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COMMENDATIONS

Assistant United States Attorneys GAIL T. BARDACH and BRADLEY L. WILLIAMS, Southern District of Indiana, have been commended by Mr. William H. Webster, Director of the Federal Bureau of Investigation, for their efforts in the extremely complex white-collar crime case of United States v. Henderson, a prosecution of a former accountant who was charged with embezzlement of funds from Community Action Against Poverty of Greater Indianapolis, Incorporated.

Assistant United States Attorney ELIZABETH T. CAMPBELL, Northern District of Alabama, has been commended by Mr. Roger L. Hildebeidel, Eastern States Director of the Bureau of Land Management, U.S. Department of Interior in Alexandria, Virginia, for significant contribution to obtaining the first civil recovery through a $1.1 million consent judgment for unauthorized mining in Alabama and in establishing legal precedents for subsequent cases and other states by her performance as leading legal representative in the Alabama Coal Trespass Cases during the period of February 1979 - April 1981.

Assistant United States Attorneys PHILIP L. DOUGLAS, JANE PARVER and BENITO ROMANO, Southern District of New York, have been commended by Mr. Bruce E. Jensen, Special Agent in Charge of the Drug Enforcement Administration, Department of Justice in New York, New York, for their excellent work in the successful prosecution of United States v. Loften involving illicit traffic in narcotics.

Assistant United States Attorneys WALTER JONES and DANIEL STEWART, Northern District of Illinois, have been commended by G. R. Dickerson, Director of the Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, for their superb performance in the prosecutions of Anthony Giacomino and John Christopher for violations involving the Explosive Control Act, the Gun Control Act, mail fraud and obstruction of justice.

Assistant United States Attorney RONALD M. KAYSER, Southern District of Iowa, has been commended by Mr. Harlan C. Phillips, Special Agent in Charge, Federal Bureau of Investigation in Omaha, Nebraska, for the successful prosecution of Larry Eugene Crum which concluded with the conviction of Mr. Crum on three of four counts of the indictment in the Theft from Interstate Shipment under Title 18 §659.

Assistant United States Attorney DAVID V. KIRBY, Eastern District of New York, has been commended by Mr. Bruce E. Jensen, Special Agent in Charge of the Drug Enforcement Administration, Department of Justice in New York, New York, for his fine work in the Grand Jury investigation and subsequent trial of Salvatore V. Messina who was found guilty of the charge of conspiracy to manufacture methaqualone in the case of United States v. Messina.

First Assistant United States Attorney JEFFREY L. VIKEN, District of South Dakota, has been commended by T. J. Yates, District Director of the Internal Revenue Service, Department of the Treasury in Aberdeen, South Dakota, for his impressive handling of a recent income tax trial in the case of United States v. Barney.

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EXECUTIVE OFFICE FOR U. S. ATTORNEYS
William P. Tyson, Acting Director

POINTS TO REMEMBER

Ethics in Government Act: Post-Government Employment Restrictions: Agency Determination Upheld

This case was handled jointly by the U. S. Attorney's office, W. D. Tennessee, and the U. S. Army Judge Advocate General's office.

Plaintiff, a former Army Lt. Col. who was the immediate past commanding officer and Army contracting officer's representative at the Milan, Tennessee Army Ammunitions Plant (MAAP), was offered the corresponding civilian position of plant manager by the installation's prime contractor, Martin-Marietta. In the civilian position he would have administered the same five-year, multi-million dollar contract in which he participated personally and substantially while in the Army by making major recommendations regarding performance appraisals of Martin-Marietta and determination of the "cost base" for payments to Martin-Marietta. During the pendency of plaintiff's approval by the parent Army command of MAAP, the command counsel of the next higher command group called the president of Martin-Marietta to communicate his disapproval of the proposed hiring on conflict of interest grounds. Plaintiff's application thereupon stalled at the parent Army command level and Martin-Marietta withdrew its offer.

On Plaintiff's application for a preliminary injunction, the district court ruled that plaintiff had been denied due process by the Army's failure to act upon Martin-Marietta's submission in his behalf, and by the informal manner in which the Army reached its conflict of interest finding. The court remanded the case to the parent Army command, directing the command to reach a decision and specify the reasons -- including the law and regulations -- supporting the decision. Following the Army's conclusion that Martin-Marietta's employment of former Colonel Knipp would violate 18 U.S.C. §207(a) and (b) -- the Ethics in Government Act -- the Court held that the Army's determination was not "arbitrary and capricious" despite its failure to specify and discuss the Army regulations governing the situation, and the Court refused to determine whether the Army had correctly applied the law and regulations to plaintiff's situation.

