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COMMENDATIONS

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

Jerry R. Atencio (District of Colorado), by Gilbert M. Cisneros, Regional Administrator, Small Business Administration, Denver, for his excellent representation in the preparation and trial of a civil case.

Andrew B. Baker, Jr. (Indiana, Northern District), by Valdas Adamkus, Regional Administrator, Environmental Protection Agency, Chicago, for his legal skills and expertise in the trial of a four-county landfill case.

Alfred Bethea (District of South Carolina), by Frederick Verinder, Special Agent in Charge, FBI, for obtaining the conviction of two defendants in a major criminal case.

Barbara M. Carlin (Pennsylvania, Western District), by Joseph M. Kopp, District Director, Small Business Administration, Pittsburgh, for her outstanding representation in a number of civil cases on behalf of SBA.

Alan Everett (District of Nebraska), by Leland L.S. Holdt, Chairman of the Board and President, Security Mutual Life Nebraska, for his success in the investigation and prosecution of a fraudulent claims case.

Terry Flynn (Florida, Middle District), by Robert W. Butler, Special Agent in Charge, FBI, Tampa, for his valuable assistance in the investigation of a major bank fraud scheme involving millions of dollars of federally insured funds.

Arthur Garcia (District of Arizona), by William Barber, Jr., Area Director, Bureau of Indian Affairs, Phoenix, for his participation in a recent BIA Superintendents' meeting in Reno, Nevada. Also, by Jack W. Neckel, Regional Director, Rocky Mountain Region, Denver, for obtaining a favorable decision by the Ninth Circuit Court of Appeals.

Andrew Grosso (Florida, Middle District), by William S. Sessions, Director, FBI, for his professionalism and expertise in a complex fraud against the government case.

David H. Hoff (Illinois, Central District), received a Certificate of Appreciation from the Illinois State Bar Association for his outstanding service to the Association and the Bar of Illinois.

Mel S. Johnson and **James L. Santelle** (Wisconsin, Eastern District), by Constant B. Chevalier, Regional Inspector General for Investigations, Midwest Region, Department of Agriculture, for their successful prosecution of a production fraud case.

Palmer Kelly (Texas, Western District), by Donald Mancuso, Assistant Inspector General for Investigations, Department of Defense, Arlington, Virginia, for obtaining the conviction of a psychologist on 37 counts of submitting false claims to the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS).

Jeanine Nemisi Laville (Georgia, Northern District) by Paul Adams, Inspector General, Department of Housing and Urban Development, Washington, D.C., for her outstanding contribution to the success of a recent HUD fraud case.

Peter Loewenberg (Florida, Middle District), by Ted Elders, Office of General Counsel, Department of Agriculture, Atlanta, for his valuable assistance to the Farmers Home Administration in connection with a delinquent FHA borrower.

Kris McLean and **Carl Rostad** (District of Montana), by Thomas R. King, Regional Special Agent, U.S. Forest Service, for obtaining a conviction in a criminal case involving assault on a federal officer and use of a firearm in a drug trafficking case.

James E. Mueller (District of Arizona), by Stanley A. Twardy, Jr., United States Attorney, District of Connecticut, for his participation in an office evaluation conducted by the Executive Office for United States Attorneys, Washington, D.C.

Melissa Mundell (Georgia, Southern District), by Larry Hahn, Resident Agent in Charge, DEA, Savannah, for her outstanding success in the investigation and prosecution of a civil case involving $98,900 being forfeited to the government.

John P. Panneton and **John K. Vincent** (California, Eastern District), by William S. Sessions, Director, FBI, Washington, D.C., for their outstanding legal support and prosecutive efforts in a public corruption case.

Stephen C. Peters (District of Colorado), by Gerald F. Swanson, District Director, IRS, Denver, for his excellent representation in the prosecution of a former IRS employee.

Albert Ratliff and **John Smith** (Texas, Southern District), by Marcus L. Dobbs, Assistant City Attorney, Houston, for their presentation before the grand jury of a perjury case against a former Houston police officer.

David Sarnacki (Wisconsin, Western District), received the Inspector General's Integrity Award from Richard P. Kusserow, Inspector General, Department of Health and Human Services, for his outstanding efforts in the investigations, prosecutions and deterrence of medical insurance fraud in the Wisconsin area.

D. Broward Segrest (Alabama, Middle District), by John A. Gandy, District Manager, Social Security Administration, Montgomery, for his skill and professionalism in obtaining a conviction in an assault case against an employee of the Social Security Administration.

E. Montgomery Tucker (Virginia, Western District), by Donald T. Coats, Division Director, Human Resources, U.S. Postal Service, Richmond, for successfully prosecuting a Postal Service case, and avoiding the potential loss of a large sum of money.

Frank Violanti and **James B. Tucker** (Mississippi, Southern District), by Robert L. Prince, Chairman, Board of Directors, Leviticus Project Assn., Richmond, for their legal skill and expertise in obtaining indictments and convictions in a recent major white collar crime case.

* * * * *

SPECIAL COMMENDATION FOR THE SOUTHERN DISTRICT OF GEORGIA

Judge B. Avant Edenfield, United States District Court for the Southern District of Georgia, Savannah, commended Assistant United States Attorney Frederick W. Kramer, III for his successful prosecution of an espionage case.

Sgt. James Hall, a SIGINT analyst at Field Station Berlin, was recruited by Huseyin Yildirim in 1983 to sell Top Secret U.S. defense information to the East Germans. The East German MFS (Ministry of State Security, the East German equivalent of the KGB) placed Yildirim in a job at the Auto Craft Shop in Berlin, a facility maintained by the Army as a do-it-yourself repair garage for U.S. personnel. There Yildirim came into contact with U.S. Army intelligence personnel on a close and continuing basis. Yildirim received stolen Top Secret documents from Hall, copied or photographed them, and delivered them to Warsaw Pact intelligence operatives. He would receive payment for these deliveries and would then pay Hall. This espionage activity continued through Hall's assignments to intelligence units in Berlin, Frankfurt, and Fort Monmouth, New Jersey, and up to his arrest at Fort Stewart, Georgia in December, 1988.

Hall was induced by an undercover FBI agent posing as a KGB operative to reveal the history and methods of the conspiracy, and the extent of the compromise of U.S. intelligence and operational secrets wrought by him and Yildirim. Seized in great bulk were copies and originals of stolen Top Secret documents, as well as significant amounts of tradecraft, specialized cameras and film, drop site instructions, concealment devices, false pass-passports and "pocket litter," and instructions and demands from the MFS and KGB. The damage to U.S. and NATO defense and intelligence structures was significant and grave.

Sgt. Hall pled guilty before an Army Court-Martial and was sentenced to 40 years. Yildirim was tried to a jury in Savannah on July 17, 1989 and convicted as charged of conspiracy to commit espionage. He is presently awaiting sentencing.

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DRUG ISSUES

Drug Trafficking Report

On August 3, 1989, Attorney General Dick Thornburgh transmitted the "United States Attorneys' Report On Drug Trafficking" to President George Bush. A copy of the letter accompanying the report, together with the President's acknowledgement, is attached at the Appendix of this Bulletin as Exhibit A.

* * * * *

Drug Testing

D.C. Circuit

Harmon v. Thornburgh, No. 88-5265 (D.C. Cir. June 30, 1989). DJ # 35-16-3020

The D.C. Circuit unanimously held that "all DOJ employees holding top secret national security clearances may constitutionally be required to undergo random urinalysis." The Court also held unconstitutional random drug testing for Department of Justice prosecutors and Department of Justice employees having access to grand jury proceedings. Nevertheless, the Court recognized "the distinct possibility that some workers within

these categories may perform duties so closely tied to the enforcement of federal drug laws that they could constitutionally be required to undergo (random) testing." Chief Judge Wald's majority opinion (concurred in by Judge Robinson) left open the possibility that the Attorney General might "promulgate new, narrower regulations for the category of "drug prosecutors." In his partial dissenting opinion, Judge Silberman stated that he would have immediately allowed the Department of Justice to test "drug warriors" without the need for any new regulations.

If you have any questions, please contact Leonard Schaitman, FTS/202-633-3441 or Lowell Sturgill, FTS/202-633-3427, of the Civil Division Appellate Staff.

* * * * *

Fourth Circuit

Thomson v. Carlucci, No. 88-2838 (4th Cir. July 6, 1989). DJ # 145-15-1682

The Fourth Circuit has just unanimously upheld against Fourth Amendment Challenge the Army's drug testing program for civilian employees with access to areas in which experiments with chemical warfare agents are performed. In unanimously reversing the adverse district court decision, the Court agreed with our argument that the Fourth Amendment issue is controlled by recent Supreme Court authorities even though those cases did not involve random testing. The Fourth Circuit thus joins the First and D.C. Circuits in recent cases upholding random drug testing programs. While the Fourth Circuit's opinion is unpublished, we are moving to publish.

If you have any questions, please contact Leonard Schaitman, FTS/202-633-3441 or Robert V. Zener, FTS/202-633-3425, of the Civil Division Appellate Staff.

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POINTS TO REMEMBER

Amendment To The Federal Rules Of Bankruptcy Procedure

On August 3, 1989, L. Ralph Mecham, Director, Administrative Office of the United States Courts, issued a memorandum to all Judges of the United States Courts, United States Magistrates, Circuit Executives, District Court Executives, and Clerks of the United States Courts, concerning an amendment to the Federal Rules of Bankruptcy Procedure. The Congress has taken no action to defer the effective date of the amendment to Rule 9006(a) of the Federal Rules of Bankruptcy Procedure which was adopted by the Supreme Court in April pursuant to 28 U.S.C. §2075. Therefore, this amendment became effective on August 1, 1989, as provided in the Supreme Court Order of April 25, 1989, and as set out in House Document 101-54. A copy of the Amendment is attached at the Appendix of this Bulletin as Exhibit B.

