United States District Court
Northern District of Ohio
Cleveland, Ohio 44114

William K. Thomas
Judge

January 16, 1986

The Honorable G. Wix Unthank
P.O. Box 1012
Pikeville, Kentucky 41501

RE: United States of America v. Jacob F. Butcher, et al., CR3-84-63 and CR3-84-64

Dear Judge Unthank:

Today by Federal Express I forwarded to the United States District Court, Eastern District of Tennessee (Knoxville), my memorandum and order which ruled on defendant Barr's motion for a reduction of sentence. A copy of the memorandum and order is enclosed.

Sincerely,

William K. Thomas

WKT/vr

Enclosure

1-9-86

United States District Court
Northern District of Ohio
Cleveland, Ohio 44114

William K. Thomas
Judge

January 7, 1986

The Honorable G. Wix Unthank
P.O. Box 1012
Pikeville, Kentucky 41501

RE: United States of America v. Jacob F. Butcher, et al., CR3-84-63

Dear Judge Unthank:

Today by express mail I forwarded to the United States District Court, Eastern District of Tennessee (Knoxville), my memorandum and order which ruled on defendant Butcher's motion for a reduction of sentence. A copy of the memorandum and order is enclosed.

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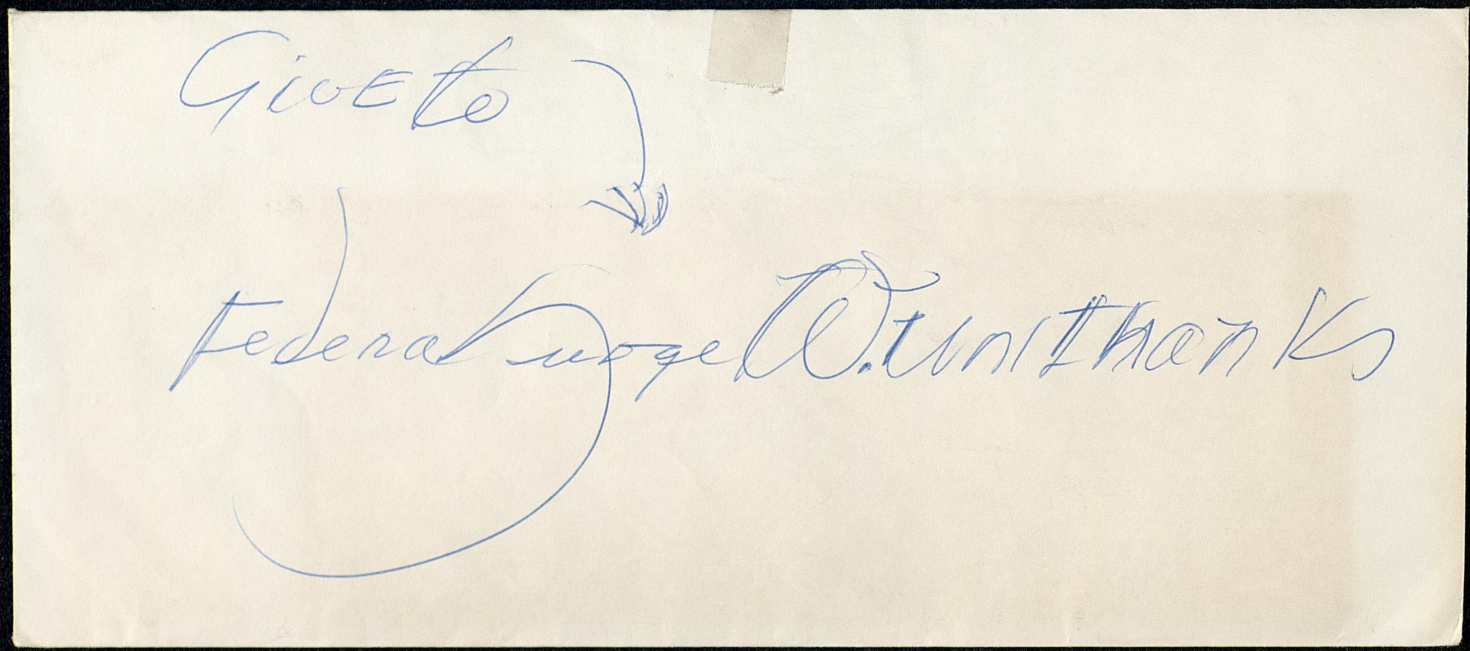
Enclosure


Give to
Federal Judge W. Hunt Banks

4-4-85

NEAL & HARWELL
8TH FLOOR, THIRD NATIONAL BANK BUILDING
NASHVILLE, TENNESSEE 37219-2084
(615) 244-1713

JAMES F. NEAL
AUBREY B. HARWELL, JR.
JON D. ROSS
JAMES F. SANDERS
THOMAS H. DUNDON
ROBERT L. SULLIVAN
RONALD G. HARRIS
ALBERT F. MOORE
PHILIP N. ELBERT
JAMES G. THOMAS
WILLIAM T. RAMSEY

MITCHELL ROGOVIN
OF COUNSEL
(NOT ADMITTED IN TENNESSEE)

April 1, 1985

Honorable G. Wix Unthank
Post Office Box 278
Pikeville, KY 41501

Re: United States v. Jacob F. Butcher
Cr. No. 84-28

Dear Judge Unthank:

For additional authority in support of defendant Butcher's motion for discovery of statements of coconspirators, defendant Butcher submits the following additional authority:

United States v. Mays, 460 F. Supp. 573 (E.D. Texas 1978);

United States v. Brighton Building and Maintenance Co., 435 F. Supp. 222, 233 n. 20 (N.D. Ill. 1977), aff'd., 598 F.2d 1101 (7th Cir. 1979), cert. denied, 444 U.S. 840 (1979); and

United States v. Agnello, 367 F. Supp. 444, 448-49 (E.D. N.Y. 1973).

In addition, defendant Butcher points out that this Court has previously ordered the Government to disclose statements of coconspirators during an Enright hearing in United States v. Edgar Jones, et al., Cr. No. 83-8.

Thank you for considering this additional authority.

Respectfully,

William T. Ramsey

William T. Ramsey

cc: Barbara Edelman
Jane Graham

area briefs

Cocke County school bonds won't be split

NEWPORT — The Cocke County Schools system does not have to share a $1,250,000 bond issue with the city of Newport.

Chancellor Chester Rainwater ruled in favor of the county school system in a suit filed by Newport officials asking for $164,500.

The city officials claimed the money on the basis that Newport has a grammar school but no high school, and that the county, which provides high schools, uses Newport's grammar school on a part-time basis. Newport officials say city taxpayers shouldn't have to pay for an elementary school used by county students. The county contended the bonds were issued as "high school bonds."

The bonds were issued in 1983 for construction of six classrooms and a gymnasium at Cosby High School, operated by the county.

Rainwater called the part-time use of a portion of Newport Grammer School by county students "incidental," and concluded the bonds were used to improve the high school, and not for an elementary school.

Attorney Roy Campbell representing the city said the ruling will be appealed.

Greenevillian identified as wreck victim

GREENEVILLE — Charles Coy Heck, 27, Greeneville, has been identified as a man killed in a traffic accident late Wednesday.

Police were unable to identify Heck until yesterday, since he carried no identification and the license number of the motorcycle he was riding could not be found in state records. Officers said identification was made by Heck's wife, who awoke yesterday morning and discovered her husband, who works the night shift, had not come home.

Officers said Heck's motorcycle collided with a car driven by Janice L. Taylor, 27, also of Greeneville, who was not injured. No charges have been filed.

Stamp, coin fair scheduled

MARYVILLE — More than 30 stamp and coin dealers from six states are expected to participate in a stamp and coin fair May 3-5 at the Foothills Shopping Mall.

A special hand-stamp cancellation will be provided at the show by U.S. Postal Service employees. The Old Smokey Railroad Club and the Knoxville Model Railroad Society also will participate in the show, promoting some upcoming train trips and operating model railroads.

Those who cannot attend the fair can order the special canceled covers through the mail for 75 cents each or three for $2. A self-addressed stamped envelope should be enclosed. The address for ordering is Foothills Covers, 27 South Ft. Thomas Ave., Ft. Thomas, Ky. 41075.

Newscaster is commencement speaker

GREENEVILLE — John Palmer, newscaster for the NBC News' "Today" program, will give the commencement address at Tusculum College at 4 p.m. May 19.

Palmer, a native of Kingsport, received the Merriman Smith Memorial Fund Award for Excellence in Presidential News Coverage for his exclusive report of the aborted mission to rescue American hostages in Iran in 1980.

Problems of gifted to be discussed

CLINTON — Anderson County Association for the Talented and Gifted will meet at 7 p.m. Monday at Clinton Senior High School. Clinical psychologist Dr. Janet Wallace, who is with The Development Center in Knoxville, will speak on problems gifted children have at school.

local news

KUB OK's study to read meters through power lines

by BILL MAPLES
News-Sentinel staff writer

A contract to examine the possibility of reading electric, gas and water meters through customer power lines has been approved by KUB.

The research project also will investigate the possibility of reducing the utility's peak power demand by temporarily switching off water heaters and air conditioners.

The project will cost $750,000. Ed Hoskins, KUB general manager, told the board Thursday TVA will pay $250,000, the Tennessee Valley Public Power Association will pay $250,000 and KUB will contribute $250,000 in labor.

Hoskins told commissioners the utility's biggest cost is its peak power demand from TVA. He said if this peak power demand can be cut one half of 1 percent the money spent on the project will be recovered. He said he could not estimate the long-term savings if the experiment proves successful.

The proposed new method of reading meters uses impulses, Hoskins said. He said it is a means of sending a message to a meter and getting it back.

Hoskins said earlier the project could save KUB and its customers thousands of dollars, because KUB spends $1.5 million a year reading meters.

In other matters, Hoskins said KUB has won a national safety award for the fourth consecutive year from the American Public Power Association. The latest award was second place among all the public power groups in the nation.

The board also was told the threat of ice-laden trees, the bane of KUB's crews in past winters, was cut drastically in recent winter months by selective trimming of trees under supervision of a forester.

The board heard a report from Tom Simpson, who went to work as forester for the utility in October 1983. He said fewer homes were without power from tree limbs across lines as a result of a new method of pruning trees near KUB lines.

Simpson said Holston Hills, which in the past could be expected to be without power an average of 10 times in a snowstorm or ice storm, had one power failure in recent storms because of trees falling on lines.

He said the same averages applied to Sequoyah Hills and Maynardville. By comparison, the Rocky Hill area, where crews had not finished trimming, was without power 40 times.

east tennessee

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Money	4-5
Editorials	6
Knox Happenings	7
Obituaries	7

The Knoxville News-Sentinel

Friday, March 22, 1985

'Butch' Butcher used as funnel, trustee says

A million and a half dollars flowed through accounts controlled by C.H. "Butch" Butcher III to a Swiss bank in the Grand Cayman Islands in 1983, according to exhibits filed yesterday by his father's court-appointed bankruptcy trustee.

Of that amount, $1 million came from funds transferred from C.H. Butcher Jr.'s account at Merrill, Lynch, Pierce, Fenner and Smith in transactions starting in March 1983, and continuing through June 1983. Butcher Jr., former head of the defunct City and County Bank chain, was declared bankrupt in July, 1983. Bankruptcy trustees continue to try to trace funds that might belong to his estate.

Another $550,000 originated from accounts of Butcher III in Knox Federal Savings and Loan and from C.H. Butcher Sr.'s Union County Bank and made its way to a Swiss account between March 1983, and August 1983, according to the flow charts.

Butcher III refused to answer questions about the transactions on constitutional grounds against self-incrimination.

Regarding the Merrill, Lynch account, the chart showed $1.2 million from a check written by C.H. Sr., acting as trustee, and $749,000 from a check on Butcher III's Red Gate Quarter Horses Inc. went toward a $2 million certificate of deposit for Red Gate at Union County Bank.

Butcher III said he was not aware a Red Gate account existed at Merrill, Lynch. He refused to answer questions about any of the transactions, which, according to the trustee's chart, showed $1 million, written in four cashier's checks from the $2 million CD flowing to a $1 million CD at First State Bank of Gainesville, Texas, and then to two $500,000 money orders to an account called Teal Ltd. in the Grand Caymans.

> **"Isn't it a fact, Mr. Butcher, that Teal Ltd., was formed for the purpose of accepting deposits into the Grand Cayman Islands?"**
>
> Neal Melnick

"Isn't it a fact, Mr. Butcher, that Teal Ltd., was formed for the purpose of accepting deposits into the Grand Cayman Islands?," asked Neal Melnick, the bankrupty trustee's attorney.

Butcher III refused to answer the question on grounds of self-incrimination.

In the other flow chart, four cashier's checks from Union County Bank and a check from Knox Federal, all endorsed by Butcher III, went into an account at the Gainesville Bank, and from there checks went to First National Bank of Sanger to CDs in Butcher III's name, and then to a Grand Cayman account.

Butcher III also said the only thing he knew about a Florida corporation, Redwind Inc., was that "I've just heard the name." He said so far as he knows he is not a director, although he has been listed with the Florida Secretary of State as the secretary of the corporation, through which other Butcher financial transactions have been traced.