Apparently, the plaintiff's employment in this matter would have been permanently prohibited under 18 U.S.C. §207(a) because he had "participated personally and substantially" on the same matter (i.e., the five-year contract) in the Army that he would have been representative and supervisor for while an employee of Martin-Marietta.

In addition, the plaintiff's employment in this matter apparently would have been prohibited for two years under 18 U.S.C. §207(b)(i) because, as the Army contracting officer's representative at this particular installation, he had had "official responsibility" for administering and evaluating the same contracts during his final year as a Government employee.

This holding comports with the Department of Justice position in this area.

Attorneys: Arthur S. Kahn (Assistant U. S. Attorney)
FTS 222-4231 (W. D. Tennessee)

Frank J. Sando (Army/JAG)
FTS 697-3462

Other questions dealing with the post-government employment restrictions of the Ethics Act should be directed to Mr. Leslie Rowe, Executive Office for United States Attorneys (FTS 633-4024; Room 1630, Main DOJ).

(Executive Office)

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CIVIL DIVISON
Acting Assistant Attorney General Stuart E. Schiffer

Barrett v. Bureau of Customs, 5th Cir. Nos. 80-3162 (July 27, 1981) D.J. # 145-3-2093.

ATTORNEYS FEES UNDER PRIVACY ACT: FIFTH CIRCUIT HOLDS THAT NON-ATTORNEY, PRO SE LITIGANTS UNDER THE PRIVACY ACT ARE NOT ELIGIBLE FOR ATTORNEY FEES.

The Fifth Circuit, after holding that the same standards apply to the attorney-fee provisions of the Freedom of Information Act and the Privacy Act, held that non-attorney pro se litigants are not eligible for awards of attorney fees. The Court adopted our arguments that 5 U.S.C. 552a(g)(3)(B) required that any attorney fees can be awarded only if they have been "reasonably incurred," and that the statutory policies would not be furthered by awards to pro se litigants. The Fifth Circuit thus rejected the D.C. Circuit's holding that pro se litigants are eligible for attorney fees, and aligned itself with the First and Tenth Circuits. (The Second Circuit is somewhere in the middle, and the issue will be argued in the Third Circuit on September 14.)

Attorney: Marc Richman (Civil Division)
FTS 633-4052

Lenwood Williams, Jr. v. The Shipping Corporation of India, 4th Cir. No. 80-1243, (July 7, 1981) D.J. # 118-982-206.

FOREIGN SOVEREIGN IMMUNITIES ACT: FOURTH CIRCUIT CONCURS WITH SECOND CIRCUIT THAT THE FOREIGN SOVEREIGN IMMUNITIES ACT PRECLUDES ALTERNATIVE DIVERSITY JURISDICTION AND THAT ITS BAR AGAINST JURY TRIALS IS CONSTITUTIONAL.

In this case an injured longshoreman sued the shipping corporation, which is wholly owned by the Government of India, in a state court and demanded a jury trial. The defendant removed the action to the federal district court pursuant to the Foreign Sovereign Immunities Act 28 U.S.C. 1441(d), and moved to strike the jury trial demand as barred by this provision. Plaintiff contended, however, that the district court's jurisdiction could be predicated upon diversity of citizenship pursuant to 28 U.S.C. 1332(a)(2) and was removable under 28 U.S.C. 1441(a) which does not proscribe jury trials, relying on several lower court decisions to this effect. The district court tried the case without a jury and ruled in favor of the defendant corporation.

We filed an amicus brief in the court of appeals in support of the district court's interpretation of the Act and the

constitutionality of the nonjury trial provision. The court of appeals has held, as did the Second Circuit in Ruggiero v. Compania Peruana de Vapores, 639 F.2d 872 (1981), that in the FSIA Congress provided a single vehicle for action against foreign states, as defined to include agencies and instrumentalities of foreign states, and that the proscription against jury trials does not offend the Seventh Amendment since suits against foreign sovereigns were unknown to the common law of this country and England. The identical issues are still pending before the Third Circuit in a similar case in which we are an intervenor-appellant.

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

Kester v. Campbell, 9th Cir., No. 79-4545 (July 2, 1981) D.J. # 35-21-13.