* * * * *

Guideline Sentencing Update

A copy of "Guideline Sentencing Update," Volume 2, Number 9, dated July 13, 1989, and Volume 2, Number 10, dated August 4, 1989, is attached at the Appendix of this Bulletin as Exhibit C.

* * * * *

Office Of Inspector General

On July 11, 1989, Attorney General Dick Thornburgh issued a memorandum to all employees of the Department of Justice advising that the Office of the Inspector General was established on April 14, 1989, thereby implementing the Inspector General Act Amendments of 1988, Pub. L. No. 100-504, 101 Stat. 2515. The Attorney General's memorandum stated as follows:

> The creation of the Office reaffirms my commitment to ensure that the Department is managed, and that its personnel conduct themselves, in accordance with the highest standards of integrity and efficiency.

The Office of Professional Responsibility and the Office of the Inspector General will share responsibility for the detection and prevention of misconduct and mismanagement on the part of Department personnel. The Office of Professional Responsibility will continue to exercise authority over investigations of allegations of misconduct involving attorneys and those in criminal investigative or law enforcement positions.

The Office of the Inspector General will exercise authority over allegations of misconduct involving other employees and for investigations and audits involving allegations of fraud, waste, and abuse.

In order for these two offices to function properly, they must be promptly notified whenever misconduct is suspected. It is the responsibility of each employee in the Department to notify the Office of the Inspector General or the Office of Professional Responsibility when situations involving fraud, misconduct, or other improprieties are suspected. Allegations relating to those employed by the Department of Justice in an attorney, criminal investigative, or law enforcement position that may violate a law, regulation, or order of the Department of Justice or any other applicable standard of conduct shall be made to the Counsel, Office of Professional Responsibility. All allegations relating to Department employees in other categories, and all allegations of fraud, waste, or abuse in the Department's programs and operations, including its grants and contracts, shall be made to the Inspector General. Where there is uncertainty as to jurisdiction, report to either office or both -- but report.

To assist in this effort, the Office of the Inspector General, under the direction of Anthony C. Moscato, Acting Inspector General, has established a Hotline staffed by operators from 8:30 to 5:00 daily, 1-800-869-4499. In addition, allegations may be forwarded in writing to the Office of the Inspector General, P.O. Box 27606, Washington, D.C. 20038-7606.

Correspondence to Michael E. Shaheen, Counsel, Office of Professional Responsibility, should be addressed to the Department of Justice, Washington, D.C. 20530, FTS-202/633-3365.

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Review Of Searches Of Department Of Energy Facilities

On July 24, 1989, Acting Deputy Attorney General Edward S.G. Dennis, Jr. forwarded a memorandum to all United States Attorneys concerning two Department of Energy owned facilities that have been the subject of searches for potential violations of the Resource Conservation and Recovery Act (42 U.S.C. §§6901-6991), (hereinafter referrred to as RCRA) and other environmental laws. In one case involving the Rocky Flats Nuclear Weapons Plant, a criminal search warrant was used; in the other case concerning West Valley demonstration project, near Buffalo, New York, the search was conducted under the authority of the Inspector General's Office of the Department of Energy in cooperation with the local United States Attorney's Office. Searches of such facilities necessarily involve national security considerations and highly specialized questions of law regarding the environmental regulation of waste they generate.

From these two experiences, where a review by the Criminal Division and the Land and Natural Resources Divison was conducted, it was apparent that the success of these two searches was enhanced by the review process. To assure that the potential problems of such searches will continue to be avoided, future searches of Department of Energy owned facilities will need clearance and review by the Criminal Division and the Land and Natural Resources Division. One specific area which will be addressed in this review is the national security consequences and concerns. Given the nature of the work done in many of these facilities, these concerns will affect the manner in which the search is conducted. In addition, the time during which the facility may be disrupted may also have national security implications. This review will also allow consideration of other potential problems to prosecution, such as the need to use classified documents at trial, which will implicate legal issues under the Classified Information Procedures Act, 18 U.S.C. App. IV.

The review procedure can be most sucessful if sufficient advance notice of the investigation and the search is given to the Criminal Division to allow these concerns to be investigated. You may be assured that the Divisions appreciate the importance of vigorously and expeditiously fighting environmental crimes and will review the potential search warrants and accompanying affidavits in a prompt manner to avoid any unnecessary delays.

If you have any questions, please contact Joseph G. Block, Chief, Environmental Crimes Section, Land and Natural Resources Division, at FTS/202-272-9877, or William P. Sellers IV, Senior Legal Advisor, General Litigation and Legal Advice Section, Criminal Division, at FTS/202-786-4821.

* * * * *

Use Of Prisoners In Investigations

On July 26, 1989, Laurence S. McWhorter, Director, Executive Office for United States Attorneys, issued a memorandum to all United States Attorneys concerning the use of prisoners in investigations. There recently have been several instances when investigative agents have requested that federal prosecutors procure court orders for the use of prisoners in investigations where there has been no prior approval by the Office of Enforcement Operations of the Criminal Division. These requests should not be acted upon until the federal prosecutor has been advised by the Office of Enforcement Operations that the required approval has been granted. To secure approval, please refer to the United States Attorneys' Manual, Section 9-21.120. Each United States Attorney should immediately instruct the members of his/her staff accordingly.

Since 1982, at the request of the Director, Bureau of Prisons, the Office of Enforcement Operations has been reviewing all requests from investigative agencies or United States Attorneys to use federal inmates under the jurisdiction of the Bureau of Prisons and the United States Marshals Service in investigations which necessitate furloughs, extraordinary transfers, consensual monitoring, and any activities other than regular interviews of the inmates. This includes all federal inmates, sentenced or unsentenced, no matter where they are housed, including but not limited to federal prisons, county jails, halfway houses or contract facilities.

These types of investigations are extremely sensitive. Extraordinary precautions must be undertaken and approved by the investigative agencies' headquarters as well as by the Office of Enforcement Operation (OEO). We must consider the safety of the inmates, the risk to the community, and the possibility that the inmate may escape, against the benefits to be obtained. This involves precise interagency coordination between the United States Attorney, Office of Enforcement Operations, the Bureau of Prisons and the appropriate investigative agency. No initial contact with either Bureau of Prisons officials or United States Marshals personnel should be made by federal prosecutors or investigative agents concerning the utilization of federal prisoners prior to receiving Office of Enforcement Operations approval.

It must be emphasized that court orders are not to be utilized to remove inmates from federal facilities when the purpose of the removal is to utilize the inmate in an investigation without the prior approval of OEO. Concerned federal investigative

agencies have been requested to coordinate these situations through the head of the agency or their designated representatives and to forward pertinent information to the Office of Enforcement Operations.

Please contact Diane Ried, Chief, Witness Security Program (OEO), Gurnia Michaux, Assistant Director (OEO) or Gerald Shur, Senior Associate Director (OEO) at FTS/202-633-3684 for assistance. During off duty hours all of these individuals may be contacted through the Department of Justice operator, at FTS/202-633-2000.

* * * * *

Supreme Court Decision In Gomez v. United States

The following is provided as guidance to those districts impacted by the recent Gomez v. United States Supreme Court decision. The court in Gomez determined that the delegation by district judges to magistrates of the function to preside over jury selection in felony cases was inappropriate. In many districts, magistrates were fulfilling this function. The issue in the case was whether a magistrate may preside over jury selection in felony cases without defendant's consent pursuant to the Federal Magistrates Act's (FMA) ". . . additional duties as are not inconsistent with the Constitution. . . ." The Court of Appeals rejected the argument that a magistrate could not fulfill this function because the "additional duties. . ." statutory clause encompassed such purpose. The Supreme Court, however, reversed by categorizing jury selection as more akin to a "dispositive matter" requiring a de novo review procedure, rather than a pretrial matter (and thereby within the designated functions of magistrates). The Court did not adopt the Government's position that this was harmless error because petitioners did not allege specific prejudice. A deprivation of the defendant's right to an impartial adjudicator, be it judge or jury, cannot be treated as harmless error, said the Court.

The Department of Justice, through the Criminal Appellate Division, in concert with certain United States Attorney's Offices, is taking the following position regarding issues left unresolved by the Gomez decision:

ISSUE 1: Retroactivity. Recent Court decisions have held that constitutional rules for conduct of criminal prosecutions apply retroactively to all cases pending on direct appeal. Applying this principle, the Gomez holding probably will apply retroactively to all convictions not yet final at the time of the decision. However, because Gomez was not decided on constitutional grounds, it is the Department's position that the principle of retroactivity in constitutional cases should not apply because the FMA is a procedural statute. In any event, the holding in Gomez should not apply retroactively to convictions that are final. In addition, collateral attacks by defendants should fail because the "cause prong" of the "cause and prejudice" standard governing collateral attacks cannot be satisfied. Coram nobis claims should also fail because of the writ's limited scope of applying only where the "errors are of the most fundamental character, rendering the proceeding itself invalid."

ISSUE 2: Jurisdiction. The Court did not address whether Article III would permit this practice if Congress had authorized it in the FMA. However, because the Court indicated harmless error does not apply when "an officer exceeds his jurisdiction by selecting a jury," defendants will likely challenge the convictions based on this practice as a jurisdictional error.

The Department suggests "jurisdiction" is not used so expansively in Gomez. The Court's use of the term "jurisdiction" seems to be more akin to the concept of personal jurisdiction over defendant, which can be waived if not asserted. Further, the decision should apply only to those who have not consented to the delegation of the function.

ISSUE 3: Consent. The decision did not address the question whether consent by the defendant might vitiate a claim to reverse a conviction.

The Department believes that consent is a waiver of the "right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside." Prior to Gomez, some courts determined that even in misdemeanor trials, defendants had the right to an Article III judge, but this right was waived if defendant consented to trial before a magistrate. Thus, if a defendant was informed of his right to jury selection conducted by a district judge, and consented to the magistrate procedure, then such consent serves as a waiver of the constitutional right.

ISSUE 4: Failure To Object. The Court did not decide the consequence of acquiescence by the defendant to the procedure without actual consent. Can the defendant waive the basic right to voir dire by "an officer with jurisdiction to preside?" This issue will likely arise where convictions were not yet final when Gomez was decided.

