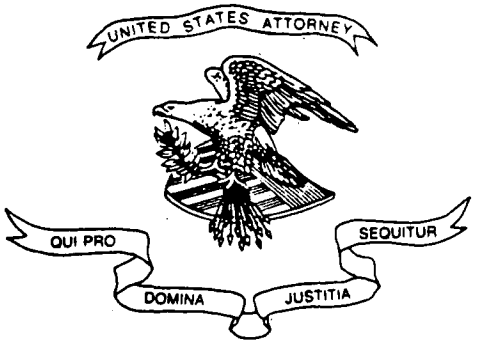
U.S. Department of Justice
Executive Office for United States Attorneys



United States Attorneys' Bulletin

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TABLE OF CONTENTS ***Page***

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COMMENDATIONS

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

James R. Allison and ***Stephen C. Peters*** (District of Colorado), by Roland J. Brumbaugh, Bankruptcy Judge, U.S. Bankruptcy Court, Denver, for their successful prosecution of a high profile bankruptcy fraud case.

Christopher F. Bator (District of Massachusetts), by State Representative Thomas M. Finneran, The Commonwealth of Massachusetts, Boston, for his outstanding public service to the community, city, and state in addressing and responding to drug-related problems.

Janet E. Bauerle (Texas, Western District), by Major General David C. Morehouse, Deputy Judge Advocate General, Department of the Air Force, Washington, D.C., for her excellent representation in a bankruptcy dispute with a military contractor over the valuation of secured collateral.

Martin C. Carlson (Pennsylvania, Middle District), by William H. Galyean, Jr., Regional Inspector General for Investigations, Department of Agriculture, Hyattsville, Maryland, for his valuable assistance in a 12-month undercover investigation leading to the indictment and prosecution of twenty seven individuals on charges of food stamp fraud and drug trafficking in the York and Harrisburg areas.

Michael E. Clark, Joe A. Porto, Jr. and ***Pamela Derbyshire*** (Texas, Southern District), by Steven W. Hooper, Special Agent in Charge, U.S. Customs Service, Houston, for their successful prosecution of a complex Customs case involving violations of the Trading with the Enemy Act as it applies to U.S. sanctions against the Socialist Republic of Vietnam.

Virginia M. Covington (Florida, Middle District), received a Certificate of Appreciation from Bruce R. Jacob, Dean, and Dorothea Beane, Assistant Professor of Law, Stetson University College of Law, St. Petersburg, for her outstanding presentation before the students and faculty on the investigation and preparation of cases.

Janet Craig (Texas, Southern District), by Steven A. Bartholow, Deputy General Counsel, Railroad Retirement Board, Chicago, for her legal skill and professionalism in bringing a civil case to a satisfactory conclusion. Also, by Robert B. Serino, Deputy Chief Counsel, Comptroller of the Currency, Administrator of National Banks, Washington, D.C., for her excellent representation in obtaining an order of dismissal and for summary judgment in an equal employment opportunity case.

Jeffrey S. Downing, Walter E. Furr III, and ***Terry A. Zitek*** (Florida, Middle District), by Alfred W. Scudieri, Supervisory Special Agent, FBI, Tampa, for their participation in the 1980 Moot Court Program which greatly enhanced the quality of the legal training provided to the agents in attendance.

Stephen R. Graben (Mississippi, Southern District), by Mary E. Barrett, District Counsel, Department of Veterans Affairs, Jackson, for his outstanding representation and successful efforts in the prosecution of a psychiatric malpractice case.

Nancy L. Griffin (District of Connecticut), by Captain Harry P. Salmon, Jr., Naval Underwater Systems Center, Department of the Navy, New London, for her special efforts in obtaining the dismissal of an important civil action which could have resulted in a major upheaval in the federal civilian personnel system.

Patrick D. Hansen (Indiana, Northern District), by William S. Sessions, Director, FBI, Washington, D.C., for his aggressive and successful prosecution of over 30 persons thus far in a massive insurance fraud matter.

Cynthia Hawkins (Florida, Middle District), by County Court Judge Anthony H. Johnson, Ninth Judicial Circuit of Florida, Orlando, for her excellent presentation on federal criminal prosecution before the students at the University of Central Florida.

John B. Hughes (District of Connecticut), received a Certificate of Appreciation from D.A. D'Andrea, MSC Manager/Postmaster, U.S. Postal Service, New Haven, for his valuable assistance and special efforts on behalf of the U.S. Postal Service in a number of complex cases over the past year.

Jay T. Karahan, Joe A. Porto, Jr. and ***Daniel C. Rodriguez*** (Texas, Southern District), by H. Rae Scott, Assistant Inspector General for Investigations, Department of Transportation, Houston, for their outstanding efforts in the prosecution of Federal Aviation Administration "Pilot Match" cases resulting in numerous felony and misdemeanor convictions.

Gregory W. Kehoe (Florida, Middle District), by John E. Hensley, Assistant Commissioner, Office of Enforcement, U.S. Customs Service, Washington, D.C., for his excellent presentation on organized crime before the American-Dutch Money Laundering and Organized Crime Seminar recently held in Orlando and Miami.

Clifford C. Marshall (North Carolina, Western District), by Alan Weinberg, District Counsel, Internal Revenue Service, Greensboro, for his consistent professionalism and dedicated efforts in representing the Internal Revenue Service for over eight years.

Anna Maria Martel (Iowa, Northern District), by Linda A. Akers, United States Attorney for the District of Arizona, for her outstanding assistance and success in settling a Federal Tort Claims Act action for less than 10 percent of plaintiffs' demands.

Raymond M. Meyer (Missouri, Eastern District), by Terril Shoemaker, Police Officer, Metropolitan Police Department, St. Louis, for his excellent presentation on the subject of asset forfeiture at the recent Third District Public Affairs meeting.

Kathleen L. Midian (Ohio, Northern District), by Robert E. Tilton, Chief of Police, Stow Police Department, Stow, Ohio, for her excellent representation and valuable assistance to local law enforcement in the successful prosecution of a forfeiture case.

Michael J. Norton, United States Attorney and ***John Hutchins, Assistant United States Attorney*** (District of Colorado), by Lori Strode, Training Coordinator, Office of the Clerk, Tenth Circuit Court of Appeals, Denver, for their outstanding presentations on the role of the United States Attorney. ***Michael J. Norton and Staff*** were also commended by Richard C. Breeden, Chairman, Securities and Exchange Commission, Washington, D.C. for their successful efforts in seeking to prevent manipulation of securities markets.

Leslie C. Ohta (District of Connecticut), by Michael Drieblatt, Chief, Criminal Investigation Division, Internal Revenue Service, Hartford, for her excellent presentation on civil forfeiture and 6E orders at a recent Continuing Professional Education class for District IRS Special Agents.

John Paniszczyn (Texas, Western District), by Colonel Michael R. Emerson, Chief, General Litigation Division, Office of The Judge Advocate General, Department of the Air Force, Washington, D.C., for his legal skill, expertise, and sensitivity in successfully prosecuting a case involving the removal of an Air Force physician.

James C. Preston (Florida, Middle District), by Michael Powers, Resident Agent in Charge, Drug Enforcement Administration, Tampa, for his outstanding success in the prosecution of the largest methamphetamine manufacturing/distribution organization in the area.

Michael W. Reap (Missouri, Eastern District), by Jerome R. Rodgers, Assistant Vice President, Federal Reserve Bank of St. Louis, for his excellent presentation to the bank employees on the subject of bank fraud.

Rudolf A. Renfer, Jr. (North Carolina, Eastern District), by Alan Weinberg, District Counsel, Internal Revenue Service, Greensboro, for his consistent professionalism and dedicated efforts in representing the Internal Revenue Service for over seven years.

Kurt J. Shernuk (District of Kansas), by Charles E. Thacker, Regional Director, Federal Deposit Insurance Corporation, Kansas City, for successfully prosecuting a financial fraud case resulting in a conviction on all counts.

Russell C. Stoddard and ***Douglas Frazier*** (Florida, Middle District), by Allen H. McCreight, Special Agent in Charge, FBI, Tampa, for their valuable assistance and prompt action in bringing a dangerous criminal to justice following a bomb explosion at DEA Headquarters in Fort Myers last March.

Kathleen L. Torres (District of Colorado), by W. Michael Tupman, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, Washington, D.C., for her professionalism and legal expertise in a complicated bankruptcy case and other court actions during the past year.

Henry L. Whisenhunt, Jr. (Georgia, Southern District), by Donald R. Kronenberger, Jr., Regional Attorney, Office of General Counsel, Department of Agriculture, Atlanta, for obtaining approximately $42,000 in excess proceeds generated from a prior lien foreclosure sale of farmland owned by a Farmers Home Administration borrower.

J. Gregory Whitehair (District of Colorado), by Lawrence M. Jakub, Regional Attorney, Office of General Counsel, Department of Agriculture, Denver, for his excellent representation of the U.S. Forest Service and successful results in a civil action.

Warren A. Zimmerman (Florida, Middle District), received a Certificate of Appreciation from Bruce R. Jacob, Dean, and Dorothea Beane, Assistant Professor of Law, for his outstanding presentation on the preparation of pretrial stipulations before the students and faculty of Stetson University College of Law in St. Petersburg.

SPECIAL COMMENDATION FOR THE MIDDLE DISTRICT OF FLORIDA

Joseph K. Ruddy, Assistant United States Attorney for the Middle District of Florida, was commended by Marlene A. Young, Ph.D., J.D., Executive Director, National Organization for Victim Assistance, Washington, D.C., for arranging a donation of $10,000. This donation arose out of a diversion plan developed by Mr. Ruddy in a criminal case involving a threat to the family of a federal law enforcement officer. Absent a basis for standard restitution in the diversion plan, Mr. Ruddy devised a "surrogate" restitution payment to the government which would serve as a kind of trustee to use the funds for support victims generally. The National Organization for Victim Assistance is a charitable organization named in the Combined Federal Campaign. The $10,000 donation will be used in a cost-effective manner to advance the goals of victim services across the country.

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SPECIAL COMMENDATIONS FOR THE MIDDLE DISTRICT OF ALABAMA, THE SOUTHERN DISTRICT OF GEORGIA, AND THE MIDDLE DISTRICT OF GEORGIA

Between June 1989 and December 1989, Walter Leroy Moody, Jr. of the Northern District of Georgia, constructed four improvised explosive devices out of steel pipe approximately 7 inches in length and 2 inches in diameter, sealed at each end with threaded end caps. The pipes were packed with Hercules Red Dot double-base smokeless powder and contained an improvised detonator constructed out of the barrel of a ballpoint pen filled with a high explosive. The initiator was designed and electrically triggered to explode, thereby detonating the main explosive charge when the top lid of the box was opened. Nails were secured to the pipe with rubber bands, which would and did function as additional projectiles at the time of explosion.

