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UNITED STATES DEPARTMENT OF JUSTICE

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COMMENDATIONS

Tax Division Attorney Charles Alexander has been commended by Attorney General Griffin Bell for his generous and enthusiastic contributions to the Attorney General's Advocacy Institute.

Assistant United States Attorneys William A. Barnett and Daniel W. Gillogly, Northern District of Illinois, have been commended by F.B.I. Director William H. Webster, for their successful efforts in defending an F.B.I. agent in a civil suit.

Assistant United States Attorney D. Mark Elliston, Northern District of Texas, has been commended by W.R. Newsome, Postal Inspector in Charge, for his successful prosecution of United States v. Floyd, a mail fraud case.

Assistant United States Attorney John P. Flannery, II, Southern District of New York, has been commended by Norman A. Carlson, Bureau of Prisons Director, for his efforts in directing the recent investigation of staff corruption at the New York Metropolitan Correctional Center.

Assistant United States Attorney David M. Jones, Southern District of New York, has been commended by Francis V. La Ruffa, Department of Labor Regional Solicitor, for his successful efforts in a veteran's re-employment rights case.

Assistant United States Attorney Charles Lewis, Southern District of Texas, has been commended by Robert Mundheim, Department of the Treasury General Counsel, for his outstanding work in the case Victor M. Guerra, et al. v. Eduardo Guajardo, District Director of Customs, et al. where the plaintiffs had unsuccessfully sought to enjoin the U.S. Customs Service from furnishing Mexican customs officials commercial information concerning the exportation of various commodities from the United States into Mexico.

Assistant United States Attorney Robert Martin, Southern District of Ohio, has been commended by James A. Clem, Special Agent in Charge, United States Secret Service, for his extraordinary efforts in the case of United States v. James Albert Latimer, which involved a threat against the President of the United States.

Assistant United States Attorneys Charles R. Niven and James E. Wilson, Middle District of Alabama, have been commended by Kater Williams, Chief of Police of Dothan, Alabama, for their outstanding prosecution of a drug trafficking case.

Assistant United States Attorney David W. O'Connor, Southern District of New York, has been commended by John J. Creamer, Jr., F.B.I. Special Agent in Charge, for his successful efforts in a case involving bank fraud, mail fraud and conspiracy.

Assistant United States Attorney Caryl P. Privett, Northern District of Alabama, has been commended by James M. Feltis, Jr., M.D., Colonel, M.C., Department of the Army, for her outstanding work in defending the U.S. Army in the case of Suggs v. Alexander.

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POINTS TO REMEMBER

OFFICE OF PROFESSIONAL RESPONSIBILITY

The Department of Justice Office of Professional Responsibility was created to oversee investigations and review allegations of criminal or ethical misconduct by Department employees. Allegations against DOJ employees involving violations of law, Departmental regulations, or Departmental standards of conduct may, at any time, be brought directly to the attention of that Office.

(Executive Office)

* * *

FEES AND EXPENSES OF WITNESSES

The Act to Establish Fees and Allow Per Diem and Mileage Expenses of Witnesses Before U.S. Courts (PL 95-535, 92 Stat. 2033, Oct. 27, 1978) has changed the procedure by which fees and allowances are paid to fact witnesses. Whereas the prior law merely allowed payment for mileage, the new law requires that a witness be reimbursed for actual travel expenses as indicated by travel receipts. The United States Marshal must collect the receipts and reimburse the witness. When a witness leaves without visiting the United States Marshal's office, the Marshal must locate the witness and obtain the witness' list of expenses, receipts, and signature before issuing a reimbursement check. This has resulted in a number of complaints from both witnesses and United States Marshals. A visit by the witness to the Marshal's office would eliminate this problem and the resulting complaints.

To help resolve this situation attorneys are requested to complete a witness attendance certificate before releasing a witness and instruct the witness to visit the United States Marshal's office before leaving the place of attendance.