It is the Department's position that even though a harmless error standard cannot be utilized to analyze these cases, defendants' failure to object below estops them from raising it on appeal under the "raise or waive" rule. Therefore, if a defendant consented to, or acquiesced to the delegation of jury selection to a magistrate, the Government does not need to confess error in cases pending on direct appeal at the time Gomez was decided.

The Criminal Division has prepared a brief raising these positions in the First Circuit. To obtain copies of the memoranda discussing these issues more in-depth with citations, please contact the Legal Counsel's office of the Executive Office for United States Attorneys, at FTS/202-633-4024 . You may also direct questions to J. Douglas Wilson, Criminal Appellate Division, at FTS/202-633-3740.

* * * * *

OFFICE OF LEGISLATIVE AFFAIRS

Adoptive Forfeitures

Unless repealed or amended, Section 6077 of the Anti-Drug Abuse Act of 1988 will virtually eliminate the equitable sharing program, effective October 1, 1988. This program, whereby state and local law enforcement authorities share in forfeiture proceeds from cases in which they have assisted federal law enforcement agencies, has done much to foster operational cooperation between the various levels of government in making major drug cases.

During floor consideration of the Department of Defense authorization bill, S. 1352, the Senate adopted as an amendment the text of Senator Wilson's bill, S. 1010, which would repeal Section 6077. The Department will be working with members and staff in an effort to retain this provision when the bill goes to a conference committee.

* * * * *

Department of Justice Appropriations

On August 1, 1989, the House passed the State, Justice, Commerce FY 1990 appropriations bill, H.R. 2991, by a vote of 399 to 18. The few provisions of interest to the Department were not amended on the floor. The Senate Appropriations Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies plans to mark up the House-passed FY 1990 appropriations bill shortly after the August recess.

* * * * *

Claims Settlement Authority

On July 27, 1989, the Senate Judiciary Committee ordered favorably reported S. 604. This legislation, which the Administration fully supports, would expand the authority of the Attorney General to settle claims for damage arising from law enforcement activity of the federal government. These involve claims by innocent third parties who sustain damage from the proper performance of law enforcement duties, which would not be cognizable under the Federal Tort Claims Act. Existing law, 31 U.S.C. §3724, permits settlement only of claims resulting from FBI activities up to the sum of $500. The bill would increase that sum to $50,000 and broaden its application to all law enforcement officers, as that term is defined in 28 U.S.C. §2680(h) who are employed by the Department of Justice. An identical House bill, H.R. 972, was passed by that body on May 9, 1989.

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Federal Prison Industries

On July 31, 1989, the Senate adopted an amendment to the Department of Defense authorization bill, S. 1352, which would eliminate the procurement preference currently accorded the Federal Prison Industries Inc. (FPI) in offering products for purchase by the Department of Defense. When the amendment, authored by Senator Dixon, was adopted, proponents argued that little has been done to ensure that FPI does not impose an undue competitive burden on any specific industry and capture more than a reasonable share of the government market for a specific product.

The Department opposes this amendment. In the 100th Congress, legislation was enacted which established an elaborate set of guidelines for FPI which are designed to prevent the unfairness alleged by the amendment's proponents. Moreover, elimination of FPI's Department of Defense procurement preference would cripple a vital program. The federal prison system is expected to expand about 13-15 percent annually, with a doubling in size in the next decade. This population will be housed in facilities that are greatly overcrowded. The Administration and Congress are in agreement about the need for this expansion. FPI is an essential part of the expansion, because FPI is absolutely necessary for the orderly management of the federal prison system.

* * * * *

Federal Tort Claims Act Amendments

On July 11, 1989, the Department of Justice was apprised of a proposal under consideration by the Senate Committee on Labor and Human Resources that would make the United States liable under the Federal Tort Claims Act (FTCA) for medical malpractice committed by employees and contractors with Community and Migrant Health Centers. The Centers receive about 50 percent of their funding from the United States, but they are not agencies of the United States for FTCA purposes. We were informed that Committee staff were considering inclusion of the proposal in budget reconciliation measures.

Department officials conferred with the staff from Labor and Human Resources as well as Judiciary Committee staff on July 26, 1989, in order to inform them of our vigorous objections to this costly and ill-advised proposal. The Department has consistently opposed legislation like this, that would extend the scope of FTCA liability to cover the actions of individuals who are not employees of the United States. During the meeting the proposal was abandoned in favor of efforts to develop a self-insurance program for the Health Centers, whose sky-rocketing malpractice insurance costs precipitated the initial move to seek coverage under the FTCA.

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Futures Trading Abuses

At a July 26, 1989, mark-up of the Commodity Futures Improvement Act, H.R. 2869, the House Agriculture Subcommittee on Conservation, Credit and Rural Development adopted amendments by Rep. Tallon to create criminal sanctions for an abuse arising from dual trading on futures exchanges. Under this proposal, "front running," in which a broker trades for his own account ahead of his customers, would be prohibited specifically. The Department opposed these amendments as unwarranted, on the ground that the existing antifraud provisions of the Commodity Exchange Act, coupled with the mail and wire fraud provisions of Title 18, provide a sufficient arsenal against futures trading abuses deserving criminal prosecution. The Department succeeded in having the offending language removed from the bill as reported.

* * * * *

Hatch Act Repeal

On July 25, 1989, Acting Deputy Attorney General Edward S.G. Dennis, Jr. testified before the Senate Committee on Governmental Affairs in opposition to S. 135, a bill that would repeal substantial portions of the Hatch Act, which prohibits certain partisan political activities by federal employees. He was joined by Director Constance Barrie Newman, Office of Personnel Management, and Special Counsel Mary Wieseman. Mr. Dennis explained the Department's grave concerns that the proposed repeal of existing Hatch Act protections would leave federal employees, and the programs that they implement, vulnerable to political exploitation and patronage abuse. The resulting politicization of federal public administration and diversion of public revenues to partisan political ends would be accompanied by a substantial decrease in the public's confidence in the quality and fairness of government. The remaining criminal statutes prohibiting such exploitation and abuse would be wholly inadequate to protect federal employees or programs due, in part, to the problems of proof that are inherent in prosecutions of that nature.

The Senate Governmental Affairs Committee approved S. 135 on July 26, 1989. It is not yet clear when Senate floor action will be scheduled. The House version of this legislation, H.R. 20, was passed by that body on April 17, 1989.

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CIVIL DIVISION

D.C. Circuit Affirms Ruling That Pro Se Lawyers Are Eligible To Fee Awards Under EAJA

In this case, the government challenged a district court decision holding that a Department of Interior attorney is eligible for fees under the Equal Access to Justice Act ("EAJA") when proceeding pro se against the government. The D.C. Circuit (Edwards, Mikva, & Silberman, JJ.) affirmed the district court's fee award. Although the Circuits are "hopelessly divided" on this question under other fee shifting statutes, Judge Edwards has concluded that the "plain language" of EAJA permits a fee to a pro se litigant, rejecting as "strange" the government's argument that Congress did not intend to subsidize lawyers bringing their own suits against the government. In a separate concurring opinion, however, Judge Silberman asserts that, were he not bound by prior D.C. Circuit opinions granting fees to pro se litigants under the Freedom of Information Act, he would hold that no fees are available to pro se litigants, lawyer or not. Judge Silberman ended his concurrence by noting the conflict in the Circuits and suggesting that "Supreme Court review is most appropriate."

David E. Jones v. Manuel Lujan, No. 88-5229 (D.C. Cir. June 30, 1989). DJ # 35-16-2796.

Attorneys: Michael Jay Singer, FTS/202-633-5431
Victoria Nourse, FTS/202-633-4215

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D.C. Circuit, In First Decision Applying Recent Supreme Court Ruling Regarding FOIA Privacy Exemptions, Holds That Release of Names and Addresses of Federal Retirees Would Constitute a Clearly Unwarranted Invasion of Personal Privacy

This case involves the efforts of NARFE, an organization of federal retirees, to obtain from the Office of Personnel Management a list of the names and addresses of recent retirees. NARFE prevailed before the district court, largely on the theory that release of this information to NARFE would not constitute a "clearly unwarranted invasion of personal privacy," and hence the information could not be withheld under FOIA's Exemption 6. Although the case was argued in April 1987, it was held up because

of the various rulings in Reporters Committee for Freedom of the Press v. U. S. Department of Justice -- first for further briefing in light of the D.C. Circuit's decision in that case, and later held pending disposition by the Supreme Court. Following the Supreme Court's March 1989 ruling in Reporters Committee, we filed further supplemental briefs addressing its analysis of privacy issues under FOIA.

The Court of Appeals has now reversed the district court, in an opinion that fully embraces the rationale of Reporters Committee. The court began by recognizing that FOIA, as interpreted in Reporters Committee, requires that information be made available either to all requesters or to none, and that the purposes of a particular requester -- including the limited ways in which it intends to use the information -- are irrelevant. The court also held that the "privacy" interests to be considered under FOIA cannot be limited to "intimate details." Although the court shied away from holding that one always has a significant privacy interest in one's home address, it readily found such an interest here, because the list would disclose the fact that those on it are federal annuitants. On the other side of the balancing test, the court recognized that, under Reporters Committee, the kinds of "public interests" that can justify disclosure despite privacy concerns are limited to those relating to informing the public of the workings of government. Here the court held that no such interest would be served, and concluded that "even a modest privacy interest outweighs nothing every time.

National Association of Retired Federal Employees v. Horner, No. 86-5446 (D.C. Cir. July 7, 1989). DJ # 145-156-475.

