U.S. Department of Justice

Executive Office for United States Attorneys

United States Attorneys' Bulletin

Published by:

Executive Office for United States Attorneys, Washington, D.C.
For the use of all U.S. Department of Justice Attorneys

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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

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VOL. 35 NO. 12 THIRTY-FOURTH YEAR DECEMBER 15, 1987

Please send change of address to Editor, United States Attorneys' Bulletin, Room 1136 Universal Building North, 1875 Connecticut Avenue, N.W., Washington, D.C. 20009.

COMMENDATIONS

The following **Assistant United States Attorneys** have been commended:

JOSEPH S. BECK (Iowa, Southern) by former Director William M. Webster, Federal Bureau of Investigation, for his aggressive and successful prosecution in a bank fraud case.

JOHN O. BRAUD, JAN M. HOLTZMAN and **NICHOLAS J. PANTEL** (Ohio, Southern) by State Director, Bernard T. Chupka, Farmers Home Administration, United States Department of Agriculture, for providing their excellent representation to the agency in a number of difficult bankruptcy cases.

ROBERT C. BRICHLER (Ohio, Southern) by Chief William R. Britt, Criminal Investigation Division, Internal Revenue Service, for successfully prosecuting complex criminal tax cases.

THOMAS M. COFFIN (District of Oregon) was recently presented a plaque by the Drug Enforcement Administration in recognition of his continued outstanding efforts in drug law enforcement.

RICHARD COOK (Indiana, Northern) by Inspector in Charge M. R. Grey, United States Postal Service, for his dedicated work in a raised money order case which resulted in saving the public many hundreds of thousands of dollars in potential victim losses.

BOB DARDEN, JACK SHEPHERD, MARIANNE TOMECEK, KIMBERLY PIGNUOLO and **MIGUEL MARTINEZ** (Texas, Southern) by Acting District Director H. A. McMullen, Small Business Administration, for their outstanding and successful handling of a variety of collection cases which resulted in payments to date in excess of $300,000.

ROBERT C. DOPF (Iowa, Southern) by Regional Inspector General for Investigations Randol B. Brune, Office of Inspector General, United States Department of Agriculture, for his diligent and professional prosecution in a grain conversion case.

JOSEPH A. FLORIO (Texas, Western) by Joseph R. Davis, Assistant Director - Legal Counsel, Federal Bureau of Investigation, for sharing his vast experience in forfeiture law at a Seminar for Principle Legal Advisors in New Orleans, Louisiana.

BARBARA GEROLAMO (Pennsylvania, Eastern) by District Director Loren Y. Johnson, Department of Health and Human Services, for processing of a seizure and destruction of adulterated foods valued at approximately $40,000, and the closure of the food manufacturing plant until adequate sanitation was achieved.

KATHRYN GOODWIN (District of Colorado) was presented a mounted snowy owl by Assistant Chief David Croonquist, Colorado Division of Wildlife, and Monty Halcomb of the United States Fish and Wildlife Service for her exemplary dedication and perseverance in the successful prosecution of a wildlife case.

MICHAEL J. HLUCHANIUK (Michigan, Eastern) by Acting Director John Otto, Federal Bureau of Investigation and United States Attorney, Roy C. Hayes, Eastern District of Michigan, for providing consistent, diligent and highly professional representation of the government in cases arising in Bay City, Michigan. Mr. Hluchaniuk is also commended by District Counsel, Lawrence Pazol of the Small Business Administration, for providing assistance leading to a decision that a lending institution may secure a first security interest in a liquor license.

MARK C. JONES (Michigan, Eastern) by Special Agent in Charge Ronald Hendrix, Bureau of Alcohol, Tobacco and Firearms, United States Department of the Treasury, for providing highly professional and successful representation of the government in a variety of criminal cases.

JOSEPH T. LABRUM, III and **ROBERT E. GOLDMAN** (Pennsylvania, Eastern) by Special Agent in Charge Norton J. Wilder, Drug Enforcement Administration, for their exemplary dedication and expertise in the investigation and prosecution of a complex drug case.

ROBERT A. MANDEL (District of South Dakota) by Director William S. Sessions, Federal Bureau of Investigation, for his excellent preparation and professional ability which resulted in a successful conclusion to a murder case.

VIRGINIA R. POWEL (Pennsylvania, Eastern) by District Counsel John R. Abbott, Small Business Administration, for her outstanding performance in many bankruptcy cases.

STEPHEN P. PREISSER (Florida, Northern) by Joseph R. Davis, Assistant Director - Legal Counsel, Federal Bureau of Investigation, for his excellent participation as defense counsel in the New Agents Moot Court Program.

RUDY RENFER (North Carolina, Eastern) by State Director Larry W. Godwin, Farmers Home Administration, United States Department of Agriculture, for providing his legal expertise which resulted in a successful resolution in a civil case.

JOHN J. ROBINSON (California, Southern) by Chief Counsel Dennis F. Hoffman, Drug Enforcement Administration, for skillfully representing the Drug Enforcement Administration which resulted in a successful conclusion to a highly complex civil case.

CARL ROSTAD (District of Montana) by Inspector General James R. Richard, United States Department of the Interior for his outstanding assistance and successful prosecutions in fraud cases on the Indian Reservations in the State of Montana.

LINDA L. SHAFER (Pennsylvania, Eastern) by Counsel for Defense Michael Trovarelli, Logistics Agency, for her successful settlement of a personal injury case.

JUDY GOLDSTEIN SMITH and **JOSEPH T. LABRUM, III** (Pennsylvania, Eastern) by Special Agent in Charge Stephen M. Harney, United States Customs Service, for their successful prosecution in a major smuggling case.

JOHN E. STEVENS (District of Columbia) by Joseph R. Davis, Assistant Director - Legal Counsel, for his skillful presentation as defense counsel during the New Agents Moot Court Program.

JAMES L. SUTHERLAND (District of Oregon) by Forest Supervisor Michael Kerrick, United States Department of Agriculture, for his dedication and successful prosecutions involving wildland fire law.

