

# United States Attorneys Bulletin



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UNITED STATES DEPARTMENT OF JUSTICE

*W. J. ...*

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COMMENDATIONS

Attorneys William R. Morrow, Jr. and Curtis Nash, Tax Division have been commended by Blair A. Griffith, United States Attorney, Western District of Pennsylvania for their work in ten-percenter cases at Commodore Downs Race Track in Erie, Pennsylvania.

Assistant United States Attorney Henry H. Korn, Southern District of New York has been commended by Clarence M. Kelley, Director, Federal Bureau of Investigation, for his work in United States v. Martin Gaudia, et al.

United States Attorney James P. Buchele, District of Kansas, has been commended by Kay Bailey, Acting Chairman, National Transportation Safety Board for his efforts in the natural gas pipeline accident in Lawrenceville, Kansas.

Assistant United States Attorney Ben Burgess, District of Kansas, has been commended by A. N. Hunter, Chief, Intelligence Division, Internal Revenue Service, for his work in the prosecution of Alice Thieman for failure to file employment tax returns.

Assistant United States Attorney Alvin H. Badger, Northern District of Texas, has been commended by Clarence M. Kelley, Director, Federal Bureau of Investigation, for the successful prosecution of several organized gambling operations.

Assistant United States Attorney William L. Johnson, Jr., Northern District of Texas, has been commended by W. F. Warren, Regional Administrator, U.S. Department of Agriculture, Food and Nutrition Service for his work which resulted in the disqualification of two firms for the Food Stamp Program.

Assistant United States Attorneys John O. Birch and David Shapiro, District of Columbia, have been commended by Joseph A. Califano, Jr., Secretary of Health, Education and Welfare, for their efforts in Peele v. Califano.

Assistant United States Attorney Johnny Hardwick, Northern District of Alabama, has been commended by Colonel Richard D. Matthews, Commander, United States Air Force, for his work in Ickard Manufacturing Co. v. United States.

Assistant United States Attorney William A. Bower, Southern District of California, has been commended by Peter B. Bensinger, Administrator, Drug Enforcement Administration, for his efforts in United States v. Alberto Sicilia-Falcon, et al., a complex conspiracy case.

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POINTS TO REMEMBER

## UNITED STATES ATTORNEY APPOINTMENTS

The following Presidentially-appointed United States Attorneys have entered on duty. The Executive Office staff takes this opportunity to extend its hearty welcome.

<u>DISTRICT</u>	<u>UNITED STATES ATTORNEY</u>	<u>ENTERED ON DUTY</u>
Louisiana, E	John A. Volz	3/1/78
Oklahoma, W	Larry Patton	3/6/78

(Executive Office)

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## UNITED STATES ATTORNEYS' MANUAL--BLUESHEETS

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

<u>DATE</u>	<u>AFFECTS USAM</u>	<u>SUBJECT</u>
2/28/78	9-11.250	Addendum to the United States Attorneys' Manual Re Grand Jury Practice Dated December 16, 1977
1/3/77	2-3.210	Appeals in Tax Cases
2/14/78	9-2.031	Prosecution of Phencyclidine [PCP] Users
2/22/78	4-2.320	Memoranda Containing the United States Attorney's Recommendations for the Compromising or Closing of Claims Beyond His Authority
12/2/77	9-2.145	Interstate Agreement on Detainers

(Executive Office)

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## FOREIGN CORRUPT PRACTICES ACT OF 1977

On December 19, 1977, the President signed into law the "Foreign Corrupt Practices Act of 1977", 91 Stat. 1494. The Act creates a new series of criminal offenses in that it prohibits the corrupt use of the mails, telecommunications, or other means and instrumentalities of interstate and foreign commerce by American citizens and commercial entities to bribe foreign government officials, foreign political parties, or candidates for foreign political office in order to obtain or retain business. Primary investigative jurisdiction for allegations involving corporations which are subject to the regulatory jurisdiction of the Securities and Exchange Commission rests with the Commission. Allegations involving all other business entities and United States citizens individually will be investigated by the Federal Bureau of Investigation.