Attorneys: Leonard Schaitman, FTS/202-633-3441
John F. Daly, FTS/202-633-2541

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Third Circuit Holds That Disabled Persons Are Not Entitled To Retroactive Food Stamps To Cover SSA Disability Determination Periods, But Also Holds That Utility Reimbursements Received by Public Housing Tenants Are Excluded As Income Under The Food Stamp Act

This case involves two class challenges. Class A plaintiffs, who are persons that received retroactive Social Security disability benefits, argued that they were also entitled to recalculation of their food stamp benefits to cover the same retro-

active period. The Food Stamp Act defines a "disabled" person as one who "receives" SSA disability payments. 7 U.S.C. §2012(r). The Secretary of Agriculture construed this term to exclude the period between the date a claimant applies for benefits and the date SSA approves the claim, even when the award is made retroactive to the date of the claim. Plaintiffs argued that this interpretation was inconsistent with the Food Stamp Act, the Rehabilitation Act, 29 U.S.C. §794, and the Due Process Clause. Class B plaintiffs are public housing tenants whose food stamp allotments were reduced because the utility reimbursements they received under the United States Housing Act, 42 U.S.C. §§1401 et seq., were treated as income under the Food Stamp Act. Plaintiffs asserted that this practice violated the Food Stamp Act and the United States Housing Act. The district court granted the government's motion for summary judgment.

The Third Circuit has now affirmed the district court's decision as to Class A plaintiffs, but reversed as to Class B. As to Class A, the Court held that the Secretary's interpretation of the word "receive" in §2012(r) to mean actual receipt was reasonable and entitled to deference. Significantly, the Court accepted our argument that this interpretation was entitled to deference even though the Secretary had slightly modified his original interpretation of §2012(r). The Court held that only "sharp reversals of policy" would divest an agency of the deference to which it is normally entitled. The Court also rejected plaintiffs' argument that the Secretary's interpretation of the statute unlawfully discriminated against the disabled or violated due process. As for Class B, the Court held that the utility reimbursements provided to public housing residents are excluded as income under 7 U.S.C. 2014(d)(11), which exempts as income payments made under "any federal law for the purpose of providing energy assistance." The Court rejected our argument that the United States Housing Act was not such a statute.

West v. Bowen, No. 88-1475 (3d Cir. June 30, 1989).
DJ # 145-16-2781.

Attorneys: Anthony J. Steinmeyer, FTS/202-633-3388
Constance A. Wynn, FTS/202-633-4331

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Sixth Circuit Rules That Tree Cutter Who Was Injured By Falling Tree Is Allowed To Keep $2 Million Tort Judgment

In 1983, the Forest Service hired a professional tree cutter, Jay Caplan, to cut down trees in a national forest in eastern Kentucky. About seven years earlier, the Service had tried to kill trees in this part of the forest (judged to be of "low quality") with herbicide. Most had died from the herbicide but some remained living. It was these trees that Mr. Caplan contracted to cut down. Mr. Caplan worked full time at cutting these trees for the next four months. He was fully aware of the herbicide treatments and knew that the vast majority of dead trees in the area, both standing and on the ground, were dead as a result of poisoning. Just as he was completing his Forest Service contract, on a rainy April day a dead tree fell on him as he was cutting a live tree. His injuries were serious and he is now a paraplegic.

Mr. Caplan sued the United States under the FTCA alleging that the Forest Service did not properly inform him of the risks of his work. Specifically, he argued that he had not been told the date when herbicides had been injected in the trees and could not properly assess the dangers of working in the forest. The district court agreed with him and awarded almost $2 1/2 million in damages.

The Sixth Circuit has just affirmed this decision, rejecting our position that Mr. Caplan was legally responsible for knowing about the dangers of dead trees and for providing for his own safety. The court also disagreed with our suggestion that the Forest Service's decision as to the warnings that should be given to forestry contractors like Mr. Caplan about forest dangers is a discretionary function and, therefore, immune from FTCA liability.

Caplan v. United States, No. 88-5558 (6th Cir. June 30, 1989). DJ # 157-30-352.

Attorneys: Michael Jay Singer, FTS/202-633-5431
William G. Cole, FTS/202-633-5090

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Sixth Circuit Upholds Secretary of Agriculture's Decision To Treat "Workfare" Benefits As "Unearned Income" For Purposes Of The Food Stamp Program

The Food Stamp Act allows households to deduct 20 percent of their "earned" income from their total income when computing the households' eligibility for food stamps. 7 U.S.C. 2014(c). Ohio runs a workfare program, under which recipients of welfare benefits work at assigned public service jobs in order to remain eligible for their benefits. The Secretary in 1978 concluded that such "workfare" benefits should be considered "earned" income when computing food stamp eligibility. The Secretary in 1986 reversed course, and issued a new regulation which deemed workfare benefits to be "unearned" income. The district court concluded that the new interpretation violated both the Food Stamp Act and the Equal Protection Clause of the Fourteenth Amendment.

The Sixth Circuit (Engle, C.J., Nelson, Ryan, J.J.) has now reversed. The court, accepting our arguments in full, agreed that the Secretary had the discretion to change his interpretation of the Food Stamp Act, that his new interpretation did not conflict with the statute and was reasonable, and that the interpretation did not violate the Fourteenth Amendment. The court, again adopting our position, dismissed as unripe the State of Ohio's argument (raised for the first time on appeal) that the court should order the Secretary to reimburse the state for food stamps it awarded under the old interpretation after the district court had enjoined use of the new interpretation.

Garrett v. Lyng, Nos. 87-3468/3479 (8th Cir. June 12, 1989). DJ # 147-58-47.

Attorney: Douglas N. Letter, FTS/202-633-3602

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Eighth Circuit Affirms District Court Judgment Invalidating HHS Interpretation Of A 1986 Law That Required States To Disregard Certain Increases In Social Security Benefits When Calculating Medicaid Eligibility

In most states Medicaid eligibility is linked by federal law to eligibility for Supplemental Security Income (SSI) benefits. A 1984 increase in Social Security disability benefits raised some persons' income above the threshold for SSI, and hence Medicaid, eligibility. In 1986, therefore, as part of COBRA, Congress ordered the states to "deem" Medicaid applicants SSI-eligible, for Medicaid purposes, if the only reason they are off

the SSI rolls is the 1984 Social Security increases. In other words, the 1984 increases were to be disregarded. A problem arose, however, in the so-called "section 209(b)" states, where Medicaid eligibility is not linked by federal law to SSI eligibility and states are free to establish their own Medicaid eligibility requirements (within certain restrictions). HHS took the position that these states were free to choose on their own whether to disregard the 1984 benefit increases, because the COBRA provision, in terms, only required the disregard in states that used SSI as the benchmark for Medicaid eligibility. The district court in this class action suit disagreed with HHS's view and entered an injunction requiring section 209(b) states to disregard the 1984 increases. We took an appeal, but the Eighth Circuit (Gibson, Wollman and Beam) has affirmed. The court of appeals acknowledged that HHS's position followed from COBRA's plain language, but concluded that "this is a case in which the strict application of the statute's literal language would lead to a result unintended by Congress." The court believed that the statute, as written, would "result in a discriminatory and inequitable treatment in the various states." The court specifically declined to defer to HHS's views.

Darling v. Bowen, No. 88-2210 (8th Cir. June 28, 1989). DJ # 137-43-411.

Attorneys: John F. Cordes, FTS/202-633-3380
Michael E. Robinson, FTS/202-633-5460

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Ninth Circuit Holds That Government Decisions Concerning Design Of Irrigation Canal Are Discretionary Functions But Nevertheless Affirms Government Liability For Canal Breaks On Ground That Negligence In Construction Of Canal Did Not Involve Policy Judgment

In this FTCA case, the district court found the government liable for damages of approximately $1.3 million for two major breaks in an irrigation canal constructed by the Bureau of Reclamation in the State of Washington in the early 1950's. We argued on appeal that the Bureau's decisions in designing and constructing the canal were protected by the discretionary function exception. In a lengthy opinion, the court of appeals (Wright, Wallace, Pregerson) held that the Bureau's design decisions were protected by the exception. Specifically, the court held that

the Supreme Court's decision in Berkovitz establishes that a safety or engineering standard operates to remove discretion under the FTCA only when it is embodied in a specific, mandatory regulation, statute, or policy which creates clear duties for government actors. The court also held that the government need not prove that it made a "conscious decision" grounded in social, economic, or political policy in order for its discretionary actions to be protected by the discretionary function exception. Finally, the court clarified its own earlier decision in Arizona Maintenance, rejecting any suggestion that violation of "industry" standards was sufficient to preclude application of the exception -- only safety standards embodied in a specific, mandatory regulation or policy have that effect.

However, the court also held that specific negligent decisions by Bureau officials supervising construction of the canal did not involve policy judgment and were therefore unprotected. The court further rejected our argument that a provision of the repayment contract between the government and the local irrigation district obligated the district to indemnify the government for the damages.

Kennewick Irrigation District v. United States, No. 87-4203 (9th Cir. July 12, 1989). DJ # 157-24-338.

Attorneys: John F. Cordes, FTS/202-633-3380
Irene M. Solet, FTS/202-633-3355

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Ninth Circuit Reverses District Court Ruling That EPA Waived Right To Withhold Documents By Releasing Related Documents

Plaintiff sought disclosure by the EPA of several documents related to an alleged air pollution violation by Mobil at its Bakersfield, California plant. The district court ordered release of certain documents on the ground that the EPA had earlier released different but related documents to a third party and plaintiff. The court of appeals (Hug, Wiggins, O'Scannlain) has now reversed. After a comprehensive review of the relevant case law and pertinent policy considerations, the court concluded that release of one document could not waive an agency's right to withhold different related documents.

Mobil Oil Corp. v. U.S. Environmental Protection Agency, No. 88-1900 (9th Cir. July 19, 1989). DJ #145-185 333.

Attorneys: Leonard Schaitman, FTS/202-633-3441
Mark B. Stern, FTS/202-633-5534

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Tenth Circuit Reverses District Court's Orders Denying Government Official's Motion To Dismiss A Bivens Claim And His Motion To Quash The Filing Of A Lis Pendens On The Title Of The Officials Home

Hill was removed from his Air Force job because of his misuse of government telephones and his unauthorized removal of papers from a superior's desk. Hill filed suit asserting several causes of action, including a Bivens claim against one of his superiors alleging that the official denied Hill due process by interfering with his security clearance and his job possibilities and violated his right to privacy by eavesdropping on his personal telephone conversations. The district court denied our motion to dismiss based on qualified immunity, and we appealed (No. 88-2775). While the matter was on appeal, Hill filed a lis pendens on the title to the official's home to protect the money judgment he was seeking. The district court denied our motion to quash the lis pendens. We then appealed that order.