DEFERENCE TO AGENCY INTERPRETATION OF EXECUTIVE ORDER: NINTH CIRCUIT REVERSES DISTRICT COURT JUDGMENT ALLOWING CLASS OF CIVIL SERVANTS TO RECOVER OVER SIX MILLION DOLLARS IN COST OF LIVING ALLOWANCES.

In 1976 the Civil Service Commission (now the Office of Personnel Management) began enforcing in Hawaii a 1948 Executive Order which required deductions in civil servants' cost of living allowances (COLA) whenever such employees "are furnished" commissary, lodging, or other such privileges. The Commission interpreted this "are furnished" provision to cover also those civil servants whose commissary and other privileges came as a result of retirement from the military or from marriage to a military spouse. A group of civil servants whose purchasing power derived from the military brought this suit seeking restoration of their full COLA. During the pendency of the suit President Carter expressly revoked the "are furnished" provision insofar as it applies to military benefits, but the revocation was prospective only, leaving intact some six million dollars in COLA deductions made under the original "are furnished" clause. The district court held that the Civil Service Commission's interpretation of the original "are furnished" clause was unreasonable and inequitable, and accordingly ordered the Commission to arrange for back payments of over six million dollars in deducted COLA amounts. The Ninth Circuit has just reversed, agreeing with our view that the courts must defer to the "agency's presumed expertise in interpreting executive orders charged to its administration...." The court also rejected the plaintiffs' argument that the Commission's non-enforcement of the

Executive Order between 1948 and 1974 precluded current enforcement.

Attorney: John Cordes (Civil Divison)
FTS 633-4214

Hawaiian Airlines v. National Mediation Board, et al., 9th Cir. No. 79-4265 (July 24, 1981) D.J. # 145-135-32.

JUDICIAL REVIEW OF NATIONAL MEDIATION BOARD DECISIONS: NINTH CIRCUIT REAFFIRMS LIMITED REVIEW OF DETERMINATIONS.

In this case, the employer objected to the results of an election in which its employees had voted by a margin of one ballot to be represented by a union, and sought to have the district court review the determination by the National Mediation Board that the employer now had to negotiate with the union. The district court found that because the NMB had investigated the dispute, the court lacked jurisdiction to inquire further into the decision. The employer appealed to the Ninth Circuit which was the only court previously to have inquired into the quality of an NMB investigation and overturned it. The Ninth Circuit has just affirmed the principle that once the district court determines that the NMB has met its statutory obligation to investigate a representation dispute, it lacks authority to inquire further into the kind or quality of the investigation or to impose judicial standards on the NMB's reviewing process.

Attorney: Douglas N. Letter (Civil Division
FTS 633-3427

August 28, 1981

CIVIL RIGHTS DIVISION
Assistant Attorney General Wm. Bradford Reynolds

Newman v. Alabama, CA No. 3501 (M.D. Ala.) DJ 144-2-702

Prison Conditions and Medical Care

On July 15, 1981, the court entered an order granting habeas corpus writs effective July 24, 1981, to 400 sentenced Alabama prisoners who were approaching their release date. The court also ordered correction officials to consider 50 additional inmates for parole 6 months in advance of their scheduled parole hearings. These inmates were among those identified by prison officials as "least deserving of continued incarceration." The court found that the constitutional rights of all Alabama inmates remained in jeopardy and that release of inmates was the only means available to the court to remedy the situation. The United States did not take a position in this matter.

Attorney: Stephen A. Whinston (Civil Rights Division)
FTS 633-3479

United States v. State of North Carolina, No. 81-1313 (4th Cir.) DJ 170-54-78

Title VII

On July 15, 1981, we filed in the Fourth Circuit our brief as appellee. We argued that the district court committed no error in invalidating the North Carolina Highway Patrol's 5'5" minimum height requirement for state troopers as violative of Title VII.

Attorney: Louise A. Lerner (Civil Rights Division)
FTS 633-2172

United States v. Phoenix Union High School, CA No. 81-393-PHY-VAC (N. Ariz.) DJ 169-8-3

School Desegregation

The district court entered an order authorizing access to Phoenix Union High School's Executive Session board minutes. Access is initially to be limited to those materials which the school district determines are relevant to our investigation, subject to further litigation if we disagree as to what is relevant Copying of disclosed materials will be permitted. To protect the district from disclosure of its minutes beyond the in-

vestigative staff, the court ordered that the United States could not release the documents to any other persons without its approval. Contrary to the school district's previous public statements, an appeal was immediately sought. The court granted a stay of its order ex parte until the appeal was resolved.

