chlorine represented nutritional problems in this country; that the use of the article would insure against all vitamin and mineral deficiencies; that the article would be effective to prevent and correct lack of vitality, sterility, impotence, neurasthenia, nervousness, sleeplessness, poor memory, impurities of the skin, psychoneurosis enfeeblement of the mind, psychocoma, morning sickness in pregnancy, arteriosclerosis, varicose veins, gout, creaking joints, congestion of the bowels, constipation, arthritis, bone ailments, poor complexion, brain tumors, diabetes, syphilis and other sexual diseases, cancer, obesity, rheumatism, autointoxication, and heart disease; that the article would relax the brain, promote sleep, cool the liver, assuage fever, calm nerve ends and nerve nets, stop certain kinds of heat, soothe the generative system, stop contraction in motor nerves, relieve neurotic cramps, reduce temper, and relieve pain in periosteal structures of the body and in linings containing fine nerves capable of intensive pain sensations; and that it would prevent germs from taking hold, prevent impairment of the lining of the lungs, throat, and bronchial tubes, and prevent and correct tension in the spleen. The article would not be efficacious for the purposes stated and implied.

DISPOSITION: April 30, 1947. The defendant having entered a plea of guilty, the court ordered that he be placed on probation for a period of 2 years and that he pay a sum of $300 as costs and expenses.

2121. Misbranding of Miracle Slenderizing Cream. U. S. v. Norval C. Douglas (Miracle Products). Plea of not guilty. Tried to the jury. Verdict of guilty. Sentence of 1 year's imprisonment and fine of $4,000. Judgment reversed on appeal to the Circuit Court of Appeals. Case returned to the district court for retrial. Plea of nolo contendere subsequently entered and a fine of $2,000 and costs imposed. (F. D. C. No. 14292. Sample Nos. 41208-F, 63480-F.)

INFORMATION FILED: On or about June 20, 1945, Northern District of Illinois, against Norval C. Douglas, trading as Miracle Products at Chicago, Ill.

ALLEGED SHIPMENT: From the State of Illinois into the States of Texas and Georgia. The product was shipped on or about March 2 and May 22, 1944. A number of circulars entitled "The Miracle Plan For A Slender Body" and "For the Preservation and Enhancement of Beauty" were shipped with a portion of the product, and a number of the circulars were shipped separately on or about April 26, 1944.

PRODUCT: Examination showed that the product was a semi-solid, consisting essentially of water, magnesium stearate, epsom salt, and sodium sulfate, perfumed with methyl salicylate.

NATURE OF CHARGE: Misbranding, Section 502 (a), the labeling of the product was false and misleading since it represented and suggested that the article would be efficacious in the reduction of body weight, whereas it would not be efficacious for such purpose.

The information charged also that another product, *Miracle Aid*, was misbranded under the provisions of the law applicable to cosmetics, as reported in notices of judgment on cosmetics.

DISPOSITION: The defendant having entered a plea of not guilty, the case came on for trial before a jury on December 3, 1945. The jury returned a verdict of guilty. The court thereupon sentenced the defendant to serve 1 year in jail, and imposed a fine of $1,000 on each of the 4 counts of the information. The case was subsequently appealed to the United States Circuit Court of Appeals for the Seventh Circuit, and on June 15, 1946, the following opinion was handed down by that court:

MAJOR, *Circuit Judge*: "This is an appeal from a judgment of conviction predicated upon an information filed by the United States District Attorney, which charged a violation of numerous sections of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. A. 301, et seq.

"Defendant urges numerous grounds for reversal, but inasmuch as we are of the view that the judgment must be reversed on one of such grounds, it is unnecessary to state or discuss the others. The court sent to the jury the information, to which were attached two affidavits, each of which contained convincing proof in support of the charges contained in the information. One of the affidavits was made by a person called as a witness at the trial, the other was not. We see no reason to set forth the contents of these affidavits.