On the appeal of the qualified immunity issue, we also argued that Hill had failed to state a claim because no Bivens remedy should be implied in a federal employment case (citing Bush v. Lucas and Schweiker v. Chilicky). We argued that, because the court had jurisdiction over the interlocutory appeal of the qualified immunity issue, the court could also take "pendent jurisdiction" over the Bush/Chilicky issue. In the qualified immunity appeal, the court of appeals reversed the district court, accepting our Bush/Chilicky argument and our argument that it had pendent jurisdiction over this issue. The court stated that "courts must withhold their power to fashion damages remedies when Congress has put in place a comprehensive system to administer public rights, has 'not inadvertently' omitted damages remedies for certain claimants, and has not plainly expressed an intention that the courts preserve Bivens remedies" (quoting Spagnola v. Mathis, 859 F.2d 223, 228 (D.C. Cir. 1988)). In the lis pendens appeal, the court reversed the district court stating that the law is very clear in New Mexico that a lis pen-dens is not proper in anticipation of a money judgment but is only proper where title to real property is at stake. We will move for publication of the two opinions.

Hill v. Air Force, Nos. 88-2775 and 88-2917 (10th Cir. July 7, 1989). DJ # 145-14-2249.

Attorneys: Barbara Herwig, FTS/202-633-5425
Howard Scher, FTS/202-633-3180

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Eleventh Circuit Holds That Government May Be Held Liable Under The FTCA For Contractor's Illegal Disposal Of Toxic Wastes

Federal environmental laws require government agencies, like private parties, to dispose of toxic wastes safely. The Department of Defense (DOD) made a policy determination that it was not equipped to handle the task of disposing of toxic PCBs collected from various installations itself, and that private contractors should be hired. DOD entered into two contracts with the AEC Company to handle PCB disposals. The contracts required AEC to comply with all federal environmental laws and regulations. However, once the PCBs passed into AEC's control, DOD -- again as a policy choice -- did not monitor AEC's compliance. AEC proved to be an unscrupulous operator. It sold PCB-contaminated oil as waste oil, some of which ended up in the tanks of Dickerson, an asphalt company. Dickerson incurred significant damage and clean-up expense, and sued the government under the Tort Claims Act. The district court found the government liable, relying on Emelwon v. U.S., 391 F.2d 9 (5th Cir. 1968), a case applying Florida law that imposed a nondelegable duty for a contractor's safe performance of an ultra-hazardous activity. On appeal, we argued that Emelwon was undercut by more recent cases, and that the United States was immune from liability by virtue of the independent contractor exemption and the discretionary function exception to the FTCA.

The Eleventh Circuit (Roney, C.J., Hill, J. and Howard, D.J.) has now affirmed the district court, holding that Emelwon remains binding precedent, and that the relevant environmental laws left no room for a policy decision not to maintain "cradle to the grave" responsibility. Accordingly, the court held that the DOD was responsible for its negligence in not supervising AEC's disposal activities.

Dickerson, Inc. v. United States, No. 88-3449 (11th Cir. June 27, 1989). DJ # 157-17M-733.

Attorneys: Robert S. Greenspan, FTS/202-633-5428
Dwight Rabuse, FTS/202-633-3159

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TAX DIVISION

Supreme Court Rules In Summons Case Involving Church Of Scientology

United States v. Zolin, et al. On June 21, 1989, the Supreme Court decided this summons enforcement case partially in the Government's favor, and, by an evenly divided vote, partially against the Government. The case arises out of the Service's criminal investigation of L. Ron Hubbard, the founder of the Church of Scientology, for calendar years 1979 through 1983. The Supreme Court granted certiorari to resolve conflicts in the circuits on two issues: (1) whether a district court may condition its enforcement order by placing restrictions on the disclosure of the summoned information to other governmental agencies, and (2) whether a prima facie case for invocation of the crime-fraud exception to the attorney-client privilege (involving an attorney's prior knowledge of a crime to be committed) must be established by independent evidence, or, alternatively, whether the applicability of that exception can be resolved by an in-camera inspection of the allegedly privileged material.

The court held in the Government's favor on the second issue, rejecting the independent evidence requirement. In so ruling, the Court held that, where the Government shows that there is a reasonable basis for believing that such a review would reveal that the crime-fraud exception applies, the district court may conduct an in-camera review of the materials in question to determine whether the communications fall within that exception. The Court vacated the judgment of the Ninth Circuit on this issue, and remanded the case for further proceedings. The Court, however, was evenly divided with respect to the issue of the power of a district court to place restrictions upon the summons enforcement action. It, therefore, affirmed the judgment of the court of appeals insofar as it upheld the district court's conditional enforcement order. This issue remains pending before the Court on the taxpayer's petition for certiorari in United States v. Barrett, No. 87-1705, and if that petition is granted (as seems likely) the Court will ultimately deal with the question in its next term.

* * * * *

Third Circuit Creates Apparent Conflict In Holding In Government's Favor In Bankruptcy Case Involving Trust-Fund Taxes

Harry P. Begier, Jr. v. United States. On June 30, 1989, the Third Circuit, with one judge dissenting, held that payments to the Internal Revenue Service on account of withholding tax

obligations made by a debtor before it files a bankruptcy petition may not be recovered by the trustee in the ensuing bankruptcy proceeding. Reversing the decisions of the bankruptcy and district courts, the court of appeals held that "at least pre-petition, the act of payment identifies those taxes as funds held in trust" for the United States pursuant to Section 7501 of the Internal Revenue Code. Since such trust funds were not property of the debtor in the first instance, they may not be recovered by the debtor's estate under Section 547 or 549 of the Bankruptcy Code. In so holding, the court created an apparent conflict with the decision of the District of Columbia Circuit in Drabkin v. District of Columbia, 824 F.2d 1102 (1987), and expressly endorsed the position taken by Judge Ruth Ginsburg in her dissent in that case. In Drabkin, the majority held that "the mere fact of payment" of funds covered by a statutory trust does not, by itself, serve to identify the funds as "trust funds" belonging to the recipient and, thus, does not prevent recovery of the funds as a preference under Section 547.

* * * * *

Tenth Circuit Allows Car Expense Deduction To Policemen For Commuting Costs

Pollei v. Commissioner. On June 13, 1989, the Tenth Circuit reversed the decision of the Tax Court and held that police officers who were on duty during the time in which they commuted between their residences and police headquarters may deduct the car expenses attributable to those trips. The taxpayers were Salt Lake City police officers who received a monthly car allowance in return for using their personally owned vehicles, which were equipped with police radios, sirens, lights, etc. The officers were required to notify the police dispatcher upon leaving and arriving home, and were "on call" during their travel time to and from headquarters.

The Tenth Circuit emphasized the supervisory roles performed by the officers during their commutes to and from headquarters, distinguishing that situation from one in which the officers would merely be available to respond to emergency calls when they used their cars for purely personal trips when off duty. The court also distinguished cases which disallowed deductions to employees performing work voluntarily while commuting (such as using dictaphones or a car telephones), finding that here the officers were required to perform supervisory and patrol responsibilities as they drove to and from headquarters. The court concluded that when conditions of employment restrict and employee's discretion in typically personal choices, the expense loses its personal character and becomes a business expense. See

Sibla v. Commissioner, 611 F.2d 1260 (9th Cir. 1980); Christey v. United States, 841 F.2d 809 (8th Cir. 1988), cert denied, 109 S. Ct. 1131 (1989). The court also noted that, as in Sibla and Christey, there was a public service or safety component to the officers' jobs which justified the deduction of otherwise personal expenses.

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ADMINISTRATIVE ISSUES

Thrift Savings Plan

Attached at the Appendix of this Bulletin as Exhibit D is a fact sheet which provides monthly returns for January through June, 1989 for the three investment funds: the Government Securities Investment Fund (G Fund), the Common Stock Index Investment Fund (C Fund), and the Fixed Income Index Investment Fund (F Fund). If you have any questions, please contact the Federal Retirement Thrift Investment Board at FTS/202-523-7507.

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Career Opportunities

Executive Office For United States Trustees
Los Angeles

The Office of Attorney Personnel Management, Department of Justice, is seeking an Assistant U.S. Trustee to assist with the management of the U. S. Trustee's Office in Los Angeles. The Assistant U.S. Trustee will be responsible for monitoring the legal and financial aspect of cases filed under Chapters 7, 11, 12, 13 of the Bankruptcy Code; maintaining and supervising a panel of private trustees; supervising the conduct of debtors in possession and other trustees; and ensuring that violations of civil and criminal law are detected and referred to the United States Attorney's Office for possible prosecution, as well as participating in the administrative aspects of the office. Applicants must have had their J.D. degree for at least one year and be an active member of the California bar in good standing. Extensive management experience and outstanding academic credentials are helpful. Familiarity with bankruptcy law and accounting principles, litigation experience, and civil practice is preferred. Please submit a resume and SF-171 (Application for Federal Employment) to: U.S. Trustee, 300 North Los Angeles Street, Room 3101, Federal Building, Los Angeles, California 90012.

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Justice Management Division

The Office of Attorney Personnel Management, Department of Justice, is seeking an Attorney-Advisor for the Legal and Information Systems Staff, Justice Management Division, in Washington, D.C. The primary responsibility of this position is to instruct Federal attorneys in the use of Justice Retrieval and Inquiry System (JURIS), the Department's automated legal research system. This position requires extensive travel throughout the United States. Applicants must have had their J.D. degree for at least one year and be an active member of the bar in good standing. Automated legal research experience and/or public speaking experience is preferred. This position will be at the GS-11 level (beginning salary is $28,852.00). Please submit a resume and SF-171 (Application for Federal Employment) to: U.S. Department of Justice, JMD/LISS/LRTS/, Room 129, 425 I Street, N.W., Washington, D. C. 120530, Attn: James M. Gallagher, Assistant Director. The closing date for acceptance of applications is September 30, 1989. This advertisement is being conducted in anticipation of possible future vacancies.