THOMAS P. SWAIM (North Carolina, Eastern) by Assistant Attorney General William F. Weld, Criminal Division, Department of Justice, for his valuable participation in the successful prosecution of a major drug dealer.

SARAH R. TUNNELL (Texas, Southern) by Charles A. Wiegand, III, Supervisory General Attorney, Immigration and Naturalization Service, for her professionalism and splendid cooperation in the prosecution of a civil case.

DENNIS O. WILSON (Pennsylvania, Eastern) by United States District Court Judge Louis C. Bechtel for his successful prosecution in a drug distribution case.

ALLEN M. WOLF (Michigan, Eastern) by Special Agent in Charge Ronald W. Hendrix, Bureau of Alcohol, Tobacco and Firearms, United States Department of the Treasury, for his excellent presentation and innovative use of visual aids which resulted in a successful conclusion in an arson case.

POINTS TO REMEMBER

Personnel

Effective November 6, 1987, **Charles A. Banks** was sworn in as the court-appointed United States Attorney for the Eastern District of Arkansas.

Effective November 6, 1987, **Frank L. McNamara Jr.**, took the Oath of Office as the Presidentially-appointed United States Attorney for the District of Massachusetts.

(Executive Office)

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New Publications Available On Legal Forfeiture

The Legal Counsel Division of the Federal Bureau of Investigation has recently published four new publications on legal forfeiture:

(1) Facts on Petitions (Petitions for Remission or Mitigation of Forfeiture)

(2) Forfeiture Outline

(3) Real Property Seizure Kit

(4) Seizures of Currency for Forfeiture Purposes Under Title 21, U.S.C., Section 881

You may obtain copies of these publications by contacting the Legal Forfeiture Unit, Legal Counsel Division, Federal Bureau of Investigation at FTS 324-3534.

(Federal Bureau of Investigation)

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Interim Sentencing Advocacy and Case Settlement Policy Under New Sentencing Guidelines

The new Sentencing Guidelines became effective November 1, 1987, for all offenses committed on or after that date. Under the new system, the nature of the charge to which a defendant pleads guilty is particularly important because it will more precisely than ever determine the defendant's actual sentence. Associate Attorney General Stephen S. Trott has issued a memorandum discussing interim sentencing advocacy and case settlement policy under these new guidelines. It should be noted that the consultation requirement in paragraph 4 of the memorandum applies to all Sentencing proceedings regardless of whether they result from a plea bargain or a trial. A copy of this memorandum is attached to the Appendix of this Bulletin.

(Office of the Associate Attorney General)

* * * *

Use of Diners Club Accounts

It is the policy of the Department that Diners Club accounts be used only for official authorized government travel -- transportation, subsistence, and other allowable travel. These cards are not to be used for personal business, shopping, restaurant bills, personal travel arrangements, or to obtain government discounts for personal business. This policy is to be adhered to without exception. (See DOJ Order OBD 2200.2, dated November 8, 1984.)

Misuse of the Diners Club card is a violation of the contract between Diners Club and the federal government and will subject the cardholder to disciplinary actions ranging from a reprimand to removal. Monthly Diners Club usage reports will be reviewed to identify potential abusers.

Please be reminded that Diners Club accounts are to be paid in full within 25 days of the billing date. Extended or partial payments are not permitted. If a charge is disputed, it can be deducted from the amount due, but the remaining balance must be paid in full. Accounts which are delinquent for more than 60 days will be temporarily suspended by the Diners Club until the receipt of proper payment. A 120-day delinquency results in cancellation of the individual's card.

As a general rule, charges made during one month will not show up on statements until the following month. Since there are 25 days to pay from the date of the statement receipt, the average lapsed time between the date the charges were incurred and the time payment is due will be 50 or 60 days. If travel vouchers are filed promptly, reimbursement for allowable expenses should be received before payments are due to the Diners Club.

(Executive Office)

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CASENOTES

OFFICE OF LEGISLATIVE AFFAIRS

SELECTED HIGHLIGHTS OF CONGRESSIONAL AND LEGISLATIVE ACTIVITIES OCTOBER - NOVEMBER 1987

Child Protection and Obscenity Enforcement Act of 1987

The President announced a comprehensive anti-pornography bill on Tuesday, November 10, 1987, The bill is a balanced proposal which should enjoy bipartisan support; in short, we believe it is entirely possible that this measure, or at least most parts of it, can be enacted during the 100th Congress. The bill is truly comprehensive in that it addresses child pornography, interstate traffic in obscene materials, the so-called "dial-a-porn" and "cable porn" problems, and other related issues.

* * * *

H.R. 1212, Polygraph Testing

On Wednesday, November 4, 1987, the House of Representatives passed H.R. 1212, legislation to ban the use of polygraph tests in the private sector by a vote of 254-154. Several amendments to H.R. 1212 were offered and considered, most of which proposed exemptions for particular industries from the overall ban proposed by the bill. The following amendments were accepted: Roukema's amendments exempting the security services industry; Richardson's exemption for drug security, theft or drug diversion investigations; and the Hughes' amendment to the Richardson amendment prohibiting random polygraph testing of current employees. The following amendments were rejected: Young's exemption for the nursing home industry; Gunderson's exemption for on-going investigations; Roukema's exemption for federally regulated financial institutions; Vukanovich's exemption for financial institutions; DeLay's exemption for services provided in personal residences; and the Young-Darden substitute amendment. The Administration is opposed to H.R. 1212, primarily due to the belief that states, rather than the federal government should be responsible for regulation of polygraph use in the private sector. The Administration did not support any of the amendments carving out special exemptions from the bill's coverage due to the philosophical nature of its opposition to the bill as a whole.