It is sufficient to state that they strongly supported the government's case; in fact, they contained proof of every element essential to a conviction.

"The question therefore is, was the submission of these affidavits to the jury reversible error? The government attempts to excuse their submission almost entirely by the fact that the court instructed the jury in the usual form to the effect that the information was no evidence of the defendant's guilt, that it was not to be treated by the jury as raising any kind of presumption against the defendant, and that it was simply the formal manner prescribed by law for preferring a charge and should be regarded by the jury solely in that light. A number of cases are cited in which this general instruction has been approved. We need not cite or discuss them for the reason that they are beside the point. No complaint is made because the information was permitted to go to the jury, but the criticism is directed solely at the affidavits. It is one thing to send to the jury an indictment or information, the accusation against the defendant, but something entirely different to send affidavits containing the government's proof in support of such accusation. We know of no authority and we suspect there is none which condones, much less approves, such a procedure.

"It is pointed out by the government that these affidavits were required by the court as a prerequisite to its granting leave to file the information. This no doubt was a proper procedure. The filing of an information is discretionary with the court and leave must be obtained. In the exercise of this discretion, it may properly require that in some manner it be satisfied of probable cause for a prosecution. One of the ways by which it may be so satisfied is by the filing of affidavits. See *Albrecht* v. *United States*, 273 U. S. 1, 5.

"It is also suggested that the affidavits were attached to the information and became a part thereof. We are unable to discern how this affects the situation. We know of no reason why they should be attached to the information other than perhaps for the purpose of convenience. In any event, they are no part of the charge, and their sole function is to serve as proof in convincing the court that leave should be granted to file. Furthermore, the fact that they were attached to the information furnishes no reason why they could or should not have been detached before the information was sent to the jury.

"The government is in a dilemma in attempting to sustain its position. In one breath it concedes, as it must, that these affidavits were submitted to the court as proof in support of the charge for the purpose of inducing the court to grant leave to file, and in the next breath argues that when these same affidavits were submitted to the jury they were merely a part of the accusation and constituted no proof in support thereof. This latter argument is untenable and must be rejected. In fact, we think that there would be no difference in effect or result if the transcript of the testimony given before a grand jury as the basis for an indictment was submitted to the trial jury. Surely no one would seriously contend but that such procedure would constitute prejudicial error.

"Lastly, the government urges that this court ignore the error for the reason that it was neither excepted to nor assigned as error by the defendant. Again the government is in a rather awkward situation. There is nothing in the record, including the court's charge to the jury, to show or indicate that either defendant or the court had any knowledge that these affidavits were being submitted to the jury. The court instructed the jury concerning the information and of course all had knowledge that it was being submitted. Obviously, defendant's counsel could not be expected to object to the submission of the affidavits unless he had knowledge thereof. True, as pointed out, the court no doubt had knowledge that the affidavits were attached to the information at the time leave was granted to file, but it does not follow that it had such knowledge at the time it submitted the information. Furthermore, it may be that the court presumed that counsel for the government would make it his business, as he should have done, to ascertain that these affidavits were detached. Counsel for the government was the moving factor in the matter and must be held responsible for a procedure which, in our judgment, was unfair, prejudicial and attended with dangerous consequences.

"Furthermore, we are of the view that the question presented is too serious to go unnoticed even though it was not properly raised in the court below. Amendment VI of the Constitution of the United States provides: 'In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him.' The submission to the jury of the

affidavits complained of was a palpable infringement of this constitutional right.

"The judgment is REVERSED."

A petition for rehearing was filed, and following its denial on July 6, 1946, the case was returned to the district court. On February 25, 1947, the defendant entered a plea of nolo contendere, on which date the court imposed a fine of $2,000 and costs, which included charges against both the drug and cosmetic.

2122. Misbranding of Miracle Milk Bath, Miracle Bath, Miracle Cream, and Miracle-Aid Lotion. U. S. v. 54 Bags, etc. (and 1 other seizure action). (F. D. C. Nos. 19700, 21194. Sample Nos. 51572–H, 56441–H to 56444–H, incl.)