The investigation and prosecution of particular allegations of violation of this new Act may raise complex enforcement problems abroad as well as difficult issues of jurisdiction and statutory construction. For example, part of the investigation may involve interviewing witnesses in foreign countries concerning their activities with high-level foreign government officials. Additionally, relevant accounts maintained in United States banks and subject to subpoena may be directly or beneficially owned by senior foreign government officials. Therefore, coordination from Washington of such investigations and prosecutions is essential. Consequently, no investigation of alleged violation of the Foreign Corrupt Practices Act should be initiated or closed or indictments returned without the prior approval of the Criminal Division. All inquiries regarding the Act should be directed to Richard Shine of the Fraud Section, who can be reached at F.T.S. number 739-5341. Appropriate amendments to the United States Attorneys' Manual will be forthcoming.

(Criminal Division)

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## UNITED STATES ATTORNEYS' MANUAL--TRANSMITTALS

The following United States Attorneys' Manual Transmittals have been issued to date in accordance with USAM 1-1.500. This monthly listing may be removed from the Bulletin and used as a check list to assure that your Manual is up to date.

Transmittal Affecting Title	Transmittal No. / Date Mo/Day/Yr	Date of Text	Contents	
1	1	8/20/76	8/31/76	Ch. 1, 2&3
	2	9/3/76	9/15/76	Ch.5
	3	9/14/76	9/24/76	Ch.8
	4	9/16/76	10/1/76	Ch.4
	5	2/4/77	1/10/77	Ch.6, 10&12
	6	3/10/77	1/14/77	Ch.11
	7	6/24/77	6/15/77	Ch.13
	8	1/18/78	2/1/78	Ch.14
2	1	6/25/76	7/4/76	Ch. 1 to 4
	2	8/11/76	7/4/76	Index
3	1	7/23/76	7/30/76	Ch.1 to 7
	2	11/19/76	7/30/76	Index
4	1	1/3/77	1/3/77	Ch.3 to 15
	2	1/21/77	1/3/77	Ch.1 & 2
	3	3/15/77	1/3/77	Index
	4	11/28/77	11/1/77	Revisions to Ch. 1-6, 11-15. Index
5	1	2/4/77	1/11/77	Ch.1 to 9
	2	3/17/77	1/11/77	Ch.10 to 12
	3	6/22/77	4/5/77	Revisions to Ch. 1 - 8

6	1	3/31/77	1/19/77	Ch.1 to 6
	2	4/26/77	1/19/77	Index
7	1	11/18/76	11/22/76	Ch.1 to 6
	2	3/16/77	11/22/76	Index
8	1	1/4/77	1/7/77	Ch.4 & 5
	2	1/21/77	9/30/77	Ch.1 to 3
	3	5/13/77	1/7/77	Index
	4	6/21/77	9/30/76	Ch.3 (pp 3-6)
	*5	2/9/78	1/31/78	Revisions to Ch. 2
9	1	1/12/77	1/10/77	Ch.4,11,17,18, 34,37,38
	2	1/15/77	1/10/77	Ch.7,100,122
	3	1/18/77	1/17/77	Ch.12,14,16, 40,41,42,43
	4	1/31/77	1/17/77	Ch. 130 to 139
	5	2/2/77	1/10/77	Ch.1,2,8,10,15, 101,102,104, 120,121
	6	3/16/77	1/17/77	Ch.20,60,61,63, 64,65,66,69,70, 71,72,73,75,77, 78,85,90,110
	7	9/8/77	8/1/77	Ch. 4 (pp 81-129) Ch. 9. 39
	8	10/17/77	10/1/77	Revisions to Ch. 1

\*Transmittals to be distributed to Manual Holders soon.