On December 14, 1989, Walter Leroy Moody, Jr. mailed a package containing an explosive device at Newnan, Georgia addressed to Judge Robert Vance, United States Court of Appeals for the Eleventh Circuit, Birmingham, Alabama. The package was delivered by the U.S. Postal Service to Judge Vance at his home in Mountainbrook, Alabama. When the Judge opened the package, he triggered the explosion and was killed, and his wife was seriously injured.

On December 15, 1989, Walter Leroy Moody, Jr. mailed a package containing an explosive device addressed to Robert E. Robinson, Savannah, Georgia. The package was delivered by the U.S. Postal Service to Mr. Robinson's law office. When the attorney opened the package, he triggered the explosion, and was severely wounded. Mr. Robinson later died of wounds sustained in the explosion.

On December 16, 1989, Walter Leroy Moody, Jr. mailed a package containing an explosive device at Atlanta, Georgia addressed to the Clerk's Office of the Eleventh Circuit Court of Appeals in Atlanta. A security officer intercepted the package, x-rayed it, and removed it from the site. Another improvised explosive device was mailed to the NAACP in Jacksonville, Florida.

James Eldon Wilson, United States Attorney for the Middle District of Alabama, First Assistant United States Attorney ***D. Broward Segrest,*** Assistant United States Attorneys ***Charles R. Niven, Charysse L. Alexander, Steven M. Reynolds,*** and ***Kent B. Brunson***, and their ***Support Staff,*** were commended by William S. Sessions, Director, FBI, Washington, D.C. for their outstanding cooperation, participation and teamwork during the investigation of the mail bomb incidents. The United States Attorney and staff responded immediately and became directly involved in the investigation by providing legal guidance and legal opinions during the preparation and execution of numerous search warrants, making the necessary arrangements to facilitate the grand jury subpoena process, and assisting in the management of the media that inundated the area. In addition, an Assistant United States Attorney and secretary were stationed at the Federal Courthouse in Dothan for several weeks to facilitate the grand jury subpoena process. The excellent coordination orchestrated by the Middle District of Alabama resulted in a 70-count indictment and a smooth and efficient prosecutive endeavor.

Hinton R. Pierce, United States Attorney for the Southern District of Georgia, and Assistant United States Attorney ***William McAbee*** were also commended by William S. Sessions, Director, FBI, Washington, D.C., for their valuable cooperation and legal guidance during the investigation of the mail bomb deaths. Their special efforts assisted the FBI greatly in bringing this high-profile case to the indictment stage.

On December 14, 1990, Walter Leroy Moody, Jr. was convicted of thirteen counts of obstruction of justice, subornation of perjury and witness tampering at Brunswick, Georgia. He is awaiting sentencing. ***Samuel A. Wilson,*** First Assistant United States Attorney for the Middle District of Georgia, was commended by Attorney General Dick Thornburgh for his outstanding efforts in the investigation and trial of this very important case. Mr. Wilson was also instrumental in obtaining the cooperation of Susan Moody, wife of Walter Moody. The Attorney General said, "Your assistance has been of tremendous importance to the case. The testimony and evidence furnished by Mrs. Moody will have critical impact at the upcoming bombing trial. Your professionalism and dedication to duty are great credits to the United States Attorney's Office for the Middle District of Georgia and to the entire Department."

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NORTHERN DISTRICT OF GEORGIA

On January 29, 1991, ***Joe D. Whitley,*** United States Attorney for the Northern District of Georgia, announced the return of a superseding indictment in United States v. Walter Leroy Moody, Jr. Walter Moody was originally charged in a seventy-count indictment on November 7, 1990, with the December, 1989 mail bomb assassinations of Judge Robert S. Vance of the Eleventh Circuit Court of Appeals and Savannah Alderman Robert E. Robinson, together with a series of related crimes.

This indictment adds two new counts, charging Walter Moody with transporting five firearms in interstate commerce from Rex, Georgia to Titusville, Florida, and with obstruction of justice relating to Moody's allegedly fraudulent efforts to overturn a previous conviction.

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PERSONNEL

New Special Counsel For Financial Institutions

Ira Raphaelson, Assistant United States Attorney for the Northern District of Illinois, has assumed the position of Special Counsel for Financial Institutions, Office of the Deputy Attorney General. This position was formerly held by ***James Richmond***, who returned to his post as United States Attorney for the Northern District of Indiana.

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ATTORNEY GENERAL'S ANNUAL AWARDS

On February 8, 1991, the Attorney General's 39th Annual Awards ceremony was held at the Great Hall of the Department of Justice. The following employees from the United States Attorneys' offices received an award:

Distinguished Service Award

Joseph J. Aronica, Eastern District of Virginia
Robert J. Bondi, Southern District of Florida
Louis J. Freeh, Southern District of New York
Russell Hayman, Central District of California
Ernst D. Mueller, Middle District of Florida
Group Award for the Eastern District of Pennsylvania --
John P. Pucci; Ronald H. Levine;
and Pamela Donleavy

John Marshall Awards

Trial of Litigation
Thomas M. Durkin, Northern District of Illinois
William F. Fahey, Central District of California
Group Award for the Eastern District of New York --
Leslie R. Caldwell; Peter T. Sheridan

Support of Litigation
Posthumous Award: Serena H. Ross, Eastern District of Pennsylvania

Handling of Appeals
Roger W. Haines, Jr., Southern District of California

Interagency Cooperation
Group Award for the Southern District of New York --
Robert T. Mooney; David P. Nelson; and Special Assistant
United States Attorneys, Securities and Exchange Commission

Excellence in Legal Support
Christine H. Balzar, Northern District of Indiana

* * * * *

INSPECTOR GENERAL ISSUES

Office Of Inspector General, Resolution Trust Corporation

An Office of Inspector General at the Resolution Trust Corporation (RTC) has been created through the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (P.L. 101-73), which amended the Inspector General Act of 1978. This office, under the leadership of Inspector General John J. Adair, is responsible for investigating, detecting, and preventing fraud, waste, and mismanagement in RTC programs and operations. The Inspector General anticipates that they will be working extensively with the Department of Justice on a variety of matters. Criminal investigators are presently being hired who have considerable experience working with Assistant United States Attorneys in white collar crime and government program fraud.

To assist you in addressing allegations of fraud in RTC programs in your district, the following is a list of Regional Inspectors General for Investigation, together with their addresses, telephone numbers, and geographical areas of responsibility:

Mid-Atlantic Consolidated Office
Michael L. Mitchell (404) 881-4940
Colony Square,
Building 100, Suite 2300
Atlanta, Georgia 30361

(Louisiana, Mississippi, Alabama, Georgia, Florida, South Carolina, North Carolina, Tennessee, Kentucky, West Virginia, Virginia, Maryland, Delaware, New Jersey, Ohio, Pennsylvania, Connecticut, Rhode Island, New York, Massachusetts, New Hampshire, Vermont, Maine, Puerto Rico, Virgin Islands)

Mid-Central Consolidated Office
Daniel L. Sherry (806) 968-7145
Board of Trade Building II
4900 Main Street, Suite 200
Kansas City, Missouri 64112

(Arkansas, Missouri, Kansas, Illinois, Indiana, Nebraska, Iowa, South Dakota, North Dakota, Minnesota, Wisconsin, Michigan)

Dallas Regional Office
Johnny O. Lee (214) 953-4848
300 N. Ervay
Dallas, Texas 75201

(Texas, Oklahoma)

Denver Regional Office
Wayne D. Zigler (303) 291-5827
1225 17th Street, Suite 3100
Denver, Colorado 80202

(Colorado, New Mexico, Arizona, Utah, Wyoming, Montana, Idaho, Nevada, California, Washington, Oregon, Alaska, Hawaii, Guam)

Additional staff is anticipated in FY 1992 for program offices already located in the Philadelphia area, Tampa, Baton Rouge, Tulsa, San Antonio, Houston, Minneapolis area, Chicago area, Costa Mesa, and Phoenix.

If you have any questions concerning this new office, please call Clark W. Blight, Assistant Inspector General for Investigation, at (202) 416-4343 or (202) 416-7459.

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GOVERNMENT ETHICS

Ban On Honoraria

The Assistant Attorney General for Administration, Harry H. Flickinger, has advised all Department of Justice employees that as of January 1, 1991, all Federal employees are subject to a ban on the receipt of honoraria. (See P.L. 101-194.) An honorarium is defined as a payment of money or anything of value for a speech, appearance, or article. The penalty for violation could be $10,000.

This ban applies even when there is no connection to your official duties. (Justice employees are already prohibited by the standards of conduct from accepting compensation from outside sources for speaking or writing in their official capacity or when their subject is the programs or operations of the Department. (See 28 CFR §45.735-12.)

Regulations have not been issued to implement this new law but the following summarizes the advice of the Office of Government Ethics about its implementation in the Executive Branch.

Not Allowed	Allowed
* Accepting a fee for a speech	* Payment for teaching a course of multiple presentations
	* Paid artistic performances
* Accepting pay for an article	* Payment for writing a book
	* Writing for a periodical on a continual basis under contract or on salary
	* Payment for works of poetry, fiction, lyrics and scripts

You may direct an honorarium prohibited by this ban, up to $2000, to certain charitable organizations as long as neither you nor a member of your family receives any direct financial benefit from the organization and you do not take a tax deduction. Generally, you may accept travel expenses incurred in making a speech for yourself and one relative. (See 28 CFR §45.735-14a.

If you have any questions about whether certain activities violate the honoraria ban, please contact Legal Counsel, Executive Office for United States Attorneys, at (FTS) 368-4024 or (202) 514-4024. Other Department of Justice employees should consult the ethics official for your component listed on page IV-18 of the Department Telephone Directory.

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SAVINGS AND LOAN ISSUES

Savings And Loan Fraud Update

On January 22, 1991, Attorney General Dick Thornburgh submitted to President Bush and the Congress a two-year report on the accomplishments of the Department of Justice in prosecuting fraud in the nation's thrift industry.

In a review of statistics and important cases, the Attorney General identified a "tragic element" common to many fraud schemes in which sound, first-rate institutions became "the vehicles for outrageous self-dealing on the part of thrift executive and officers." He said, "Our U.S. Attorneys, however, have delivered on President Bush's promise to bring the 'cheats and chiselers and charlatans' of the savings and loan industry to the bar of justice."

The following information, based on reports from the 94 offices of the U.S. Attorneys and from the Dallas Bank Fraud Task Force, describes activity in "major" savings and loan prosecutions from October 1, 1988 - December 31, 1990.

Informations/Indictments	329*
S&Ls Victimized	507
Estimated S&L Losses	$6.458 billion
Defendants Charged	566*
Defendants Convicted	403*
Defendants Acquitted	18
Prison Sentences:	768 years
Sentenced to prison	232 (79%)
Awaiting sentence	117
Sentenced w/o prison or suspended	63
Fines Imposed	$4.808 million
Restitution Ordered	$231.863 million*

CEOs, Chairmen of the Board and Presidents:

Charged by indictment/information	70
Convicted	56
Acquitted	6

Directors and Other Officers:

Charged by indictment/information	98
Convicted	78
Acquitted	3

The term "major" is defined as (a) the amount of fraud or loss was $100,000 or more, (b) the defendant was an officer, director, or owner (including shareholder), or (c) the schemes involved convictions of multiple borrowers in the same institution.