* * * *

Immigration Oversight

On Wednesday, October 21, 1987, Immigration and Naturalization Service Commissioner Alan C. Nelson appeared before the House Subcommittee on Immigration, Refugees and International Law of the Committee on the Judiciary. Also appearing before the Subcommittee on behalf of the Department of Justice was Mary E. Mann, Acting Special Counsel for Immigration Related Unfair Employment Practices. The hearing concerned the implementation of the Immigration Reform and Control Act of 1986. Representatives from the Departments of State, Labor, Health and Human Services, and Agriculture were also present. Commissioner Nelson was called upon to clarify earlier confusion as to the Immigration and Naturalization Service policy concerning deportation of minor children who did not qualify for legalization. The policy, as announced at the hearing, was that where both parents qualified for legalization, non-qualifying minor children would not be deported. In the case of only one parent qualifying for legalization, the decision to deport minor children will be decided on a case-by-case basis. Mary Mann clarified confusion concerning the intentional discrimination standard mandated by the act and outlined the Department's progress in start-up of the Office of Special Counsel.

* * * *

Indemnification of Government Contractors

On October 29, 1987, Robert L. Willmore, Deputy Assistant Attorney General for the Civil Division, appeared before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary at a hearing concerning H.R. 2378, the "Federal Procurement Liability Reform Act of 1987". The bill would provide for the indemnification of contractors for liability incurred under their contracts with the Government, and for the equitable reduction of contractors' liability in actions brought by federal employees to the extent that the Government is found to be at fault in connection with the employee's injury. Representatives of the Department of Defense were also present.

In his testimony and in response to questioning by members of the Subcommittee, Mr. Willmore recognized the need for reform of the existing tort system, but emphasized that additional indemnification of government contractors was not the appropriate response to the significant growth in the size of damage awards in recent years. Mr. Willmore stressed the Administration's concern that providing for additional indemnification would, among other things, merely pass tort judgments to the "deep pocket" of the taxpayers; lessen contractors' incentives to assure safe product design and manufacture; lead to greater government supervision of contractors' performance; and likely place significant strain on the government's litigative resources in defending lawsuits against indemnified contractors.

* * * *

Indian Self-Determination

On October 27, 1987, the House passed H.R. 1223, the Indian Self-Determination Act Amendments. We expressed significant opposition to a provision that would have rendered the United States vulnerable to suit under the Federal Tort Claims Act for the negligence of tribal organizations which contract with the Department of Health and Human Services. This provision was deleted from the version passed by the House. The Senate Select Committee on Indian Affairs has scheduled a markup on the Senate counterpart, S. 1703, for today. We have communicated our objections to a similar Federal Tort Claims Act provision as well as other concerns regarding the Senate bill.

The Secretary of the Interior and the Assistant Secretary for Indian Affairs appeared before the Subcommittee on Interior and Related Agencies of the House Committee on Appropriations on Tuesday to promote increased opportunity for Indian self-determination. Among their various proposals were calls for: (a) redefinition of the government's "trust responsibility" to Indian tribes; (b) greater local control of education; (c) reexamination of the government's "Indian

preference" hiring policy to create a waiver authority; (d) more equitable distribution of federal funds among tribes, especially smaller ones; (e) empowering tribes to design their own programs and contract them to any federal or state agency they choose; (f) employment and job training programs for welfare recipients; and (g) the provision of financial trust services by a contract financial institution to manage the $1.5 billion held for tribes and individual Indians.

* * * *

Public Safety Officers Death Benefits

On October 29, 1987, the House Judiciary Subcommittee on Criminal Justice, chaired by Representative John Conyers, held a hearing on legislation to amend the Omnibus Crime Control and Safe Streets Act to increase benefits payable with respect to the death of public safety officers. Subcommittee members Gekas, Edwards, and Fish were present.

Representatives Biaggi, Traficant, Traxler, and Feighan testified on behalf of increasing the death benefit from $50,000 to $100,000, expanding beneficiaries, and adding cost-of-living increases. Representative Biaggi advocated taking the additional funds ($10 million) from the Department's Asset Forfeiture Fund, which he claimed has a surplus. Upon questioning by the Subcommittee, Representative Biaggi was not prepared to expand the scope of benefits to fire and emergency medical personnel.

George Luciano, Director of the Bureau of Justice Assistance, testified on behalf of the Department. Mr. Luciano explained the Department's opposition to dollar increases and expansion of coverage by citing the original intent of the Public Safety Officers Death Benefits Act, which is a one time benefit payment and not an insurance policy or pension fund for state and local public safety officers.

The Subcommittee is interested in raiding the Department's Asset Forfeiture Fund to fund these increases. There is a stubborn misconception that these assets are exclusively the federal government's and are not being shared with the state and local law enforcement agencies.

* * * *

S. 249, The Parental and Temporary Medical Leave Act

On Thursday, October 29, 1987, the Senate Labor and Human Resources Subcommittee on Children, Families, Drugs and Alcoholism held the final hearing on the proposed Parental and Temporary Medical Leave Act, S. 249. Assistant Attorney General Stephen J. Markman testified, presenting the Administration's views in opposition to the bill. Assistant Attorney General Markman emphasized that the Administration is not opposed to the objectives of this legislation, but rather, believes that federal legislation is an inappropriate solution to the problem. Also testifying were William J. Gainer from the General Accounting Office, a panel of parents and families, two law professors and a variety of business associations and community organizations. Senator Dodd, Chairman of the Subcommittee, was rather aggressive in pursuing Mr. Markman on the historical role of federal legislation as a solution to various social problems. Mr. Markman declined the opportunity to testify on the history of child labor laws, etc., opting instead to clarify for Senator Dodd the Administration's position on parental leave.

* * * *

The Federal Debt Collection Procedures Act of 1987

This Department of Justice legislative proposal has now been cleared by the Office of Management and Budget, and we plan to submit it to Congress shortly. While it is largely procedural in nature, this bill is timely in that it would assist in collection of the billions of dollars of debts owed to the United States. In addition, there is a basic "fairness" argument in support of the bill as it would avoid situations which occur today when similarly situated federal debtors residing in different states are treated differently due to the vagaries of state law. In short, this proposal would create a new debt collection procedure applicable to all debts owed to the United States.