(Executive Office)

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## CIVIL DIVISION

Assistant Attorney General Barbara Allen Babcock

American Science and Engineering, Inc. v. Califano, \_\_\_\_\_ F.2d  
\_\_\_\_\_, No. 77-1437 (1st Cir. Oct. 10, 1977) DJ 145-16-1247

## Injunctive Relief Against United States; Breach Of Contract

The First Circuit has held injunctive relief unavailable against the United States in an action which sounded in contract. HEW executed a licensing agreement giving plaintiff exclusive rights to market an x-ray device. HEW later concluded the agreement not to be in the public interest and sought to cancel it. Plaintiff, seeking to require HEW to adhere to the contract, sued in district court and obtained a preliminary injunction against the Government's cancellation. The court of appeals, however, reversed, holding that plaintiff's sole remedy is a Tucker Act suit for damages in the Court of Claims since the claim sounded in contract.

Attorney: Robert S. Greenspan (Civil Division)  
FTS 739-4102

Angela M. Williams, et al. v. Joseph A. Califano, Secretary of Health, Education and Welfare, \_\_\_\_\_ F.2d \_\_\_\_\_, No. 77-1618  
(5th Cir. January 26, 1978) DJ 137-32-300

## Social Security; After Adopted Children

The Fifth Circuit has affirmed a district court ruling upholding the constitutionality of the provisions of the Social Security Act denying a presumption of dependency to children adopted after a parent becomes eligible for disability benefits. The court reasoned that the limitation on eligibility is reasonably related to the legitimate Congressional purpose of preventing improperly motivated adoptions.

Attorney: Alice L. Mattice (Civil Division)  
FTS 739-3259

Louis C. Ostrer, et al. v. William H. Aronwald, etc. and United States of America, \_\_\_\_\_ F.2d \_\_\_\_\_, No. 77-6118 (2nd Cir. December 27, 1977) DJ 145-12-2924

## Pleadings; Sufficiency Of Complaint For Alleged Violations

A complaint containing only conclusory, vague, or general allegations of a conspiracy to deprive a person of constitutional rights will not withstand a motion to dismiss, the Second Circuit has held. The plaintiff filed a complaint seeking injunctive relief against the United States and Government officials for the

harrassment of the plaintiffs. The complaint alleged that members of a team of Government attorneys and investigators conducting a grand jury investigation of possible violations of the tax laws were engaged in a conspiracy to harass and discredit the plaintiffs and to deprive them of their livelihood by, inter alia, leaking defamatory stories to the news media, discouraging business associates from dealing with plaintiff, appropriating plaintiffs' records, making disparaging remarks in open court and before legislative committees, and engaging in overlapping and repetitive investigations. Affirming the district court's dismissal of the complaint, the court of appeals stated that conclusory allegations which fail to detail the factual basis necessary to enable a defendant intelligently to prepare a defense will not suffice to sustain a claim of Governmental conspiracy to deprive a person of Constitutional rights.

Attorney: Gary G. Cooper (Assistant United States Attorney, Southern District of New York)  
FTS 662-0055

United States of America v. Edward LePatourel and Valerie LePatourel, F.2d \_\_\_\_\_, No. 77-1306 (8th Cir. January 26, 1978) DJ 157-45-18

#### Federal Torts Claims Act; Applicability To Judiciary

The Eighth Circuit has reversed a district court decision holding that members of the judiciary are not within the purview of the Federal Torts Claims Act. A Federal judge was involved in an automobile accident while performing an official, but not judicial, function. The court of appeals held that members of the judiciary are employees of the Government within the meaning of the FTCA. Accordingly, the court of appeals reversed the district court's denial of the Government's motion for summary judgment on the ground that no administrative claim was filed within the two year statute of limitations, and remanded with instructions to enter judgment for the United States.