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* These amounts have been adjusted due to improved reporting, not necessarily monthly activity.

* * * * *

Dallas Bank Fraud Task Force

On January 17, 1991, the Department of Justice announced that two co-owners and co-chairmen of the Guaranty Federal Savings and Loan Association in Dallas, Paul S. Cheng and Simon E. Heath, were sentenced to 20 and 30 years in prison after being convicted on charges of savings and loan fraud. In addition, they were ordered to pay restitution to the Federal Deposit Insurance Corporation (FDIC) in the amount of $7.8 million. Cheng and Heath were convicted on August 15, 1990 on various charges in connection with a $10 million loan that they made while they were owners of Guaranty. They were found guilty of two counts of executing a bank fraud scheme; one count of conducting a fraud scheme using the interstate wire system; one count of having misapplied money belonging to Guaranty; and two counts of having made false entries in the books and records of Guaranty. Cheng was also convicted of four counts and Heath five counts of having caused the transportation in interstate commerce of money taken by fraud. Attorney General Dick Thornburgh said, "Heath and Cheng have mortgaged their freedom well into the next century. The trend toward longer sentences for savings and loan crooks is an appropriate reflection of public outrage at those who took once solvent thrifts and used them as a personal resource."

The Attorney General praised the Dallas Bank Fraud Task Force for their work in this case and the on-going investigation of fraud in the savings and loan industry which has thus far resulted in charges being brought against 95 defendants. Seventy-one convictions have been obtained since the inception of the Task Force in August, 1987.

Leading the prosecution was Fraud Section Attorney Robert E. Hauberg, Jr. of the Dallas Bank Fraud Task Force. The Task Force includes attorneys from the Dallas Regional Office of the Fraud Section, Criminal Division; attorneys from the Tax Division; Assistant United States Attorneys from the Northern District of Texas; examiners from the Office of Thrift Supervision; and agents of the Federal Bureau of Investigation and the Internal Revenue Service.

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DRUG ISSUES

Letter To Ann Landers

On January 21, 1991, a letter from Attorney General Dick Thornburgh appeared in the Ann Landers column of the Washington Post in response to the question, "What happens to the drugs after a bust?" The Attorney General's letter is as follows:

> In the past six years, we have confiscated over $1.5 billion from drug traffickers and other criminals. Over 35,000 parcels of real and personal property worth more than $1.3 billion have been seized and are being held pending forfeiture. It is only fair that these assets be reinvested in law enforcement. We have shared more than $560 million with state and local police agencies, while another $491 million is being used to build prison cells. Another $268 million has helped finance the anti-drug operations of the Drug Enforcement Administration, the Federal Bureau of Investigation, the U.S. Marshals Service, and other federal agencies.
>
> We are proud of our forfeiture program. It cripples drug syndicates and saves taxpayers hundreds of millions of dollars a year by supplementing law enforcement budgets out of the pockets of criminals. Thanks for helping get this message out.

* * * * *

CRIME ISSUES

Organized Crime Strategy For The 1990s

On January 31, 1991, Attorney General Dick Thornburgh issued a Department of Justice report on organized crime strategy for the 1990s which seeks to eliminate the influence of the 24 traditional 'families' of La Cosa Nostra (LCN). The Attorney General said, "With the implementation of this strategy, we are 'putting out a contract' on the hierarchy of the traditional LCN families now operating in major American cities. In the last year alone, we have secured the indictment or conviction of major organized crime figures in Boston, New York, Chicago, Newark, Pittsburgh and Philadelphia. Building on this record of success, the Organized Crime Council has devised a blueprint for the 1990s focusing on the 'enterprise theory' of investigation, in which the leadership and chain of command of organized criminal groups are penetrated and destroyed."

The strategy emphasizes the use of: electronic surveillance, especially the interception of oral communications; undercover operations; compulsion of testimony; witness protection and relocation; investigation of criminal organizations under the enterprise theory; utilization of task forces composed of local, state, and federal officers and prosecutors; development of long range witnesses-in-place; civil provisions of RICO; multi-jurisdictional RICO prosecutions; computer-assisted organizations of multi-faceted RICO investigations; and cross-designation of local and federal prosecutors. The strategy also is aimed at preventing emerging organized crime organizations, such as the Sicilian Mafia, Japanese Boryokudan (or "Yakuza") groups, Jamaican Posses and Chinese Triads from achieving levels of power comparable to that of the LCN.

Department of Justice resources dedicated to combatting organized crime were increased by 42 percent following the merger of the Organized Crime Strike Forces into the offices of the United Sates Attorneys in December of 1989. Prior to the merger, the Department had 122 attorneys specifically pursuing organized crime cases. By the end of 1990, new prosecutors had been added to create a full complement of 173 attorneys now assigned to the organized crime fight. The new strategy commits additional law enforcement resources through the Organized Crime Drug Enforcement Task Forces and the 21 Strike Force Units operating out of the offices of the United States Attorneys.

In addition, the FBI has deployed approximately 800 Special Agents to work on organized crime cases. FBI Director William Sessions said, "The FBI's organized crime program is in concert with, and fully supportive of, the new organized crime national strategy of the Department of Justice. Further, the FBI will continue to strongly support the use of combined federal, state and local agencies to deal a fatal blow to all factions of organized crime."

The Organized Crime Council also emphasized the continued use of international money laundering laws to restrict organized criminal profiteering. Additional measures in the strategy call for the establishment of an international law enforcement infrastructure through the United Nations Drug Convention and Mutual Legal Assistance Agreements to make it more difficult for criminals to escape justice by hiding behind national boundaries.

The Council is chaired by Deputy Attorney General William P. Barr. Its members include: Robert S. Mueller, III, Assistant Attorney General, Criminal Division; Joseph M. Whittle, Chairman, Attorney General's Advisory Committee of United States Attorneys; William Sessions, Director, FBI; Robert C. Bonner, Administrator, DEA; Gene McNary, Commissioner, Immigration and Naturalization Service; Michael Moore, Director, U.S. Marshals Service; Julian W. De La Rosa, Inspector General, Department of Labor; Stephen E. Higgins, Director, Bureau of Alcohol, Tobacco and Firearms; Inar Morics, Assistant Commissioner for the Criminal Investigation Division, Internal Revenue Service; Charles R. Clauson, Chief Postal Inspector; William C. McLucas, Director of Enforcement, Securities and Exchange Commission; Peter K. Nunez, Assistant Secretary for Enforcement Operations, Department of the Treasury; John R. Simpson, Director, Secret Service; and Carol B. Hallett, Commissioner, U.S. Customs Service.

* * * * *

Female Crime Victims

The Bureau of Justice Statistics, a component of the Office of Justice Programs of the Department of Justice, estimates that women in the United States sustained an average of 2.5 million violent crimes each year from 1979 through 1987. The Bureau reported that about one-quarter of such incidents were committed by family members or boyfriends and an additional 27 percent by other people whom the victims knew. Strangers committed about 44 percent of the violent crimes, and in 4 percent of the incidents, the relationship was unknown.

Among male violent crime victims, 4 percent of violent crimes were committed by family members or girlfriends and 27 percent by other friends or acquaintances. Approximately 65 percent of the violent incidents were committed by strangers and in 4 percent of such crimes, the relationship was unknown. During the 1979-1987 period, males sustained an average of 4 million violent crimes annually.

The violence women suffer is more frequently caused by people with whom the victims have had a prior relationship than is the case among men. Almost one in five of the women who had been attacked by a family member or boyfriend said that the violence they experienced had been part of a series of at least three similar violent crimes that occurred within six months of the interview.

The statistics are from the National Crime Survey, which, during the years 1979 through 1987, interviewed almost 535,000 women who were at least 12 years old in nationally representative samples of the U.S. population. Almost 14,000 women reported being victims of violent crime. Among the other findings are the following:

-- Fifty six percent of the women attacked by close friends or intimates (that is, by a husband, former spouse, parent, child, brother, sister, other relative, boyfriend or former boyfriend) said they had called the police for assistance. Among those who said they did not call for law enforcement assistance, the most frequent reason given was that the incident was a private or personal matter or an incident that she handled herself (almost one-half of the non-callers). Nineteen percent of the women who did not call police said they feared reprisals by the offenders. Among those who did call the police, more than one-half said they did it to stop the violence from happening again.

-- Twenty-one percent of the women who were attacked by family members or boyfriends said the offender used a weapon -- about one-third of these victims said the weapon was a gun.

-- Twenty percent of the women who were attacked by an intimate said they actively resisted the offender by using a weapon or fighting back. Most, however, resisted by trying to threaten, argue or evade the attack. Overall, 81 percent reported some type of resistance.

-- More than 50 percent of the women attacked by family members or boyfriends said they were injured, 23 percent said they received medical treatment and 10 percent said their injuries were serious enough to require medical care in a hospital.

-- Among the women violence victims, 6 percent said the crime was a rape or an attempted rape, 17 percent had been robbed, 22 percent were the victims of an aggravated assault and 56 percent described a simple assault.

-- Sixty-five percent of the rape or attempted rape victims said they were attacked after nightfall and more than one-third said the attack happened at or in their own home. Twenty-four percent said the offender used a weapon, and 38 percent of these said the weapon was a gun. The Bureau also noted that per capita rape and attempted rape rates were highest among women 16 to 24 years old, black women, separated or divorced women, women who have never married, women who live in central cities or in rental housing and among low income or unemployed women.

Single copies of the bureau's report, "Female Victims" (NCJ-126826), may be obtained from the National Criminal Justice Reference Service, Box 6000, Rockville, Maryland 20850.

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SUPREME COURT ACTION

Supreme Court Decision in Cheek v. United States

On January 8, 1991, the Supreme Court reversed the decision of the Seventh Circuit in John L. Cheek v. United States, No. 89-658 (S.Ct. January 8, 1991), which affirmed the conviction of a tax protestor on charges of failure to file and evasion. Cheek contended at trial that he did not act willfully because he had a good faith belief that the federal tax laws were being unconstitutionally enforced and that his actions were lawful. The trial court instructed the jury that an honest but unreasonable belief is not a defense and does not negate willfulness. The Supreme Court ruled that the trial court's instructions were, in part, erroneous. The Court held that a good faith misunderstanding of the law or a good faith belief that one is not violating the law negates willfulness, whether or not the claimed belief or misunderstanding is objectively reasonable. The Court also held, however, that a good faith belief that the tax laws are unconstitutional or invalid does not negate willfulness and does not provide a defense to tax charges. In general, the Court's decision is not expected to have an adverse impact on tax protestor prosecutions.

Attached at the Appendix of this Bulletin as Exhibit A is a copy of a detailed memorandum dated January 29, 1991, from Shirley D. Peterson, Assistant Attorney General for the Tax Division to all United States Attorneys concerning this decision. If you have any questions or would like further information, please call Robert E. Lindsay or Alan Hechtkopf of the Criminal Appeals and Tax Enforcement Policy Section of the Tax Division at (FTS) 368-5396 or (202) 514-5396.