* * * *

OFFICE OF THE SOLICITOR GENERAL

The Solicitor General has authorized the filing of:

A petition for certiorari in Bowen v. Jordan, 808 F.2d 733 (10th Cir. 1987). The question presented is whether the appeals court erred in dismissing the Secretary's appeal without considering the constitutionality of the 1984 amendments to §205(g) of the Social Security Act which prescribe annual accounting for "representative payees" (persons designated to receive funds on behalf of minor or incompetent beneficiaries) violates the Due Process Clause by exempting payees who are spouses or parents living with the beneficiary.

A petition for certiorari in United States v. Taylor, 821 F.2d 1377 (7th Cir. 1987). The question is whether an indictment may be dismissed with prejudice for violation of the Speedy Trial Act where the defendant's flight caused the violation, the delay is brief, the crime is serious, and there is no showing of prejudice to the defense.

A petition for certiorari in United States v. Meyer, 810 F.2d 1242 (D.C. Cir. 1987). The issues are (1) whether the district court was justified in dismissing as vindictive the prosecutor's decision to bring an additional charge, and (2) if so, whether the district court also may dismiss another nonvindictive charge.

A petition for certiorari in Bowen v. Russell, 814 F.2d 148 (3rd Cir. 1987). When are attorney's fees properly awarded against the federal government under the Equal Access to Justice Act because the government's position was not "substantially justified."

A petition for certiorari in Webb v. Maldonado, 811 F.2d 1341 (9th Cir. 1987). The question is whether a lawyer's customary billing rate is the appropriate "lodestar" for determining the amount of an attorney's fees award.

A petition for certiorari in INS v. Fazelihokmabad, 794 F.2d 1470 (9th Cir. 1986). The questions presented are: (1) Must a decision by the Board of Immigration Appeals denying an alien's motion to reopen deportation proceedings be affirmed if it is plausible and not arbitrary; (2) Is BIA, in ruling on motion to reopen deportation proceedings, required to address specifically every point raised by alien or to articulate every factor bearing on its decision.

A petition for certiorari in Bowen v. Kendrick, 657 F. Supp. 1547 (D.D.C. 1987). Whether the D.C. District Court erred in holding that the Adolescent Family Life Act violates the Establishment Clause.

A petition for certiorari in Deschambault v. Sowell, 791 F.2d 170 (11th Cir. 1986) and Potts v. Heathcoat, 790 F.2d 1540 (11th Cir. 1986). The issue is whether the immunity recognized in Barr v. Matteo protects petitioning federal employees sued in their individual capacities from liability under state tort law for injuries allegedly caused by their official acts.

A petition for certiorari in Brody v. Guercio, 814 F.2d 1115 (6th Cir. 1987). The question presented is whether a judge is absolutely immune from damages in an action concerning the allegedly unconstitutional dismissal of his confidential secretary.

A petition for certiorari in Bowen v. Massachusetts, 816 F.2d 796 (1st Cir. 1987). The issue is whether a plaintiff that improperly brings a Tucker Act suit in federal district court rather than the United States Claims Court for money allegedly past due from the federal government may nonetheless obtain from the district court adjudication of some or all of the legal theories that govern the plaintiff's claim for past due money, merely because adjudication of those theories will affect the amount of money the federal government pays the plaintiff in the future as well as money allegedly due in the past.

A petition for certiorari in Frink v. Commissioner, 798 F.2d 106 (4th Cir. 1986), and George v. Commissioner, 803 F.2d 144 (5th Cir. 1986). The question presented is whether a corporation formed by the controlling partners of a real estate partnership to hold title to property and to obtain financing that the partnership itself could not obtain can be disregarded for federal income tax purposes on the theory that it is merely an "agent" of the partnership.

An amicus brief in Dixon v. Westinghouse Electric Corp., 787 F.2d 943 (4th Cir. 1986). The question presented is whether a charge brought under Title VII of the 1964 Civil Rights Act "initially instituted" with state fair employment practices agency, thereby triggering 300-day extended charge filing period of §706(e) of Act, where, pursuant to work sharing agreement with Equal Employment Opportunity Commission, state agency allocates to EEOC initial processing of charge under §706(c).

A petition for certiorari in EEOC v. Ocean City Police Dep't., 820 F.2d 1373 (4th Cir. 1987). The question is whether the 300-day limitations period for filing a Title VII charge with the EEOC, which is generally available when the charging party files first with a state or local agency, is also available when the state has previously agreed with EEOC that EEOC would initially process the charges.

A petition for certiorari in Bowen v. Adams House Health Care, 817 F.2d 587 (9th Cir. 1987). The issue is whether the provider Reimbursement Review Board may consider a health care provider's claim that it is entitled to reimbursement under Medicare statute for a particular cost when that provider failed to seek reimbursement for that cost from its fiscal intermediary and did not seek to otherwise reserve before the intermediary its right to seek reimbursement for that cost.

A petition for certiorari in United States v. Halper, slip op. No. 86 Civ. 2955 (RWS) (S.D.N.Y. April 23, 1987). The question presented is whether the mandatory "civil penalty of $2,000" per false claim specified in the False Claims Act, 31 U.S.C. 3729 (before 1986 amendments) is, despite its label, in fact a criminal penalty (and thus triggering the protections of the Double Jeopardy Clause) when applied to sixty-five Medicare overcharges of nine dollars each, on the ground that a $130,000 penalty for $585 in overcharges to the government is so disproportionate that it can no longer be labeled "civil."

* * * *

FEDERAL RULES OF EVIDENCE

Rule 613(a). Prior Statements of Witnesses. Examining Witnesses Concerning Prior Statements.

Although Rule 613(a) did away with the common law requirement that a witness who is asked about his prior written or oral statement must be shown the statement or informed of its contents, defense counsel examined prosecution witnesses by reading from Federal Bureau of Investigation interview reports and asking the witness if he had made that "statement." The judge required defense counsel to show the witnesses the reports and to ask whether they adopted the statements set forth therein. The defendants complained that their lawyers should not have been required to do this.