Attorney: Thomas D. Thalken (Assistant United States Attorney, District of Nebraska)  
FTS 864-4774

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

United States v. 376.2 Acres in Morris County, N.J.  
(Wildlife Preserves, Inc., Harootunian and Caldwell),  
F 2d \_\_\_\_\_, No. 77-1588 (3rd Cir. January 12, 1978)  
DJ 33-31-5-78

**Condemnation**

The court of appeals affirmed the district court's rulings that (1) the landowners' evidence of a reasonable probability of a zoning change to a higher economic use was too speculative and, hence, inadmissible in the condemnation proceeding for the Great Swamp National Wildlife Refuge; and (2) the testimony of expert witnesses, that a local zoning ordinance was unconstitutional, was properly excluded.

Attorney: Neil T. Proto (Land and Natural  
Resources Division) FTS 739-3888

Miller v. Robertson, \_\_\_\_\_ F 2d \_\_\_\_\_, Nos. 77-1803, 77-1829,  
77-1887, 77-2922 (9th Cir. January 12, 1978) DJ 90-1-4-74

**Jurisdiction; mootness**

The court of appeals granted the government's motion to remand its appeal to enable the district court to consider whether its judgment, enjoining alleged violations of the Bull Run Trespass Act, should be vacated as moot because of repeal of the Trespass Act on November 23, 1977, by Public Law 95-200. The district court judgment contains a permanent injunction restraining Forest Service officials from allowing commercial loggers and the general public from entering a portion of the Mount Hood National Forest in Oregon, except under specified conditions. Plaintiffs were denied attorneys' fees.

Attorney: Dirk D. Snel (Land and Natural  
Resources Division) FTS 739-2769

Steele Creek Community Association v. Adams, \_\_\_\_\_ F 2d \_\_\_\_\_,  
No. 77-2431 (4th Cir. February 2, 1978) DJ 90-1-4-121

National Environmental Policy Act

Affirming the district court, the court of appeals agreed that the EIS concerning the proposed new airport runway project in Charlotte, North Carolina, was adequate. The court also upheld the Secretary's 4(f) determination under the Highway Act.

Attorney: Robert L. Klarquist (Land and Natural  
Resources Division) FTS 739-2754

National Rifle Association of America v. Andrus, \_\_\_\_\_ F 2d \_\_\_\_\_,  
No. 77-1156, 77-1392 (D.C. Cir. January 20, 1978)  
DJ 90-1-4-1515

National Environmental Policy Act

In this challenge to the adequacy of the EIS for the program requiring steel shot, instead of lead shot, in certain waterfowl hunting areas, the district court was affirmed on its opinion, the court of appeals entering no opinion of its own.

Attorney: Carl Strass (Land and Natural  
Resources Division) FTS 739-2720

Matsumoto v. Brinegar, \_\_\_\_\_ F 2d \_\_\_\_\_, No. 75-2245 (9th Cir.  
February 1, 1978) DJ 90-1-4-1

National Environmental Policy Act; Airport and  
Airway Development Act of 1976

The district court's denial of injunctive relief concerning the Caldwell, Idaho, Industrial Airport was

upheld. The court of appeals rejected attacks on the adequacy of the EIS and on compliance with the Airport and Airway Development Act of 1976, 49 U.S.C. 1711 et seq, which requires that fair consideration be given to community interests before approval by DOT of airport development. Concerning judicial review of the merits of an agency decision, the court said, in memorable terms, "The project when finished may be a complete blunder-- NEPA insists that it be a knowledgeable blunder."

Attorney: John J. Zimmerman (Land and Natural Resources Division) FTS 739-4519

United States v. Atlantic Richfield Co., 435 F.Supp. 1009  
No. A-75-2159 (D. Alaska) DJ 90-6-62

#### Indians

The United States sued the State of Alaska and 140 corporations and private parties who had entered into Arctic Slope land selected by the State of Alaska under color of Section 6 of the Alaska Statehood Act. In the complaint, the United States asserted that the Natives of the Arctic Slope possessed aboriginal title to the Arctic Slope until the date of enactment of the Settlement Act in 1971, that the Native interest was protected by Section 4 of the Statehood Act and thus could not be selected under Section 6 of the same Act, and that defendants' activities therefore were not authorized by federal law and constituted a trespass to land which the Natives had an unextinguished right to use and occupy.