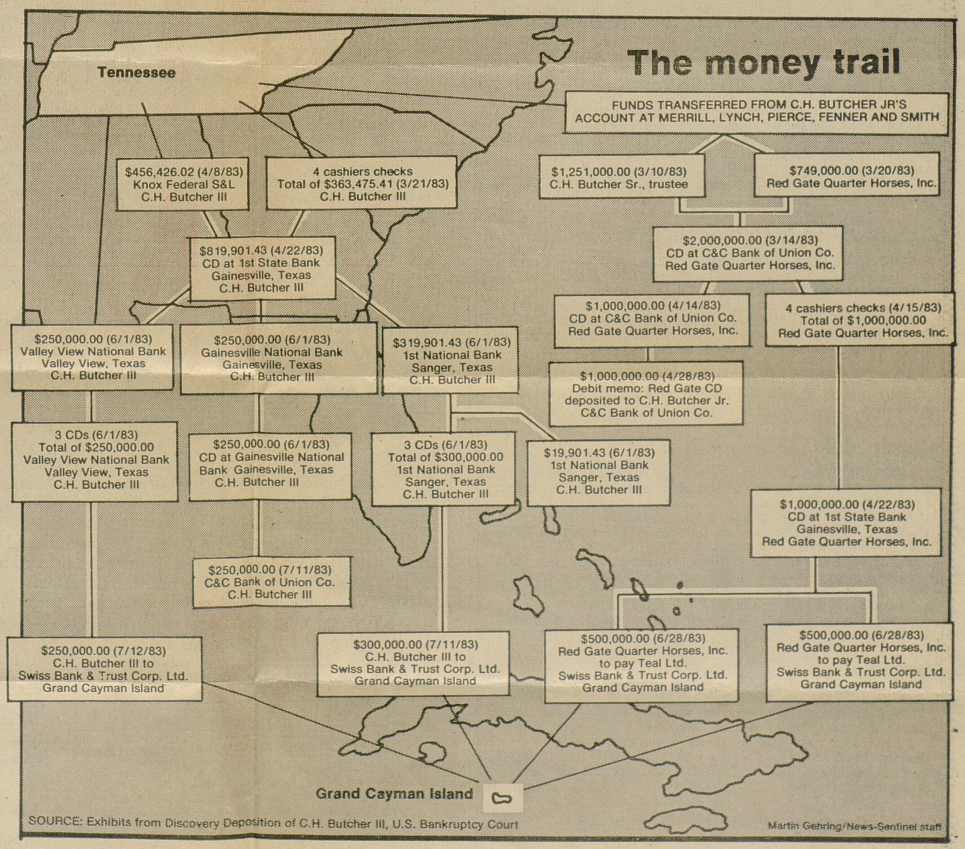
He also refused to answer questions about an accountant's report in 1983 of Red Gate's foreign bank account in the Grand Caymans.

Butcher III has been questioned at length about Red Gate, his quarter horse operation in Texas and in Tennessee in connection with efforts to recover funds for the some $218 million in claims against his father and mother.

Butcher's attorney said Red Gate's corporate records through July 1984, have been subpoenaed by a federal grand jury.

Red Gate was set up as a corporation in 1982. Butcher III, 24, said he had been dealing in quarter horses since 1976. He has testified he does not know where the money came from to set up Red Gate.

Butcher III also has refused to answer questions about the flow of money through another series of companies, originating with the Palmary Trust, of which he is the beneficiary. The flow includes funds from a bingo operation in Arizona, and goes through a variety of corporations.



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION, AT KNOXVILLE, TENNESSEE

UNITED STATES OF AMERICA,	:	
	:	
PLAINTIFF,	:	
	:	
VS.	:	CR. 3-84-63,64
	:	
JACOB F. BUTCHER,	:	JUDGMENT.
	:	
DEFENDANT.	:	**(EXCERPT - PAGES 43-56 ONLY)
	:	

TRANSCRIPT OF PROCEEDINGS BEFORE THE HON. WILLIAM K. THOMAS, SENIOR DISTRICT JUDGE, ON MONDAY, JUNE 3RD, 1985.

APPEARANCES:

ON BEHALF OF THE PLAINTIFF:

JOHN W. GILL, JR., ESQ.
U.S. ATTORNEY
ROBERT E. SIMPSON, ESQ.
JIMMY BAXTER, ESQ.
P.O. BOX 872
KNOXVILLE, TN 37901

ON BEHALF OF THE DEFENDANT BUTCHER:

JAMES F. SANDERS, ESQ.
WILLIAM T. RAMSEY, ESQ.
NEAL & HARWELL
800 THIRD NATIONAL BANK BUILDING
NASHVILLE, TN 37219

REPRESENTATIVES ADOPTED A RESOLUTION ON MAY 6, 1982, ACCLAIMING YOUR SUCCESS AS CHAIRMAN OF THE 1982 WORLD'S FAIR.

THESE PUBLIC CREDITS YOU HAVE RECEIVED WERE UNDOUBTEDLY WELL-DESERVED. BUT I CONCLUDE THAT THESE CREDITS MAY NOT BE EXCHANGED TO DISCHARGE OR TO REDUCE YOUR PERIOD OF INCARCERATION FOR WILLFULLY MISAPPLYING AND CAUSING TO BE MISAPPLIED MONIES WELL IN EXCESS OF $7,000,000 OF UNITED AMERICAN BANK IN KNOXVILLE AND THE UNITED BANK OF CHATTANOOGA, RE-NAMED THE UNITED AMERICAN BANK IN HAMILTON COUNTY.

MR. BUTCHER, YOUR COUNSEL CALLS ATTENTION TO THE PAROLE GUIDELINES OF THE UNITED STATES PAROLE COMMISSION. FOR PURPOSES OF PAROLE, THE PROBATION DEPARTMENT STATES THAT YOU WOULD HAVE THE HIGHEST SALIENT FACTOR SCORE, THAT IS, TEN. THIS IS A QUANTIFYING OF OFFENDER CHARACTERISTICS.

SUB-CHAPTER D-- THEFT AND RELATED OFFENSES-- PLACES YOUR OFFENSE BEHAVIOR IN CATEGORY 6, WHERE THE VALUE OF THE PROPERTY STOLEN IS MORE THAN $500,000. PARENTHETICALLY, IT IS EVIDENT THAT THE GUIDELINES NEVER CONCEIVED OF MULTI-MILLION-DOLLAR THEFTS SUCH AS ARE PRESENT IN THIS CASE.

APPLYING YOUR SALIENT FACTOR SCORE OF TEN AND YOUR OFFENSE BEHAVIOR OF CATEGORY 6, THE GUIDELINES

INDICATE 40 TO 52 MONTHS AS THE "CUSTOMARY TOTAL TIME TO BE SERVED BEFORE RELEASE."

BEARING THESE PAROLE GUIDELINES IN MIND, YOUR COUNSEL STATES: "IT SHOULD ALSO BE RECOGNIZED THAT THESE GUIDELINES ARE APPLICABLE EVEN WHERE THE SENTENCE IS IMPOSED UNDER 18 U.S.C. SECTION 4205(a), THAT IS, AFTER A THIRD OF THE SENTENCE IS SERVED; AND THE GUIDELINES COULD HAVE THE EFFECT OF GREATLY ENLARGING THE PERIOD OF INCARCERATION, EVEN BEYOND THE ONE-THIRD PRESCRIBED UNDER 18 U.S.C. SECTION 4205(a)."

THE COURT MADE IT CLEAR BEFORE YOU PLED GUILTY THAT A PERIOD OF INCARCERATION WOULD BE IMPOSED SUBJECT TO SECTION 4205(a)'S ONE-THIRD OF SENTENCE PAROLE ELIGIBILITY REQUIREMENT. THEREFORE, IT WAS CLEAR THAT A SENTENCE UNDER THE TERMS OF THE PLEA AGREEMENT MAY RESULT IN A MINIMUM SENTENCE THAT WOULD EXCEED THE PAROLE COMMISSION'S GUIDELINES' PROJECTION OF 40 TO 52 MONTHS.

OF COURSE, EVEN THE PAROLE COMMISSION'S GUIDELINES' STATEMENT OF GENERAL POLICY SPECIFIES: "THESE TIME RANGES ARE MERELY GUIDELINES. WHERE THE CIRCUMSTANCES WARRANT, DECISIONS OUTSIDE OF THE GUIDELINES (EITHER ABOVE OR BELOW) MAY BE RENDERED."

IN ANY EVENT, IT IS CONCLUDED THAT CIRCUMSTANCES HERE WARRANT A SENTENCE IN WHICH THE PERIOD OF INCARCERATION WILL EXCEED 40 TO 52 MONTHS.

YOUR COUNSEL, MR. BUTCHER, ALSO HAS CALLED TO THE COURT'S ATTENTION BANK EMBEZZLEMENT CONVICTION STATISTICS FOR THE YEARS ENDING JUNE 30, 1982 AND JUNE 30, 1983. THIS DATA IS COMPILED BY THE STATISTICAL ANALYSIS AND REPORTS DIVISION OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS. FOR THE YEAR ENDING JUNE 30, 1982, 66 PERCENT OF 886 PERSONS CONVICTED RECEIVED PROBATION; 17 PERCENT RECEIVED SPLIT SENTENCES; AND 16 PERCENT WERE INCARCERATED. FOR THE YEAR ENDING JUNE 30, 1983, 68 PERCENT OF 884 PERSONS RECEIVED PROBATION; 18 PERCENT RECEIVED SPLIT SENTENCES; AND 15 PERCENT RECEIVED INCARCERATION.

THE A.O. REPORT DOES NOT INDICATE THE BANK EMBEZZLER'S BANK POSITION. BUT IT IS THIS COURT'S EXPERIENCE AND KNOWLEDGE THAT THE HIGH PERCENTAGE OF BANK EMBEZZLERS GIVEN PROBATION ARE BANK TELLERS AND THE AMOUNTS EMBEZZLED DO NOT COMPARE WITH THE AMOUNTS EMBEZZLED IN THIS CASE. PRECIOUS FEW BANK PRESIDENTS OR HIGH BANK EXECUTIVES ARE LIKELY TO BE AMONG THOSE CONVICTED OF BANK EMBEZZLEMENT. THE COURT, THEREFORE, RESPECTFULLY DECLINES AGAIN TO GRANT PROBATION.

THE DATA FURTHER INDICATES THAT OF THE 142 WHO WERE INCARCERATED IN THE YEAR ENDING JUNE 30, 1982, THE LENGTH OF CONFINEMENT RANGED FROM TWO MONTHS TO 192 MONTHS. ONE RECEIVED 192 MONTHS; ONE RECEIVED 180 MONTHS; AND ONE RECEIVED 120 MONTHS.

FOR THE YEAR ENDING JUNE 30, 1983, THE LENGTH OF CONFINEMENT OF THE 130 INCARCERATED RANGED FROM ONE MONTH TO 180 MONTHS. ONE RECEIVED 180 MONTHS AND THREE RECEIVED 120 MONTHS. WITHOUT KNOWING THE FACTS OF EACH OF THESE CASES, NO COMPARISON CAN BE MADE BETWEEN THOSE CASES AND THE PRESENT CASE. BUT THESE FIGURES DO SHOW THAT EXTENSIVE SENTENCES HAVE BEEN IMPOSED IN SOME BANK EMBEZZLEMENT CASES.

YOUR COUNSEL DECLARES: "WHILE A MULTI-MILLION-DOLLAR FRAUD IS INDEED RARE, THE NATURE AND DEGREE OF PUNISHMENT ALREADY INFLICTED ON THIS DEFENDANT AND HIS FAMILY IS EQUALLY RARE."

BECAUSE A MULTI-MILLION-DOLLAR FRAUD PERPETRATED BY A BANK PRESIDENT ON HIS OWN BANK IS INDEED RARE, STATISTICS OF OTHER SENTENCES IN OTHER PROSECUTIONS FOR BANK EMBEZZLEMENT CASES WILL BE LAID ASIDE. AS FOR THE PUNISHMENT THAT YOUR COUNSEL SAYS HAS ALREADY BEEN INFLICTED ON YOU, THIS SELF-INFLICTED PUNISHMENT CAN HARDLY CANCEL OUT PUNISHMENT TO BE INFLICTED UNDER LAWS THAT WERE WELL-KNOWN TO YOU AS A BANK PRESIDENT AND CITIZEN.

THE FACT THAT YOU USED MULTIPLE FRAUDS TO ILLEGALLY OBTAIN MILLIONS FROM YOUR OWN BANKS WARRANTS A SENTENCE COMPARABLE TO ONE THAT WOULD BE IMPOSED ON A PERSON WHO USES VIOLENCE OR THE THREAT OF VIOLENCE TO OBTAIN A FAR SMALLER AMOUNT OF MONEY FROM ONE OF YOUR OWN

BANKS.

YOUR COUNSEL DESCRIBES YOU AS "A WARM AND CARING HUMAN BEING WHO HAS DONE WRONG, BUT WHOSE GOODNESS LIVES ON AND WILL LIVE ON." MR. BUTCHER, UNDOUBTEDLY YOUR COUNSEL'S DESCRIPTION IS TRUE. THAT MAKES IT ALL THE MORE DIFFICULT FOR ONE TO COMPREHEND YOUR EGREGIOUS CRIMINAL CONDUCT.