* * * * *

SENTENCING REFORM

Sentencing Organizational Antitrust Offenders Under Proposed Guideline Chapter Eight

On December 13, 1990, James F. Rill, Assistant Attorney General for the Antitrust Division, appeared before the United States Sentencing Commission concerning the application of the October 26, 1990, Sentencing Commission "Draft Guidelines for Organizational Defendants" to antitrust offenses.

A copy of Mr. Rill's statement is attached at the Appendix of this Bulletin as Exhibit B.

* * * * *

Guidelines Sentencing Update

A copy of the Guideline Sentencing Update, Volume 3, No. 17 dated January 3, 1991, is attached as Exhibit C at the Appendix of this Bulletin.

* * * * *

Federal Sentencing And Forfeiture Guide

Attached at the Appendix of this Bulletin as Exhibit D is a copy of the Federal Sentencing and Forfeiture Guide, Volume 2, No. 14, dated December 31, 1990, and Volume 2, No. 15, dated January 14, 1991, which is published and copyrighted by Del Mar Legal Publications, Inc., Del Mar, California.

* * * * *

POINTS TO REMEMBER

State Of The Union Message

The following is an excerpt from the State of the Union Message delivered by President Bush on January 29, 1991:

> . . .Civil rights are also crucial to protecting equal opportunity. Every one of us has a responsibility to speak out against racism, bigotry and hate. We will continue our vigorous enforcement of existing statutes, and I will once again press the Congress to strengthen the laws against employment discrimination without resorting to the use of unfair preferences.
>
> We're determined to protect another fundamental civil right -- freedom from crime and the fear that stalks our cities. The Attorney General will soon convene a crime summit of our nation's law enforcement officials. And to help us support them, we need tough crime-control legislation, and we need it now.
>
> And as we fight crime, we will fully implement our national strategy for combatting drug abuse. Recent data show that we are making progress, but much remains to be done. We will not rest until the day of the dealer is over, forever.

* * * * *

1991 Environmental Law Enforcement Conference

On January 8, 1991, Attorney General Dick Thornburgh delivered the keynote address to over 900 law enforcement officials participating in the 1991 Environmental Law Enforcement Conference in New Orleans. This conference was the largest environmental enforcement conference ever held in the United States and was co-sponsored by the Environment and Natural Resources Division, the Executive Office for United States Attorneys, and the Environmental Protection Agency. Joining the record number of law enforcement officials in New Orleans for advanced instruction on civil and criminal enforcement of hazardous waste statutes were 35 United States Attorneys, 191 Assistant United States Attorneys, state and federal prosecutors, technical representatives, and numerous members of the federal judiciary.

Prior to the conference, the Department of Justice announced the second straight billion dollar year for civil recoveries for environmental violations, coupled with a record 134 indictments and a 95 percent conviction rate in criminal cases. During Fiscal Year 1990, federal criminal environmental enforcement efforts reaped a record $19.9 million in fines, restitution and forfeitures by polluters. In civil enforcement proceedings, the Department of Justice recorded an all-time high $1.2 billion in cost recoveries, including more than $1 billion in court-ordered environmental cleanup activities, $61.7 million in Superfund cleanup cost recoveries, $32 million in civil penalties, and $23 million in natural resources damages recoveries. Environmental enforcement actions now return nearly $30 in penalties and remedies for each enforcement dollar spent by the Justice Department.

The Attorney General said, "We are not resting on our laurels of environmental enforcement -- we seek to further sharpen our skills with regard to the environmental law we are charged to enforce. We want every year to be a record-breaker."

* * * * *

Exxon Valdez Oil Spill

Dick Stewart, Assistant Attorney General for the Environment and Natural Resources Division, and Charles E. Cole, Attorney General for the State of Alaska, have agreed to closely coordinate federal and state legal actions to recover for losses caused by the Exxon Valdez oil spill on March 24, 1989. The two governments will work together closely to expedite legal efforts to recover for losses caused by the spill, including clean-up costs, restoration efforts, and long-term protective measures. Detailed measures were agreed upon for sharing and coordinating scientific information, economic studies, and other technical data needed to establish the breadth and scope of damages caused by the largest oil spill in United States history. They have also agreed on a joint approach to civil litigation strategies.

The United States is currently pursuing criminal charges against Exxon Corporation and Exxon Shipping Company, and the State has brought a civil action to recover damages. Trial in the criminal case is scheduled for April 10, 1991.

Dick Stewart stated, "At the direction of Attorney General Dick Thornburgh, the Department of Justice remains committed to pursuing all appropriate legal remedies against Exxon at the earliest possible time. The citizens of Alaska will ultimately benefit from our coordinated legal actions to hold Exxon responsible and compel it to fully correct and compensate for the damage done by this spill. We are particularly pleased that Attorney General Cole has taken initiatives to help bring about what I firmly believe will be a favorable result."

* * * * *

Requests For Prospective Juror Information Under 26 U.S.C. 6103(h)(5)

On January 29, 1991, Shirley D. Peterson, Assistant Attorney General, Tax Division, issued the following memorandum to all United States Attorneys setting forth the Tax Division's position concerning the Hashimoto decision:

> The Tax Division is aware that, since the Ninth Circuit decided United States v. Hashimoto, 878 F.2d 1126 (9th Cir. 1989), there have been numerous defense requests in tax cases for information about prospective jurors pursuant to Section 6103(h)(5) of the Internal Revenue Code (26 U.S.C.). 1/ The Division understands that these requests have resulted in confusion, trial delays, and burdens on both the local United States Attorney's office and the Internal Revenue Service. Moreover, even where there have been responses to requests under Section 6103(h)(5), questions still remain concerning whether the responses satisfy the requirements of the statute and, if not, whether the trial results can be sustained on appeal.
>
> We need to be able to determine the precise impact of Hashimoto, to keep abreast of how the various district courts are dealing with Section 6103(h)(5) requests, and to be prepared to take any steps necessary to solve the problems flowing from the Hashimoto decision and Section 6103(h)(5).
>
> Accordingly, we request that, until further notice, the Tax Division be advised of all Section 6103(h)(5) requests and dispositions. Please provide this information to Alan Hechtkopf or Robert E. Lindsay of the Criminal Appeals and Tax Enforcement Policy Section at (FTS) 368-5396 or (202) 514-5396.

1/ Section 6103(h)(5) provides:

> In connection with any judicial proceeding * * * [involving tax administration] to which the United States is a party, the Secretary shall respond to a written inquiry from an attorney of the Department of Justice (including a United States Attorney) involved in such proceeding or any person (or his legal representative) who is a party to such proceeding as to whether an individual who is a prospective juror in such proceeding has or has not been the subject of any audit or other tax investigation by the Internal Revenue Service. The Secretary shall limit such response to an affirmative or negative reply to such inquiry.

[In Hashimoto, the Ninth Circuit held that, under the statute, a defendant in a criminal tax prosecution has an absolute right to receive prospective juror audit/investigation information and that while the statute does not set forth any procedures for exercising that right, it contemplates sufficiently early release of the jury list to enable the defendant to file a request for the information and receive a response.]

* * * * *

Attorney General Guidelines For Intercepting Electronic Communications

On January 16, 1991, the Criminal Division issued a bluesheet to all United States Attorneys entitled "U.S. Attorney Compliance with Attorney General Guidelines for Intercepting Electronic Communications Pursuant to Title III," which affects Section 9-7.100 of the United States Attorneys' Manual. This bluesheet sets forth guidelines to apply for authorization to intercept electronic communications pursuant to Title III.

If you would like additional copies, please call the United States Attorney's Manual staff at (FTS) 241-6098 or (202) 501-6098.

* * * * *

LEGISLATION

Antitrust Matters

On January 3, 1991, H.R. 9, a bill to reform the McCarran-Ferguson Act, was introduced by Chairman Brooks. The bill picks up where the House Judiciary Committee left off in the 101st Congress and applies federal antitrust standards to the business of insurance except where there is effective state regulation, with transition provisions on collective compilation of historical loss data and trending.

On January 3, 1991, H.R. 27, a joint production ventures bill, was introduced by Congressman Fish. The bill amends the National Cooperative Research Act to include joint development and production, but not marketing or distribution, activities. The "relevant market" definition would apply the rule of reason standard and would include the worldwide capacity of suppliers. This is the same bill that Congressman Fish introduced in the 101st Congress.

On January 3, 1991, H.R. 70, a bill which limits antitrust exemptions for independent natural gas producer cooperatives, was introduced by Congressman Bryant. Joint activity among the producer cooperatives is not prohibited if it is necessary to market the gas and is not undertaken to reduce competition.

* * * * *

Asset Forfeiture

On January 16, 1991, representatives of the Executive Office for Asset Forfeiture and the Office of Legislative Affairs met with Senate Governmental Affairs Committee staff. The staff requested a briefing to provide status updates on the Asset Forfeiture Fund program. The Justice Department employees provided materials and answered questions regarding the management of seized property, systems for valuation of property (specifically automobiles) and maintenance costs associated with real property. Committee staff anticipate an April hearing before the Governmental Affairs Committee on these issues.

* * * * *

Terrorism

Joseph R. Biden, Jr., Chairman, Senate Judiciary Committee, has introduced anti-terrorism legislation. The bill includes five titles: punishment of terrorist acts by imposition of the death penalty (and other enhanced penalties), prevents domestic and international terrorism, prevents aviation terrorism, prevents economic terrorism and provides authorizations for counter-terrorist activities.

Senator Strom Thurmond also has a terrorism bill which authorizes the death penalty for terrorist murders committed either in the United States or abroad. The measure also enhances penalties for terrorism where death does not result. Furthermore, the bill would enhance the government's ability to remove known terrorist aliens from the United States.

* * * * *

CASE NOTES

CIVIL DIVISION

Supreme Court Holds That 30-Day Period Of Limitations For Filing Title VII Suits Against The Government Is Not Jurisdictional, But Subject To Equitable Tolling

Petitioner, Shirley Irwin, filed a complaint with the Equal Employment Opportunity Commission (EEOC), claiming that he had been unlawfully fired by the Veterans Administration (VA) on the basis of his race and disability. The EEOC dismissed the complaint on March 19, 1987, mailing copies of a right-to-sue letter to both Irwin and his attorney. Irwin received the letter on April 7; his attorney received actual notice of the letter on April 10, having been out of the country when it was delivered to his office on March 23. Forty-four days after his attorney's office received the letter and 29 days after Irwin received his copy, he filed an action in district court alleging a violation of Title VII of the Civil Rights Act of 1964. The district court dismissed the case for lack of jurisdiction on the ground that the complaint was not filed within 30 days of receipt of notice of final action taken by the EEOC, as required by the relevant statute of limitations and the court of appeals affirmed.