On defendants' motion, the district court dismissed on the grounds that the 1971 Alaska Native Claims Settlement Act, 43 U.S.C. 1601 et seq, operated retroactively to extinguish any aboriginal title to selected lands as of the date of selection, rather than as of the date of enactment of the Settlement Act, and that it also extinguished any damage claims arising from alleged trespasses which were pending as of the date of enactment of the Settlement Act.

Attorney: James J. Clear (Land and Natural Resources Division) FTS 739-2445

11/10/78

OFFICE OF LEGISLATIVE AFFAIRS  
Assistant Attorney General Patricia M. Wald

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

MARCH 1 - MARCH 10, 1978

Refugee Admission Policy. Cognizant agencies within the Administration are putting together a comprehensive analysis of our refugee admission policy and possible statutory revisions to our existing admission procedures. This information will be sent to the President to assist him in formulating the Administration's position on this important issue. As part of the Administration's review of this area, OLA is now in the process of discussing refugee policy with the staff aides of several key members of Congress with an interest in the subject. The Chairman of the House Judiciary Immigration Subcommittee, Congressman Eilberg, is anxious to receive the Administration's views on H.R. 7175, Mr. Eilberg's bill to revise the procedures for the admission of refugees.

Undocumented Aliens. OLA staff members are meeting individually with cognizant aides to the members of the Senate Judiciary Committee and other interested Senators in order to brief them on the Administration's proposed Alien Adjustment and Employment Act (S. 2252). In addition, a special group briefing for key Senate and House staff members will be given on March 8. Hearings before the full Senate Judiciary Committee on S. 2252 will begin on March 14. The Attorney General will testify on behalf of the bill on March 16.

Civil Rights Hearings. On March 6 AAG Drew Days testified before the House Judiciary Subcommittee on Civil and Constitutional Rights on H.R. 10831, extension of the Civil Rights Commission. Mr. Days' testimony supported extension of the commission. On March 8, Mr. Days testified before the same subcommittee on a General Accounting Office Report recently issued concerning the Voting Rights Act. Our testimony discussed the functions of the Voting Rights Section of the Civil Rights Division and was partially supportive and partially critical of the GAO Report. Additionally, on March 2 DAAG James Turner of the Civil Rights Division testified before the House Government Operations Subcommittee on Legislation and National Security in support of the President's Reorganization Plan No. 1. The Plan would, among other things, clarify the authority of the Department of Justice to initiate pattern-and-practice litigation under Title VII of the Civil Rights Act against state and local government employees.

Pregnancy Disability. By a vote of 25 to 6, the House Education and Labor Committee favorably reported to the full House H.R. 6075, a bill to prohibit discrimination on the basis of pregnancy. However, on a 19-12 vote, the bill was amended to provide that:

neither 'pregnancy' nor 'related medical conditions', as they relate to eligibility for benefits under any health or temporary disability insurance or sick leave plan available in connection with employment, may be construed to include abortions, except where the life of the mother would be endangered if the fetus were carried to term; provided, however that nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

The bill which was passed (by a large margin) in the Senate does not exclude abortion coverage.

Diversity of Citizenship Jurisdiction. By a margin of 266 to 133, the House on February 28 passed H.R. 9622, the bill to abolish diversity of citizenship jurisdiction for suits involving citizens of different states and eliminate the \$10,000 jurisdictional limit in federal question cases. The diversity issue will be addressed by the Senate on March 17, 20 and 21, when hearings are scheduled in the Senate Judiciary Subcommittee on Improvements in Judicial Machinery. AAG Daniel Meador will be the lead off witness on March 17.