YOUR COUNSEL, IN HIS SENTENCING MEMORANDUM, SUGGESTS THAT THE EVENTS AND TRANSACTIONS DESCRIBED IN THE INDICTMENTS ARE "AN INTERLUDE OF INSANITY THAT EVEN [YOU] CANNOT EXPLAIN OR FULLY COMPREHEND." IT IS ENOUGH TO SAY THAT NO DEFENSE OF INSANITY WAS OFFERED AND NO PSYCHIATRIC SUPPORT TO SUCH A DEFENSE WAS PROFFERED.

I WON'T TOUCH ON THE LETTERS THAT WERE RECEIVED BY ME THAT ARE ADVERSE TO YOU, MR. BUTCHER. I THINK THERE WERE SOME 15 THAT I RECEIVED. BUT I WILL CERTAINLY NOTE FOR THE RECORD THAT 55 LETTERS HAVE BEEN RECEIVED BY THE PROBATION DEPARTMENT, AND I HAVE RECEIVED ONE OTHER, TELLING ME THAT THE JAKE BUTCHER THEY KNOW IS A GOOD PERSON, HELPFUL TO OTHERS AND A GOOD FAMILY MAN.

NONE OF THESE LETTERS ARE AS MOVING AS THE THREE LETTERS FROM YOUR DAUGHTERS AND YOUR WIFE, SONYA. READING SONYA'S SINCERE AND SUPPORTIVE LETTER, I THOUGHT OF DOSTOEVSKY'S "CRIME AND PUNISHMENT" AND THE SUPPORT SONYA GAVE TO HER LOVER, RASKOLNIKOV, AS ETCHED OUT IN

THE BOOK'S LAST SCENE.

I HAVE NOT SENTENCED OTHER MEN WITHOUT LEARNING FIRSTHAND THAT A FAMILY SUFFERS INCALCULABLE HURT AND HARM WHEN I SENTENCE THE MALE HEAD OF THE FAMILY TO PRISON FOR A LONG TERM. YET, I ALSO HAVE LEARNED THAT IN FIXING THE LENGTH OF A SENTENCE, ALL THE MORE SO FOR A CRIME OF GREAT PUBLIC CONSEQUENCE, WHAT A FAMILY SUFFERS, WHILE TO BE CONSIDERED, MAY NOT BE A CONTROLLING FACTOR.

MUCH OF THE FOREGOING ANALYSIS, AND OF THE DEFENDANT BUTCHER'S STATEMENT AND MEMORANDUM, WAS MADE BEFORE I CAME TO KNOXVILLE LAST THURSDAY AFTERNOON. SINCE READING THE GOVERNMENT'S MEMORANDUM AND CLARIFYING THE FDIC PURCHASE AND ASSUMPTION AGREEMENT, HERE IN KNOXVILLE, AS WELL AS READING ADDITIONAL LETTERS, I HAVE MADE SOME REVISIONS IN MY ANALYSIS.

OVER THE WEEKEND, I HAVE FINALLY MADE THE DETERMINATION OF THE LENGTH OF THE SENTENCE I WILL IMPOSE. THESE FURTHER STATEMENTS, PREPARED THIS WEEKEND, REPRESENT THE THINKING THAT HAS LED ME TO THAT DETERMINATION.

WEIGHING THE RECORD, MR. BUTCHER'S WRITTEN STATEMENT, THE TWO SENTENCING MEMORANDA, AND INDEED WHAT I HAVE HEARD THIS MORNING, I AM STILL PERSUADED BY TWO OVERRIDING REASONS.

FIRST, THE HIGHEST SEVERITY OF YOUR BANK

EMBEZZLEMENT IN STEALING MONIES FROM YOUR OWN BANKS REQUIRES A 20-YEAR SENTENCE TO DETER OTHER GUARDIANS OF BANK FUNDS FROM COMMITTING SIMILAR EMBEZZLEMENTS OF THEIR OWN BANK FUNDS. ANY SENTENCE OTHER THAN THE MAXIMUM PERMISSIBLE UNDER THE PLEA AGREEMENT, AND, IN MY VIEW, COMBINED INCARCERATION AND COMMUNITY SERVICE PROBATION, WOULD DIMINISH THE DETERRENT FORCE AND CLARION MESSAGE YOUR SENTENCE MUST PROVIDE.

SECOND, DURING MY PLEASANT BUT DEADLY SERIOUS SOJOURN IN EAST TENNESSEE, PARTICULARLY THROUGH THE IN-DEPTH QUESTIONING OF 142 POTENTIAL JURORS, I LEARNED THAT PUBLIC CONFIDENCE IN YOUR BANKING SYSTEM AND IN YOUR FINANCIAL INSTITUTIONS IN THIS AREA HAS BEEN BADLY SHAKEN BY THE REVELATIONS, MR. BUTCHER, OF YOUR MULTI-MILLION-DOLLAR FRAUDS ON YOUR OWN BANKS.

BELIEF THAT JUSTICE HAS BEEN DONE IN THIS CASE IS ESSENTIAL TO RESTORING PUBLIC CONFIDENCE, IN EAST TENNESSEE, IN ITS BANKING SYSTEM AND IN ITS FINANCIAL INSTITUTIONS. IN MY JUDGMENT, THAT RESTORATION OF PUBLIC CONFIDENCE MAY ONLY BE OBTAINED BY IMPOSING THE MAXIMUM PERIOD OF INCARCERATION PERMISSIBLE UNDER YOUR PLEA AGREEMENT WITH THE GOVERNMENT.

UNDER YOUR PLEA AGREEMENT, YOURGUILTY PLEAS IN THE TWO KNOXVILLE INDICTMENTS ARE INTERLOCKED WITH YOUR GUILTY PLEAS IN THE WESTERN DISTRICT OF TENNESSEE AND IN THE EASTERN DISTRICT OF KENTUCKY. THE SENTENCE IMPOSED

ON YOUR KNOXVILLE PLEAS OF GUILTY AFFECTS THE SENTENCES WHICH MAY BE IMPOSED IN THE OTHER DISTRICTS.

HENCE, THE MAXIMUM SENTENCE I IMPOSE TODAY MAY ALSO HELP TO RESTORE PUBLIC CONFIDENCE IN THE BANKING SYSTEM AND IN FINANCIAL INSTITUTIONS IN THE WESTERN DISTRICT OF TENNESSEE AND IN THE EASTERN DISTRICT OF KENTUCKY.

DESPITE THE DETERMINATION OF LENGTH OF SENTENCE I MADE OVER THE WEEKEND, I HAVE KEPT MY MIND RECEPTIVE THIS MORNING FOR ANY NEW FACT, ANY NEW ARGUMENT OR ANY NEW CONSIDERATION THAT MIGHT ALTER MY DECISION TO IMPOSE THE MAXIMUM SENTENCE. I HAVE NOW CONCLUDED THAT-- INCLUDING THE ARGUMENTS THAT I HEARD THIS MORNING AND YOUR OWN VERY DIRECT STATEMENT, THAT THERE IS NOTHING THAT LAYS ASIDE OR UNDERMINES THOSE OVERRIDING CONSIDERATIONS THAT HAVE IMPELLED MY DECISION TO IMPOSE A 20-YEAR SENTENCE.

I DO WANT TO JUST SAY ONE THING, THOUGH, IN RESPONSE TO SOMETHING THAT MR. SANDERS HAD SAID ABOUT THE POSSIBILITY THAT THE PAROLE COMMISSION MIGHT SOMEHOW KEEP YOU IN PRISON FOR 10 TO 15 YEARS. MR. SANDERS, GOOD LAWYER THAT HE IS, WILL FILE A MOTION TO REDUCE SENTENCE. I'VE FOLLOWED THE PRACTICE OVER THE YEARS OF NOT RULING ON THOSE MOTIONS TO REDUCE SENTENCE, BUT HOLDING, SO THAT I RETAIN SOME JURISDICTION.

EVEN THOUGH, AND I LOOKED FOR A MOMENT AGO AT THE FACT THAT NEXT YEAR THAT OLD SECTION IS SUPER-

SEDED BY A NEW SECTION, I THINK THAT UNDER THESE-- THAT'S THE PRESENT SECTION-- SINCE I AM SENTENCING YOU UNDER THAT PRESENT SECTION, I STILL HAVE THE RIGHT TO RETAIN THAT JURISDICTION UNDER THAT MOTION TO REDUCE SENTENCE.

INDEED, GOD WILLING, IF I AM STILL ALIVE, IF THE PAROLE COMMISSION SHOULD SOMEHOW PILE ON THE YEARS BEYOND THAT PERIOD OF ELIGIBILITY AND WHATEVER THEY DEEM TO BE AN APPROPRIATE PERIOD-- I CERTAINLY DON'T ATTEMPT TO SECOND-GUESS THEM, BUT AT THE SAME TIME, I RESERVE THE RIGHT TO MODIFY THE SENTENCE SO THAT YOUR SENTENCE WOULD NEVER REACH THE LENGTH THAT MR. SANDERS HAS SUGGESTED HERE.

THEREFORE, AT THIS TIME, I AM PREPARED TO PROCEED WITH THE IMPOSITION OF THE SENTENCE, UNLESS INDEED, BEFORE I DO THAT THERE IS ANYTHING THAT ANYONE WANTS TO TO PUT ON THE RECORD ON THE PART OF EITHER THE DEFENDANT OR ON THE PART OF THE GOVERNMENT.

MR. SANDERS: NOTHING FROM THE DEFENDANT, YOUR HONOR.

MR. SIMPSON: NOTHING FROM THE GOVERNMENT, YOUR HONOR.

THE COURT: MR. SANDERS, AND IF YOU, MR. BUTCHER, WILL PLEASE STEP FORWARD. MR. BUTCHER, ON EACH OF COUNTS 1, 7, 22 AND 31 OF CR. 3-84-63, YOU ARE SEPARATELY SENTENCED TO 5 YEARS IN THE CUSTODY OF THE ATTORNEY GENERAL OR HIS AUTHORIZED REPRESENTATIVE. THE

FIVE-YEAR SENTENCE IMPOSED ON EACH OF THOSE FOUR COUNTS SHALL RUN CONSECUTIVELY WITH EACH OTHER FIVE-YEAR SENTENCE, FOR A TOTAL SENTENCE OF 20 YEARS IN CR. 3-84-63.

IN ADDITION, ON EACH OF COUNTS 1, 4, 7 AND 10 OF CR. 3-84-64, YOU ARE SEPARATELY SENTENCED TO FIVE YEARS IN THE CUSTODY OF THE ATTORNEY GENERAL OF THE UNITED STATES OR HIS AUTHORIZED REPRESENTATIVE. THE FIVE-YEAR SENTENCE ON EACH OF THOSE FOUR COUNTS IS TO RUN CONSECUTIVELY AS TO EACH OTHER FIVE-YEAR SENTENCE, FOR A TOTAL SENTENCE OF 20 YEARS IN THE SECOND INDICTMENT, CR. 3-84-64; BUT EACH OF THESE FIVE-YEAR SENTENCES SHALL RUN CONCURRENTLY WITH THE SENTENCES I IMPOSE ON THE FOUR COUNTS IN CR. 3-84-63.

ALL OF THE FOREGOING SENTENCES ARE MADE SUBJECT TO THE PAROLE REQUIREMENT OF 18 U.S.C. SECTION 4205(a). JUST SO THERE'S NO QUESTION ABOUT THAT, LET ME READ THAT SECTION TO YOU AGAIN.

IN PERTINENT PART, IT PROVIDES: "WHENEVER CONFINED AND SERVING A DEFINITE TERM OR TERMS OF MORE THAN ONE YEAR, A PRISONER SHALL BE ELIGIBLE FOR RELEASE ON PAROLE AFTER SERVING ONE-THIRD OF SUCH TERM OR TERMS."

AS FOR THE INSTITUTION IN WHICH YOU WILL SERVE THE SENTENCE, THIS IS DETERMINED BY THE BUREAU OF PRISONS. I MAKE NO RECOMMENDATION.

THERE NEEDS TO BE FIXED A DATE FOR SELF-SURRENDER THAT WAS PART OF THE PLEA AGREEMENT, AND I AM

PREPARED TO FIX A MINIMUM PERIOD OF TIME BEFORE SELF-SURRENDER OCCURS. I AM QUITE WILLING TO HEAR FROM COUNSEL FOR THE DEFENDANT AND PERHAPS YOU'RE PREPARED TO MAKE THAT STATEMENT.

IF YOU WANT TO TALK IT OVER WITH MR. BUTCHER, YOU MAY DO SO, SIR, SITTING DOWN IF YOU'D LIKE.

MR. SANDERS: YOUR HONOR, I'M PREPARED TO MAKE A STATEMENT.

THE COURT: ALL RIGHT.

MR. SANDERS: INDEED, I HAVE DISCUSSED THE MATTER SOME TIME AGO WITH THE UNITED STATES ATTORNEY'S OFFICE. AS THE COURT WELL KNOWS, MR. BUTCHER MUST FACE THREE OTHER SENTENCINGS. TWO OF THOSE HAVE NOT BEEN SCHEDULED YET.