(Office of Management and Finance)

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CIVIL DIVISION
Assistant Attorney General Barbara Allen Babcock

Copaken v. Califano, No. 78-1311 (8th Cir., January 11, 1979) DJ 145-16-969

Social Security Act; Attorneys Fees

In this action, plaintiffs, two attorneys representing claimants before the Social Security Administration, sought judicial review of the amount of attorneys fees awarded them by the Secretary's award. Plaintiffs contended primarily that the Secretary's failure to provide them with an evidentiary hearing constituted a denial of due process, and that this was a "colorable constitutional claim" reviewable under Section 405(g) of the Social Security Act. The Eighth Circuit has just affirmed the district court's dismissal of the action for lack of subject matter jurisdiction.

Attorneys: Terrence Jackson (formerly of the Civil Division); William Kanter (Civil Division)
FTS 633-3354

DSI Corp. v. Secretary of Housing and Urban Development, No. 75-2605 (9th Cir., January 19, 1979) DJ 130-11-2679

HUD "Sue and Be Sued" Clause; Sovereign Immunity

Plaintiffs brought suit seeking to recover money damages for HUD's allegedly improper handling of plaintiffs' federally insured housing benefits. Jurisdiction was asserted solely on the basis of 12 U.S.C. 1702, which permits the HUD Secretary to "sue and be sued." Noting that the complaint sought damages which would have to come from the United States Treasury and not HUD, the Court of Appeals concluded that 12 U.S.C. 1702 was not available as a grant of jurisdiction since it did not constitute a waiver of sovereign immunity against the United States. The court consequently affirmed the lower court's judgment of dismissal, but, since jurisdiction for plaintiffs' claim may lie in the Court of Claims, the court remanded the cause to the district court to consider whether a transfer to the Court of Claims might be appropriate.

Attorney: Michael Kimmel (Civil Division)
FTS 633-3418

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

Reichardt v. Kinder, Nos. 75-3031 and 75-3032 (N.D. Calif.) (9th Cir. January 11, 1979) DJ 170-11-129

Title VII

The Ninth Circuit held that 42 U.S.C. 1985 (3) prohibits private conspiracies by insurance companies to discriminate against women in the issuance of disability policies. We had argued that position as amicus. The court did not decide whether the statute, as applied, was constitutional.

Attorney: Robert Reinstein (Civil Rights Division)
FTS 633-4757

Liddell and United States v. School District of the City of St. Louis, Missouri, C.A. No. 72C100(1) (E.D. Mo.) DJ 169-42-36

School Desegregation

On February 2, 1979, Assistant Attorney General Drew S. Days, III attended the closing arguments in the above-captioned case. We are participating in this case as plaintiff-intervenor and we contend that the constitutional violation is systemwide and warrants the imposition of a systemwide remedy.

Attorney: J. Gerald Hebert (Civil Rights Division)
FTS 633-3639

United States v. Baltimore County, et al. C.A. No. H-78-836 (D. Md.) DJ 170-35-55

Title VII

On January 29, 1979, the District Court approved an agreement in settlement of that part of our litigation with Baltimore County which concerns the police department. The Agreement is based upon our experience with the Chicago police and fire departments, where we found that a short term hiring goal, in conjunction with affirmative recruitment efforts, served to increase the number of qualified minority applicants, and has resulted in the hiring of significant numbers of minority persons without any need for preferential treatment. The most significant feature of the Agreement with Baltimore

County is the obligation of the County to attempt to develop, for future use, selection standards and procedures which either eliminate or have only a minimal adverse impact. If the County is unable to develop such standards, then it will consider procedures which are used by other jurisdictions and which have been demonstrated to have little or no adverse impact.