Indian Adoption. On March 9 Larry Simms, Attorney/Advisor in the Office of Legal Counsel, testified before the House Interior and Insular Affairs Subcommittee on Indian Affairs and Public Lands on S. 1214, dealing with Indian child welfare. Mr. Simms' testimony reflected the Department's view that certain portions of the bill are unconstitutional. S. 1214 has already passed the Senate.

Tribal-State Compact Act. On March 10, DAAG Sanford Sagalkin will testify before the Senate Select Committee on Indian Affairs on S. 2502, a bill to provide a means for Indian tribes and states to enter into agreements with each other on matters involving jurisdictional issues. Our testimony will probably be supportive of the bill, with suggested amendments.

D.C. Representation. The House passed on March 2 by a vote of 298-127 H.J. Res. 554, an Administration supported measure which would provide for a Constitutional Amendment for full voting representation in the Congress for the District of Columbia. Prior to final passage, the House disapproved a substitute amendment offered by Congressman Butler which would have limited voting representation in the Congress for the District solely to the House of Representatives. Also disapproved were two motions to recommit H.J. Res. 554 to the Committee on the Judiciary.

Department Authorization. On March 10 the Attorney General leads off a succession of Department witnesses before the House Judiciary Committee on Department Authorizations. Further hearings are scheduled on March 14, 15, 16, 17, 21 and 22.

Lobbying Reform. On February 22 the House Judiciary Committee held a final day of mark up on H.R. 8494 and reported the bill out on a voice vote. Congressman Danielson decided not to propose an amendment authorizing the Attorney General to issue advisory opinions under the bill on the strength of the Department's statement that it has inherent authority to issue statements of prosecutorial intent, as the Antitrust Division has done for decades. The Committee also made slight changes in the bill's coverage thresholds and other provisions.

Indian Religious Freedom. On February 27, Larry Simms of the Office of Legal Counsel testified before the Senate Select Committee on Indian Affairs on S.J. Res. 102, regarding the free exercise of Native American religions. The resolution would apparently direct federal agencies to evaluate their policies and procedures to determine whether Native American religious cultural rites and practices are being protected and preserved. Our testimony supported the concept of religious freedom for Native Americans but questioned the vagueness of the resolution.

Antiterrorism Act. Deputy Assistant Attorney General Mary Lawton testified before the Senate Governmental Affairs Committee on February 22 on S. 2236, Chairman Ribicoff's comprehensive antiterrorism bill. This measure contains our legislative proposal to implement the Montreal Convention, but has some other provisions which we oppose. The Committee has indicated that the bill will be marked up in March.

CONFIRMATIONS:

On February 23, 1978, the Senate confirmed the following nominations:

25

John P. Volz, to be U.S. Attorney for the Eastern District of Louisiana;

David T. Wood, presently U.S. Attorney for the District of Guam, to be also U.S. Attorney for the District of the Northern Mariana Islands;

Larry D. Patton, to be U.S. Attorney for the Western District of Oklahoma.

NOMINATIONS:

On February 24, 1978, the Senate received the following nomination:

James R. Williams, to be U.S. Attorney for the Northern District of Ohio.

On February 27, 1978, the Senate received the following nomination:

James C. Cissell, to be U.S. Attorney for the Southern District of Ohio.

On March 1, 1978, the Senate received the following nomination:

Joan F. Kessler, to be U.S. Attorney for the Eastern District of Wisconsin.

## FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11(c). Pleas. Advice to Defendant.

In a divided opinion, the Second Circuit vacated defendant's guilty plea to one count of conspiracy to distribute heroin. The defendant had sought to vacate his plea because the district court had failed to fulfill its obligations under Rule 11(c) to advise him of the "maximum possible penalty provided by law." The district court failed to disclose that according to statute, 21 U.S.C. §841(a)(1), the defendant was possibly subject to a special parole term lasting the remainder of his life. The majority cited United States v. Journet, 544 F.2d 633 (2d Cir. 1976), to support its application of the strict rule that where the court improperly complies with the requisites of Rule 11(c) that "the plea must be treated as a nullity."