The Supreme Court has now affirmed, but on different grounds. First, although the Court agreed that the complaint was untimely, it held that the petitioner's failure to comply with the filing deadline set forth under Title VII did not constitute a jurisdictional bar to the petitioner's suit. Rather, going out of its way "to adopt a more general rule to govern the applicability of equitable tolling in suits against the Government," the Court stated that, once Congress has waived its sovereign immunity and subjected itself to suit, the same rebuttable presumption of equitable tolling applicable in private suits also applies to suits against the United States absent a clear statement to the contrary. The Court went on to find, however, that notice to the attorney's office, which was acknowledged by a representative of the office, qualified as notice to the client for purposes of the filing deadline and that here the petitioner had established, at best, a garden variety claim of excusable neglect that was insufficient to warrant equitable tolling. Accordingly, it affirmed the judgment of the court of appeals.

Irwin v. Veterans Administration, No. 89-5867 (Dec. 3, 1990).
DJ # 37-76-214

Attorney: Michael E. Robinson - (FTS) 368-4259 or (202) 514-4259

* * * * *

Ninth Circuit Holds That Damage Cap Applicable To State Governments Applies To Federal Government in Federal Tort Claims Act Action

In this Federal Tort Claims Act (FTCA) action, plaintiff sued the United States for injuries allegedly incurred during a vehicle accident on federal property allegedly caused by a federal police officer. The district court concluded (without opinion) that the Nevada statute limiting recovery in tort actions against state officials to $50,000 should apply and certified its ruling for interlocutory review. We pointed out to the Ninth Circuit that we disagreed with its case law holding that the liability of the United States should be determined with reference to state officials rather than private individuals as required by the FTCA. However, if such an analogy were to be applied, the government should also receive the benefit of liability limitations.

The Ninth Circuit (Tang, Rymer) has now agreed. Judge Noonan dissented on the ground that the Nevada cost cap is an exercise of state sovereign immunity irrelevant to determining the extent of liability under state law. Both the majority and the dissent assumed that analogy could properly be made to the liability imposed upon state governments under state law.

Aguilar v. United States, NO. 89-16018 (9th Cir. Dec. 11, 1990)
D.J. # 157-8-1202

Attorney: Mark B. Stern - (FTS) 368-5089 or (202) 514-5089

* * * * *

Ninth Circuit Upholds Secretary's Refusal To Reimburse "Stock Maintenance Costs" Under Medicare

National Medical Enterprises (NME) sought reimbursement under the old Medicare "reasonable cost" system for the "stock maintenance costs" of eighteen of its wholly-owned hospital subsidiaries. Stock maintenance costs are costs for SEC filings, shareholder meetings, annual reports, and other expenses related to shareholders. The district court held that Medicare must reimburse these expenses under the statutory test requiring reimbursement for all costs reasonably related to patient care.

On our appeal, the Ninth Circuit (Nelson, Norris, O'Scannlain, JJ.) has now reversed. The court first held that the Department of Health and Human Services was not collaterally estopped from relitigating this issue based upon an earlier Court of Claims decision that awarded NME stock maintenance costs for a previous year. It held that mutuality was lacking because 15 of the 18 subsidiaries had not been parties to the prior suit. On the merits, the Ninth Circuit accepted our argument that the costs in dispute were incurred primarily for the benefit of the owners of the hospitals, not their patients. This decision is in accord with decisions of the D.C. and Fifth Circuits, but in conflict with Court of Claims decisions.

National Medical Enterprises v. Sullivan, No. 89-55859
(Oct. 10, 1990). DJ # 137-12C-1257.

Attorneys: Anthony J. Steinmeyer - (FTS) 368-3388 or (202) 514-3388
Marc Richman - (FTS) 368-5735 or (202) 514-5735

* * * * *

TAX DIVISION

Fifth Circuit Adopts Liberal Standard For Exceeding $75 Per Hour Cap On Attorney Fee Awards

On December 27, 1990, the Fifth Circuit affirmed in part and reversed in part a district court's award to taxpayers of attorney's fees under Section 7430 of the Internal Revenue Code in Bode v. United States. Taxpayers sought an award of attorney's fees in the amount of $160,000. Although taxpayers failed to present any records detailing the number of hours spent by their attorneys or the hourly rate charged by them, the district court awarded attorney's fees of $90,000 computed on the basis of 600 attorney hours at a rate of $150 per hour. The Government maintained on appeal that the award could not stand due to the absence of adequate billing records and that, in any event, the rate of reimbursement was limited under Section 7430 to $75 per hour.

The Court of Appeals agreed that the district court did not have an adequate basis for determining the total number of attorney hours subject to reimbursement under Section 7430. The appellate court also agreed that expertise in tax was not in itself a special factor warranting an award in excess of the normal statutory cap of $75 per hour. The court concluded, however, that taxpayers had established that they could not have obtained the services of an attorney qualified to handle their complex tax case for substantially less than $150 per hour and on that basis, approved the district court's departure from the statutory cap. Since the going rate for qualified counsel in most areas of the country exceeds the $75 per hour cap, the "test" established by the court for permitting departures from that cap will likely be satisfied in almost every case.

* * * * *

District Court Orders Religious Organization To Honor Levy

On December 20, 1990, the District Court in Philadelphia entered an order holding that the Philadelphia Yearly Meeting of the Religious Society of Friends was required to honor a levy served by the Internal Revenue Service to collect taxes owed by employees of the Yearly Meeting. Two employees of the Yearly Meeting had refused to pay the full amount of taxes they owed, apparently on the grounds that their religious beliefs precluded them from paying the portion of their taxes that would support the military. The Internal Revenue Service thereafter served notices of levy upon the Yearly Meeting in an attempt to effect collection of the unpaid amounts. The Yearly Meeting refused to honor these levies, indicating that it would not "coerce or violate the consciences of its employees and members with respect to their religious principles, or to act as an agent for those who do." The United States then brought suit to enforce these levies.

In its ruling, the District Court held that neutral laws of general application, such as the levy provisions of the Internal Revenue Code, are valid against all claims for special treatment under the Free Exercise Clause. While the court went on to hold that the Yearly Meeting was not liable for the fifty percent penalty that attaches to a failure to comply with a levy "without reasonable cause," any future failure to honor a similar levy would be subject to the penalty.

* * * * *

ADMINISTRATIVE ISSUES

Foreign Travel

On January 25, 1991, Richard L. DeHaan, Associate Director for Administrative Services of the Executive Office for United States Attorneys (EOUSA), advised all United States Attorneys and Administrative Officers of two immediate changes. First, Deputy Attorney General William Barr is now the approving official for all foreign travel.

All requests for foreign travel should be forwarded to the Financial Management Staff, EOUSA, as usual. The Financial Management Staff will prepare the necessary paperwork and forward to the EOUSA Director. If approved, the package will then be forwarded to the Deputy Attorney General for his consideration.

Second, all foreign travel is restricted to those trips of an essential nature; requests to attend foreign conferences or meetings will be denied. Because of the additional approval requirements, requests should be received in the Deputy Attorney General's office at least three weeks in advance of anticipated travel.

If you have any questions, please call Lydia Ransome or Gerri Perry of the Financial Management Staff, EOUSA, at (FTS) 241-6935 or (202) 501-6935.

* * * * *

Voluntary Leave Program

Steve Muir, Chief, Labor & Employees Relations Branch, Executive Office for United States Attorneys (EOUSA), has advised that EOUSA and the United States Attorneys' offices have once again proven that they care about their fellow employees in a most remarkable way. Since the Voluntary Leave Transfer Program (VLTP) was established by law on October 31, 1988, to assist employees experiencing a medical or family medical emergency, this program has met with great acceptance and great success.

To date, 577 employees have donated 14,045 hours of annual leave to 63 recipients. These numbers precluded many of our recipients from having to suffer a financial hardship during their family and/or medical emergency situations.

Currently, there is a monthly status listing of 19 VLTP recipients who are still in need of donated annual leave totaling 4,144 hours. Should you wish to consider donating to a worthy employee, please contact your Administrative Officer for the necessary forms and procedures.

* * * * *

APPENDIX

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

(As provided for in the amendment to the Federal postjudgment interest statute, 28 U.S.C. §1961, effective October 1, 1982)

Effective Date	Annual Rate	Effective Date	Annual Rate
10-21-88	8.15%	01-12-90	7.74%
11-18-88	8.55%	02-14-90	7.97%
12-16-88	9.20%	03-09-90	8.36%
01-13-89	9.16%	04-05-90	8.32%
02-15-89	9.32%	05-04-90	8.70%
03-10-89	9.43%	06-01-90	8.24%
04-07-89	9.51%	06-29-90	8.09%
05-05-89	9.15%	07-17-90	7.88%
06-02-89	8.85%	08-24-90	7.95%
06-30-89	8.16%	09-21-90	7.78%
07-28-89	7.75%	10-27-90	7.51%
08-25-89	8.27%	11-16-90	7.28%
09-22-89	8.19%	12-14-90	7.02%
10-20-89	7.90%	01-11-91	6.62%
11-16-89	7.69%		
12-14-89	7.66%		

Note: For a cumulative list of Federal civil postjudgment interest rates effective October I, 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 Attorneys Bulletin, dated February 15, 1989.

* * * * *

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Alabama, S	J. B. Sessions, III
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North Mariana Islands	D. Paul Vernier

* * * * *

U.S. Department of Justice

Tax Division

EXHIBIT A

Washington, D.C. 20530

January 29, 1991

MEMORANDUM

TO: All U.S. Attorneys' Offices

FROM: Shirley D. Peterson
Assistant Attorney General
Tax Division

SUBJECT: Supreme Court's decision in Cheek v. United States

In a case arising out of a prosecution of a tax protestor for willfully failing to file income tax returns (26 U.S.C. 7203) and willfully attempting to evade income taxes (26 U.S.C. 7201), the Supreme Court reversed a decision of the Seventh Circuit holding that, in order to negate willfulness, a claim of a good-faith misunderstanding of the law or a belief that one has complied with the law must be objectively reasonable. (Cheek v. United States, No. 89-658 (S.Ct. January 8, 1991).)

The Court held (Slip Op. at 9-11) that a defendant's good-faith misunderstanding of the law or good-faith belief that he/she is not violating the law negates willfulness, whether or not the claimed belief or misunderstanding is objectively reasonable. The Court also held (Slip Op. at 11-14), however, that a defendant's views about the constitutionality or validity of the tax laws "are irrelevant to the issue of willfulness, need not be heard by the jury, and if they are, an instruction to disregard them would be proper." In addition, the Court recognized that "the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge." Slip Op. at 11.

We do not believe that the Cheek decision will have any significant impact on our successful prosecution of tax protestors and others. The Seventh Circuit's position was in conflict with the majority of circuits that had considered the issue. See, e.g., United States v. Whiteside, 810 F.2d 1306, 1310-1311 (5th Cir. 1987); United States v. Phillips, 775 F.2d 262, 263-264 (10th Cir. 1985); United States v. Aitken, 755 F.2d 188, 191-193 (1st Cir. 1985). In all circuits but the Seventh, both Tax Division attorneys and Assistant United States Attorneys have had consistent success trying tax protestor cases under the assump-

tion that willfulness could be negated by any good-faith misunderstanding of the law, whether or not objectively reasonable. There is no reason why we should not continue to have similar results in tax protestor cases in the future.

