| <b>CIVIL</b>     |                      |                      |                |
|------------------|----------------------|----------------------|----------------|
| Cash Receipts    |                      |                      |                |
| Month            | 82 - 83              | 83 - 84              | % Change       |
| <b>March</b>     | <b>\$ 8,013,943</b>  | <b>\$ 13,395,189</b> | <b>67.15</b>   |
| April            | 14,359,070           | 17,341,700           | 20.77          |
| <b>May</b>       | <b>20,228,909</b>    | <b>14,660,724</b>    | <b>(27.53)</b> |
| June             | 6,347,956            | 13,746,440           | 116.55         |
| <b>July</b>      | <b>9,752,093</b>     | <b>12,776,758</b>    | <b>31.02</b>   |
| August           | 8,236,754            | 11,726,309           | 42.37          |
| <b>September</b> | <b>15,719,678</b>    | <b>22,082,178</b>    | <b>40.47</b>   |
| October          | 7,243,968            | 12,770,761           | 76.30          |
| <b>November</b>  | <b>10,215,151</b>    | <b>8,051,231</b>     | <b>(21.18)</b> |
| December         | 8,845,767            | 8,768,241            | (00.88)        |
| <b>January</b>   | <b>12,344,126</b>    | <b>16,935,642</b>    | <b>37.20</b>   |
| <b>February</b>  | <b>8,588,325</b>     | <b>8,928,510</b>     | <b>(18.29)</b> |
| <b>Total</b>     | <b>\$129,895,740</b> | <b>\$161,183,683</b> | <b>24.09</b>   |

| <b>TOTALS</b>    |                      |                      |                |
|------------------|----------------------|----------------------|----------------|
| Cash Receipts    |                      |                      |                |
| Month            | 82 - 83              | 83 - 84              | % Change       |
| <b>March</b>     | <b>\$ 10,909,285</b> | <b>\$ 15,494,949</b> | <b>42.03</b>   |
| April            | 17,982,597           | 23,472,617           | 30.53          |
| <b>May</b>       | <b>22,900,857</b>    | <b>17,095,988</b>    | <b>(25.35)</b> |
| June             | 9,146,443            | 16,850,677           | 84.23          |
| <b>July</b>      | <b>11,829,386</b>    | <b>18,375,295</b>    | <b>55.34</b>   |
| August           | 12,739,646           | 14,625,580           | 14.80          |
| <b>September</b> | <b>19,141,136</b>    | <b>28,489,810</b>    | <b>48.84</b>   |
| October          | 12,745,953           | 18,193,405           | 42.74          |
| <b>November</b>  | <b>11,755,732</b>    | <b>15,746,594</b>    | <b>33.95</b>   |
| December         | 11,771,826           | 14,875,154           | 26.36          |
| <b>January</b>   | <b>18,785,740</b>    | <b>27,137,351</b>    | <b>44.46</b>   |
| <b>February</b>  | <b>12,126,828</b>    | <b>12,123,463</b>    | <b>(00.03)</b> |
| <b>Totals</b>    | <b>\$171,835,429</b> | <b>\$222,480,883</b> | <b>29.47</b>   |

\* Maryland not reporting.

† ( ) = Negative values.

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT  
INTEREST RATES

(as provided for in the amendment to the federal postjudgment interest statute, 28 U.S.C. §1961, effective October 1, 1982)

| <u>Effective<br/>Date</u> | <u>Annual<br/>Rate</u> |
|---------------------------|------------------------|
| 10-01-82                  | 10.41%                 |
| 10-29-82                  | 9.29%                  |
| 11-25-82                  | 9.07%                  |
| 12-24-82                  | 8.75%                  |
| 01-21-83                  | 8.65%                  |
| 02-18-83                  | 8.99%                  |
| 03-18-83                  | 9.16%                  |
| 04-15-83                  | 8.98%                  |
| 05-13-83                  | 8.72%                  |
| 06-10-83                  | 9.59%                  |
| 07-08-83                  | 10.25%                 |
| 08-10-83                  | 10.74%                 |
| 09-02-83                  | 10.58%                 |
| 09-30-83                  | 9.98%                  |
| 11-02-83                  | 9.86%                  |
| 11-24-83                  | 9.93%                  |
| 12-23-83                  | 10.10%                 |
| 01-20-84                  | 9.87%                  |
| 02-17-84                  | 10.11%                 |
| 03-16-84                  | 10.60%                 |

NOTE: When computing interest at the daily rate, round (5/4) the product (i.e., the amount of interest computed) to the nearest whole cent.

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

Teletypes To All United States Attorneys

- 04/19/84--From William P. Tyson, Director, Executive Office for United States Attorneys, re: "Statement of Attorney General William French Smith Concerning Federal Bureau of Investigation's Announcement that Serious Crimes in the United States Declined in 1983."
- 04/20/84--From William P. Tyson, Director Executive Office for United States Attorneys, by Susan A. Nellor, Assistant Director for Legal Services, re: "Multiple Representation of Grand Jury Witnesses."
- 04/26/84--From William P. Tyson, Director Executive Office for United States Attorneys, by Susan A. Nellor, Assistant Director for Legal Services, re: "United States Judicial Conference Inquiry on Cameras in the Courtroom."