Attorneys: Richard Ugelow (Civil Rights Division)
FTS 633-3895
Andrew Woods (Civil Rights Division)
Ellen Wayne (Civil Rights Division)
FTS 633-3861

Connor v. Finch, C.A. No. 3830(A) (S.D. Miss.) DJ 166-0-2

Voting Rights Act

At the urging of the United States and private plaintiffs, formerly multimember Senate District 15 was split into two majority-black single member districts and a special election was ordered to fill a vacancy in newly formed District 15A (Holmes, Madison, part of Yazoo Counties). The January 27, 1979, runoff in District 15A has resulted in the election of a black, Mr. Arthur Tate, to the Mississippi Senate for the first time since Reconstruction.

Attorney: Jeremy Schwartz (Civil Rights Division)
FTS 633-4491

State of Texas DJ 166-012-3

Section 5 of the Voting Rights Act

On January 26, 1978, the Civil Rights Division initiated FBI investigations in 11 Texas Counties (Brewster, Briscoe, Brown, Callahan, Camp, Culberson, Gaines, Glasscock, Hardin, Leon, and Real) which have not yet sought Section 5 preclearance of their bilingual election procedures. These 11 counties were among the 92 Texas Counties which had not sought preclearance of their bilingual election programs as of October 1978. In October, we wrote to these counties to remind them of their obligation under the Voting Rights Act to adopt such procedures and to obtain preclearance of them. Since the 11 subject counties failed to acknowledge receipt of our letter, we have asked the FBI to contact them to determine

if and when we may expect them to seek preclearance.

Supervisory Paralegal Specialist Janet Blizard (Civil Rights Division)
FTS 633-3860

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

Washington, et al. v. Confederated Bands and Tribes of the Yakima Indian Nation, ____ U.S. ____, No. 77-388 (S.Ct., January 16, 1979) DJ 90-2-0-799

Indians

Reversing the Ninth Circuit and contrary to the government's amicus curiae position supporting the Tribes, the Supreme Court held that under Section 6 of Pub. L. 280, a State may effectively accept jurisdiction over an Indian reservation through legislative action notwithstanding the presence of a disclaimer in its constitution prohibiting such jurisdiction. Moreover, Section 7 of Pub.L. 280 permits the state to accept partial subject matter and geographic jurisdiction. The fact that partial jurisdiction may result in "checkerboard" jurisdiction, as does the Washington statute, does not make it invalid under the Equal Protection Clause.

Attorneys: Neil T. Proto and Carl Strass (Land and Natural Resources Division) and the Solicitor General's Staff FTS 633-2772/ 4427

United States v. Tivian Laboratories, Inc., ____ F.2d ____, No. 78-1109 (1st Cir., December 20, 1978) DJ 90-5-2-3-729

Constitutional Law; Searches and Seizures

Tivian Laboratories lost its constitutional challenges to provisions of the Water Pollution Prevention and Control Act and the Air Pollution Prevention and Control Act authorizing EPA to require information. The First Circuit rejected its Fourth (search and seizure) and Fifth (due process) Amendment claims on the ground that EPA must institute suit in order to enforce its requests. Tivian's Thirteenth (involuntary servitude) Amendment claims concerning the expense of complying was rejected on the grounds that the Amendment is simply inapplicable to such circumstances. The court did remand for the limited purpose of determining Tivian's claim that compliance with EPA's request is so burdensome as to entitle it to reimbursement.

Attorneys: Assistant United States Attorney, Everett C. Sammartino (D. R.I.) and Larry G. Gutterridge and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-2740/2762

People of the State of Illinois v. NRC and United States, ____ F.2d ____ (7th Cir., January 10, 1979) DJ 90-1-4-1779

Administrative Law

The court upheld the refusal of NRC to institute a proceeding and hearing to review a final order of the Commission granting the General Electric Co. a special nuclear license for the reprocessing and short-term storage of spent nuclear fuel at its facility near Morris, Illinois. The Seventh Circuit found no right to such a proceeding and hearing under either the Atomic Energy Act or the APA. The court also upheld NRC's regulations in this regard and found that NRC's refusal to institute a proceeding was not arbitrary and capricious.