The United States Court of Appeals for the Seventh Circuit held that while Rule 613(a) had altered the common law approach to examining a witness about prior statements, the old method may be used if necessary to avoid confusion. There would be no justification for the judge's action if counsel had been reading from a court document, but these "statements" could easily have been inaccurate through the fault of the interviewing agent and yet be given undue weight by the jury simply because they were contained in official Federal Bureau of Investigation documents. Nothing in Rule 613 strips a judge of discretion to manage a trial so as to promote accuracy and fairness, the court stresses. The judge's ad hoc recurrence to the common law was not reversible error per se. The procedure did not impede the cross examination of the prosecution's witness or cause any other prejudice to the defendants.

(Affirmed.)

United States v. Marks, 816 F.2d 1207 (7th Cir. 1987).

APPENDIX

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

(As provided for in the amendment to the Federal Postjudgment Interest Statute, 28 U.S.C. §1961, effective October 1, 1982.)

Effective Date	Annual Rate	Effective Date	Annual Rate
12-20-85	7.57%	04-10-87	6.30%
01-17-86	7.85%	05-13-87	7.02%
02-14-86	7.71%	06-05-87	7.00%
03-14-86	7.06%	07-03-87	6.64%
04-11-86	6.31%	08-05-87	6.98%
05-14-86	6.56%	09-02-87	7.22%
06-06-86	7.03%	10-01-87	7.88%
07-09-86	6.35%	10-23-87	6.90%
08-01-86	6.18%		
08-29-86	5.63%		
09-26-86	5.79%		
10-24-86	5.75%		
11-21-86	5.77%		
12-24-86	5.93%		
01-16-87	5.75%		
02-13-87	6.09%		
03-13-87	6.04%		

NOTE: When computing interest at the daily rate, round (5/4) the product (i.e., the amount of interest computed) to the nearest whole cent.

For cumulative list of those federal civil postjudgment interest rates effective October 1, 1982, through December 19, 1985, see United States Attorneys' Bulletin, Vol. 34, No. 1, Page 25, January 17, 1986.

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TELETYPES TO ALL UNITED STATES ATTORNEYS FROM THE EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

10/21/87 From James G. Richmond, United States Attorney, Northern District of Indiana, re: "Crack House Profile for Search Warrants."

10/27/87 From Laurence S. McWhorter, Director, EOUSA, by Tim Murphy, Associate Director, Debt Collection, re: "Publicity for Our Debt Collection Program."

10/27/87 From Tim Murphy, Associate Director, Debt Collection, re: "15 Top Priority Civil Judgment Debtors."

11/10/87 From Louis Defalaise, United States Attorney, Eastern District of Kentucky, re: "Nationwide Plea Agreement with Ren P. Setchell."

11/12/87 From Maurice O. Ellsworth, United States Attorney, District of Idaho, re: "Regional White House Conference for A Drug Free America."

11/13/87 From J. Michael Fitzhugh, United States Attorney, Western District of Arkansas, re: Nationwide Plea Agreement with Ren P. Setchell."

11/17/87 From Richard L. DeHaan, Associate Director, Administrative Services, re: "FY 1988 Operations."

11/17/87 From Robert G. Ulrich, United States Attorney, Western District of Missouri, re: "AGAC Meeting Scheduled for November 30 - December 2, 1987."

11/18/87 From Bob Wortham, United States Attorney, Eastern District of Texas, re: "Information Concerning Burglary of Jewelry Stores in Strip Shopping Center."

UNITED STATES ATTORNEYS' LIST

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Washington, E	John E. Lamp
Washington, W	Gene S. Anderson
West Virginia, N	William A. Kolibash
West Virginia, S	Michael W. Carey
Wisconsin. E	Patricia J. Gorence
Wisconsin, W	Patrick J. Fiedler
Wyoming	Richard A. Stacy
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U.S. Department of Justice

Office of the Associate Attorney General

The Associate Attorney General

Washington, D.C. 20530

NOV 3 1987

MEMORANDUM

TO: All Litigating Division Heads and
All United States Attorneys

FROM: Stephen S. Trott
Associate Attorney General

SUBJECT: Interim Sentencing Advocacy and Case Settlement Policy Under New Sentencing Guidelines

General Comment

The new Sentencing Guidelines became effective November 1, 1987, for all offenses committed on or after that date. Under the new system, the nature of the charge to which a defendant pleads guilty is particularly important because it will more precisely than ever determine the defendant's actual sentence. It should be remembered that underlying the concept of determinate sentencing guidelines is the idea that sentences should be more uniform; that persons similarly situated in terms of offense and offender characteristics should be similarly penalized.

Although there is a two level adjustment for acceptance of responsibility (which is not to be automatically recommended or granted simply because there is a plea), the Guidelines do not provide a specific or universal incentive for defendants to plead guilty in lieu of going to trial. It will be up to the Government to insure that inconsistencies in the treatment of plea agreements do not frustrate the purpose of the Guidelines. As noted in the commentary to Chapter 6, Part B, of the Guidelines, Congress indicated that it expected judges "to examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines." S.Rep. 98-225, 98th Cong., 1st Sess. 63, 167 (1983). Our conduct will therefore be under scrutiny both by the courts, the Congress, and the public.

The overriding principle governing the conduct of plea negotiations is that plea agreements should not be used to circumvent the Guidelines. This principle is consistent with the guidelines governing charging policies and plea agreements set

forth in the Principles of Federal Prosecution in Chapter 27 of Title 9 of the United States Attorneys' Manual. For example, charges should not be filed simply to exert leverage to induce a plea. Rather, the prosecutor should charge the most serious offense or offenses consistent with the defendant's conduct. Similarly, once the charging decision is made, a plea should ordinarily be taken to the most serious offense or offenses charged that adequately and accurately describe the gravamen of the defendant's conduct.[1/] If this policy is not consistently followed, then the principle of uniform sentences for similar offenses will be undermined.

The overriding principle of this interim case settlement policy is full disclosure of the circumstances of the actual offense or offenses. Attempts to circumvent the Guidelines by manipulation of charges, counts, and factual statements to present an unrealistic or incomplete picture of a defendant's offense or offender characteristics should not be permitted as it will undermine the principal purpose of the Guidelines: greater uniformity in sentencing.