No limitations on the types of evidence which traditionally have been used to overcome claims of good faith mistake of law are required as a result of the Cheek decision. Indeed, in Cheek, the Supreme Court provided guidance on meeting a tax protestor's good-faith belief claim. The Court pointed out (Slip Op. at 10) that "in deciding whether to credit Cheek's good-faith belief claim, the jury would be free to consider any admissible evidence from any source showing that Cheek was aware of his duties under the tax laws, including evidence showing his awareness of the relevant provisions of the [Internal Revenue] Code or regulations, of court decisions rejecting his interpretation of the tax law, of authoritative rulings of the Internal Revenue Service, or of the contents of personal income tax return forms and accompanying instructions that made it plain that his wages should be returned as income."

Knowledge of the tax laws may also be shown through evidence that a defendant filed proper tax returns in prior years or that the IRS notified the defendant that protest documents did not constitute valid returns. United States v. Grumka, 728 F.2d 794, 797 (6th Cir. 1984); see also United States v. Ostendorff, 371 F.2d 729, 731 (4th Cir.), cert. denied, 386 U.S. 982 (1967). Evidence that a defendant attempted to hide his income or assets from the IRS would also be proof that he was aware of his legal obligations. See, e.g., Spies v. United States, 317 U.S. 492, 499 (1943). Statements the defendant has made to others may reveal his/her true intent in not filing or paying taxes, as may statements made to IRS agents and correspondence with the Internal Revenue Service. Protest material attached to any document submitted as a return may support the inference that the defendant was aware of the filing requirement and merely disagreed with it. United States v. Burton, 737 F.2d 439 (5th Cir. 1984); United States v. Reed, 670 F.2d 622, 623 (5th Cir.), cert. denied, 457 U.S. 1125 (1982). See also Hayward v. Day, 619 F.2d 716, 717 (8th Cir.), cert. denied, 446 U.S. 969 (1980)(evidence of defendant's involvement in the tax protest movement may be used to establish that he was aware of his legal obligation and intentionally chose not to comply). Finally, evidence of prior convictions for tax offenses may be admissible under Rule 404(b) of the Federal Rules of Evidence to show defendant's knowledge, intent, and/or absence of mistake.

The following is a sample instruction regarding the good-faith defense that we believe is consistent with Cheek:

> The defendant's conduct is not willful if he acted through negligence, inadvertence, justifiable excuse, mistake, or due to his good faith misunderstanding of the require-

> ments of the law. If a person believes in good faith that he has done all that the law requires, he cannot be guilty of the criminal intent to willfully [fail to file a tax return] [attempt to evade taxes] [file a false and fraudulent return] [aid and assist in the preparation or presentation of a false or fraudulent return]. But, if a person acts without reasonable ground for belief that his conduct is lawful, it is for you to decide whether he acted in good faith or whether he willfully intended to fail to file a tax return.
>
> A defendant's conduct is not willful, if he had a genuine misunderstanding of the tax laws. On the other hand, one who believes, even in good faith, that the income tax laws are unconstitutional is a willful violator of the law if he understands the duties the law imposes upon him. A disagreement with the law is not a defense. In considering the defendant's claimed good-faith misunderstanding of the law, you must make your decision based upon what the defendant actually believed and not upon what you or someone else believe or think the defendant ought to believe.

This instruction is based on one approved in United States v. Whiteside, 810 F.2d at 1311, as employing the subjective standard. Additional sample jury instructions incorporating the subjective standard are set forth in the Department's Criminal Tax Manual at pp. 163-165, 167, 168-169, 170-171, 211-212, 235, 445. See also Devitt & Blackmar, Federal Jury Practice and Instructions, Section 35.12 (3d ed. 1977).

Whiteside specifically approved the language of the instruction (see the last sentence of the first paragraph of the instruction above) which permits the jury to consider whether the defendant acted with a reasonable ground for the asserted claim of good faith misunderstanding of the requirements of the law. The court held that this language did not direct the jury to apply an objective test, a holding which now finds support in the Supreme Court's recognition in Cheek that "the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge" (Slip Op. at 11).

Finally, the Court's holding concerning a defendant's views about the constitutionality or validity of the tax laws may be used to the Government's advantage. The Cheek opinion affirms

that willfulness may not be negated by a good-faith belief that the law is unconstitutional or invalid, and it establishes that evidence of such a belief need not even be heard by the jury. Thus, to simplify tax protestor trials and to prevent confusion of the jury, prosecutors should seek to exclude such evidence. Of course, if the evidence is admitted, the jury should be instructed that the claimed belief is not a defense.

If you have any questions about this memorandum or desire further information about the Cheek decision, please contact Robert E. Lindsay or Alan Hechtkopf of the Criminal Appeals and Tax Enforcement Policy Section at FTS 368-5396 or (202) 514-5396.

Department of Justice

EXHIBIT B

STATEMENT

OF

JAMES F. RILL
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE THE

UNITED STATES SENTENCING COMMISSION

CONCERNING
SENTENCING ORGANIZATIONAL ANTITRUST OFFENDERS
UNDER PROPOSED GUIDELINE CHAPTER EIGHT

DECEMBER 13, 1990

Mr. Chairman and Members of the Sentencing Commission:

I am pleased to be here today to present the views of the Department of Justice concerning the application of the October 26, 1990, Sentencing Commission "Draft Guidelines for Organizational Defendants" to antitrust offenses. The Commission's draft, unlike the draft Chapter Eight submitted to the Commission by the Department of Justice, would include antitrust offenses within the coverage of the general provisions that establish guideline fine sentencing ranges. Although the Department recommends the application of additional organizational guidelines to antitrust violations--such as guidelines relating to implementing the sentence of a fine and probation--we strongly object to the proposal to calculate antitrust fines for organizational defendants under §8C2.1.

Let me begin by stating the Department's criteria for evaluating antitrust sentencing proposals. The Department of Justice is strongly committed to effective, vigorous enforcement of the antitrust laws. The Attorney General has made the prosecution of white-collar fraud offenses a top priority of the Department, and antitrust crimes fall clearly into this category. Price fixing and bid rigging are serious offenses undertaken purely to defraud their victims--including the federal government--and must be aggressively prosecuted and punished to protect the public and the overall economy. It is

critical that any sentencing proposal support this effort to deter and punish antitrust offenses.

Abandoning the current antitrust offense guideline in the manner proposed in the Commission draft would seriously undercut antitrust enforcement and the deterrence of antitrust crime. The generic approach in the draft would likely require the diversion of substantial prosecutorial resources to proving the amount of injury in antitrust cases, proof that is not required to establish a criminal, per se violation of the Sherman Act. It could clog the courts with protracted sentencing hearings. Most importantly, it would undoubtedly result in an overall lowering of guideline antitrust fines for organizations, in many cases to but a minor fraction of the levels previously found appropriate by the Commission, at a time when Congress has just reaffirmed its solid support for antitrust enforcement and stiff sentences for antitrust violators by increasing maximum corporate antitrust fines to $10 million, specifically in order to accommodate the Commission's existing guideline for determining appropriate antitrust fine ranges.

The Commission's current antitrust guideline for organizational offenders, found in §2R1.1(c), provides for a fine of 20-50 percent of an organization's volume of commerce

that was affected by an antitrust offense, with a minimum fine of $100,000. This guideline relies on volume of commerce because of the complexity of establishing the loss or gain caused by a criminal antitrust conspiracy. This complexity is discussed by the Commission in the Background to §2R1.1, which states that "offense levels are not based directly on the damage caused or the profit made by the defendant because damages are difficult and time consuming to establish."

The Commission draft takes a different approach to developing fine ranges for antitrust offenses by organizations. Under each of the draft's options, a base amount determined either by offense level or by loss or gain attributable to the defendant would be multiplied to establish an initial fine range of 2-3 times the base amount plus any gain to the defendant from the offense that has not been and will not otherwise be disgorged. The range would decline from there depending on the existence of a variety of mitigating factors.

In determining which of the two methods for deriving a base amount should be used in a particular case--either offense levels or loss or gain--the Commission draft directs courts to choose the method that results in the greater amount, unless calculating loss or gain would unduly complicate the sentencing

process. For most antitrust crimes, the base amount derived from offense levels would be substantially lower than the amount based on loss or gain.

Antitrust violations are assigned lower guideline offense levels than most comparable fraud-type offenses, such as mail fraud and false statements violations covered by §2F1.1. The current antitrust guideline is purposefully designed to impose relatively short but certain prison sentences that, when coupled with substantial fines against both individuals and organizations, provide an effective overall antitrust deterrent. However, a consequence of this unique design is that the relatively low offense levels for antitrust violations found in §2R1.1 are not currently used, nor were they ever intended to be used, to establish the fine component of an antitrust sentence. They are, in fact, quite inappropriate for a sentencing scheme such as the one proposed in §8C2.1 of the Commission draft. Any offense-level-based fine imposed on an antitrust organizational defendant will be substantially below current guideline sanctions and wholly inadequate to provide the requisite deterrent impact.

For example, consider a hypothetical price-fixing violation by a corporation whose volume of commerce affected by the offense was $10 million. The guideline offense level for this

crime would be 10. Under §2R1.1(c), the fine range for this defendant would be $2-5 million. That fine range was established by estimating typical antitrust overcharges of some 10 percent, and set at a multiple of typical overcharges to reflect the difficulty of detecting covert antitrust conspiracies. A fine of this magnitude will deter antitrust violations because the typical organization would be unwilling to risk such a penalty to achieve whatever gains collusion would bring. By comparison, under even the strictest of the offense level options in the Commission draft the fine range, based on an offense level of 10, would be $75,000-$112,500, a small fraction of the range under the Commission's existing guideline.

Obviously, a fine on this order would provide little deterrence to antitrust offenses. Where the volume of commerce affected by an antitrust violation was $10 million, such a fine would be viewed as an incremental cost of doing business, not as punishment for wrongdoing. Moreover, such a low fine would likely undermine public confidence in the criminal justice system, which is perceived by many to be lenient on white-collar criminals.

In order to achieve a fine range comparable to that provided by §2R1.1, the offense level for this hypothetical

would have to be on the order of 21-23 rather than the current level of 10. Clearly, any serious effort to base antitrust fines on offense levels would require a complete rethinking of §2R1.1.

In light of the wholly ineffective antitrust fines that would result from organizational sanctions based on offense levels, the Department would, to the maximum extent possible, be forced to rely in antitrust cases on the other method provided for deriving a base amount: calculating loss or gain caused by the defendant. The need to prove loss or gain in order to obtain anything like a reasonable sentence, however, would likely complicate the sentencing process, and would certainly result in a serious drain on the Department's enforcement resources and a major imposition on the courts. Antitrust offenses, unlike many if not most other crimes involving property, often result in loss or gain that is not easily measured. Under the per se rule, the government need not prove the amount of harm in order to establish an antitrust violation, and the government does not routinely and could not easily investigate amount of harm while trying to prove the very existence of a covert conspiracy. Resources spent calculating loss or gain for sentencing purposes would come directly from the Department's limited enforcement resources currently dedicated to the detection and prosecution of

antitrust crimes and the interdiction of anticompetitive mergers and acquisitions. And it is not only the Department's enforcement resources that are implicated--scarce judicial resources would also be consumed by hearings and determinations of the types of issues that characterize lengthy treble-damage litigation.