THERE IS A SENTENCING SCHEDULED FOR JUNE 24TH IN THE EASTERN DISTRICT OF KENTUCKY. THERE IS A CHANGE OF PLEA SET IN THE TAX CASE OF THIS DISTRICT FOR JUNE THE 20TH. I WOULD ASSUME THAT SENTENCING WILL PROCEED FAIRLY QUICKLY THEREAFTER IN BOTH THAT CASE AND IN THE MEMPHIS CASE.

BECAUSE OF THAT, BECAUSE OF THE NEED TO TRY TO WIND UP WHAT MATTERS HE CAN WIND UP AND IN ORDER TO ASSIST HIS FAMILY IN GETTING READY FOR THIS NEXT AWFUL PERIOD, I ASK THE COURT TO GIVE HIM AT LEAST 60 DAYS IN ORDER TO WIND UP HIS AFFAIRS. I BELIEVE THAT THE GOVERNMENT HAS NO OBJECTION TO THAT PERIOD OR WITHIN FIVE OR SIX DAYS

OF THAT, PURSUANT TO OUR INITIAL DISCUSSIONS.

IF THE COURT COULD SEE FIT TO GIVE HIM SOME MORE TIME, OBVIOUSLY, THAT WOULD HELP A GREAT DEAL. HE IS GOING TO BE SUBJECT TO A NUMBER OF SUBPOENAS, BOTH FOR TRIAL TESTIMONY AND DEPOSITION TESTIMONY. HE'S GOT AN AWFUL LOT THAT HE MUST DO BEFORE HE GOES TO PRISON. IT MIGHT BE A TREMENDOUS SERVICE TO SOME OF THE LITIGANTS AND SOME OF THE COUNSEL IN THESE CASES TO GIVE HIM SUFFICIENT TIME SO THAT THESE THINGS CAN BE DONE BEFORE HE HAS TO GO AWAY. IT WOULD BE VERY EXPEDITIOUS, IT WOULD BE MONEY-SAVING FOR THE GOVERNMENT, IT WOULD BE MONEY-SAVING FOR THE LITIGANTS.

THE COURT: I HAVE NO WAY OF KNOWING WHAT SPAN OF TIME YOU'RE TALKING ABOUT. OF COURSE,THE ACTUAL DATE DOES NOT DIRECTLY CONCERN ME. MR. BUTCHER WILL NOT HAVE TO RE-APPEAR BEFORE ME. JUST THAT BY A CERTAIN DATE HE MUST REPORT TO--

MR.SANDERS: YES, SIR, YOUR HONOR.

THE COURT: -- THE INSTITUTION OR INDEED TO THE MARSHAL'S OFFICE. DOES THE MARSHAL HAVE ANY COMMENT, MR. MONTGOMERY?

MARSHAL: NO, SIR. WE'LL BE READY WHENEVER.

THE COURT: WHICHEVER OPTION IS TAKEN.

MR. SANDERS: YOUR HONOR, I'D LIKE TO SUGGEST AT LEAST THE 60 DAYS, AND THAT'S, I THINK, WITHIN

MY AGREEMENT WITH THE GOVERNMENT. BUT I WOULD LIKE TO ASK FOR A PERIOD OF AT LEAST 90 DAYS OR FOR 90 DAYS, BECAUSE THAT WOULD HAVE EVERYBODY ON NOTICE, GIVE THEM ENOUGH TIME TO SCHEDULE THINGS SO THAT--

THE COURT: ALL RIGHT. WE'LL FIX THE DATE THE FIRST DAY AFTER LABOR DAY, WHATEVER DATE THAT IS, FOR THE TIME THAT HE MUST SURRENDER HIMSELF. THAT CERTAINLY OUGHT TO GIVE TIME FOR ALL THESE DEPOSITIONS, I ASSUME, THAT ARE NOW GOING TO BE TAKEN THAT YOU'RE TALKING ABOUT.

MR. SANDERS: YES, YOUR HONOR.

THE COURT: AS WELL AS OTHER THINGS. AND I QUITE AGREE THAT IT'S SENSELESS TO HAVE HIM BROUGHT BACK FROM AN INSTITUTION EACH TIME.

IN TERMS OF THE BOND, THERE IS, OF COURSE, A BOND ON MR. BUTCHER, AND THAT SHOULD BE CONTINUED WITHOUT MODIFICATION DURING THIS PERIOD.

MR. SANDERS: THAT'S CORRECT.

THE COURT: THAT'S UNDERSTOOD, ISN'T IT?

MR. SANDERS: YES. IT'S UNDERSTOOD.

THE COURT: BUT IF I HAVE TO IN EFFECT RE-ORDER THAT NOW, AND I DO, THAT IT BE CONTINUED UNTIL INDEED HE HAS SURRENDERED HIMSELF.

DOES THE GOVERNMENT HAVE ANY COMMENT TO MAKE ABOUT THIS POINT?

MR. GILL: NO, YOUR HONOR.

THE COURT: MR. SAULPAW?

CLERK: YES, YOUR HONOR?

THE COURT: HERE IS MY STATEMENT THIS MORNING, AND I DIRECT YOU, PLEASE, TO HAVE IT FILED. THEN IF ANYONE WANTS A COPY OF IT, MAKE DUPLICATE COPIES SO THEY'RE AVAILABLE FOR THOSE WHO WOULD LIKE TO HAVE COPIES.

CLERK: ALL RIGHT, SIR.

THE COURT: I'VE ADDED ON IN MY OWN HANDWRITING SOME POINTS THIS MORNING, BUT JUST DO IT AS IT IS, WITH ALL ITS WARTS.

CLERK: YES, YOUR HONOR.

THE COURT: OKAY. YOU MAY BE SEATED, OR PERHAPS WE'LL ALL BE STANDING IN A MOMENT. IS THERE ANYTHING ELSE TO PUT ON THE RECORD BEFORE WE ADJOURN COURT?

MR. SIMPSON: NO, YOUR HONOR.

MR. SANDERS: NO, YOUR HONOR.

THE COURT: AT THIS TIME, MS. MCREYNOLDS-- WOULD YOU-- OR, MS. TWOHIG, WHOEVER IS GOING TO DO IT, OR MR. MONTGOMERY. PLEASE STAND EVERYONE AND WE'LL ADJOURN COURT. HOLD, PLEASE, HOLD, PLEASE, TILL THE COURT IS ADJOURNED, IF YOU DON'T MIND, JUST A MINUTE.

(HEARING CONCLUDED AT 10:47 A.M.)

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

Donnetta Foudra 6/14/85

6-5-85

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT
MICHIGAN-OHIO-KENTUCKY-TENNESSEE

PIERCE LIVELY
CHIEF JUDGE
FEDERAL BUILDING
DANVILLE, KENTUCKY

REPLY TO:
POST OFFICE BOX 1226
DANVILLE, KENTUCKY 40422

June 3, 1985

Office file

James F. Sanders, Esquire
Neal & Harwell
8th Floor, Third National Bank Building
Nashville, Tennessee 37219-2084

re United States v. Jacob F. Butcher

Dear Mr. Sanders:

This is in reply to your letter of May 27 which arrived while I was attending the Conference of another circuit. No judge assigned to any of the Butcher cases has raised the question of joint sentencing or requested that I enter an order such as the one you suggested in your letter. Though it may be within my authority to enter such an order, I respect the wide discretion which district judges have in such matters and do not intend to interfere with that discretion.

Yours very truly,

Pierce Lively
Chief Judge

cc: Judges Thomas, Unthank and Bertelsman

Comment

Judge Lively may have authority to permit a judge to hear a matter pursuant to a joint conference. But it is questionable whether he has authority to permit a judge to act on a case outside the appointment order of the judge where the case is transferred to the other jurs pursuant to statute.

1-18-85

NEAL & HARWELL

8TH FLOOR, THIRD NATIONAL BANK BUILDING

NASHVILLE, TENNESSEE 37219-2084

(615) 244-1713

January 15, 1985

Honorable William K. Thomas
201 Superior Avenue
338 United States Courthouse
Cleveland, OH 44114

Honorable Odell Horton
969 Madison Avenue
Memphis, TN 38104

Honorable G. Wix Unthank
Post Office Box 278
Pikeville, KY 41501

Re: United States v. Butcher, et al.
Nos. 3-84-63 and 3-83-64
United States v. Butcher, et al.
No. 84-20252H
United States v. Butcher, et al.
No. 84-28

Dear Judges:

We are in receipt of the Orders scheduling a joint hearing (and setting an agenda therefor) in all of the cases pending against our client, Jake Butcher, and we are writing to request that another item be placed on that agenda.

As you will recall, we filed motions in both the London and Memphis cases seeking a transfer of those cases to Knoxville for the purpose of consolidating them for trial with Criminal No. 3-83-64 in the Eastern District of Tennessee. Contemporaneous with the second of these motions, we sent a letter to the clerks in London and Memphis in which we suggested that a joint hearing on the transfer motions might be appropriate. In the meantime,

we received the Orders noticing the February 1st hearing.

Given the pendency of the transfer motions and the issues addressed therein, as well as sufficient time for all concerned to prepare, it would appear that the February 1st hearing presents an excellent opportunity for discussion and argument on the transfer motions and consolidation. Accordingly, we respectfully request that these motions be placed on the agenda for the February 1st hearing.

Respectfully submitted:

James F. Neal

James F. Sanders

cc: Mr. John Gill
Mr. Dan Clancy
Ms. Barbara Edelman

Order entered 1-17-85 Assigning motion for hearing on Feb 1, 1985 at Status Conf. at Knoxville —

Copy of 1-17-85 order to be forwarded to other Judges —

Knoxville notes II

Butcher & Baer

II – Transfer granted + consolidation order be ready by 6 May

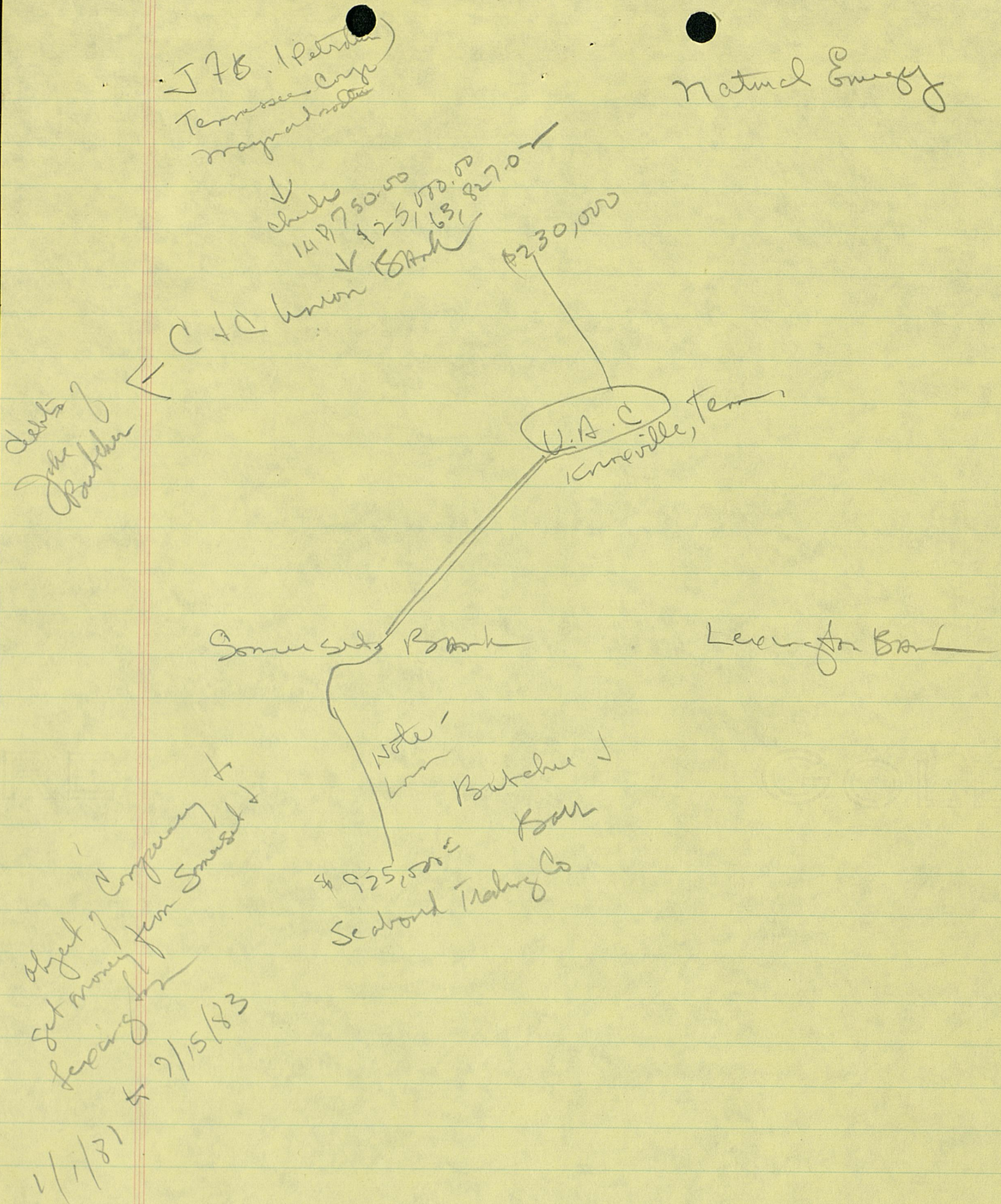
20 Feb – Can't be ready in London

First in time.