LIBELS FILED: On or about April 26 and October 16, 1946, Western District of Missouri and District of Minnesota.

ALLEGED SHIPMENT: Between the approximate dates of March 5 and 15, and on or about September 17, 1946, by the Marval Laboratories, Inc., from Chicago, Ill.

PRODUCT: 54 6-pound bags of *Miracle Milk Bath*, 11 6-pound bags of *Miracle Bath*, 15 1-pound jars of *Miracle Cream*, and 62 6-fluid-ounce bottles of *Miracle-Aid Lotion* at Kansas City, Mo., and 22 1-pound jars of *Miracle Cream* at Minneapolis, Minn. Examination showed that the *Miracle Milk Bath* consisted essentially of epsom salt and skim milk powder; that the *Miracle Bath* consisted essentially of epsom salt, sulfur, and soap; that the *Miracle Cream* consisted essentially of epsom salt, sodium sulfate, water, fatty acids, and methyl salicylate; and that the *Miracle-Aid Lotion* consisted essentially of water, with small proportions of soapy material, gum, and perfume.

NATURE OF CHARGE: Misbranding, Section 502 (a), (*Miracle Milk Bath* and *Miracle Cream*) the label statement "An Aid for Reducing" was false and misleading since the articles would not be effective to bring about a reduction in weight; (*Miracle Bath*) the label statements "A Reducing Aid for Home Use * * * Aid for Rheumatism and Arthritis" were false and misleading since the article would not be effective in reducing and in the treatment of rheumatism and arthritis; and (*Miracle-Aid Lotion*) the label statements "For Superficial Wrinkles * * * Applied by Patting with Fingertips, on Wrinkles" were false and misleading since the article would not be effective in the removal of wrinkles.

DISPOSITION: August 15, 1946, and March 6, 1947. No claimant having appeared, judgments were entered ordering that the products be destroyed.

2123. Misbranding of Miracle Bath, Miracle Cream, and Miracle-Aid Lotion. U. S. v. 34 Packages, etc. (F. D. C. No. 22304. Sample Nos. 68051–H to 68054–H, incl., 68072–H to 68074–H, incl.)

LIBEL FILED: March 3, 1947, District of Nebraska.

ALLEGED SHIPMENT: On or about February 14, 1947, by Valmar Distributors, Inc., Chicago, Ill., from Milwaukee, Wis.

PRODUCT: 34 6-pound packages of *Miracle Bath*, 28 1-pound jars of *Miracle Cream*, and 8 6-fluid-ounce bottles of *Miracle-Aid Lotion* at Omaha, Nebr. Analyses showed that the *Miracle Bath* consisted essentially of epsom salt, sulfur, and soap; that the *Miracle Cream* consisted essentially of epsom salt, sodium sulfate, water, fatty acids, and methyl salicylate; and that the *Miracle-Aid Lotion* consisted essentially of water, with small portions of soapy material, gum, and perfume.

NATURE OF CHARGE: Misbranding, Section 502 (a), certain label statements on the articles were false and misleading. The statement "A Reducing Aid * * * for Rheumatism and Arthritis," appearing on the label of the *Miracle Bath*, represented and suggested that the article would be effective in reducing and in the treatment of rheumatism and arthritis; the statement "An Aid for Reducing," appearing on the label of the "*Miracle Cream*," represented and suggested that the article would be effective to bring about a reduction in weight; and the statement "For Superficial Wrinkles * * * Apply by patting with finger tips, on wrinkles," appearing on the label of the *Miracle-Aid Lotion*," represented and suggested that the article would be effective in the removal of wrinkles. The articles would not be effective for such purposes.

DISPOSITION: April 11, 1947. No claimant having appeared, judgment of condemnation was entered and the products were ordered destroyed.