Any benefits from such costly and time consuming litigation concerning loss or gain would be far outweighed by the costs it would impose on the Department and the courts. Criminal antitrust offenses covered by the Guidelines consist of clearly defined categories of conduct that cause harm while providing no countervailing benefits whatsoever. Thus, the only question is one of fairness in arriving at a penalty that provides adequate punishment and deterrence and is in reasonable proportion to the magnitude of the offense, but that does not unreasonably tax the criminal justice system with uncertainties that are of the defendant's own making.

The current antitrust guideline for sentencing organizations was carefully developed and specifically designed to avoid costly litigation, yet to be basically fair. It makes reasonable assumptions regarding average overcharges in price-fixing and bid-rigging cases that well serve the purposes of punishment and general deterrence, notwithstanding that a

particular organization in a particular conspiracy may have caused a greater or lesser degree of harm than the average. Antitrust penalties vary with the volume of commerce affected by the violation, so fines are tied to an organization's purchases or sales in the affected industry, and the fine range of 20-50 percent of the volume of commerce affected provides judges with considerable latitude in sentencing. Departures are also available to deal with cases where "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission . . . ." See 18 U.S.C. 3553(b); Sentencing Guideline §5K2.0. Thus, considering the substantial devotion of resources that frequently would be required to determine the loss or gain resulting from an antitrust violation, the cost to effective antitrust law enforcement of eliminating the current guideline in order to provide more particularized fines in the manner proposed in the Commission draft is totally out of proportion to any benefits that would be derived.

Moreover, mitigation of fines under the broad approach in the Commission draft would compound the draft's potential adverse effects on antitrust deterrence. As applied to the nominal fines that would result from basing fines on offense levels, or even to fines based hypothetically on loss or gain,

mitigation could result in significantly lower antitrust fines than provided by the current guideline. The current guideline range of 20-50 percent of the volume of commerce permits judges to take account, within the guideline range, of the factors now proposed for adoption as mitigating factors. See Application Note 3 to §2R1.1. Had the initial antitrust sentencing regime been designed with substantial mitigation of the fine range a possibility, it is not clear that the current range provided in §2R1.1 would have been considered adequate. But what is absolutely clear is that, as applied to antitrust violations, mitigation as proposed in the Commission draft would result in relatively nominal fines in many antitrust prosecutions, fines that are simply insufficient to provide adequate deterrence of antitrust offenses or to serve the public interest in having convicted organizations appropriately punished for their crimes.

Congress is increasingly concerned with punishment and deterrence of white-collar fraud crimes such as fraud by financial institutions, defense procurement fraud and antitrust crimes. New legislation passed by the 101st Congress, Pub. L. No. 101-588, raised the Sherman Act maximum dollar fines for antitrust offenses by corporations from $1 million to $10 million and by other persons from $100,000 to $350,000. This legislation essentially ratifies the antitrust

organizational sanctions established in §2R1.1. It is both an endorsement of the substantial fines for organizational antitrust offenders provided in the current guideline and a recognition of the difficulty of using the alternative statutory maximum based on loss or gain, found in 18 U.S.C. 3571(d), in antitrust cases. Much of the benefit of these increased Sherman Act maximum fines will be immediately lost if organizations convicted of antitrust violations are sentenced under the Commission draft.

In his floor statement concerning this new legislation made immediately prior to its passage by the Senate, Senator Thurmond stated: "Antitrust violations will only be effectively deterred if the system of penalties is meaningful. These changes accomplish that goal." The antitrust proposal made in the Commission draft will, unfortunately, move the goal post backward.

The Department of Justice continues to place increasing importance on strong law enforcement efforts against hard-core antitrust violations. The Sentencing Commission endorsed this importance when it adopted the current guideline for sentencing organizations that are convicted of antitrust offenses. We do not believe that the Commission should now send a contrary

message to potential antitrust offenders by replacing §2R1.1 with the far less effective provisions of the Commission draft.

I hope these comments will be useful to the Commission as it considers its position on sentencing guidelines for organizations.

Guideline Sentencing Update

FEDERAL JUDICIA

EXHIBIT C

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 3 • NUMBER 17 • JANUARY 3, 1991

Departures

Tenth Circuit holds that similarly situated codefendants should receive equivalent departures. Three codefendants pled guilty to maintaining a crack house. They were sentenced separately and all received upward departures based on the amount of drugs involved in the offense. Two defendants received sentences of 36 and 72 months, adjusted upward from ranges of 15–21 and 30-37 months, respectively. Defendant here, however, received a departure from a 30–37 month range to a 120-month sentence.

The appellate court remanded: "Because of the disparity in the sentence given [defendant] as opposed to those given [his codefendants], when each departure was based on the same conduct involving the same quantity of drugs, we must reverse and remand for resentencing. The sentencing guidelines incorporate the principles of equality and proportionality. Their purpose is to narrow the 'disparity in sentences imposed . . . for similar criminal conduct by similar offenders.' . . . The district court's disproportionate upward departure from [defendant's] guideline sentence range thwarts the very purpose of the guidelines and is therefore invalid. Given that the three defendants here were 'similar offenders' engaged in 'similar criminal conduct' with respect to the reason given for their upward departure, they should have received equivalent upward departures."

The court noted that this case "is distinguishable from cases in which disparate sentences were upheld because the disparity was explicable given the facts in the respective records. . . . Here, no distinguishing factors were offered or appear in the record."

The court rejected, however, defendant's claim that an upward departure could not be based on the amount of drugs in the offense of operating a crack house: "quantity of drugs is a valid factor to consider in determining whether an upward departure from the sentence for a premises violation is appropriate." *See also U.S. v. Bennett*, 900 F.2d 204 (9th Cir. 1990) (departure for large quantity of drugs in telephone offense); *U.S. v. Correa-Vargas*, 860 F.2d 35 (2d Cir. 1988) (same); *U.S. v. Crawford*, 883 F.2d 963 (11th Cir. 1989) (departure for quantity of drugs in simple possession offense); *U.S. v. Ryan*, 866 F.2d 604 (3d Cir. 1989) (same, plus purity and packaging).

U.S. v. Sardin, No. 89-6189 (10th Cir. Dec. 18, 1990) (Seymour, J.).

First Circuit instructs district courts to characterize departure sentences as either upward or downward, even when both upward and downward "interim calculations" are made, in order to determine which party has the right to appeal. Defendant pled guilty to embezzlement charges. The district court departed upward four offense levels from the guideline sentencing range (GSR) because the amount embezzled, over $11 million, was substantially in excess of the highest amount in the applicable guideline. The court also departed downward two levels to reward defendant for his substantial assistance, U.S.S.G. § 5K1.1, p.s. Defendant appealed the upward departure and argued the downward departure should have been greater.

The appellate court upheld the sentence, but rejected "the characterization of appellant's sentence as one embodying dual departures—a characterization employed both by the district court and by the litigants." The court reasoned that "decisions to increase or decrease offense levels prior to the imposition of a sentence, or a court's assessment of countervailing considerations before passing sentence, can only be seen as interim calculations. Whether or not circumstances exist that might support departures in both directions, it is indisputable that the sentence finally imposed can only fall below, within, or above the GSR. In other words, in any given sentencing, there can be at most one departure, up or down—a phenomenon determined by the net result of all interim calculations. Hence, to describe a sentence as consisting of two departures, one up and one down, is necessarily inaccurate."

The distinction is important because, barring error in applying the Guidelines, "a decision to depart can only confer a right of appeal on one party." *See* 18 U.S.C. § 3742(a)(3) and (b)(3). "But in each case, the prime beneficiary of the departure . . . may not appeal." Here, for example, "where the sentence actually imposed was above the GSR, the only cognizable departure was upward and the only party entitled to appeal the departure decision was the defendant." To "avoid confusion in the future," the court instructed district courts "to avoid terminology suggestive of multiple departures within the contours of a single sentence."

U.S. v. Harotunian, No. 90-1393 (1st Cir. Dec. 5, 1990) (Selya, J.).

AGGRAVATING CIRCUMSTANCES

U.S. v. Cox, No. 90-1670 (8th Cir. Dec. 18, 1990) (per curiam) (reversing upward departure given because consolidation for sentencing of bank robbery and escape convictions effectively resulted in no punishment for the escape: "In essence, the guidelines merged [defendant's] escape charge into his robbery charge. This merger effectively barred the court from imposing a separate sentence for the escape charge. Because the Sentencing Commission already has determined how to calculate an offense level when multiple offenses are sentenced in the same proceeding, we conclude that the circumstances in this case are not sufficiently 'unusual' to warrant an upward departure from the guidelines. *See* U.S.S.G. § 3D1.4"). *Accord U.S. v. Miller*, 903 F.2d 341 (5th Cir. 1990).

Mitigating Circumstances

U.S. v. McHan, No. 89-5057 (4th Cir. Dec. 6, 1990) (Wilkinson, J.) (reversing downward departure for drug defendant that was based on his charitable activities: "Not only are the above personal factors ordinarily irrelevant in sentencing determinations, but to depart downward because a successful drug dealer has made charitable contributions to his community is to distort the purpose of the Guidelines").

Criminal History

U.S. v. Williams, No. 90-6085 (10th Cir. Dec. 19, 1990) (Brorby, J.) (affirming U.S.S.G. § 4A1.3, p.s., upward departure to career offender level for bank robbery defendant who had committed four separate bank robberies in 1981, which were consolidated for sentencing and thus counted as only one offense in criminal history score: "a sentencing judge may separate prior related convictions that resulted in a single sentence. The judge may then count the convictions as prior felony convictions for purposes of the Guidelines career offender calculation. . . . We find no provision in the Guidelines preventing a court from departing upward to the career offender section"). *Accord U.S. v. Dorsey*, 888 F.2d 79 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 756 (1990).

Adjustments

Role in Offense

Fifth Circuit reaffirms holding that related conduct may be used in U.S.S.G. § 3B1.1 role in offense determination; Fourth Circuit reaches same conclusion. Both cite recent "clarifying amendment" to guideline as support. In the Fifth Circuit defendant pled guilty to one count of possession with intent to distribute cocaine. A related conspiracy charge was dropped, but based on the defendant's leadership role in the conspiracy the district court imposed a four-level upward adjustment under U.S.S.G. § 3B1.1(a).