Cert of ... Tenn. ...

Search document
relied upon by all cases
must be passed upon only once

(2) Memphis least complicated
(3) Kentucky next complicated
(1) Knoxville I least time
(4) II most complicated.


J 78. (Petroleum)
Tennessee Corp
Natural Energy
$230,000
U.A.C
Somerset Bank
Lexington Bank
Note
Butcher
Bank
Seaboard Trading Co
1/1/81
7/15/83

1 July 82

Maynardsville

UAB [illegible] Knoxville

Somerset | Lexington

2,550,000.00 - (1,300,000.00)

??, Cumberland Fed & Money

Note — Franklin forged name of Ch.

False NB

Somerset

$750,000 ac

|

Southern Resources

Court

925,000

+

Seaboard

- Jesse Ross

John Jesse

Court (B)

925

Knoxville

Natural Energy

TRI-State Mining Letters & Newsletter

V. A.B. Knoxville

two indictments file at Knoxville.

13 Nov 84

1983 - investigation began Valentine day

Simultaneous indictments for same transactions - in all 3 districts.

5th and Substantive procedure Due process

Franklin

Const - actual 3 - see
Court

Const. - - apparently not placing much [illegible] on this

Rule 21 (b)

Choice of venue cannot be abusive

Platt factors -

Change of residence since indictment (he said before indictment and perhaps before communications between U.S. Atty and Δs)

1. Platt Conditions
2. Venue [illegible]
3. balancing of inconvenience

Memphis

- 10 days trial (including selection of jury)

Inconvenience to [illegible] as to substantially prejudice the right of Δs to a fair trial.

Δs

CONSP.

Fait accompli.

When does a conspiracy become a completed act

State Courts, merger / conspiracy & completed offense

1-7-85

United States District Court
Northern District of Ohio
Cleveland, Ohio 44114

William K. Thomas
Senior Judge

January 2, 1985

The Honorable Odell Horton
957 Federal Building
Memphis, Tennessee 38103

The Honorable G. Wix Unthank
P.O. Box 278
Pikeville, Kentucky 41501

Dear Judges:

Chief Judge Lively has approved our proposed joint status hearing. After consultation with Dewey Heising, Chief, Financial Management Division, Administrative Office of the Courts, Administrator James Higgins indicates that your travel voucher to and from Knoxville, Tennessee will be approved by Mr. Heising's office. Mr. Heising requests that a statement to the following effect be attached to your travel voucher: The purpose of this trip is to participate in a joint status conference in United States of American v. Jacob F. Butcher, aka Jake F. Butcher; Jesse A. Barr; and Jack H. Patrick, No. CR 3-84-63, E.D.Tenn.; United States of American v. Jacob F. Butcher, aka Jake F. Butcher; and Jesse A. Barr, No. CR3-84-64, E.D.Tenn.; United States of American v. Jacob F. Butcher and Jesse A. Barr, No. CR84-20252H, W.D.Tenn.; United States of American v. Jacob F. Butcher and Jesse A. Barr, Indictment No. 84-28-1, E.D.Ky. Sixth Circuit Chief Judge Pierce Lively has approved this travel.

Enclosed is a copy of the February 1, 1985 joint status hearing notice which I am directing Clerk of Court Karl D. Saulpaw, Jr. to issue on Wednesday, January 9, 1985. Likewise, I am asking him to notify respective counsel by telephone of the issuance of the notice.

Also enclosed is a copy of the agenda of the Knoxville hearing of Monday, December 17, 1985.

Sincerely,

William K. Thomas

William K. Thomas

WKT/vr

Enclosures

cc: The Honorable Pierce Lively w/o enc.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

INDICTMENT NO. 84-28-1

UNITED STATES OF AMERICA PLAINTIFF

VS: MEMO TO JUDGE UNTHANK

JACOB F. BUTCHER DEFENDANT
JESSE A. BARR

The indictment charges the defendants with violations of 18 USC, sections 371, 2, 656, and 1005.

Section 371 provides for penalties if two or more persons conspire to commit an offense against, or to defraud the United States, or any agency thereof.

Section 2 provides that whoever aids, counsels commands, induces or procures the commission of an offense against the United States, is punishable as a principal.

Section 656 provides for punishment for any officer, agent, director, or employee of any national bank or insured bank, who willfully misapplies any of the moneys, funds or credits of such bank or any of the moneys, funds or credits intrusted to the custody or care of such bank,

Section 1005 provides, among other things, that whoever makes any false entry in any book, report, or statement of a national or insured bank with intent to injure or defraud such bank, or to deceive any officer of such bank, or the Comptroller of Currency or the FDIC, or any agent or examiner appointed to examine the affairs of such bank shall be subject to punishment.

This action has pending several pre-trial motions of

defendants assigned for hearing at 9:00 A.M. on February 1, 1985 at Knoxville per attached copy of order of assignment. As follows are the motions with comments:

Response - Objection 1/24/85

1. MOTION FOR CONTINUANCE OF TRIAL DATE FROM FEBRUARY 20, 1985.

Defendant Butcher submits affidavit of his attorney and a signed waiver of rights under the Speedy Trial Act. He points out that the Memphis case is set for trial January 25, 1985 and the Knoville cases on May 6, 1985. If this schedule is retained there would probably be a conflict between Memphis and London cases. Also there is the serious problem of adequate time in between trials for preparation for the succeeding trials. This motion should be granted and trial reassigned with due consideration for trial dates of other cases and through the coordinated efforts of the three presiding judges.

It is noted that the Defendant Barr has not submitted a signed waiver of the Speedy Trial Act.

Response - 1/24/85 Objection

2. MOTION TO TRANSFER THESE PROCEEDINGS TO EASTERN DISTRICT OF TENNESSEE FOR TRIAL WITH THE PROCEEDINGS FROM THE EASTERN AND WESTERN DISTRICTS OF TENNESSEE

This motion is made pursuant to Crim. R. 21(b) which provides:

> "For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceedings as to him or any one or more of the counts thereof to another district."

In a lengthy memorandum in support of this motion, the defendant contends that the successive trials in three separate federal districts, under the facts of the respective charges, would violate his constitutional rights under Article III, Sec. 2,

the Fifth and Sixth Amendments to the U. S. Constitution.

The defendant did NOT specify in what respect the Fifth Amendment would be violated but it would appear that he was referring to the clause which prohibits double jeopardy as he subsequently argues that to be tried three times would constitute double jeopardy on many of the charges particularly referring to various overt acts noted in the indictments.

He, also in his memorandum, erroneously quoted language from the Sixth Amendment as being from Article III, Section 2. The language that he is probably referring to in Article III is probably the last literary paragraph of Section 2, to-wit:

> "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed;.." ~~wherexmaxxcommittedxwithinxanyxStx~~

He quotes as the pertinent provisions of the Sixth Amendment as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district where the crime shall have been committed, which district shall have been previously ascertained by law ,....."

It appears to be defendants' argument that since many of the overt acts charged in this indictment in reference to preparation and execution of documents involved in the various transations concerning the Kentucky banks took place in Knoxville, and the money disbursed by the Kentucky banks passed through the hands of certain legal entities controlled by defendant passed into and through Knoxville Banks, that the offenses as charged in this indictment alledgedly took place in Eastern District of Tennessee. This argument ignores the receipt of the documents in question by the Kentucky banks,

in different districts constitute harassment of the defendant and gives the government an unfair and tactical advantage; and that under Crim. R. 21(b) the court, in its discretion, should apply the Platt factors, Platt V Minnesota Mining & Mfg. Co. 376 U. S. 240 (1964) and direct the transfer of this case to Eastern District of Tennessee. The Platt factors are:

1. Location of defendant.
2. Location of possible witnesses.
3. Location of events likely to be in issue.
4. Location of documents and records likely to be involved.
5. Disruption of defendant's business unless the case is transferred.
6. Expense to the parties.
7. Location of counsel.
8. Relative accessibility of place of trial.
9. Docket condition of each district.
10. Any other special elements which might affect the transfer.

It is defendant's contention that these factors are either neutral or weight heavily in favor of defendant's request for transfer of this action to Eastern District of Tennessee.

In the Platt case, supra, the Court further noted that the criminal defendants do not have "a constitutional right to a trial in their home district" and that "the main office or home of the respondent has no independent significance in determining whether transfer to that district would be 'in the interest of justice,' although it may be considered with reference to such factors as the convenience of records, officers, personnel and counsel."

In regard the defendant's claim that all these indictments involve the same transactions or parts of the same transaction, it is noted that each indictment involves charges of

fraudulent acquiring funds from or misapplication of funds of separate banks located in the respective districts.

Whether or not the motion to transfer should be granted appears to be a matter of discretion on the part of the Court. Whether Judge Thomas is willing to accept such transfer maybe determinative of the granting or denial of the motion.

Response - objection 1/24/85

3. MOTION FOR EXTENSION OF TIME WITHIN WHICH TO FILE ADDITIONAL PRE-TRIAL MOTIONS.

The present deadline was December 10, 1984. This motion should be granted. It is noted that each continuance of the trial will bring on another motion for extension of time within which to file pre-trial motions.

Response NOTICE of INTENTION to use evid.

4. MOTION FOR CRIM. R. 12(d)(2) NOTICE OF GOVERNMENT'S TO USE EVIDENCE SEIZED IN NOVEMBER 18, 1983 SEARCH

It would appear under the provisions of this rule this motion is required to be sustained.

MOTION

No obj. with filing for purposes that also known as Jake Butcher

5. MOT/TO STRIKE "ALIAS a/k/a JAKE F. BUTCHER" FROM THE INDICTMENT

It is discretionary with the Court as to whether this motion should be granted. Whether or not it is granted in all probability reference will be made to the defendant during the trial as Jake F. Butcher rather than Jacob F. Butcher.

6. MOTION FOR A BILL OF PARTICULARS-Crim. R. 7(f)

This motion is very extensive as to the particulars the defendant is asking the government to disclose. After receipt of the government's response in which the government may or may not concede that certain particulars may be proper in part, if not to all the specific requests for particuliars. This motion cannot be

properly considered without such a response. Upon receipt of a response it will probably be necessary to hold a hearing in view of the fact that there are many specific items involved, should the government not make major and numerous concessions, which are not expected. Because this motion is peculiar to this particular indictment and any hearing will probably will be lenghty, it would not be appropriate to hold such hearing jointly with the other two judges presiding over the Tennessee cases.

7. MOTION FOR DISCLOSURE- CRIM. R. 16

This motion is subject to the same comments in item 6, above. Unless the government makes many concessions as to the information it will disclose to the defendant, it will probably require a lengthy and extensive hearing, maybe evidentiary as to some aspects, to resolve the issues of entitlement to the information requested. Again, because this motion is peculiar to this indictment it probably would not be appropriate for joint hearing thereon with the two judges presiding over the Tennessee cases, unless they should elect to do so.

8. MOTION TO DISMISS COUNTS 1, 10, 11, 12 and 13 OF THE INDICTMENT-CRIM. R. 12(b).

This motion will be considered on the basis of each separate count. As of this date (Jan. 29, 1985) the Government has not responded to the defendants' various motions.

COUNT 1

In considering count 1, the defendants contend that the prosecution of this conspiracy count and also the conspiracy count in the Memphis indictment would violate the Double Jeopary Clause of the Fifth amendment as the conspiracy charged in each

indictment is only one and same conspiracy. Upon a claim of double jeopardy, "the burden shifted to the government to show by a preponderance of the evidence, that the conspiracies alleged in the two indictment were in fact separate". U. S. v. Jabara, 644 F2d 574, 576 (6CA 1981).

To digress momemtarily, Abney v U. S., 431 U. S. 651, (1977) held that denial of a motion to dismiss an indictment on double jeopardy plea is immediately appeabable. (Jeopary attaches upon swearing of the jury). In Jabara, supra the Court futher noted:

> "As a ~~cibseqyebcem~~ consequence (of immediate appeal) in order to make an appropriate record to test a double jeopardy claim, there must be a pretrial proceeding with rules about going forward with proof, the burden of persuasion, and the weight of the evidence." id p. 576

The defendants argue that the facts alleged in count 1 in both the Memphis and London indictments would constitute only one agreement and therefore the same conspiracy is charged in both indictments and that either one of them should be dismissed or they should be joined together for trial in order to avoid double jeopary on the part of the defendants. U. S. v. Sinito, 723 F2d 1250 at 1256 (6CA 1983).

After discussing the Blockburger v U.S., 284 U. S. 299, or if same evidence in both cases, then same conspiracy, the Court in U. S. v. Sinito, supra, noted certain weaknesses in the Blockburger Test and applied the totality of circumstances test, further noting that the trial court should consider the elements of:

1. Time
2. Persons acting as co-conspirators
3. Statutory offenses charged in indictment.

4. The overt acts charged by the government or any other description of offenses charged.
5. Places where alleged events took place.

