UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-9544

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

CRAIG M. VANDERVOORT and
DAVID R. WALTERS,

Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana
(CA 92-219 "I")

(November 24, 1993)

Before GARWOOD and BARKSDALE, Circuit Judges and WALTER[*], District Judge.[**]

PER CURIAM:

In this prosecution for use of the mails to defraud, 18 U.S.C. § 1341, conspiracy and related offenses, the government attempts to appeal the district court's November 16, 1992 pretrial order denying the government's October 6, 1992 "Government's Motion And

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[*] District Judge of the Western District of Louisiana, sitting by designation.

[**] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Incorporated Memorandum To Compel Defendants Craig M. Vandervoort And David R. Walters To Establish Attorney Client Privilege And Motion And Order For An Expedited Hearing." The government filed its notice of appeal December 10, 1992. Although the government bases its right to appeal on the second sentence of 18 U.S.C. § 3731 (and no other provision of law would even arguably authorize appeal), it did not file, in the district court or in this Court, the certificate called for by that same sentence until June 17, 1993, seven months after the order appealed from, six months after notice of appeal was due to be filed under § 3731, some fifty days after filing its appellant's brief in this case, and after defendants-appellees had filed their briefs pointing out that there was no certificate.

We accordingly dismiss the appeal. We recognize that the failure to file the certificate required by the second sentence of § 3731 is not jurisdictional. But that does not mean the requirement can be ignored. In *United States v. Herman*, 544 F.2d 791 (5th Cir. 1977) "[n]either party raised the jurisdictional issue, and the absence of the certificate did not come to our attention until . . . [the] opinion was being prepared" and "we had already resolved to uphold [defendant-appellee] Herman's position." *Id.* at 794. We therefore did not dismiss the government's appeal, "but we serve[d] notice upon it that we will entertain no future § 3731 appeals unless the appropriate certificate is incorporated in the record on appeal." *Id*. In *United States v. Miller*, 952 F.2d 866 (5th Cir.), *cert. denied*, 112 S.Ct. 3029 (1992), we dismissed the government's appeal where, as here, the certificate was filed

seven months after the order appealed, six months after the notice of appeal, and after the filing of the appellees' briefs. *Id*. at 875. *Miller*, which arose in the Western District of Louisiana while this case arose in the Eastern District, was handed down January 23, 1992, about nine and a half months before entry of the order here appealed from (and certiorari was denied in *Miller* on June 29, 1993, about four and one half months before the order).

The indictment in this case was filed April 24, 1992. It relates to matters allegedly occurring in 1988, 1989, 1990 and 1991. No superseding indictment was filed. The case was initially set for trial June 22, 1992; on June 18, 1992, on motion of defendants, the case was reset for trial for October 19, 1992, with "final pretrial conference" to be October 9, 1992. The government did not file the instant motion until October 6, 1992. As a result, on October 15, 1992, the October 19, 1992 trial date was continued and the case was reset for trial December 7, 1992, with final pretrial conference November 25, 1992. The district court held an evidentiary hearing on the government's motion on October 19 and 22 and November 2 and 3, 1992. On October 20, the case was reset for trial for January 25, 1993. In December 1992, the case was again reset, this time for April 5, 1993. Of course, that setting has been aborted. The record on appeal was filed in this Court on January 20, 1993, and the government's brief on appeal would normally have been due March 1, 1993, but it procured extensions and its brief was not filed until April 26, 1993. Still, the certificate was not filed until some fifty-two days

later, after appellees had called attention to its absence in their briefs.[1] A sufficient showing of prejudice is made.

The government argues that this case is distinguishable from *Miller* because there we noted that a second prosecution was involved, *id.*, 952 F.2d at 875, while here that is not the case. However, in *Miller* on the other side of the scale was the fact that there the defendants themselves had appealed orders of the district court denying their motion to dismiss on double jeopardy and collateral estoppel grounds. *Id.*, n.10. That circumstance is not present here. We decline to limit *Miller* to cases involving second prosecutions.

We also note that the record indicates that the government does not know the contents of the statements by the defendants to the attorneys for their corporate employer beyond the fact that, presumably, some of the statements are related to the general subject matter covered by the indictment, and the government only suspects that some of those statements were incriminating, but just how or in what respect is in no way suggested by the record or stated by the government.[2] At the very least, it was not obvious that the government would conclude that the defendants' statements to the corporation's attorneysSQnone of the specifics of which were or are known to the governmentSQconstituted "substantial proof of

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[1] And we note that the government, at least alternatively, asks for a remand for more specific fact findings by the district court.

[2] We assume *arguendo*, but do not decide, that the district court's order may be properly treated as one "suppressing or excluding evidence" under the second sentence of § 3731.

a fact material in the proceeding," as required for the § 3731 certificate.

The government also argues that defendants are adequately protected by the portion of 28 C.F.R. § 0.20(b) which provides for the Solicitor General to determine "whether, and to what extent, appeals will be taken by the Government to all appellate courts." We reject this contention, which in essence amounts to little more than an assertion that Congress did an unnecessary thing in allowing appeals under the second sentence of § 3731 only "if the United States attorney certifies to the district court that the appeal is not taken for purposes of delay and that the evidence is a substantial proof of a fact material in the proceeding." The Solicitor General's approval is required in *all* government appeals; but Congress thought the special protection of a certificate was required in appeals under the second sentence of § 3731, though not in any other government appeals, civil or criminal. Moreover, nothing in the regulations requires the Solicitor General to determine that the evidence is a substantial proof of a material fact, or to so certify to the district court or otherwise.

As we said in *Miller*, the purpose of the § 3731 certificate "is defeated by the perfunctory filing of the certificate after the appeal has been docketed and briefed."[3] 952 F.2d at 875. To adopt

[3] Further, where, as is obviously the case here, the government first realizes that a § 3731 certificate is required when the record and its brief have already been filed and the trial long delayed, it stretches credulity to suppose that the same consideration will be given to whether the certificate can properly be made as would have been the case had that matter been addressed at the beginning of the process. *Cf. U.S. Steel Corp. v. U.S. Environmental Protection Agency*, 595 F.2d 207, 214 (5th

the government's position here is to drain the certificate requirement of any "substantial meaning." *Id*.

Accordingly, the appeal is

DISMISSED.

Cir. 1979) (agency "is more likely to give real consideration to" pre-rule comments than to those post-rule; so availability of latter does not cure failure to provide opportunity for former).