Attorneys: Joel Selig (Civil Rights Division)
FTS 633-4732
Burt Dougherty (Civil Rights Division)
FTS 633-3178
Gregg Meyers (Civil Rights Division)
FTS 633-4564

United States v. Louisiana, No. 81-3372 (M.D. La.) DJ 169-32M-3

School Desegregation

On July 17, 1981, we filed in the Fifth Circuit a response to the petition for a writ of mandamus of the NAACP and a class of proposed intervenors in our suit to desegregate the Louisiana system of public higher education. The district court denied petitioners' motion to intervene and they sought a writ of mandamus from the Fifth Circuit. Although we supported the proposed intervenors' motion in the district court, we stated in our response to the petition we did not believe the district court had abused its discretion in denying the motion for intervention. Additionally, we suggested that mandamus was not an appropriate remedy, but that the court might wish to treat the petition as an appeal.

Attorney: William Yeomans (Civil Rights Division)
FTS 633-4126

United States v. Board of Education of the City of Chicago, CA No. 80C5124 (N.D. Ill.) DJ 144-100-23-1

School Desegregation

On July 21, 1981, we filed our response to the Chicago School Board's desegregation plan, which had been developed pursuant to the September 24, 1980, consent decree. In our response we characterized the Board's plan as incomplete and asked the district court to provide guidance to the Board in future planning and to set up a rigid time schedule for specific planning steps so that a comprehensive plan can be developed by December 1981, for implementation in September

1982. One specific criticism of the plan is that the time schedule adopted for implementation of various phases of the plan contains inadequate assurance that the plan will be effective as soon as is feasible. Some of the other criticisms are that the plan lacks sufficient specificity to enable the court, the Department, or other interested parties to measure its effectiveness, and the plan is based on arbitrary mathematical ratios which negate reasonable remedial steps by foreclosing at the outset any examination of practical ways to meet the goals of the decree.

Attorney: Alexander Ross (Civil Rights Division)
FTS 633-2303

LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Carol E. Dinkins

Commonwealth of Kentucky v. Alexander, ____ F.2d ____, Nos. 80-3452, 3503, 3610 (6th Cir., Jul. 21, 1981) DJ 90-1-4-2094.

National Environmental Policy Act; EIS for Corps permit under Section 10 of Rivers and Harbors Act ruled adequate.

The Sixth Circuit held that a Corps of Engineers EIS for a barge port and industrial park on the Indiana shore of the Ohio River in the vicinity of Louisville, Ky., was adequate, and that permits the Corps had issued under Section 10 of the Rivers and Harbors Act and Section 404 the Clean Water Act could stand. In so ruling, the court of appeals reversed that part of the district court's decision which had found the EIS's discussion of several alternative sites on the Indiana shore inadequate. It refuted an argument of Kentucky's, not specifically ruled on by the district court, that the EIS should have discussed an alternative site on the Kentucky shore at Louisville. The court of appeals held that "the specificity of EIS treatment of alternatives is a matter of agency discretion" and that "the reviewing court's role is limited to deciding whether the agency's consideration of alternatives was so inadequate as to be an abuse of this discretion." Important to the court's decision was the fact that no party opposed to the project had objected to the adequacy of the discussion of alternative sites during the administrative process. Relying on Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 514 (1978), it ruled that "a significant factor in whether the specificity of an agency's examination of alternatives is an abuse of discretion is how meaningful was the participation in agency proceedings by intervenors." The court also held that where potential alternatives are not discussed in detail in the EIS because they are not feasible, the evidence of infeasibility need not be found within the EIS itself, so long as there is sufficient evidence in the administrative record as a whole.

Attorneys: Robert D. Clark, Peter R. Steenland and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-2855/2748/2762

Miller, et al. v. United States, et al., ____ F.2d ____, No. 80-1660 (8th Cir., Jul. 22, 1981) DJ 90-1-4-2188

National Environmental Policy Act; EIS not required to consider alternative not authorized by Congress.