As to whether the conspiracy charged in count 1 of this indictment and the conspiracy charged in count 1 of the Memphis indictment or one and the same conspiracy or two separate conspiracies based on more than one agreement will require an evidentiary hearing and the application of the facts developed at such hearing to the above listed elements as noted in U. S. v. Sinito, supra.

COUNT 10

The defendants contend that counts 10 and 5 are multiplicious in that they charge separate offenses for the same act.

Count 5 charges, in substance, that on July 1, 1982 that Butcher aided and abetted Barr for the purpose of defrauding the Somerset Bank in falsely representing that Cumberland Land & Mining Company, Inc. to be an existing corporation for purpose of securing an unsecured $2,550,000.00 loan thereto.

Count 10 charges, in substance, that on July 1, 1982, that Butcher aided and abetted Barr with intent to injure and defraud the Lexington bank in falsely representing that Cumberland Land & Mining Company, Inc. to be an existing corporation for purpose of the Lexington bank participating with the Sumerset bank to the extent of the amoun of $1,300,000.00 in loan to said corporation with said loan being unsecured.

In support of their contentions, the defendants rely on U. S. v Parr, 741 F2d 878 (6CA 1984) which held that three counts of transporting three adult women across state line for immoral purposes during same trip was multiplicious. They argue that in the

Parr case the transportation was the act with three victims while here, making the loan to Cumberland Land and Mining Co. was the act with two victims (the two banks) and thus that counts 10 and 5 charge separate offenses in violation of the same statute for the same act. Subject to response from the government, there appears to be some merit to the defendants' contentions.

COUNT 12

The defendants contend counts 12 and 6 are also multiplicious in that they charge separate offenses under the same statute for the same act.

Count 6 charges, in substance, that on or about July 1, 1982 that the defendants aided and abetted each other to cause false entry to be made on the records of the Somerset Bank with the intent to injure and defraud such bank by causing a note dated July 1, 1982 in amount of $2,550,000.00, bearing the signature of Cumberland Land & Mining Co., Inc. by Gene Cook, Vice president, to be entered in Bank's records, knowing that such corporation was fictitious and non-existent and that Gene Cook was not in fact such Vice president.

Count 12 charges, in substance, same as Count 6 except that the acts charge were with the intent to injure and defraud the Lexington bank.

as noted in comments under count 10, there also appears to be some merit to defendants' contentions as supported by U. S. v. Parr, supra.

COUNT 11

Count 11 charges, in substance, that on or about July 1, 1982, the defendants aided and abetted each other to cause to be made a false entry in the books and records of the Lexington bank with intent to injure and defraud said bank by causing to be placed in the records a document reflecting participation in a loan by Somerset bank to Cumberland Land & Mining Co., Inc. when the defendants knew that such was a fictitious and non-existing company.

The defendants argue that there was no false entry because the entry of participation by Lexington bank with Somerset bank to extent of $1.300,000.00 in loan to Cumberland Land & Mining Company is true in ever respect. This argument ignores the allegation that the defendants cause the entry knowing that Cumberland Land Mining Company was a fictitious and non-existing corporation and to that extent cause a false entry on the books to the effect that it was a viable corporation. Subject to further authority and showing and based on face of the indictment, motion to dismiss Count 11 should probably be denied.

COUNT 13

Count 13 charges, in substance, that on or about September 2, 1982 that Butcher aided and abetted Barr with intent to injure and defraud the Lexington bank by causing the Somerset bank to pay to the Lexington bank the sum of $19,232.87 as interest on the participation amount of $1,300,000.00 knowing that the fictitious company and borrower had not paid interest of the loan to the Somerset bank.

The defendants argue that this charge does not allege any deprivation of funds by the Lexington bank, that in fact it

received funds.

Examining this count, it appears on its face that most likely it contains a clerical error in that the charge should have stated there was caused to be misapplied the funds of the Somerset bank when it paid the interest to the Lexington bank without having received the interest from the fictitious corporate borrower. If this is correct, unless this count is amended to correct such error, it probably should be dismissed.

This is a rought draft and gives on a bird's eye view of what this case is about.

Jan. 29, 1985 ENV

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

INDICTMENT NO. 84-28-1

UNITED STATES OF AMERICA — PLAINTIFF

VS: ORDER

JACOB F. BUTCHER
JESSE A. BARR — DEFENDANTS

* * * * * *

This action is pending on the following motions by the Defendant, Jacob F. Butcher:

1. Motion for continuance of trial of this cause, now set for February 20, 1985. (item 15).

2. Motion for Transfer of Proceedings to the Eastern District of Tennessee for purpose of joining the proceedings in the Western District of Tennessee and these proceedings with the proceedings now pending in the Eastern District of Tennessee. (item 19).

3. Motion for Extension of Time Within Which to File Additional Pre-trial Motions from present deadline of December 10, 1984. (item 21).

4. Motion pursuant to Crim. R. 12(d)(2) for an order requiring the government to serve, upon the defendant, notice of its intention to use any evidence, or the fruits thereof, that was seized in the November 18, 1983 search. (item 22).

5. Motion to Strike "alias a/k/a Jake F. Butcher" from the indictment. (item 23).

6. Motion for a Bill of Particulars. (item 27).

7. Motion for Disclosure Pursuant to Rule 16. (item 29).

8. Motion to Dismiss Counts 1, 10, 11, 12 and 13 of the indictment pursuant to Crim. R. 12(b). (item 31).

There is also pending motion of Jesse A. Barr to join and adopt the foregoing motions and supporting memorandums. (item 25).

Each and all of the foregoing motions are assigned for hearing at 9:00 A. M. on the 1st day of February, 1985 in the Courtroom of the United States Courthouse for the Eastern District of Tennessee, Knoxville, Tennessee.

Done at Pikeville, Kentucky this 17th day of January, 1985.

G. WIX UNTHANK, JUDGE

17 Dec. 84 - AGENDA

I Voir Dire

A. Instructions

B. Jury Selection Questionnaire

C. Conduct of Voir Dire

D. Numbers of Jurors to be summoned.

II Discovery prusuant to Fed. Rule Criminal Procedure 16

III Discussion of contemplated motions.

IV Should CR3-84-63, and CR3-84-64 be consolidated for trial?

V What is the present status of the criminal cases in other districts?

VI Review of trial date previously fixed?

VII Other Matters

· Joint accomplice
· conspirator

3 loans by U.S. Butcher and Barr from 2 banks in eastern Ky - Somerset - Lexington
at time of loan Butcher officer + maj stockholder in Banks

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

INDICTMENT NO. 84-28-1

UNITED STATES OF AMERICA PLAINTIFF

VS: MEMO TO JUDGE UNTHANK

JACOB F. BUTCHER DEFENDANT
JESSE A. BARR

The indictment charges the defendants with violations of 18 USC, sections 371, 2, 656, and 1005.

Section 371 provides for penalties if two or more persons conspire to commit an offense against, or to defraud the United States, or any agency thereof.

Section 2 provides that whoever aids, counsels commands, induces or procures the commission of an offense against the United States, is punishable as a principal.

Section 656 provides for punishment for any officer, agent, director, or employee of any national bank or insured bank, who willfully misapplies any of the moneys, funds or credits of such bank or any of the moneys, funds or credits intrusted to the custody or care of such bank,

Is it possible to have one conspiracy but 3 joint accomplices

What about cause to be made

Section 1005 provides, among other things, that whoever, being an officer, director, agent or employee of any FDIC Bank w/o authority from director or makes any false entry in any book, report, or statement of a national or insured bank with intent to injure or defraud such bank, or to deceive any officer of such bank, or the Comptroller of Currency or the FDIC, or any agent or examiner appointed to examine the affairs of such bank shall be subject to punishment.

This action has pending several pre-trial motions of

defendants assigned for hearing at 9:00 A.M. on February 1, 1985 at Knoxville per attached copy of order of assignment. As follows are the motions with comments:

1. MOTION FOR CONTINUANCE OF TRIAL DATE FROM FEBRUARY 20, 1985.

Defendant Butcher submits affidavit of his attorney and a signed waiver of rights under the Speedy Trial Act. He points out that the Memphis case is set for trial January 25, 1985 and the Knoville cases on May 6, 1985. If this schedule is retained there would probably be a conflict between Memphis and London cases. Also there is the serious problem of adequate time in between trials for preparation for the succeeding trials. This motion should be granted and trial reassigned with due consideration for trial dates of other cases and through the cordinated efforts of the three presiding judges.

It is noted that the Defendant Barr has not submitted a signed waiver of the Speedy Trial Act.

2. MOTION TO TRANSFER THESE PROCEEDINGS TO EASTERN DISTRICT OF TENNESSEE FOR TRIAL WITH THE PROCEEDINGS FROM THE EASTERN AND WESTERN DISTRICTS OF TENNESSEE

This motion is made pursuant to Crim. R. 21(b) which provides:

> "For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceedings as to him or any one or more of the counts thereof to another district."

In a lengthy memorandum in support of this motion, the defendant contends that the successive trials in three separate federal districts, under the facts of the respective charges, would violate his constitutional rights under Article III, Sec. 2,

the Fifth and Sixth Amendments to the U. S. Constitution.

The defendant did NOT specify in what respect the Fifth Amendment would be violated but it would appear that he was referring to the clause which prohibits double jeopardy as he subsequently argues that to be tried three times would constitute double jeopardy on many of the charges particularly referring to various overt acts noted in the indictments.

He, also in his memorandum, erroneously quoted language from the Sixth Amendment as being from Article III, Section 2. The language that he is probably referring to in Article III is probably the last literary paragraph of Section 2, to-wit:

> "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed;.." ~~whenxnotxcommittedxwithinxanyxSta~~

He quotes as the pertinent provisions of the Sixth Amendment as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district where the crime shall have been committed, which district shall have been previously ascertained by law ,......."

It appears to be defendants' argument that since many of the overt acts charged in this indictment in reference to preparation and execution of documents involved in the various transations concerning the Kentucky banks took place in Knoxville, and the money disbursed by the Kentucky banks passed through the hands of certain legal entities controlled by defendant passed into and through Knoxville Banks, thus the offenses charged in this indictment alledgedly took place in Eastern District of Tennessee. This argument ignores the receipt of the documents in question by the Kentucky banks,

the entries on their records, the disbursement and transfer of funds by the Kentucky banks to the legal entities in question located in Eastern District of Tennessee. The same would be true as to the banks in Memphis.

In substance , this indictment charges defendants with conspiracty to fraudulently obtain money from the Somerset and Lexington banks in question; that the defendants willfully caused the misapplication of funds belonging to and in the custody and care of the Somerset bank; that they aided and abetted one another to make or caused to be made false entries into the records of the Somerset Bank in reference to several different transations; and like charges as to the Lexington Bank in reference to several transations.

The Memphis indictment made similar charges in reference to the United American Bank, a national and an insured bank, at Memphis Tennessee. In addition the Memphis indictment contained several counts charging use of the mail and the use of commercial and wire signals in interstate commerce for purpose of defrauding said Memphis bank.

The indictment in Eastern District of Tennessee involved charges of illegal transations for the purpose of defrauding and the misapplication of the funds of the United American Bank, at Knoxville, Tennessee and the United American Bank at Chattanooga, Tennessee, both of which are national and insured banks.

Further, the defendant argues that the government has brought multiple prosecutions in multiple venues involving the same transation and that in this instance practically speaking they are part of the same transaction; and that the successive trials in

in different districts constitute harassment of the defendant and gives the government an unfair and tactical advantage; and that under Crim. R. 21(b) the court, in its discretion, should apply the Platt factors, Platt V Minnesota Mining & Mfg. Co. 376 U. S. 240 (1964) and direct the transfer of this case to Eastern District of Tennessee. The Platt factors are:

1. Location of defendant.
2. Location of possible witnesses.
3. Location of events likely to be in issue.
4. Location of documents and records likely to be involved.
5. Disruption of defendant's business unless the case is transferred.
6. Expense to the parties.
7. Location of counsel.
8. Relative accessibility of place of trial.
9. Docket condition of each district.
10. Any other special elements which might affect the transfer.

It is defendant's contention that these factors are either neutral or weight heavily in favor of defendant's request for transfer of this action to Eastern District of Tennessee.

In the Platt case, supra, the Court further noted that the criminal defendants do not have "a constitutional right to a trial in their home district" and that "the main office or home of the respondent has no independent significance in determining whether transfer to that district would be 'in the interest of justice,' although it may be considered with reference to such factors as the convenience of records, officers, personnel and counsel."

In regard the defendant's claim that all these indictments involve the same transactions or parts of the same transaction, it is noted that each indictment involves charges of

fraudulent acquiring funds from or misapplication of funds of separate banks located in the respective districts.

Whether or not the motion to transfer should be granted appears to be a matter of discretion on the part of the Court. Whether Judge Thomas is willing to accept such transfer maybe determinative of the granting or denial of the motion.

3. MOTION FOR EXTENSION OF TIME WITHIN WHICH TO FILE ADDITIONAL PRE-TRIAL MOTIONS.

The present deadline was December 10, 1984. This motion should be granted. It is noted that each continuance of the trial will bring on another motion for extension of time within which to file pre-trial motions.