The Guidelines themselves place some constraints on negotiating plea agreements. For example, the Policy Statement in § 6B1.2(a) states that in the case of a plea agreement that includes the dismissal of any charges, perhaps the most common plea agreement under the current system, the court may accept the agreement if the court determines that "the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing." Therefore, the dismissal of charges will be subject to the scrutiny of the court.

Despite these apparent limitations on plea negotiations, the new Guidelines do not remove all incentives to plead guilty nor are there absolutely no incentives which may legitimately be offered to a defendant to plead guilty in lieu of going to trial. A prosecutor may recommend a sentence at the lower end of the 25% range of imprisonment or, when probation is permitted, recommend probation.[2/] The applicability of the reduction of two levels

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1/ Determination of the most serious offense will now require, however, consultation with the Sentencing Guidelines to determine which statutory violation results in the highest offense level. This policy is consistent with the policy set forth in the Principles of Federal Prosecution, Part D, Section 3(c), which states that a defendant should be required to plead guilty to the charges or charges "that makes likely the imposition of an appropriate sentence under all the facts of the case."

2/ Probation is permitted if the minimum sentence for the applicable guideline is six months or less; i.e., below level 11,

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Case Settlement/Appeal Policies

1. Pleas. An attorney for the Government is to accept a plea to the charge which enables a court to impose, through proper application of the Guidelines, the highest sentence provided in the Guidelines for the conduct actually committed, assuming such conduct is readily provable.4/ If a plea to a single charge is inadequate to insure a proper sentence under the Guidelines (including Chapter 3, Part D, on multiple charges), a plea is to be taken to an adequate number of counts to insure that a proper sentence can be imposed. In the event of a pre-indictment plea agreement, adequate charges are to be filed to insure that a proper sentence can be imposed.

In no event is a CCE-principal administrator (i.e. the mandatory life provision) or 18 U.S.C. § 924(c) (use of firearm) charge to be dismissed except with the consent of the Assistant Attorney General of the Criminal Division as to CCE principal administrator charges or the United States Attorney as to 18 U.S.C. § 924(c) charges (unless it cannot be readily proven or unless absolutely necessary to obtain an appropriate sentence for someone who has rendered substantial assistance to the Government).

This policy does not supersede any current specific plea policies set forth in the United States Attorneys Manual for the litigating divisions. For example, if there are tax counts, there must be a plea to the "designated" count or counts unless an exception is approved by the Tax Division. Further, the Lands Division, in an upcoming revision to the United States Attorneys Manual, will require that in a case including a wildlife or environmental count, a plea must include one or more such counts

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4/ In other words, if a defendant is charged with both robbery and theft based on the same conduct, he should be required to plead to the robbery charge even though the Guidelines would permit a departure on a theft conviction for use of weapons, infliction of injuries, etc., which could result in the imposition of an equivalent sentence. Normally the charge whose Guideline provision provides the highest sentence when applied to the conduct in question should be the charge to which a plea is taken. On the other hand, if there is a substantial, good faith doubt as to the ability to prove for legal or evidentiary reasons a particular charge, the prosecutor retains discretion not to pursue that charge as at present. Also, there may be some unusual situations where two charges of comparable seriousness carry significantly different sentences due to the fortuities of Guideline drafting. In those situations, the plea should normally be taken to the charge whose guideline will provide the highest sentence but only if that charge appropriately reflects the gravamen of the offense.

absent approval by the Lands Division. This policy is implemented now.

Subject to these criteria, an attorney for the Government may enter into a plea agreement which involves the dismissal of other charges. Under Rule 11(e)(1)(A) and Guideline 6B1.2(a), the court may accept such an agreement provided the remaining charges "adequately reflect the seriousness of the actual offense behavior" and provided it determines that the "agreement will not undermine the statutory purposes of sentencing."

2. Factual stipulations and admissions. An attorney for the Government, in accepting a plea, is to insure that the necessary factual stipulations or admissions are obtained so a court will be able to impose a sentence in accord with the applicable guidelines for the offense that provides the highest guidelines range for the conduct charged, or a sentence above the guidelines if an aggravating factor warranting such sentence is present. The plea agreement should be as precise as possible as to what occurred and should endeavor to address the presence or absence of any potential specific or general offense characteristic including those set forth in Chapter 3, as well as Chapter 2, of the Guidelines.[5/] A stipulation of facts should include a detailed and complete statement of adjustments which have been agreed upon and those where no agreement has been reached, including victim-related adjustments, adjustments for the defendant's role in the offense, adjustments for obstruction of justice, and adjustments for multiple counts. Characteristics which are known to be true and which are readily provable are not to be overlooked or denied. On the other hand, if a characteristic is believed to be true or is charged but cannot be readily proven (e.g., the full amount of a loss), it need not be pursued. The reason for this decision should be noted on the record and/or in the case file. There are to be no stipulations or proffers as to misleading or non-existing facts, however. See generally, Guideline 6B1.4.

While it may be possible to stipulate that a particular offense level is controlling in a given case, it will rarely be possible to accurately stipulate to the appropriate criminal history category within that level, until the pre-sentence report has been received and the defendant's true criminal record ascertained. Plea agreements should not foreclose the determination of the proper category by the judge, or the imposition by the judge of the alternative career offenders

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5/ Prosecutors are reminded, however, of the statement in the Attorney General's memorandum to all United States Attorneys of July 16, 1986, which stated: "Assistant United States Attorneys should be careful not to make any statement in the course of a criminal investigation or prosecution that may bind the government in a related civil case (such as the amount of damages) without consultation with the civil attorney."

offense levels provided in Chapter 4, Part B, of the Guidelines where applicable.

While no mandatory policies are imposed in this regard, it is preferable that plea agreements be in writing, at least where felony offenses are charged in the indictment. Having these agreements in writing will facilitate mandatory Sentencing Commission monitoring of the plea and sentencing process, as well as avoiding misunderstandings as to the agreements reached in a particular case.