On July 22, 1981, the Eighth Circuit, in a per curiam opinion, affirmed the District Court for the Eastern District of Arkansas, which had denied a requested injunction against the Army Corps of Engineers to enjoin construction of a dam on Cypress Creek in Conway County, Arkansas. The court held that the Corps was correct in declining to consider in its EIS a regional water supply system as an alternative to the proposed action, which was the construction of a municipal water supply system for the City of Conway, Arkansas. The Court reasoned that, since Congress had specifically provided for the construction of a municipal system in order to compensate the City of Conway for damage to its water supply occasioned by construction of the McClellan-Kerr Arkansas River Navigation System, a regional system was outside the scope of the congressional authorization, and therefore not a reasonable alternative to the municipal facility, but rather an entirely different project.

Attorneys: Robert B. Schaeffer and Kathryn A. Oberly (Land and Natural Resources Division) FTS 633-3906/2716

Ashley v. Andrus (Watt), ____ F.2d ____, No 80-1753 (7th Cir., Jul. 27, 1981) DJ 90-1-18-1372

Oil and gas leases; applications wrongly rejected by BLM.

On July 27, 1981, the Seventh Circuit, in an opinion by Circuit Judge Harlington Wood, affirmed the District Court for the Eastern District of Wisconsin, which had granted summary judgment for the plaintiff, Eleanor P. Ashley, as Personal Representative of the Estate of Charles D. Ashley, deceased. The decedent had contracted with a leasing service to have applications for oil and gas leases filed on his behalf in the noncompetitive, simultaneous drawing system, and had pre-executed a number of entry cards (applications) for this purpose. After his death, Mr. Ashley's widow, as

personal representative of his estate, signed a modified agreement with the leasing service, but did not execute new entry cards, and the service continued to file the entry cards that the decedent had signed. One of those cards was selected first in the simultaneous drawing. Upon learning that the apparent lease applicant had died before the application was filed, BLM rejected the application. The Circuit Court, in adopting the district court's reasoning, held that the regulations (43 C.F.R. 3102.7 and 3102.8) and their applicability to the plaintiff, as personal representative of the estate, were sufficiently unclear so as to render the rejection of the lease application patently unfair, and that Mrs. Ashley had proceeded reasonably in light of the uncertainties. The Circuit Court further held that its decision must be confined to the specific facts of this case, and that plaintiff's "adoption" of decedent's signature was only proper here where the regulations were ambiguous and where it was reasonable for plaintiff to assume that her actions were acceptable. Given that the pertinent regulations have been subsequently modified, the Circuit Court trusted that the issues here will not arise again.

Attorneys: Robert B. Schaefer and Kathryn A. Oberly (Land and Natural Resources Division) FTS 633-3906/2716

Jicarilla Apache Tribe v. United States, et al. and City of Albuquerque, et al., ____ F.2d ____, Nos. 80-1704, 1705 and 1759 (10th Cir., Jul. 29, 1981) DJ 90-1-2-1035

The court of appeals upheld the district court's holding that the City of Albuquerque could not store water in Elephant Butte Reservoir in anticipation of applying it to beneficial use, and that storage of water solely for recreational purposes is not permissible under the federal statute authorizing the construction of the San Juan-Chama project (through which the City obtains the water). The district court had also held that the storage of San Juan-Chama project water at Elephant Butte was not permissible under any circumstances, but the court of appeals held that such water may be stored at Elephant Butte for purposes which constitute beneficial use under state law and which are congressionally authorized; the court found, however, that

the storage contemplated by the City did not meet these criteria.

Attorneys: Martin Green and Edward J. Shawaker (Land and Natural Resources Division) FTS 633-2827/3813

Andersen v. Cumming, ____ F.2d ____, No. 80-5573 (9th Cir., Jul. 29, 1981) DJ 90-1-0-1500

Administrative law; failure to exhaust administrative remedies barring suit.

In an unpublished memorandum opinion, the court of appeals affirmed the district court's order granting the government summary judgment on counterclaims for trespass and ejectment from Indian lands in Arizona. The government had terminated in 1977 the Andersen's lease of those lands for material breach of several provisions of the lease. Rather than pursuing administrative remedies, the Andersens filed an action in federal district court seeking judicial review of the cancellation decision. The court of appeals held that administrative exhaustion was required, and both administrative and judicial review are now time-barred. The court also rejected the Andersens' arguments that the Secretary has no authority to cancel a lease on Indian lands, that the Andersens were entitled to an evidentiary hearing before cancellation even though they never sought one, that a joint decision by the Superintendent and the Area Director to cancel the lease violated the regulations, and that the government had lulled the Andersens into a false sense of security as to when they were required to file an administrative appeal.