4. MOTION FOR CRIM. R. 12(d)(2) NOTICE OF GOVERNMENT'S TO USE EVIDENCE SEIZED IN NOVEMBER 18, 1983 SEARCH

It would appear under the provisions of this rule this motion is required to be sustained.

5. MOT/TO STRIKE "ALIAS a/k/a JAKE F. BUTCHER" FROM THE INDICTMENT

It is discretionary with the Court as to whether this motion should be granted. Whether or not it is granted in all probability reference will be made to the defendant during the trial as Jake F. Butcher rather than Jacob F. Butcher.

6. MOTION FOR A BILL OF PARTICULARS-Crim. R. 7(f)

This motion is very extensive as to the particulars the defendant is asking the government to disclose. After receipt of the government's response in which the government may or may not concede that certain particulars may be proper in part, if not to all the specific requests for particuliars. This motion cannot be

properly considered without such a response. Upon receipt of a response it will probably be necessary to hold a hearing in view of the fact that there are many specific items involved, should the government not make major and numerous concessions, which are not expected. Because this motion is peculiar to this particular indictment and any hearing ~~will~~ probably will be lenghty, it would not be appropriate to hold such hearing jointly with the other two judges presiding over the Tennessee cases.

7. MOTION FOR DISCLOSURE- CRIM. R. 16

This motion is subject to the same comments in item 6, above. Unless the government makes many concessions as to the information it will disclose to the defendant, it will probably require a lengthy and extensive hearing, maybe evidentiary as to some aspects, to resolve the issues of entitlement to the information requested. Again, because this motion is peculiar to this indictment it probably would not be appropriate for joint hearing thereon with the two judges presiding over the Tennessee cases, unless they should elect to do so.

8. MOTION TO DISMISS COUNTS 1, 10, 11, 12 and 13 OF THE INDICTMENT-CRIM. R. 12(b).

This motion will be considered on the basis of each separate count. As of this date (Jan. 29, 1985) the Government has not responded to the defendants' various motions.

COUNT 1

In considering count 1, the defendants contend that the prosecution of this conspiracy count and also the conspiracy count in the Memphis indictment would violate the Double Jeopardy Clause of the Fifth amendment as the conspiracy charged in each

indictment is only one and same conspiracy. Upon a claim of double jeopardy, "the burden shifted to the government to show by a preponderance of the evidence, that the conspiracies alleged in the two indictment were in fact separate". U. S. v. Jabara, 644 F2d 574, 576 (6CA 1981).

To digress momemtarily, Abney v U. S., 431 U. S. 651, (1977) held that denial of a motion to dismiss an indictment on double jeopardy plea is immediately appeabable. (Jeopary attaches upon swearing of the jury). In Jabara, supra the Court futher noted:

> "As a ~~eibsequybeem~~ consequence (of immediate appeal) in order to make an appropriate record to test a double jeopardy claim, there must be a pretrial proceeding with rules about going forward with proof, the burden of persuasion, and the weight of the evidence." id p. 576

The defendants argue that the facts alleged in count 1 in both the Memphis and London indictments would constitute on one agreement and therefore the same conspiracy is charged in both indictments and that either one of them should be dismissed or they should be joined together for trial in order to avoid double jeopary on the part of the defendants. U. S. v. Sinito, 723 F2d 1250 at 1256 (6CA 1983).

After discussing the Blockburger v U.S., 284 U. S. 299, or if same evidence in both cases, then same conspiracy, the Court in U. S. v. Sinito, supra, noted certain weaknesses in the Blockburger test and applied the totality of circumstances test, further noting that the trial court should consider the elements of:

1. Time
2. Persons acting as co-conspirators
3. Statutory offenses charged in indictment.

4. The overt acts charged by the government or any other description of offenses charged.
5. Places where alleged events took place.

As to whether the conspiracy charged in count 1 of this indictment and the conspiracy charged in count 1 of the Memphis indictment or one and the same conspiracy or two separate conspiracies based on more than one agreement will require an evidentiary hearing and the application of the facts developed at such hearing to the above listed elements as noted in U. S. v. Sinito, supra.

COUNT 10

The defendants contend that counts 10 and 5 are multiplicious in that they charge separate offenses for the same act.

Count 5 charges, in substance, that on July 1, 1982 that Butcher aided and abetted Barr for the purpose of defrauding the Somerset Bank in falsely representing that Cumberland Land & Mining Company, Inc. to be an existing corporation for purpose of securing an unsecured $2,550,000.00 loan thereto.

Count 10 charges, in substance, that on July 1, 1982, that Butcher aided and abetted Barr with intent to injure and defraud the Lexington bank in falsely representing that Cumberland Land & Mining Company, Inc. to be an existing corporation for purpose of the Lexington bank participating with the Sumerset bank to the extent of the amoun of $1,300,000.00 in loan to said corporation with said loan being unsecured.

In support of their contentions, the defendants rely on U. S. v Parr, 741 F2d 878 (6CA 1984) which held that three counts of transporting three adult women across state line for immoral purposes during same trip was multiplicious. They argue that in the

Parr case the transportation was the act with three victims while here, making the loan to Cumberland Land and Mining Co. was the act with two victims (the two banks) and thus that counts 10 and 5 charge separate offenses in violation of the same statute for the same act. Subject to response from the government, there appears to be some merit to the defendants' contentions. of same Conspiracy - may be true; of different Conspiracy, although same date - may be to contrary.

COUNT 12

The defendants contend counts 12 and 6 are also multiplicious in that they charge separate offenses under the same statute for the same act.

Count 6 charges, in substance, that on or about July 1, 1982 that the defendants aided and abetted each other to cause false entry to be made on the records of the Somerset Bank with the intent to injure and defraud such bank by causing a note dated July 1, 1982 in amount of $2,550,000.00, bearing the signature of Cumberland Land & Mining Co., Inc. by Gene Cook, Vice president, to be entered in Bank's records knowing that such corporation was fictitious and non-existent and that Gene Cook was not in fact such Vice president.

Count 12 charges, in substance, same as Count 6 except that the acts charge were with the intent to injure and defraud the Lexington bank.

as noted in comments under count 10, there also appears to be some merit to defendants' contentions as supported by U. S. v. Parr, supra. of some entry where of cegat for victims may have gone.

COUNT 11

Count 11 charges, in substance, that on or about July 1, 1982, the defendants aided and abetted each other to cause to be made a false entry in the books and records of the Lexington bank with intent to injure and defraud said bank by causing to be placed in the records a document reflecting participation in a loan by Somerset bank to Cumberland Land & Mining Co., Inc. when the defendants knew that such was a fictitious and non-existing company.

The defendants argue that there was no false entry because the entry of participation by Lexington bank with Somerset bank to extent of $1.300,000.00 in loan to Cumberland Land & Mining Company is true in ever respect. This argument ignores the allegation that the defendants cause the entry knowing that Cumberland Land Mining Company was a fictitious and non-existing corporation and to that extent cause a false entry on the books to the effect that it was a viable corporation. Subject to further authority and showing and based on face of the indictment, motion to dismiss Count 11 should probably be denied.

cf US Vs. Terrace Allen Eddy - 6 CA - Judge Martin.

COUNT 13

Count 13 charges, in substance, that on or about September 2, 1982 that Butcher aided and abetted Barr with intent to injure and defraud the Lexington bank by causing the Somerset bank to pay to the Lexington bank the sum of $19,232.87 as interest on the participation amount of $1,300,000.00 knowing that the fictitious company and borrower had not paid interest on the loan to the Somerset bank.

The defendants argue that this charge does not allege any deprivation of funds by the Lexington bank, that in fact it

received funds.

Examining this count, it appears on its face that most likely it contains a clerical error in that the charge should have stated there was caused to be misapplied the funds of the Somerset bank when it paid the interest to the Lexington bank without having received the interest from the fictitious corporate borrower. If this is correct, unless this count is amended to correct such error, it probably should be dismissed.

This is a rought draft and gives on a bird's eye view of what this case is about.

Jan. 29, 1985 ENV

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

INDICTMENT NO. 84-28-1

UNITED STATES OF AMERICA PLAINTIFF

VS: ORDER

JACOB F. BUTCHER
JESSE A. BARR DEFENDANTS

* * * * * *

This action is pending on the following motions by the Defendant, Jacob F. Butcher:

1. Motion for continuance of trial of this cause, now set for February 20, 1985. (item 15).

2. Motion for Transfer of Proceedings to the Eastern District of Tennessee for purpose of joining the proceedings in the Western District of Tennessee and these proceedings with the proceedings now pending in the Eastern District of Tennessee. (item 19

3. Motion for Extension of Time Within Which to File Additional Pre-trial Motions from present deadline of December 10, 1984. (item 21).

4. Motion pursuant to Crim. R. 12(d)(2) for an order requiring the government to serve, upon the defendant, notice of its intention to use any evidence, or the fruits thereof, that was seized in the November 18, 1983 search. (item 22).

5. Motion to Strike "alias a/k/a Jake F. Butcher" from the indictment. (item 23).

6. Motion for a Bill of Particulars. (item 27).

7. Motion for Disclosure Pursuant to Rule 16. (item 29).

8. Motion to Dismiss Counts 1, 10, 11, 12 and 13 of the indictment pursuant to Crim. R. 12(b). (item 31).

There is also pending motion of Jesse A. Barr to join and adopt the foregoing motions and supporting memorandums. (item 25).

Each and all of the foregoing motions are assigned for hearing at 9:00 A. M. on the 1st day of February, 1985 in the Courtroom of the United States Courthouse for the Eastern District of Tennessee, Knoxville, Tennessee.

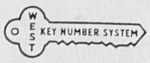
Done at Pikeville, Kentucky this 17th day of January, 1985.

G. WIX UNTHANK, JUDGE

other burden that publication would impose upon the Board seems minimal.

[15] Plaintiff's final claim appears to be that his due process rights were infringed by the failure of the Board to hold hearings throughout Massachusetts. He cites no direct support for this novel proposition, nor has this court found any. In our opinion the Board hearings presently provided in Boston are adequate and entirely consistent with procedural due process. As to this contention, the complaint fails to state a cause of action.

The judgment of the district court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.



The PLUM TREE, INC., Petitioner,

v.

John STOCKMENT and Juanita Stockment, husband and wife, Respondents,

and

The Honorable Clarence C. Newcomer, Judge, United States District Court for the Eastern District of Pennsylvania, Nominal Respondent.

No. 73-1665.

United States Court of Appeals, Third Circuit.

Argued Oct. 10, 1973.

Decided Nov. 30, 1973.

Proceeding on petition for writ of mandamus or prohibition directing United States District Court for the Eastern District of Pennsylvania to vacate its order transferring action for breach of franchise agreement. The Court of Appeals, Van Dusen, Circuit Judge, held that order transferring action would be vacated without prejudice to right of defendants to renew motion for transfer.

Order vacated without prejudice.

1. Courts ⇐277.1(4), 404(4)

In determining whether transfer of action would be for convenience of parties and witnesses and in interest of justice, federal district court is vested with wide discretion, rarely disturbed on petition for mandamus. 28 U.S.C.A. § 1404(a).

2. Courts ⇐277.1(5)

If evidence and argument supporting transfer of case are in doubt, holding of a hearing or conference before motion for transfer is decided, and statement by trial court as to evidence on which it relies, would be desirable. 28 U.S.C.A. § 1404(a).

3. Courts ⇐277.1(6)

Mere fact that alleged breach of franchise agreement would have occurred in Southern District of Texas would not by itself justify transfer of venue over action to recover for such breach from Eastern District of Pennsylvania to such Texas district. 28 U.S.C.A. §§ 1404, 1404(a).

4. Courts ⇐277.1(1)

Finding that forum-selection clause within franchise agreement was invalid would not, by itself, support decision to transfer action to recover for breach of agreement to another district. 28 U.S.C.A. §§ 1404, 1404(a).

5. Federal Civil Procedure ⇐536

Where defendants filed an answer, they waived any objection to service of process.

6. Courts ⇐404(4)

Order transferring action to another district would be vacated, without prejudice to right of defendants to renew motion for transfer, where defendants did not support motion with any affidavits, depositions, stipulations or other documents containing facts tending to

establish necessary elements for a transfer. 28 U.S.C.A. §§ 1404, 1404(a).

7. Courts ⇐277.1(6)

Existence of valid forum-selection clause whose enforcement is not unreasonable does not necessarily prevent the selected forum from ordering a transfer of case. 28 U.S.C.A. § 1404(a).

8. Courts ⇐277.1(6)

Valid forum-selection agreement may be treated as a waiver by nonmoving party of its right to assert its own convenience as a factor favoring a transfer from agreed on forum or as one element to be considered in weighing the interest of justice. 28 U.S.C.A. § 1404(a).

Martin Howard Katz, Harris N. Walters, Mark B. Dischell, Bridgeport, Pa., for petitioner.

R. C. Stiles, Wyckoff, Eikenburg, Russell & Dunn, Houston, Tex., for respondents.

Robert E. J. Curran, U. S. Atty., Philadelphia, Pa., for nominal respondent.

OPINION OF THE COURT

VAN DUSEN, Circuit Judge.