It is particularly important that pre-sentence reports be as complete and accurate as possible. Government prosecutors are to be as cooperative as legally permissible in providing information to probation officers and giving them access to materials in the case file. Where Rule 6(e) precludes access to certain information that would be relevant to the application of a Guidelines provision to the sentence determination, the government prosecutor should consider obtaining a court order permitting disclosure, or directing a probation officer's attention to an independent source for the information. Of course, if a disclosure would reveal the identity of a confidential informant, a situation-by-situation determination will have to be made as to whether to make any sort of disclosure.

3. Permitted plea agreements. Subject to the policies set forth herein and any further policies or restrictions set forth by you for your Division or Office, an attorney for the Government may enter into a plea agreement which includes the dismissal of any charges or an agreement not to pursue potential charges, or which includes a non-binding recommendation for:

a. A sentence at the lower end of the proper range as determined by the Guidelines for the offense after considering the adjustments available under Chapters 2, 3, and 4, or for a sentence of probation where permitted by the Guidelines;

b. A reduction of two levels below the otherwise applicable Guideline for "acceptance of responsibility" as provided by Guideline 3E1.1;

c. The extent, if any, of an applicable downwards departure from the Guidelines based on a factor set forth in Chapter 5, Part K1.1 or 2, of the Guidelines; and/or

d. The extent, if any, of an applicable upwards departure from the

Guidelines based on a factor set forth in Chapter 5, Part K2, of the Guidelines. (Such departures should normally be sought where applicable, but discretion is retained in this area by statute for Judges in sentencing so it should also be retained for prosecutors in making recommendations.)

4. Exceptions: Supervisory approval. Approval of the United States Attorney or a designated supervisory level official,[6] may be granted to:

a. Recommend to a judge a departure from the Guidelines based on a factor other than one set forth in Chapter 5, Part K, of the Guidelines, after first consulting with the designated person in the concerned litigating division section;[7]

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[6] In a case which is prosecuted by a section in a litigating division, approval would be by the Section Chief. In addition, in any tax case, approval of the appropriate regional assistant chief of the Criminal Section of the Tax Division is required. Current approval requirements continue to apply in Lands, Civil Rights, and Antitrust Division cases.

[7] See Appendix A. Consultation with the applicable section in a litigating division is required for an interim period before upward departures are sought or before downward departures are agreed to when based on factors other than those explicitly covered by Chapter 5, Part K. The factors listed there are not exclusive but are recognized as the most common ones for use. Departures may occur for any other significant reason not adequately taken into consideration by the Commission in formulating Guidelines for a particular offense. 18 U.S.C. § 3553(b). If the plea agreement includes a Government recommendation for departure from the Guidelines based upon the existence of factors that were not addressed by the Commission in formulating the Guidelines for a particular offense, this information should also be developed in detailed stipulations of fact. Note the discussion in Chapter 5, Part H, of factors which are "not ordinarily relevant" to sentencing. Prosecutors should be guided accordingly.

This approval and consultation requirement includes the proposed use of the upwards departure permitted by Guideline 4A1.3 for situations where the normal criminal history category

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b. Enter into the form of plea agreement that includes a specific sentence as authorized by Rule 11(e)(1)(c) and Guideline 6B1.2(c);[8] and

c. Depart from the policies set forth in paragraph 1 as to pleas for any justifiable reason consistent with the statutory purposes of sentencing. The reasons for such departures should be reflected in writing in the case file and/or on the record.

5. Issues of Interpretation. As with most statutes, there will be issues of interpretation that are not resolved by the commentary or general provisions. Over-reaching or "aggressive interpretations" should not occur. In the event it is not clear that a specific fact or offense characteristic can be established, the issue should not be pressed simply to score a point. Nor should doubtful interpretations or applications of the Guidelines be pursued. Particular care should be exercised in reference to Chapter 3, Part D, on multiple charges. If there is any question as to the interpretation or applicability of a particular guideline to a case, the relevant section in the concerned litigating division should be consulted. (The designated contact points in the litigating divisions are set forth in Appendix A.)

6. Appeals. Government appeal of a sentence is authorized in four circumstances under 18 U.S.C. § 3742(b), and the statute requires that the Solicitor General must authorize not only the appeal itself but also the filing of the notice of appeal in all four categories of cases. Government appeal is authorized: (1) when the sentence was imposed in violation of law; (2) when the sentence was imposed as the result on an incorrect application of the Guidelines; (3) when any component of the sentence is unreasonably low and is lower than the sentence recommended in the applicable guideline unless the sentence is equal to or

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7/ (...continued)
computations do not adequately reflect the seriousness of a defendant's past criminal conduct or the likelihood he will commit new crimes. The general nature of this departure warrants supervisory review.

8/ This is different from an agreement which includes merely a non-binding recommendation or the dismissal of other charges - cf. Rule 11(e)(1)(A) and (B) and Guideline 6B1.1(a) and (b).

higher than an agreed sentence in a plea agreement under Fed. R. Crim. P. 11(e)(1)(B) or 11(e)(1)(C); or (4) when there is no guideline for the offense and the sentence is unreasonably low, unless the sentence is consistent with or higher than a sentence in a plea agreement pursuant to Fed. R. Crim. P. 11(e)(1)(B) or 11(e)(1)(C). Government appeal of a sentence is not authorized for a sentence within the correct sentencing guideline or for a sentence above the guidelines even if we think the sentence is too low.

To avoid the possibility that a court might rule that notice of appeal of a sentencing issue is invalid without prior approval by the Solicitor General, approval of filing of the notice should be obtained beforehand. Accordingly, if you wish to appeal an adverse sentencing decision, you should make your recommendation to the appropriate Appellate Section of a litigating division along with accompanying documentation, within seven days of imposition of sentence.[9/] That recommendation will be processed by the Appellate Section through the Solicitor General in the same manner as any other appeal recommendation, subject to the time constraints discussed above.