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National Institute Of Corrections

The Office of Attorney Personnel, Department of Justice, is seeking an Attorney-Advisor for the National Institute of Corrections in Washington, D.C. Attorneys should have experience in correctional and financial management, administration, grants, and contracting and procurement. Applicants must have had their J.D. degree for at least one year and be an active member of the bar in good standing. This position will be at the GS-12-13 level (salary range from $34,580 - $41,121). Please submit a resume, SF-171 (Application for Federal Employment), and writing sample to: U.S. Department of Justice, National Institute of Corrections, 320 First Street, N.W., Room 207, Washington, D.C. 20534, Attn: Nancy Mason. This position is open until filled. This advertisement is being conducted in anticipation of possible future vacancies.

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APPENDIX

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUGMENT 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
10-21-88	8.15%
11-18-88	8.55%
12-16-88	9.20%
01-13-89	9.16%
02-15-89	9.32%
03-10-89	9.43%
04-07-89	9.51%
05-05-89	9.15%
06-01-89	8.85%
06-29-89	8.16%
07-27-89	7.75%
08-24-89	8.27%

Note: For a cumulative list of Federal civil postjudgment interest rates effective October 1, 1982 through December 19, 1985, see Vol. 34, No. 1, p. 25, of the United States Attorney's Bulletin, dated January 16, 1986. For a cumulative list of Federal civil postjudgment interest rates from January 17, 1986 to September 23, 1988, see Vol. 37, No. 2, p. 65, of the United States Attorney's Bulletin, dated February 15, 1989.

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Alabama, S	J. B. Sessions, III
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EXHIBIT
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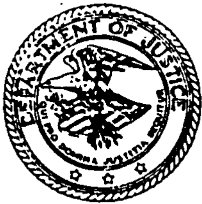


Office of the Attorney General
Washington, D.C. 20530

August 3, 1989

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

Recognizing that drug trafficking is the number one crime problem facing our country and the world, I asked our 93 United States Attorneys last fall to prepare detailed reports analyzing the business structure of drug trafficking in their districts. They were requested to use all tools available to describe how these illicit enterprises operate -- not only how the kingpins employ drug producers and shippers, but how they have turned legitimate businesses such as accounting, banking, financing, and communications to use of their nefarious activities. I am herewith transmitting to you and to Director Bennett the results of this effort.

The reports from the 93 U.S. Attorneys are drawn from intelligence files garnered from successful prosecutions conducted in their districts. These voluminous reports detail the often invisible web of drug trafficking and abuse that shroud America. It is no secret that our major metropolitan areas have long suffered from this alarming blight. However, what we learn from these reports is: no community is exempt from the ravages of the drug trade. Drug trafficking enterprises have infiltrated all of our country, from our biggest cities to the smallest villages and towns in our heartland.

This reports documents the pervasiveness of drug trafficking, how it has spread its tentacles throughout all socioeconomic groups across the country. We knew the country was awash in cocaine and crack, but we did not expect to find significant cocaine organizations in Wyoming, heroin trafficking in Iowa, LSD consumption in rural Georgia, or methamphetamine spreading to South Carolina.

The U.S. Attorneys have also painted a new portrait of organized crime, not just the traditional organizations that have been chronicled for so many years, but also the emerging groups who present equal -- if not greater -- threats. Colombian

cartels, the Bloods and the Crips, outlaw motorcycle gangs, the Asian Triads and Tongs, the Jamaican posses, and others are the contemporary "Al Capones." These crime conglomerates operate with various degrees of structure and sophistication; some are on the cutting edge of international organizational technology; others rely on cultural norms and mores that have evolved over time. A common denominator, however, is their greed -- their relentless pursuit of money.

In addition to detailing the magnitude of the problem, this report highlights the work of agents and prosecutors in pursuing drug traffickers on a scale thought impossible only a decade ago. The investigations handled today are larger and more complex than ever, not only in terms of the volume of drugs seized and the number of arrests, prosecutions, and convictions, but more important, in the Government's ability to get to the international kingpins -- wherever they are -- and to dismantle entire organizations by destroying their financial base through asset seizure and forfeiture.

Our principal efforts now target the entire criminal conglomerate, including those who operate the traffic's infrastructure: those in the transportation industry who engage in the commerce and movement of this illicit cargo; the corrupt law enforcement officer who "merely" looks the other way; the business people and bankers who launder money; and the attorneys who aid and abet drug traffickers. As the many examples contained in this report illustrate, we seek to apply the full force of the law to reach everyone involved in these transnational cartels.

No less important is the Federal law enforcement community's recognition of the importance of reducing the demand for drugs. Although we are continually engaged in struggles where the forces of law confront lawlessness and crime, we recognize that the real war will not be won in the cocaine jungles of South America where narco-terrorists prowl or on the inner-city street corners where the street gangs shoot it out. As I have often stated, the real war must be fought--and won--on the battlefield of values.

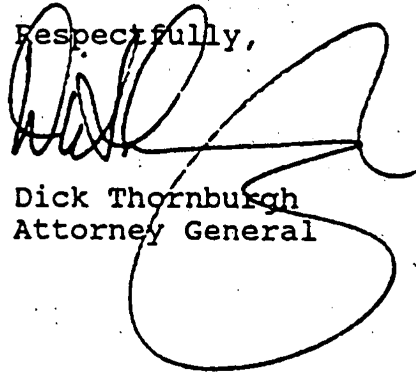
Ultimately, the drug war will not be won by drug agents or by prosecutors in the courtroom. Although law enforcement is part of the solution, we will only achieve victory when a winning battle is fought in the classroom, in the workplace, in houses of worship, in the community, and, most important, in the family. The Nation must reclaim more than its streets from the drug dealers, we must reclaim a value system that emphasizes, once

again, self-respect, self-reliance, and the integrity of our mind and spirit.

That is why efforts to reduce the demand for drugs have become an increasing part of the work of the Federal law enforcement community. This renewed partnership with the American people to return to the day of law and order, when drug use is no longer tolerated, is cause for optimism. As we strive to rid the nation of the scourge of drugs, as you have so aptly described our goal, law enforcement officials will continue to pursue all of our options with unmatched diligence, and working with the spirit and drive that have made this country great, we will be no less unrelenting in attacking the demand for drugs.

I pledge to you our full support in the implementation of your Administration's international drug control strategy. We know it may be difficult, but we will exert every effort to see that it succeeds.

Respectfully,



Dick Thornburgh
Attorney General

Enclosure

(self-typed)

THE WHITE HOUSE

WASHINGTON

August 7, 1989

Dear Dick,

Will you please tell those U.S.Attorneys who worked on the report "Drug Trafficking" that I read every page of it, and that it was an outstanding informational work which will help many better understand the problem we face. Thanks for your good letter of August 3rd. To you and all at the Department my sincere thanks for what you are doing to help in the drug war.

Most Sincerely,

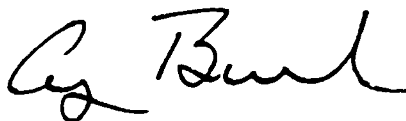


EXHIBIT
B

AMENDMENT TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 9006. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the clerk's office inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 8 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 5001(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the bankruptcy court is held.

EXHIBIT
C

Guideline Sentencing Update

Federal Judicial Center

Guideline Sentencing Update will be distributed periodically by the Center to inform judges and other judicial personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Guidelines. Although the publication may refer to the Sentencing Guidelines and policy statements of the U.S. Sentencing Commission in the context of reporting case holdings, it is not intended to report Sentencing Commission policies or activities. Readers should refer to the Guidelines, policy statements, commentary, and other materials issued by the Sentencing Commission for such information.

Publication of *Guideline Sentencing Update* signifies that the Center regards it as a responsible and valuable work. It should not be considered a recommendation or official policy of the Center. On matters of policy the Center speaks only through its Board.

VOLUME 2 • NUMBER 9 • JULY 13, 1989

Guidelines Application

SENTENCING PROCEDURE

Second Circuit holds courts are not required to advise defendants of likely guideline sentence before accepting plea bargain, but "where feasible, should" do so. Defendant pleaded guilty to importing more than 500 grams of cocaine. The facts showed, and defendant did not dispute, that the offense actually involved 25 kilograms. The district court calculated the offense level based on the larger amount, which resulted in a substantially longer sentence despite a downward departure under § 5K1.1 of the Guidelines for defendant's cooperation. Defendant argued (1) that the court erred in using the larger amount, and (2) that the court should have informed him it would do so at the time of his guilty plea to prevent unfair surprise and enable him to fully understand the consequences of his guilty plea.

Affirming the sentence, the appellate court noted that it had already rejected the first argument in *U.S. v. Guerrero*, [illegible] F.2d 245 (2d Cir. 1988). The court also rejected defendant's notice argument, holding that Fed. R. Crim. P. 11(c)(1) requires a sentencing court to apprise a defendant only of the statutory minimum and maximum penalties faced, not what the likely sentence under the Guidelines will be. "The district court was not required to calculate and explain the Guideline sentence to the appellant before accepting the plea, for, once appellant was informed of the possible consequences enumerated in the Rule—the maximum and the minimum sentences—the requisites of Rule 11 were met."

The court added, however, that "the sentence likely to be imposed can in some instances be readily calculated from the universe of facts before the district court at the time of the plea. In those cases where the applicable Guidelines sentence is easily ascertainable at the time the plea is offered, the district court has full discretion to—and, where feasible, should—explain the likely Guidelines sentence to the defendant before accepting the plea." *But cf. U.S. v. Ware*, 709 F. Supp. 1062 (N.D. Ala. 1989) (defendant not entitled to pretrial resolution of dispute involving application of Guidelines to facts of case: "such a procedure . . . creates an undue risk that error could affect the defendant's decision to go to trial or plead guilty").