The Court of Appeals decision did not address itself to whether there was in fact any prejudice. Defendant had been advised by the district court that he faced a maximum prison term of 15 years as well as that the district court possessed authority to impose "a special parole term of at least three years. . . a minimum parole term". He was actually sentenced to five years imprisonment with a special parole term of five years. This total was well within the maximum period of imprisonment or supervision that the defendant had been informed of.

(Reversed and remanded with instructions to vacate the plea).

United States v. Rafael Jesus Alejandro, \_\_\_ F.2d \_\_\_,  
No. 77-1338 (2nd Cir. February 9, 1978).

*Handwritten signature or initials*

## FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 25(a). Judge; Disability. During Trial.

Defendants made fraudulent representations to the public in order to solicit funds for what they described as a mortgage and loan company. All money raised from the sale of the company's securities were subsequently diverted to the personal use of the promoters. On appeal, an unusual issue was raised concerning the effect of the trial judge's absence during four hours of closing arguments. After five days of trial, the district judge had become ill and inquired whether any counsel had objection to allowing a magistrate to preside over counsels' closing arguments, in order to prevent delay. The first objection by defense counsel to this substitution occurred after the defendant was convicted.

The Court of Appeals agreed that the actions of the district court failed to comply with the provisions of Rule 25(a) since the magistrate was not a "judge regularly sitting in or assigned to the court" and not familiar with the record of the trial. The court, however, expressly refused to decide whether the improper substitution amounted to an error of constitutional proportions affecting the Sixth Amendment rights of the defendant. The Appeals Court in affirming viewed the mistake as harmless since there was no showing of prejudice to the substantial rights of the defendants. The court in effect found, as a concurring opinion pointed out, that the presence of the trial judge during this stage of the proceeding is not fundamental to a fair trial.

(Affirmed in part and remanded in part on other grounds).

United States v. Frederick Newell Boswell, David Rule Nichols and Emmett Howard Herndon, 565 F.2d 1338, (5th Cir. January 12, 1978).

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## FEDERAL RULES OF EVIDENCE

Rule 609. Impeachment by Evidence of Conviction of Crime.

Rule 609(c). Impeachment by Evidence of Conviction of Crime. Effect of Pardon, Annulment, or Certificate of Rehabilitation.

Michael Wiggins appealed his conviction for possession of stolen mail and forging and uttering a United States Treasury check. Two of the defendant's contentions on appeal arose under Rule 609. The first claim alleged the trial court erred in admitting testimony concerning a previous conviction for heroin distribution. Although the district court did not explain the reasoning behind its allowance of the testimony, the Court of Appeals found the trial judge's statement that he weighed probity vs. prejudice as required by Rule 609(a) to be sufficient. The Court reasoned that to rule otherwise, it would be necessary to adopt a per se rule that a conviction for selling heroin could not be considered as a factor affecting credibility.

The Fifth Circuit also rejected what it termed defendant's novel claim under Rule 609(c). As a condition for probation from his earlier drug offense, the defendant participated in a "halfway house." The defendant asserted that release from this halfway house constituted sufficient evidence of rehabilitation in accordance with Rule 609(c). On the basis of a record which insufficiently detailed the activities and objectives of the halfway house or the standards justifying release from it, the Court of Appeals refused to find the mere release from this institution to be equivalent to the "certificate of rehabilitation" required by Rule 609(c).

(Affirmed.)

United States v. Michael Douglas Wiggins, 566 F.2d 944, (5th Cir. January 26, 1978).

2019. 2/5/78

## FEDERAL RULES OF EVIDENCE

Rule 609(c). Impeachment by Evidence of Conviction of Crime. Effect of Pardon, Annulment or Certificate of Rehabilitation.

See Rule 609, this issue of the Bulletin for syllabus.

United States v. Michael Douglas Wiggins, 566 F.2d 944, (5th Cir. January 26, 1978).