Unlike most other adverse decisions, in regular criminal cases not involving tax, environmental, wildlife, or civil rights counts, if you do not wish to appeal an adverse decision on a sentencing issue, you need not process a recommendation against appeal. However, to assure consistent implementation of the Sentencing Reform Act and the Guidelines, you should promptly notify the Appellate Section by telephone or in writing of any significant appealable adverse decision you do not wish to appeal and of any significant sentencing issue raised on appeal by a defendant that could pose a problem for the Department. In cases involving tax, environmental, wildlife, or civil rights counts, the designated person in the concerned litigating division is to be contacted immediately after any adverse sentencing decision.[10/]

The Department is likely to appeal certain categories of decisions: any wholesale attack on the legality or constitutionality of the Sentencing Commission or the Guidelines;

9/ In the case of a tax case, the recommendation would be processed through the appropriate regional assistant chief of the Criminal Section of the Tax Division.

10/ Contact Assistant Chief Robert Lindsay (FTS 633-3011) of the Criminal Section of the Tax Division in tax cases; Peter Steenland, Chief of the Lands Division Appellate Section (FTS 633-2748) in Lands Division cases; and either David Flynn, Chief of the Civil Rights Division Appellate Section (FTS 633-2195), or Linda Davis, Chief of the Civil Rights Division Criminal Section (FTS 633-3204), in civil rights cases.

any illegal sentence, including a refusal or failure by the sentencing judge to follow the Guidelines; and any clearly incorrect interpretation of the Guidelines. On the other hand, we will need to be cautious in appealing a sentence because it is below the Guidelines, limiting those appeals to cases in which we have a strong argument that the sentence is unreasonable.

Appeal recommendations in regular criminal cases should be made to the Criminal Division Appellate Section person who handles adverse decisions for the circuit in question. Other reports in regular criminal cases required by Part 6 of this Memorandum should be made to Karen Skrivseth of the Appellate Section, (202)(FTS) 633-3793, or the person in the Appellate Section who handles adverse decisions for the circuit. If you have questions regarding the advisability of appealing a sentencing decision, contact the person in the Criminal Division section having substantive jurisdiction over the offense of conviction if the issue relates to the guideline for the particular offense. Contact Karen Skrivseth or the Appellate Section person who handles adverse decisions for the circuit if the issue relates to appealability of sentences or a question regarding legality or constitutionality of the new sentencing system in general.

Conclusion

I commend to your attention the Prosecutors Handbook on Sentencing Guidelines which is being distributed by the Criminal Division. Your legal staff should become familiar with the contents of this Handbook as well as the contents of this Sentencing Advocacy and Case Settlement Policy. Chapter IV in the Handbook should be read in conjunction with this Policy.

November 1st marks the beginning of a new era in the federal criminal justice system. With your cooperation, patience, and wisdom we can help make these new Guidelines a success.

APPENDIX A: CONTACTS ON SENTENCING GUIDELINES

Below are the designated contact points in the various Department components on the Sentencing Guidelines. This list includes the designated persons to contact in the event that consultation (or approval) is required with a litigating division section for departures under this policy.

CRIMINAL DIVISION

Subject Area	Contact	FTS Telephone
Appeals (including: effective date)	Karen Skrivseth or the attorney assigned to your circuit	633-3793 see attached page A-3
Fraud	Robert Dehenzel Robert Clark	786-4600 786-4383
General Litigation (including: Federal crimes while on release, evasion of military service)	Victor Stone	786-4828
Internal Security	Ihor Kotlarchuk	786-4943
Narcotics	Catherine Volz Kevin Connolly Peter Djinis	786-4706 786-4700 786-4700
Obscenity	John DuBois Janis Kockritz	633-5780 633-5780
Organized Crime	Lester Joseph	633-1564
(Questions on relief from disability pertaining to labor unions and employee benefit plans)	Jerry Toner James Silverwood	633-3666 633-1567
Prisoner Transfer	William Manoogian Jody Ferrusi	786-3524 786-3524
Public Integrity	Lee Radek	786-5079
Criminal Fines	Franklin Shippen	786-4954
Additional Copies of Prosecutors Handbook	Office of Administration	786-4881

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Subject Area	Contact	FTS Telephone
Training	Christopher Neuchterlein	633-4104
General Questions	Grace Mastalli Manny Rodriguez	633-3276 633-4024
ANTITRUST DIVISION	Judy Whalley	633-2562
CIVIL DIVISION	John Fleder	724-6786
CIVIL RIGHTS DIVISION	Daniel Bell	633-4071
Appeals	David Flynn Linda Davis	633-2195 633-3204
LAND AND NATURAL RESOURCES DIVISION	Judson Starr Raymond Mushall James Kilbourne	633-2490 633-2493 633-1811
Appeals	Peter Steenland	633-2748
TAX DIVISION	Robert E. Lindsay Assistant Chief Criminal Section	633-2914

REGIONAL ASSISTANT CHIEFS, CRIMINAL SECTION

Northern Region	George T. Kelley	633-3036
Southern Region	Patrick J. Sheedy	633-4334
Western Region	Ronald A. Cimino	633-5247

APPELLATE SECTION
ADVERSE DECISION CONTACTS

First Circuit	-	Ann Wallace (633-2842)
Second Circuit	-	Ann Wallace (633-2842)
Third Circuit	-	Sara Criscitelli (633-3741)
Fourth Circuit	-	Tom Booth (633-5201)
Fifth Circuit	-	Merv Hamburg (633-3746)
Sixth Circuit	-	Joe Wyderko (633-3608)
Seventh Circuit	-	Joel Gershowitz (633-3742)
Eighth Circuit	-	Robert Erickson (633-2841)
Ninth Circuit	-	Patty Stemler (633-2611) S.D. California, Arizona, Hawaii, Alaska, Oregon
		John DePue (633-3961) E.D. California, C.A. California, Nevada, Washington State
		Karen Skrivseth (633-3793) N.D. California Guam, Marianas, Idaho, Montana
Tenth Circuit	-	Mervyn Hamburg (633-3746)
Eleventh Circuit	-	Ann Wallace (633-2842)
	-	Deborah Watson (633-5524) S.D. Florida
D.C. Circuit	-	Ann Wallace (633-2842)

*U.S. GOVERNMENT PRINTING OFFICE:1987-202-046:82001