Petitioner Plum Tree, plaintiff in the district court, seeks a writ of mandamus or prohibition directing that the district court vacate its order dated June 28, 1973, transferring the action, pursuant to 28 U.S.C. § 1404(a), to the United States District Court for the Southern District of Texas, Houston Division. Answers to the petition have been filed by defendants and on behalf of the district judge (nominal respondent) entering the June 28, 1973, order.

Petitioner filed a complaint against respondents in the District Court for the Eastern District of Pennsylvania on January 2, 1973, seeking declaratory and monetary relief for an alleged breach of a franchise agreement. On February 16, 1973, defendants filed their answer, along with a motion for transfer to the Southern District of Texas, Houston Division. In their motion, defendants stated that their business operation was in Houston, that plaintiff's claims do not arise out of or have any connection with business activities in the Eastern District of Pennsylvania, and that any breach of any agreement alleged in plaintiff's complaint would have occurred in the Southern District of Texas. However, defendants did not file affidavits, depositions, a brief in support of these contentions, or any other document containing information showing that a transfer would be appropriate for the convenience of the parties or witnesses or in the interest of justice. See Solomon v. American Continental Life Insurance Company, 472 F.2d 1043 (3d Cir. 1972). Plaintiff, on the other hand, filed a lengthy memorandum in opposition to the motion to transfer in which it argued that the forum-selection clause in the franchise agreement was entitled to respect.

On June 28, 1973, without having heard oral argument, the district court granted the motion for transfer on the ground that the franchise agreement was a contract of adhesion and the forum-selection clause was, therefore, void as against public policy. On July 11, 1973, plaintiff filed a motion to amend the order of June 28, 1973, to state that "such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ." 28 U.S.C. § 1292(b). On July 19, 1973, the district court denied this motion. This resulted in plaintiff's filing a petition for writ of mandamus in this court, seeking to compel the district court to amend its June 28 order so that an appeal from that order might be perfected pursuant to 28 U.S.C. § 1292(b).[1] How-

1. We note that the use of mandamus as a means of forcing the district court to make a certification under 28 U.S.C. § 1292(b) does not seem appropriate, for there are au-

ever, we shall adopt the procedure suggested at oral argument and accepted by counsel of abandoning any claim for relief under 28 U.S.C. § 1292(b) and treating the petition for writ of mandamus as one seeking this court to order the district court to vacate its transfer order, which is the more usual way to proceed in this circumstance. *See, e. g.*, Solomon v. Continental American Life Insurance Company, *supra*; Swindell-Dressler Corporation v. Dumbauld, 308 F.2d 267 (3d Cir. 1962).

I.

[1, 2] Under 28 U.S.C. § 1404(a) a transfer may be ordered "[f]or the convenience of parties and witnesses, in the interest of justice . . . ." In making a determination as to the presence of these factors, the district court is vested with a wide discretion, which is rarely disturbed on a petition for mandamus. See Solomon v. Continental American Life Insurance Company, *supra*; All States Freight v. Modarelli, 196 F.2d 1010 (3d Cir. 1952). However, in Swindell-Dressler Corporation v. Dumbauld, *supra*, we held that the failure to provide notice and an opportunity to be heard to the party opposing transfer was a violation of due process and would be remedied by granting a writ of mandamus to secure vacation of a transfer order. The process of establishing the appropriate procedural steps to be followed in determining a transfer motion is a continuing one in this Circuit. While our opinion in Wood v. Zapata Corporation, 482 F.2d 350 (3d Cir. 1973), rejected the contention that any and all informal conferences and arguments relative to a change of venue motion *must* be reported and transcribed by a court stenographer, a majority of the panel agreed to the proposition that such proceedings *should* be transcribed. *Id.* at pp. 357–359 (Adams, J., concurring and Biggs, J., dissenting). Similarly, while we have not imposed a requirement that district courts make findings of fact and conclusions of law with respect to the three factors stated in 28 U.S.C. § 1404(a) on each transfer motion, we have suggested "that it would be helpful to us if each transfer order set forth the factors upon which the court relied in deciding the motion." Solomon v. Continental American Life Insurance Company, *supra*, at 1048 of 472 F.2d. In the case before us, there was no hearing or conference of any sort and, while the transfer order did contain a conclusory finding that the franchise agreement was a contract of adhesion and invalid, it made no reference to supporting evidence and did not relate that conclusory finding to the three factors stated in 28 U.S.C. § 1404(a). We do not hold that a hearing is necessarily required on every transfer motion, but where, as here, the evidence and arguments supporting a transfer were in doubt, a hearing or conference would have been desirable before the district court decided the motion. Furthermore, in making findings of fact on a transfer order, it would be helpful if the district court specifically related the evidence upon which it relies to the factors stated in 28 U.S.C. § 1404(a).

[3–5] The more significant difficulty here, however, is that there was no evidence before the district court upon which it could base a finding that a transfer order was justified. Defendants, having the burden of proof, did not support their motion to transfer with any affidavits, depositions, stipulations, or other documents containing facts that

thorities holding that the district court's decision on this question is not reviewable. See United States v. 687.30 Acres of Land, 451 F.2d 667, 670 (8th Cir.), cert. denied, 405 U.S. 1026, 92 S.Ct. 1291, 31 L.Ed.2d 486 (1971); Hirsch v. Bruchhausen, 284 F.2d 783, 786 (2d Cir. 1960). In addition, we note that an appeal by permission does not appear to be an appropriate mode of challenging a transfer order. See Garner v. Wolfinbarger, 433 F.2d 117 (5th Cir. 1970); A. Olinick & Sons v. Dempster Bros., Inc., 365 F.2d 439 (2d Cir. 1966); Standard v. Stoll Packing Co., 315 F.2d 626 (3d Cir. 1963); Bufalino v. Kennedy, 273 F.2d 71 (6th Cir. 1959).

would tend to establish the necessary elements for a transfer under 28 U.S.C. § 1404(a).[2] Nor did they submit any briefs or make any oral argument demonstrating that facts existed which were sufficient to justify a transfer. Thus, the transfer order was based entirely on the facts and conclusions asserted in defendants' motion.[3] The finding that the franchise agreement was a contract of adhesion and that the forum-selection clause was, therefore, invalid as against public policy seems to have resulted solely from an examination of the face of the contract itself, since there was no evidence submitted on the relative bargaining power of the parties or the circumstances of the making of the contract, and no argument was made by defendants as to its invalidity.[4]

[6] For the foregoing reasons, we hold that the June 28, 1973, district court order should be vacated, without prejudice to the right of defendants on remand to renew in the district court their motion for transfer, with appropriate supporting documents. See AAMCO Automatic Transmissions, Inc. v. Hagenbarth, 296 F.Supp. 1142 (E.D.Pa.1972).

II.

[7, 8] Since a substantial part of the discussion on both the motion for transfer in the district court and the petition for mandamus in this court focused on the issue of the effect to be given to the forum-selection clause in deciding a motion for transfer under 28 U.S.C. § 1404(a), and since this case is being remanded to the district court for further proceedings, we note that the existence of a valid forum-selection clause whose enforcement is not unreasonable[5] does not necessarily prevent the selected forum from ordering a transfer of the case under § 1404(a).[6] Congress set

2. Examples of such documents would be a list of the names and addresses of witnesses whom the moving party plans to call and affidavits showing the materiality of the matter to which these witnesses will testify, statements by the moving parties of the business difficulties or personal hardships that might result from their having to defend against the suit in the district court where it was originally brought, affidavits concerning the relative ease of access to sources of documentary evidence, and other materials where appropriate.

3. The mere fact that the alleged breach would have occurred in the Southern District of Texas does not by itself justify a transfer of venue. Although it would undoubtedly be inconvenient for defendants to have their business in Houston and travel to the Eastern District of Pennsylvania, there is nothing in the transfer motion to indicate that defendants would suffer a greater inconvenience than would plaintiff if the case is transferred to the Southern District of Texas.

4. Furthermore, a finding that the forum-selection clause is invalid cannot by itself support a decision to transfer. Such a finding has no necessary relevance to the convenience of the parties or witnesses, and while it does counter-balance the weight that might otherwise be given to the forum-selection clause, it does not swing the scales so far in the other direction to establish conclusively that the interest of justice requires a transfer. See Part II of this opinion, *infra*. We note that defendants, by filing an answer here, waived any objection to service of process.

5. If, on the basis of appropriate evidence and after opportunity for argument in either briefs or at a hearing, the district court finds that a forum-selection agreement is affected by fraud, undue influence, or overweening bargaining power and is, therefore, invalid or that its enforcement would be "unreasonable," the cases indicate that it should refuse to enforce its provisions. See M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972); Central Contracting Co. v. Maryland Casualty Co., 367 F.2d 341, 344 (3d Cir. 1966).

6. The cases cited by plaintiff in its memorandum in opposition to defendants' motion to transfer for the proposition that forum-selection agreements should be respected either do not involve a motion to transfer under § 1404(a) or do not rely on the forum-selection agreement in reaching their decision on the transfer motion. Thus, none of them considered the significance of the fact that Congress had specified what factors are to be considered by a district court in decid-

down in § 1404(a) the factors it thought should be decisive on a motion for transfer. Only one of these—the convenience of the parties—is properly within the power of the parties themselves to affect by a forum-selection clause. The other factors—the convenience of witnesses and the interest of justice—are third party or public interests that must be weighed by the district court; they cannot be automatically outweighed by the existence of a purely private agreement between the parties.[7] Such an agreement does not obviate the need for an analysis of the factors set forth in § 1404(a) and does not necessarily preclude the granting of the motion to transfer.

III.

In the event that the district court does not vacate its June 28 transfer order within 20 days, as described at page 757 plaintiff may apply for the entry of an order providing that a writ of mandamus shall issue, directing the nominal respondent judge to vacate and set aside the order of June 28, 1973, without prejudice to the right of defendants on remand to renew their motion for transfer supported by appropriate documents in accordance with the foregoing opinion.

ing such a motion. See M/S Bremen v. Zapata Off-Shore Co., *supra;* National Rental v. Szukhent, 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964); Central Contracting Co. v. Maryland Casualty Co., *supra;* Wm. H. Muller & Co. v. Swedish American Line, Ltd., 224 F.2d 806 (2d Cir. 1955); AAMCO Automatic Transmissions, Inc. v. Hagenbarth, *supra;* AAMCO Automatic Transmissions, Inc. v. Coleman, C.A. No. 70-1837 (E.D.Pa., Aug. 11, 1970); AAMCO Automatic Transmissions, Inc. v. Sanders, C.A. No. 70-1396 (E.D.Pa., Jan. 21, 1971). See also Spatz v. Nascone, 364 F.Supp. 967 (W.D.Pa., 1973).

7. A valid forum-selection agreement may be treated as a waiver by the moving party of its right to assert its own convenience as a factor favoring a transfer from the agreed upon forum or as one element to be considered in weighing the interest of justice. Whether the forum-selection agreement should be treated in either or both of these ways will often depend on its specific terms. In some agreements, one court is assigned exclusive jurisdiction of cases arising under the contract, while in others the parties merely consent to the jurisdiction and venue of a court that might otherwise lack them. The forum-selection clause in the agreement between the parties in this case seems ambiguous on the question of transfer. The licensee consents therein to the jurisdiction and venue of certain specified courts and agrees not to bring any legal proceedings arising out of the agreement except in those courts. It is unclear whether the intent was to give those courts exclusive jurisdiction so as to prevent any transfer.

Michael T. ONLEY, Appellant,

v.

SOUTH CAROLINA ELECTRIC & GAS COMPANY, a corporation, Appellee.

No. 73-1354.

United States Court of Appeals, Fourth Circuit.

Submitted Nov. 2, 1973.

Decided Dec. 7, 1973.

Admiralty suit was brought against utility to recover for injuries libelant sustained when he struck a submerged boat ramp after diving from a dock in navigable lake. The United States District Court for the District of South Carolina, Solomon Blatt, Jr., J., dismissed libel for lack of admiralty jurisdiction, and libelant appealed. The Court of Appeals held that, as regards instant injuries, utility's control of water level for purpose of generating electricity did not bear a sufficiently significant relationship to traditional maritime activity to create federal admiralty jurisdiction.

Motion for summary affirmance granted.

U.S. Department of Justice

5-24-85

United States Attorney
Eastern District of Kentucky

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606/*233-2661*
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May 23, 1985

Honorable G. Wix Unthank
Judge, United States District Court
P.O. Box 278
Pikeville, KY 41501

Re: United States v. Jesse Barr
London No. 84-28

Dear Judge Unthank:

Enclosed is a Notice of Filing and the Plea Agreement entered into by the Defendant Jesse Barr. I have enclosed separately a proposed Order and the "Addendum to the Plea Agreement" under seal. It is my understanding that Judge Thomas in Knoxville directed that that Addendum be filed, but under seal. Accordingly, I have included a Motion to Seal in the Notice of Filing.

If there are any questions concerning the above, I shall be happy to answer them.

Sincerely,

Louis DeFalaise
United States Attorney

By Jane E. Graham
Jane E. Graham
Assistant United States Attorney

JEG:lrd

Enclosures

CC: Honorable James L. Jones