Attorneys: Thomas L. Riesenberg and Jacques B. Gelin (Land and Natural Resources Division) FTS 633-4519/2762

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OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Robert A. McConnell

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

AUGUST 5, 1981 - AUGUST 19, 1981

Congressional Recess - Both the House and Senate remain in recess until September 9, 1981.

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Federal Rules of Evidence

Rule 405(a). Methods of Proving Character. Reputation or opinion.

On appeal, defendant alleged that his narcotics convictions should be reversed because the Government, during cross-examination of defendant's character witnesses who testified to defendant's good community reputation, asked each witness if their opinion of defendant would be changed if they were aware that defendant had distributed quantities of cocaine.

The Court reversed the convictions, concluding that Rule 405(a) which permits inquiry into relevant specific instances of conduct does not permit questions so framed as to assume defendant's guilt of the offenses for which he is on trial.

(Reversed and remanded.)

United States v. Quinn L. Polsinelli, 649 F.2d 793 (10th Cir. May 22, 1981).

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Federal Rules of Evidence

Rule 703. Bases of Opinion Testimony by Experts.

At pretrial proceedings on the issue of defendant's sanity, the government called a psychiatrist as an expert witness. The psychiatrist's testimony was based in large part on reports received from other physicians and staff at the medical center which examined the defendant, information from the United States Marine Corps, reports from the F.B.I., and a "large amount of information" from the United States Attorney's Office, none of which was introduced into evidence. On appeal, defendant contended, inter alia, that the hearsay basis of the expert witness's testimony deprived the defendant of his right to confront adverse witnesses.

The Court noted that the adoption of Rule 703 expanded the scope of expert testimony, expressly permitting experts to base their testimony on evidence that would otherwise be inadmissible, so long as it is "of a type reasonably relied on by experts in the particular field in forming opinions or inferences upon the subject." The Court found that this reasonable reliance standard was met in this case, but went on to note that in criminal cases a court's inquiry under Rule 703 must go beyond merely finding that this standard has been met, and must ensure that a defendant has had access to the hearsay information relied on, in order to allow effective cross-examination.. Since that additional requirement was satisfied in this case, the psychiatrist's expert testimony did not violate defendant's right to confront adverse witnesses.

(Affirmed.)

United States v. Darrell Eugene Lawson, ___F.2d___, No. 80-CR-4001 (7th Cir. July 9, 1981)

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Federal Rules of Criminal Procedure

Rule 35. Correction or Reduction of Sentence.

Pursuant to a plea agreement whereby the government agreed to recommend a ten year sentence, defendant pled guilty to bank robbery. Despite the government's recommendation, the district court imposed the maximum sentence of twenty-five years. The defendant then made a Rule 35 motion for reduction of his sentence to ten years, and the government opposed this motion. The defense filed a reply brief attacking the government's opposition as a breach of the plea agreement. Appealing the denial of his Rule 35 motion, the defendant urged the court to exercise its supervisory power to rule that, in the absence of new factors, a prosecutor's promise to recommend a particular sentence forbids the government from thereafter opposing a defendant's Rule 35 motion to reduce a sentence imposed in excess of that recommended.

In support of this argument, the defense cited United States v. Ewing, 480 F.2d 1141 (5th Cir. 1973), as reported in 21 USAB 941 (No. 24; 11-23-73). The Court distinguished Ewing, noting that the facts in the instant case do not indicate that the possibility of a Rule 35 motion was contemplated at the time of the plea agreement, and held that the prosecutor did not violate the plea agreement in this case. The Court went on, however, to make some general observations on the issue, stating that while it would be inappropriate to prohibit the government from ever opposing a Rule 35 motion in such circumstances, because matters could occur in the interim which might make the earlier recommendation inappropriate, the Court did not necessarily sanction government opposition in such cases. The Court noted that a slight change in the facts could well mandate the opposite result, and suggested that, in future cases of this nature, the government should respond to a defendant's Rule 35 motion by stating that it had previously recommended a particular sentence, that the court had declined to follow the recommendation, and that the government does, or does not, have any reason to retract its previous recommendation.

(Affirmed.)

United States v. William Charles Mooney, ___F.2d___, No. 80-CR-17 (7th Cir. July 17, 1981)