Attorneys: NRC Staff, Larry G. Gutterridge and Dirk D. Snel (Land and Natural Resources Division) FTS 633-2740/2769

Buras v. United States, ____ F.2d ____, No. 78-3121 (5th Cir., January 12, 1979) DJ 90-1-5-1864

Res Judicata

Action was brought challenging title to certain oil-producing land owned by the United States. The district court dismissed on res judicata grounds (the title to the land was decided in United States v. Buras, 458 F.2d 346, reh. den., 475 F.2d 1370 (5th Cir. 1972), cert. denied, 414 U.S. 865 (1973). The government's motion to affirm was granted without opinion.

Attorneys: Larry A. Boggs and Dirk D. Snel (Land and Natural Resources Division) FTS 633-2753/2769

United States v. John, ____ F.2d ____, No. 76-1518 (5th Cir., January 10, 1979) DJ 90-2-7-3004

Indians

On remand from a decision of the Supreme Court, that the Mississippi Band of Choctaw Indian reservation constitutes Indian country over which the federal courts have exclusive criminal jurisdiction concerning crimes enumerated in the Major Crimes Act, the Fifth Circuit ruled that such jurisdiction extends to lesser included offenses of those enumerated in Section 1153. The court relied primarily on 18 U.S.C. 1152, a broader statute applying to crimes committed in Indian country by Indians against non-Indians. Alternatively, the court found that Section 1153 itself confers jurisdiction over non-enumerated lesser included offenses.

Attorneys: Larry G. Gutterridge and Carl Strass (Land and Natural Resources Division) FTS 633-2740/4427

Jeannine Honicker v. NRC and United States, ____ F.2d ____, No. 78-2137 (D.C. Cir., December 21, 1978) DJ 90-1-4-1944

Administrative Law; Final Order

In a per curiam opinion, the D.C. Circuit dismissed the petition for review, sua sponte, for lack of subject matter jurisdiction. The petitioner had sought review of the Commission's decision to deny her any emergency relief with regard to her emergency petition to the Commission to shutdown nuclear plants throughout the country. The court of appeals concluded that there is no statutory or regulatory provision authorizing the filing of an emergency petition for direct and immediate action by the Commission and ruled that there was no reviewable final order.

Attorneys: NRC Staff; Michael A. McCord and Edward J. Shawaker (Land and Natural Resources Division FTS 633-2774/2813

Glover Construction Co. v. Andrus, ____ F.2d ____, No. 78-1554 (10th Cir., January 11, 1979) DJ 90-1-4-1648

Indians

By regulations interpreting the Buy-Indian Act, 25 U.S.C. 47, Indian-owned companies are given preference in bidding on contracts with BIA. Pursuant to this authority, a contract was let for reconstruction of five miles of roadway in Pushmataha County, Oklahoma, to Indian Nations Construction Company. Three companies were solicited to bid; all were Indian owned. Glover Construction, which is non-Indian owned, brought suit alleging that the road construction contract was illegal on the ground that such contracts had to be publicly advertised under the Federal Property and Administrative Services Act. The district court held that under the terms of that Act, the Buy-Indian Act could not be applied to road construction contracts. The court of appeals affirmed with Judge McKay dissenting. The court distinguished Morton v. Mancari, 417 U.S. 535 (1974) (holding that the Equal Employment Opportunity Act of 1972 did not repeal the Indian Reorganization Act's requirement of preferential Indian hiring by BIA), on grounds that preference in road construction contracts was not expressly required by the Buy-Indian Act and non-advertisement of such a contract was not expressly excluded by the Federal Property and Administrative Services Act. The dissent would have interpreted the Buy-Indian Act to have included road construction contracts and would have applied the reasoning of Morton v. Mancari to affirm the preference regulations and this particular road construction contract.