U.S. v. Fernandez, No. 88-1409 (2d Cir. June 15, 1989) (Pierce, J.).

Second Circuit holds defense attorney's underestimation of probable sentencing range does not warrant withdrawal of guilty plea. After defendant pleaded guilty to two offenses, the district court calculated the guideline sentence range to be 51–63 months. Defendant moved to withdraw his pleas, but the court denied the motion and imposed a 57-month sentence. On appeal, defendant argued he should be allowed to withdraw the pleas because he was denied effective assistance of counsel by his attorney's erroneous estimate of a sentencing range of 21–27 months. Defendant claimed he relied on that estimate, and thus his pleas were not voluntarily made with full knowledge of the consequences.

The appellate court found that when defendant pleaded guilty he was aware of the maximum terms he faced, that the length of the sentence to be imposed was within the sole discretion of the sentencing judge, and that even if the sentence was more severe than expected he was bound by his plea. Moreover, under pre-Guidelines law, "it seems clear that we would not have reversed a district judge for refusing to allow withdrawal of a plea under [Fed. R. Crim. P.] 32(d) on the ground that counsel's estimate was erroneous. We do not see why the presence of the Guidelines should change the law in this respect. If anything, they seem to us to reinforce our earlier decisions on the issue. Under the Guidelines there will be many more detailed hearings regarding imposition of sentence, as in this case. A sentencing judge will now frequently indicate, as a result of such hearing, what the sentence may be. In those circumstances, allowing defendants to use the presentence prong of Rule 32(d) to withdraw their pleas would pervert the rule and threaten the integrity of the sentencing process. Defendants may not plead guilty in order to test whether they will get an acceptably lenient sentence."

U.S. v. Sweeney, No. 89-1072 (2d Cir. June 22, 1989) (per curiam).

DEPARTURES

Ninth Circuit holds defendants must be given notice of factors warranting departure, and that courts must follow Guideline standards for departure. Defendants pleaded guilty to one count of aiding and abetting the transportation of illegal aliens. The facts showed the operation was very large and well organized, and that both defendants were key participants. At the sentencing hearing the court, without informing defendants in advance, departed upward from the guideline ranges.

The appellate court held "that the failure to notify appellants of the basis for departure in advance of the imposition of sentence violated Fed. R. Crim. P. 32(a)(1)." The court determined that Rule 32(a)(1) and 18 U.S.C. § 3553(d) "indicate that the presentence report or the court must inform the

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defendant of factors that they consider to constitute grounds for departure.... This requirement is not satisfied by the fact that the relevant information is present within the presentence report.... Rather, such information either must be identified as a basis for departure in the presentence report, or, the court must advise the defendant that it is considering departure based on a particular factor and allow defense counsel an opportunity to comment." *Accord U.S. v. Cervantes*, No. 89-1002 (2d Cir. June 20, 1989); *U.S. v. Otero*, 868 F. 2d 1412 (5th Cir. 1989).

The court found that the sentencing court could properly base a departure on the large size of the operation, but held that it "erred in relying on two factors considered and accounted for by the guidelines in its decision to depart from those guidelines," namely defendants' roles in the offense and profit motive. "Such a ruling indicates dissatisfaction with the guidelines rather than a reasoned judgment that particular characteristics of the offense or the offenses have not been accounted for. Moreover, because the court's statement of reasons contained an improper as well as a proper basis for departure, we have no way to determine whether any portion of the sentence was based upon consideration of the improper factors." The court vacated and remanded for resentencing, and emphasized that the decision to depart is limited by statute and "must be based on the guidelines or policy statements in the guidelines."

U.S. v. Nuno-Para, No. 88-5163 (9th Cir. June 20, 1989) (Nelson, J.).

District court finds departure warranted because Sentencing Commission failed to account for civil remedies. Defendant pleaded guilty to trafficking in counterfeit goods. The total offense level was 11, and the guideline range was 8–14 months. The court departed from the Guidelines to impose a 36-month term of probation and $6,000 fine: "Under the special circumstances of this case, a term of imprisonment would serve none of the stated purposes of sentencing. [Defendant] is the mother of a young child, she has no prior criminal involvement, no record of drug or alcohol abuse, and a close-knit extended family. She has freely acknowledged her guilt and immediately after apprehension she sought to cooperate with the government.... She poses no threat to the public and will be justly punished, sufficiently deterred, and adequately rehabilitated" by this sentence.

The court also noted that in this type of crime—counterfeiting trademarks of high-priced, designer-label items—the companies whose merchandise is copied "have powerful civil remedies available for protecting their interests," and, "[i]n fact, that approach to enforcing trademark rights is far more prevalent, effective, and reasonable than enlisting our already overburdened police, prosecutors, and courts to act on behalf of" such companies. The court concluded that departure in this case was appropriate, "the Sentencing Commission not having considered the availability of extraordinary civil remedies to deal with the crimes charged here."

U.S. v. Hon, No. 89 Cr. 0052 (S.D.N.Y. May 31, 1989) (Sweet, J.).

Other Recent Case:

U.S. v. Missick, No. 88-3095 (7th Cir. May 24, 1989) (Cummings, J.) (departure not appropriate for defendant who supplied drugs, through a courier, to persons possessing firearms—defendant did not possess weapon, had no direct contact with, and was not charged as co-conspirator with, those who had weapons).

Determining Offense Level

Recent Cases:

U.S. v. Wilson, No. 88-6086 (6th Cir. June 29, 1989) (Contie, Sr. J.) (the offense level reduction in guideline § 2K2.1(b)(2), covering possession of a firearm by a convicted felon "solely for sport or recreation," is not applicable to a firearm possessed as collateral; reference to "intended lawful use" in the Commentary cannot be used to broaden the "unambiguous language... in the guideline itself").

U.S. v. Sanchez-Lopez, No. 88-3102 (9th Cir. June 22, 1989) (Alarcon, J.) ("[w]hether a defendant is a 'minor' or 'minimal' participant in the criminal activity is a factual determination subject to the clearly erroneous standard"; career offender provision does not result in "impermissible double enhancement" of penalties, nor involve "unconstitutional sub-delegation of congressional authority to the various states" because state convictions may trigger the provision).

U.S. v. Mann, No. 88-2085 (8th Cir. June 13, 1989) (Gibson, J.) (quantity of drugs in prior drug sale, not included in indictment or offense of conviction but part of "same course of conduct or common scheme," may be considered by sentencing court).

U.S. v. Moore, No. 88-2573 (8th Cir. June 8, 1989) (per curiam) (separate instances of bank robbery, though committed at same bank, may not be grouped under guideline § 3D1.2).

U.S. v. Ofchinick, No. 89-3008 (3d Cir. June 7, 1989) (Greenberg, J.) (defendant convicted of escape from custody may receive criminal history enhancement under guideline § 4A1.1(d) and (e) for escaping while under sentence of imprisonment and while still in confinement, even though being in custody is element of offense).

U.S. v. Zayas, No. 89-1031 (1st Cir. June 7, 1989) (Torruella, J.) (district court "clearly justified" in refusing reduction for acceptance of responsibility to defendant who committed perjury during trial).

Appellate Review

Recent Case:

U.S. v. Ortiz, No. 89-1056 (3d Cir. June 29, 1989) (Seitz, J.) (under "due deference" standard of 18 U.S.C. § 3742(e), appellate review standard varies depending on whether issue is factual, legal, or mixed; question of defendant's "aggravating role" in offense is "essentially factual" and reviewed under clearly erroneous standard).

Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

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VOLUME 2 • NUMBER 10 • AUGUST 4, 1989

Sentencing Procedure

Fourth Circuit holds defendant bears burden of proof when seeking offense level reduction. Defendant contended the district court erred in not reducing his offense level for acceptance of responsibility, arguing he was entitled to the reduction because the government did not prove by clear and convincing evidence that he was not.

The appellate court found that other courts examining the standard of proof question "have generally agreed that a preponderance standard is the proper measure." The court also noted that, in a pre-Guidelines case, the Supreme Court concluded that applying the preponderance standard to factual findings made by a sentencing court satisfied due process. *See McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986).

As to the burden of proof, "the guideline in question involved a potential decrease in the offense level which would have had the effect of lowering [defendant's] ultimate sentencing range. In these circumstances, we hold that the defendant has the burden of establishing by a preponderance of the evidence the applicability of the mitigating factor in question. ... However, if the government seeks to enhance the sentencing range and potentially increase the ultimate sentence, it should bear the burden of proof. Such a scheme is entirely consistent with the directives of the Supreme Court in *McMillan* and with due process requirements.... [N]either concerns of procedural due process nor any other good reason suggest that a defendant should be able to put the burden on the government to prove that the defendant should not receive any particular mitigating adjustment."

This appears to be the first appellate court opinion concerning burdens of proof for adjustments to offense level. Previously *GSU* has reported two district court cases on this matter. *See U.S. v. Clark*, No. CR. SCR 88-60(1) (N.D. Ind. May 11, 1989) (burden is on defendant to prove decrease is warranted, on government for increase) (2 *GSU* #6); *U.S. v. Dolan*, 701 F. Supp. 138 (E.D. Tenn. 1988) (government has burden of proof when challenging presentence report recommendation of downward adjustment in offense level) (1 *GSU* #19). *See also U.S. v. Lovell, infra.*

U.S v. Urrego-Linares, No. 88-5646 (4th Cir. July 20, 1989) (Wilkins, J.).

District court holds party seeking offense level adjustment bears burden of proof; burden is on government when preponderance of evidence favors neither party. The government contested reductions that defendant sought in his base offense level. The court held that "where there is a dispute as to facts being taken into account by the court relative to an adjustment to the base offense level under the Guidelines, the party who desires to obtain an adjustment ... must bear the burden of coming forward with sufficient proof to establish a prima facie case that the adjustment is appropriate."