## UNITED STATES ATTORNEYS' LIST

| <u>DISTRICT</u>      | <u>U.S. ATTORNEY</u>      |
|----------------------|---------------------------|
| Alabama, N           | Frank W. Donaldson        |
| Alabama, M           | John C. Bell              |
| Alabama, S           | J. B. Sessions, III       |
| Alaska               | Michael R. Spaan          |
| Arizona              | A. Melvin McDonald        |
| Arkansas, E          | George W. Proctor         |
| Arkansas, W          | W. Asa Hutchinson         |
| California, N        | Joseph P. Russoniello     |
| California, E        | Donald B. Ayer            |
| California, C        | Robert C. Bonner          |
| California, S        | Peter K. Nunez            |
| Colorado             | Robert N. Miller          |
| Connecticut          | Alan H. Nevas             |
| Delaware             | Joseph J. Farnan, Jr.     |
| District of Columbia | Joseph E. diGenova        |
| Florida, N           | W. Thomas Dillard         |
| Florida, M           | Robert W. Merkle, Jr.     |
| Florida, S           | Stanley Marcus            |
| Georgia, N           | Larry D. Thompson         |
| Georgia, M           | Joe D. Whitley            |
| Georgia, S           | Hinton R. Pierce          |
| Guam                 | David T. Wood             |
| Hawaii               | Daniel A. Bent            |
| Idaho                | Guy G. Hurlbutt           |
| Illinois, N          | Dan K. Webb               |
| Illinois, S          | Frederick J. Hess         |
| Illinois, C          | Gerald D. Fines           |
| Indiana, N           | R. Lawrence Steele, Jr.   |
| Indiana, S           | Richard L. Darst          |
| Iowa, N              | Evan L. Hultman           |
| Iowa, S              | Richard C. Turner         |
| Kansas               | Benjamin L. Burgess       |
| Kentucky, E          | Louis G. DeFalaise        |
| Kentucky, W          | Ronald E. Meredith        |
| Louisiana, E         | John Volz                 |
| Louisiana, M         | Stanford O. Bardwell, Jr. |
| Louisiana, W         | Joseph S. Cage, Jr.       |
| Maine                | Richard S. Cohen          |
| Maryland             | J. Frederick Motz         |
| Massachusetts        | William F. Weld           |
| Michigan, E          | Leonard R. Gilman         |
| Michigan, W          | John A. Smietanka         |
| Minnesota            | James M. Rosenbaum        |
| Mississippi, N       | Glen H. Davidson          |
| Mississippi, S       | George L. Phillips        |
| Missouri, E          | Thomas E. Dittmeier       |
| Missouri, W          | Robert G. Ulrich          |

UNITED STATES ATTORNEYS

| <u>DISTRICT</u>       | <u>U.S. ATTORNEY</u>      |
|-----------------------|---------------------------|
| Montana               | Byron H. Dunbar           |
| Nebraska              | Ronald D. Lahners         |
| Nevada                | Lamond R. Mills           |
| New Hampshire         | W. Stephen Thayer, III    |
| New Jersey            | W. Hunt Dumont            |
| New Mexico            | William L. Lutz           |
| New York, N           | Frederick J. Scullin, Jr. |
| New York, S           | Rudolph W. Giuliani       |
| New York, E           | Raymond J. Dearie         |
| New York, W           | Salvatore R. Martoche     |
| North Carolina, E     | Samuel T. Currin          |
| North Carolina, M     | Kenneth W. McAllister     |
| North Carolina, W     | Charles R. Brewer         |
| North Dakota          | Rodney S. Webb            |
| Ohio, N               | J. William Petro          |
| Ohio, S               | Christopher K. Barnes     |
| Oklahoma, N           | Layn R. Phillips          |
| Oklahoma, E           | Gary L. Richardson        |
| Oklahoma, W           | William S. Price          |
| Oregon                | Charles H. Turner         |
| Pennsylvania, E       | Edward S. G. Dennis, Jr.  |
| Pennsylvania, M       | David D. Queen            |
| Pennsylvania, W       | J. Alan Johnson           |
| Puerto Rico           | Daniel F. Lopez-Romo      |
| Rhode Island          | Lincoln C. Almond         |
| South Carolina        | Henry Dargan McMaster     |
| South Dakota          | Philip N. Hogen           |
| Tennessee, E          | John W. Gill, Jr.         |
| Tennessee, M          | Joe B. Brown              |
| Tennessee, W          | W. Hickman Ewing, Jr.     |
| Texas, N              | James A. Rolfe            |
| Texas, S              | Daniel K. Hedges          |
| Texas, E              | Robert J. Wortham         |
| Texas, W              | Helen M. Eversberg        |
| Utah                  | Brent D. Ward             |
| Vermont               | George W. F. Cook         |
| Virgin Islands        | James W. Diehm            |
| Virginia, E           | Elsie L. Munsell          |
| Virginia, W           | John P. Alderman          |
| Washington, E         | John E. Lamp              |
| Washington, W         | Gene S. Anderson          |
| West Virginia, N      | William A. Kolibash       |
| West Virginia, S      | David A. Faber            |
| Wisconsin, E          | Joseph P. Stadtmueller    |
| Wisconsin, W          | John R. Byrnes            |
| Wyoming               | Richard A. Stacy          |
| North Mariana Islands | David T. Wood             |