Attorneys: Charles E. Biblowit, Robert L. Klarquist and Larry A. Boggs (Land and Natural Resources Division) FTS 633-2772/2731/2762

Concerned Citizens of Bushhill Township, et al. v. Costle, et al., ____ F.2d ____, No. 78-1745 (3rd Cir., January 9, 1979) DJ 90-1-4-1710

National Environmental Policy Act

EPA determined to give a grant to a local sewer authority to construct a sewer, but did not prepare an EIS. When two citizen organizations brought actions alleging violations of NEPA, EPA decided to suspend performance of

the grant agreement pending preparation of an EIS. The local sewer authority then filed a cross-claim against EPA and sought an injunction directing the federal government to perform the grant contract and to defend the lawsuit challenging the validity of the agreement. The district court denied the injunction. Affirming the district court, the court of appeals held that, in light of the high standards required by NEPA, EPA had properly determined to suspend performance of the grant agreement pending a final EIS and that the federal government could not be compelled to defend against the NEPA lawsuit.

Attorneys: Robert L. Klarquist and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-2731/2762

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 16. Disclosure of Evidence by the Government. Information Subject to Disclosure. Statement of Defendant.

The defendant was convicted of several charges relating to his forged endorsement of United States Treasury checks. On appeal the defendant asserted the Government improperly failed to turn over to defense counsel certain specimens of the defendant's handwriting used by a handwriting analyist as the basis for concluding that the handwriting of the signatures on two stolen checks was that of the defendant. At trial defense counsel repeatedly objected to any reference to the handwriting specimens because of the Government's failure to turn them over to him in advance of trial as required under Rule 16(a)(1)(A). Earlier, in response to defendant's Rule 16 request, the Government had turned over to defense counsel, inter alia, a copy of the report of its handwriting analyst and photocopies of the stolen checks. The Court of Appeals held that since the existence of the handwriting specimens was revealed by the handwriting analyst's report that in the absence of a specific demand for the specimens themselves, the failure to furnish them did not constitute a failure to comply with Rule 16. See, United States v. O'Shea, 450 F.2d 298 (5th Cir. 1971). Furthermore, even if the Government had technically failed to comply with Rule 16, the Court found the defendant to be unentitled to relief because of the well established rule that an error by the trial court in the administration of the discovery rules is not reversible absent a showing that the error was prejudicial to the substantial rights of the defendant.

(Affirmed.)

United States v. Edgar P. Buchanan, ___ F.2d ___, No. 78-5243 (5th Cir., November 27, 1978).

FEDERAL RULES OF EVIDENCE

Rule 702. Testimony by Experts.

Defendants were convicted of bank robbery in violation of 18 U.S.C. §§2113(a) and 2113(d). One of the defendant's allegations of error concerned the trial court's exclusion of an "expert" witness who was to testify to the unreliability of cross-racial and cross-ethnic eyewitness identifications. Following a thorough voir dire examination of Dr. T. S. Luce, a professor of psychology at the University of Oklahoma, who was to testify on this subject, the district court ruled Dr. Luce's testimony to be inadmissible because it would not be of probative value to the jury. The Court of Appeals affirmed the conviction. According to the Court, the trial court has under Rule 702 broad discretion in deciding whether to admit expert testimony. In view of the limited research in the field of cross-racial identification the Appeals Court held that present work in the field was inadequate to justify its admission into evidence. A contributing factor to the Court's decision was that the positive identification of the defendant occurred a mere two hours after the alleged robbery, thereby considerably lessening any chance of misidentification.

(Affirmed.)

United States v. Lawrence Ronald Watson, Mack H. Banks and Willie Davis, 587 F.2d 365 (7th Cir., November 24, 1978).

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ADDENDUM

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.

1/24/79	9-11.250	Definition of "Target"

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.

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4	1	1/03/77	1/03/77	Ch. 3 to 15
	2	1/21/77	1/03/77	Ch. 1 & 2
	3	3/15/77	1/03/77	Index
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	*5	2/1/79	11/22/78	Complete Revision of Title 4
5	1	2/04/77	1/11/77	Ch. 1 to 9
	2	3/17/77	1/11/77	Ch. 10 to 12

	3	6/22/77	4/05/77	Revisions to Ch. 1-8
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* Transmittals will be distributed to Manual holders soon.