"[W]here the proponent of the adjustment has established a prima facie case warranting that adjustment, the burden shifts to the opposing party to come forward with rebuttal evidence. At that point, the issues are determined by a preponderance of the evidence and the resolution of the issues is clear-cut unless the evidence does not preponderate in favor of either party's position.

"In the [latter] event ... the burden of persuasion must be placed upon the government for ... recent authority dealing with pre-Guidelines sentencing procedures concluded that the government should bear the burden of persuasion on all matters disputed in presentence investigation reports when those matters were relied upon by the sentencing judge."

U.S. v. Lovell, No. CR. 88-20171-TU (W.D. Tenn. July 7, 1989) (Turner, J.).

District court allows withdrawal of guilty pleas because of large miscalculations by government and defense counsel as to anticipated sentencing ranges. During their preliminary estimates of defendants' probable Guideline ranges, government and defense attorneys did not include certain "relevant conduct" in their calculations, resulting in much lower ranges than the court ultimately found. Defendants argued that because of the miscalculation they "did not receive the benefit of their bargain with the government which induced these pleas," and that the error provided "fair and just reasons" to allow withdrawal of their guilty pleas pursuant to Fed. R. Crim. P. 32(d).

The court agreed: "While it is true that all parties involved knew that the plea agreement calculations were only preliminary and subject to change, it does not follow that the plea negotiations created no expectations regarding a sentencing range." The court held that one defendant's expected range was close to his final range, and denied leave to withdraw his plea. For two defendants, however, the actual ranges of 41–51 months, versus expected ranges of 27–33 and 21–27 months, were "too far afield" and "simply beyond the scope of expectancy created by the plea agreement. It would be unfair and unjust to enforce the contract between the defendant and the government where the defendant was induced by a promise which could not be kept."

The court stressed that "'considerable caution' will be

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used in granting relief from pleas. . . . Only under exceptional circumstances . . . will a motion to withdraw a guilty plea be granted."

U.S. v. Bennett, No. CR 88-30 (N.D. Ind. July 13, 1989) (Lee, J.).

Guidelines Application

Determining Offense Level

First Circuit outlines procedure for sentencing when there is no specific guideline for the offense. Defendant was convicted of contempt of court for refusing to testify at a criminal trial, despite a grant of immunity. The guideline for contempt offenses, § 2J1.1, does not set a specific offense level, leaving it to the court to impose a sentence based on the principles set forth in 18 U.S.C. § 3553(a)(2). The district court imposed a three-year sentence.

The appellate court vacated and remanded for resentencing, holding that the sentence imposed was "unlawfully long." In part, the court based its decision on the facts of the case: defendant believed in good faith that he had a legal basis for refusing to testify; he showed no disrespect for the court; and he had no prior convictions. The court also found the three-year sentence did not comport with the directive of 18 U.S.C. § 3553(b), which provides: "In the absence of an applicable sentencing guideline . . . the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by the guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission." The "applicable policy statement" in § 2J1.1 refers to § 2X5.1, which directs a sentencing court to "apply the most analogous offense guideline" when no specific guideline was promulgated, and states that "[i]f there is not a sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553(b) shall control."

The appellate court determined that "[t]hese various statements all amount to the same thing: they tell the district court to look for analogies. And, in deciding whether the sentence is 'plainly unreasonable' [under 18 U.S.C. § 3742(e)(4)], that is also what we must do." The court determined that § 2J1.5, "Failure to Appear by Material Witness," was "a closely analogous guideline." Under the circumstances of this case, using § 2J1.5 would result in a maximum sentence of six months. The court held that "any sentence in excess of six months . . . is 'plainly unreasonable,' and hence unlawful" under 18 U.S.C. § 3742(e)(4), and instructed the district court to sentence defendant to a term of six months or less.

U.S. v. Underwood, No. 89-1315 (1st Cir. July 24, 1989) (Breyer, J.).

District court concludes Sentencing Commission did not adequately consider effects of certain Guidelines sections on escape convictions. Defendant, incarcerated for a pre-Guidelines offense, escaped from custody after the effective date of the Guidelines. Defendant's offense level resulted in a sentencing range of 18–24 months. In addition, guideline § 5G1.3 requires a consecutive sentence for offenses committed by a defendant already serving an unexpired sentence.

Defendant raised two objections. First, since an individual cannot commit the offense of escape unless he is under a criminal justice sentence, the two-point addition to the criminal history score mandated by § 4A1.1(d) is not appropriate in escape cases. Second, the Parole Commission will impose an additional period of incarceration on his earlier, pre-Guidelines offense regardless of the term imposed for the escape. This "sentence," defendant contended, is a factor not adequately considered by the Sentencing Commission in adopting § 5G1.3.

The court held "that the Sentencing Commission inadequately considered the impact of § 4A1.1(d) in an escape case," and departed from the guideline to reduce defendant's criminal history score by two points. The court found that "being incarcerated is an element of the offense" of escape, and under § 4A1.1(d) this same status enhances the criminal history score. The court determined that "[a] basic policy of the guidelines is to avoid double counting. . . . The underlying principle is that if one provision . . . accounts for an element of the offense or a specific offense characteristic, another provision designed to account for the same factor should not apply. The same principle holds true even if the double counting relates to an element of the current offense and calculation of the criminal history score." The court concluded that nothing in the guidelines, policy statements, or commentary indicates that this principle should be abrogated by applying § 4A1.1(d) in an escape case, or "that the Commission was even aware of the double counting that occurs when § 4A1.1(d) is applied to an escape case."

The court specifically disagreed with two earlier decisions that had upheld the use of § 4A1.1(d) in escape cases, *U.S. v. Ofchinick*, 877 F.2d 251 (3d Cir. 1989), and *U.S. v. Jimenez*, 708 F. Supp. 964 (S.D. Ind. 1989). *See also U.S. v. Goldbaum*, No. 88-2239 (10th Cir. July 21, 1989), *infra*. At least one other court has found that using § 4A1.1(d) in an escape case constitutes improper double counting. *See U.S. v. Clark*, No. 88-0793 (S.D.N.Y. Mar. 27, 1989).

The court also agreed that defendant's sentence for the escape should run concurrently with any additional time imposed by the Parole Commission. "Since [defendant's] offenses place him within the jurisdiction of both the Parole Commission and this court, the court cannot dictate exactly the amount of time [defendant] will serve. . . . Nevertheless, the court cannot close its eyes and ignore the practical effect of the Parole Commission's probable course of action. . . . There is no evidence that the Sentencing Commission adequately considered this conflict between pre-guideline sentences and post-guideline sentences when it drafted guideline § 5G1.3."

U.S. v. Bell, No. CR. 5-88-021(01) (D. Minn. June 30, 1989) (Magnuson, J.).

Other Recent Case:

U.S. v. Goldbaum, No. 88-2239 (10th Cir. July 21, 1989) (Anderson, J.) (affirming use of guideline § 4A1.1(d) to add two points to criminal history score of defendant convicted of escape). *See also U.S. v. Bell, supra.*

EXHIBIT D

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
805 Fifteenth Street NW Washington, DC 20005

THRIFT SAVINGS PLAN FACT SHEET

C, F, and G Fund Monthly Returns

July 18, 1989

The C, F, and G Fund monthly returns below represent the actual total rates of return used in the monthly allocation of earnings to individual accounts of participants in the Thrift Savings Plan.

	C FUND	WELLS FARGO EQUITY INDEX FUND *	F FUND	WELLS FARGO BOND INDEX FUND**	G FUND
1988					
July	(.24%)	(.42%)	(.49%)	(.55%)	.72%
August	(2.74%)	(3.29%)	.33%	.27%	.76%
September	4.12%	4.22%	2.07%	2.23%	.76%
October	2.53%	2.73%	1.68%	1.75%	.75%
November	(1.23%)	(1.43%)	(1.09%)	(1.15%)	.68%
December	1.78%	1.82%	.31%	.32%	.74%
1989					
January	7.14%	7.32%R	1.27%	1.33%	.76%
February	(2.51%)	(2.47%)	(.68%)	(.74%)	.67%
March	2.21%	2.30%	.50%	.53%	.78%
April	5.14%	5.20%	2.05%	2.11%	.75%
May	3.98%	4.02%	2.42%	2.51%	.76%
June	(.58%)	(.55%)	3.19%	3.27%	.70%
Last 12 months	20.85%	20.60%	12.09%	12.43%	9.18%

* Tracks the S&P 500 index
** Tracks the Shearson Lehman Hutton Government/Corporate bond index
R - revised
Numbers in ( ) are negative.

Monthly Returns

The G Fund. The monthly G Fund returns presented above reflect the daily compounding of interest on Fund investments less accrued administrative expenses.

The G Fund rates announced monthly (e.g., 8.250% for July 1989) by the Thrift Investment Board represent the statutory interest rates (expressed on a per annum basis) applicable to G Fund investments made during the specified month, without adjustment for administrative expenses, compounding, or the method of allocation of earnings to the accounts of Thrift Savings Plan participants.

The C and F Funds. The C and F Fund returns, like the G Fund returns, are shown on a net basis, i.e., after deductions for accrued administrative expenses, the investment manager's (Wells Fargo) trading costs, and accrued investment manager fees.

Last Twelve Months

The C Fund outperformed the Wells Fargo (Wells) Equity Index Fund for the latest twelve-month period. This is primarily because the Wells returns are time-weighted: they assume a constant dollar balance during each month and throughout the period. The C Fund monthly returns are dollar-weighted: they reflect total dollar earnings on the changing balances invested during the month.

The F Fund underperformed the Wells Bond Index Fund for the latest twelve-month period primarily because, like the Wells Equity Index Fund, the Wells Bond Index Fund returns are time-weighted, while the F Fund monthly returns are dollar-weighted.

The calculations of the C, F, and G Fund returns for the last twelve months assume, except for the crediting of earnings, an unchanging balance (time-weighting) from month to month and assume earnings are compounded on a monthly basis.