The appellate court affirmed, reiterating the holding in *U.S. v. Manthei*, 913 F.2d 1130 (5th Cir. 1990), that "while an upward adjustment for a leadership role under section 3B1.1 must be anchored in the defendant's transaction, we will take a common-sense view of just what the outline of that transaction is. It is not the contours of the offense charged that defines the outer limits of the transaction; rather it is the contours of the underlying scheme itself. All participation firmly based in that underlying transaction is ripe for consideration in adjudging a leadership role under section 3B1.1." *Contra U.S. v. Rodriguez-Nuez*, No. 89-2203 (7th Cir. Dec. 3, 1990) (Fairchild, Sr. J.) (role in offense must be based on offense of conviction, not related conduct; enhancement for supervisory role under § 3B1.1(c) not applicable to defendant who supervised another in drug distribution scheme at one residence but not in offense of conviction, possession of drugs with intent to distribute, that occurred at another residence).

The court added: "Any doubt concerning this conclusion must vanish in the face of a recent clarifying amendment promulgated by the Sentencing Guidelines Commission, effective November 1, 1990. This amendment was not intended to change the law, *see* 55 Fed. Reg. 19,202 (1990), but the clarity of the new language of section 3B1.1 makes it self-evident that the district court correctly calculated [defendant's] offense level." The revised Introductory Commentary to § 3B1.1 states that the role in offense adjustment "is to be made on the basis of all conduct within the scope of § 1B1.3 (Relevant Conduct) . . . and not solely on the basis of elements and acts cited in the count of conviction."

U.S. v. Mir, No. 89-5695 (5th Cir. Dec. 11, 1990) (Smith, J.).

In the Fourth Circuit defendant was convicted of five counts of distribution of crack. The district court imposed a four-level adjustment under § 3B1.1(a) because defendant was a leader of five individuals in the offenses of conviction. However, two of those individuals were government agents. Defendant argued they could not be counted and thus at most only three other individuals were involved in the offenses.

The appellate court agreed that the two government agents could not be counted: "To be included as a participant, one must be 'criminally responsible for the commission of the offense.' U.S.S.G. § 3B1.1, comment. (n.1). . . . Neither [government agent] . . . can be counted as a participant in [defendant's] organization because as government agents neither was criminally responsible." *Accord U.S. v. DeCicco*, 899 F.2d 1531 (7th Cir. 1990); *U.S. v. Carroll*, 893 F.2d 1502 (6th Cir. 1990). The court noted, however, that defendant should have been counted as a participant. *Accord U.S. v. Barbontin*, 907 F.2d 1494 (5th Cir. 1990); *U.S. v. Preakos*, 907 F.2d 7 (1st Cir. 1990) (per curiam).

The court affirmed the enhancement, however, because the record showed 17 other individuals in defendant's distribution network. The court held that the role in offense adjustment is not limited to the offense of conviction: "The Relevant Conduct guideline, U.S.S.G. § 1B1.3, plainly states that its described scope of conduct applies to Chapter Three adjustments 'unless otherwise specified,' and no language in the Role [in Offense] guidelines specifies or indicates a different intent. . . . A court should look beyond the count of conviction when considering the application of this enhancement and make its determination after considering all conduct within the scope of section 1B1.3." Like the Fifth Circuit, the court noted that the "clarifying November 1, 1990 amendment" demonstrated the Sentencing Commission's intent that relevant conduct be used for the role in offense enhancement.

U.S. v. Fells, No. 89-5649 (4th Cir. Dec. 10, 1990) (Wilkins, J.).

Obstruction of Justice

U.S. v. Teta, 918 F.2d 1329 (7th Cir. 1990) (affirming finding that defendant's intentional failure to appear for arraignment was obstruction of justice, warranting enhancement under U.S.S.G. § 3C1.1).

Criminal History

Calculation

U.S. v. Kirby, No. 90-3058 (10th Cir. Nov. 28, 1990) (McWilliams, Sr. J.) ("the instant offense" in U.S.S.G. § 4A1.2(e) refers to the offense on which defendant is being sentenced, and defendant sentenced for failure to appear should have criminal history calculation based on that offense, not on underlying drug offense; therefore, 1971 offense on which defendant was still imprisoned within 15 years of commencement of underlying offense, but not within 15 years of instant offense of failure to appear, should not be counted in criminal history for failure to appear offense).

EXHIBIT D

Federal Sentencing and Forfeiture Guide NEWSLETTER

by Roger W. Haines Jr., Kevin Cole and Jennifer C. Woll

Vol. 2, No. 15 | FEDERAL SENTENCING GUIDELINES AND FORFEITURE CASES FROM ALL CIRCUITS. | January 14, 1991

IN THIS ISSUE:

Guideline Sentences, Generally

Supreme Court grants certiorari to decide whether weight of carrier medium should be included in calculating LSD sentence. (115)(245)(250) In this case, the *en banc* 7th Circuit held that the weight referred to in 21 U.S.C. section 841 was the gross weight of the LSD plus the carrier medium, not just the net weight of the LSD. The court also held that the guideline drug quantity table referred to the gross weight of the LSD and the carrier medium. The court rejected the argument that this violated the 8th Amendment or due process. Judge Cummings dissented, joined by Chief Judge Bauer, and Judges Wood, Cudahy and Posner, finding that the inclusion of the weight of the medium violated the statute and due process. Judge Posner also wrote a separate dissent, joined by the other dissenters, finding that the majority's interpretation made the punishment scheme for LSD irrational and violative of due process. On December 10, 1990, the Supreme Court granted certiorari to resolve the issue. *U.S. v. Marshall*, 908 F.2d 1312 (7th Cir. 1990) (en banc), *cert. granted sub nom. Chapman v. U.S.*, __ U.S. __, 111 S.Ct. __ (Dec. 10, 1990), No.90-5744

2nd Circuit declines to apply amendments to guidelines piecemeal. (130) Defendant was sentenced under the October, 1988, guidelines and his sentence was vacated on unrelated grounds. Before he was resentenced, the guidelines were amended in November, 1989. Applying the amended guidelines would have resulted in a three-level increase in offense level, so the district court used the prior version of the guidelines. Defendant argued that the court should not have used the prior version as a whole, but should have considered each amended provision in isolation and applied only those amended provisions which were to his benefit. The 2nd Circuit rejected this argument. "Applying various provisions taken from different versions of the guidelines would upset the coherency and balance the Commission achieved in promulgating the objective of seeking uniformity in sentencing." *U.S. v. Stephenson*, __ F.2d __ (2nd Cir. Dec. 17, 1990) No. 90-1365.

SECTION

100 Pre-Guidelines Sentencing, Generally
105 Cruel and Unusual Punishment

110 Guidelines Sentencing, Generally
115 Constitutionality of Guidelines
120 Statutory Challenges To Guidelines
125 Effective Date/Retroactivity
130 Amendments/Ex Post Facto
140 Disparity Between Co-Defendants
145 Pre-Guidelines Cases

150 General Application Principles (Chap. 1)
160 More Than Minimal Planning (§ 1B1.1)
165 Stipulation to More Serious Offense (§ 1B1.2)
170 Relevant Conduct, Generally (§ 1B1.3)
180 Use of Commentary/Policy (§ 1B1.7)
185 Information Obtained During Cooperation Agreement (§ 1B1.8)
190 Inapplicability to Certain Offenses (§ 1B1.9)

200 Offense Conduct, Generally (Chapter 2)
210 Homicide, Assault, Kidnapping (§ 2A)
220 Theft, Burglary, Robbery, Commercial Bribery, Counterfeiting (§ 2B)
230 Public Officials, Offenses (§ 2C)
240 Drug Offenses, Generally (§ 2D)
(For Departures, see 700-746)
242 Constitutional Issues
245 Mandatory Minimum Sentences
250 Calculating Weight or Equivalency
255 Telephone Counts
260 Drug Relevant Conduct, Generally
265 Amounts Under Negotiation
270 Dismissed/Uncharged Conduct
275 Conspiracy/"Foreseeability"
280 Possession of Weapon During Drug Offense, Generally (§ 2D1.1(b))
284 Cases Upholding Enhancement
286 Cases Rejecting Enhancement
290 RICO, Loan Sharking, Gambling (§ 2E)
300 Fraud (§ 2F)
310 Pornography, Sexual Abuse (§ 2G)
320 Contempt, Obstruction, Perjury, Impersonation, Bail Jumping (§ 2J)
330 Firearms, Explosives, Arson (§ 2K)
340 Immigration Offenses (§ 2L)
345 Espionage, Export Controls (§ 2M)
350 Escape, Prison Offenses (§ 2P)
355 Environmental Offenses (§ 2Q)
360 Money Laundering (§ 2S)
370 Tax, Customs Offenses (§ 2T)
380 Conspiracy/Aiding/Attempt (§ 2X)
390 "Analogies" Where No Guideline Exists (§ 2X5.1)

400 Adjustments, Generally (Chapter 3)
410 Victim-Related Adjustments (§ 3A)
420 Role in Offense, Generally (§ 3B)
430 Aggravating Role: Organizer, Leader, Manager or Supervisor (§ 3B1.1)
440 Mitigating Role: Minimal or Minor Participant (§ 3B1.2)
450 Abuse of Trust/Use of Special Skill (§ 3B1.3)
460 Obstruction of Justice (§ 3C)
470 Multiple Counts (§ 3D)

SECTION

480 Acceptance of Responsibility (§ 3E)
485 Cases Finding No Acceptance Of Responsibility
490 Cases Finding Acceptance Of Responsibility

500 Criminal History (§ 4A)
(For Criminal History Departures, see 700-746)
520 Career Offenders (§ 4B1.1)
540 Criminal Livelihood (§ 4B1.3)

550 Determining the Sentence (Chapter 5)
560 Probation (§ 5B)
570 Pre-Guidelines Probation Cases
580 Supervised Release (§ 5D)
590 Parole
600 Custody Credits
610 Restitution (§ 5E4.1)
620 Pre-Guidelines Restitution Cases
630 Fines and Assessments (§ 5E4.2)
650 Community Confinement, Etc. (§ 5F)
660 Concurrent/Consecutive Sentences (§ 5G)
680 Double Punishment/Double Jeopardy
690 Specific Offender Characteristics (§ 5H)

700 Departures, Generally (§ 5K)
710 Substantial Assistance Departure § 5K1)
720 Downward Departures (§ 5K2)
721 Cases Upholding
722 Cases Rejecting
730 Criminal History Departures (§ 5K2)
733 Cases Upholding
734 Cases Rejecting
740 Other Upward Departures (§ 5K2)
745 Cases Upholding
746 Cases Rejecting

750 Sentencing Hearing, Generally (§ 6A)
755 Burden of Proof
760 Presentence Report/Objections/Waiver
770 Information Relied On/Hearsay
772 Pre-Guidelines Cases
775 Statement of Reasons

780 Plea Agreements, Generally (§ 6B)
790 Advice\Breach\Withdrawal (§ 6B)
795 Stipulations (§ 6B1.4) *(see also § 165)*

800 Appeal of Sentence (18 USC § 3742)
810 Appealability of Sentences Within Guideline Range
820 Standard of Review *(See also substantive topics)*

860 Death Penalty
862 Special Circumstances
864 Jury Selection in Death Cases
865 Aggravating and Mitigating Factors
868 Jury Instructions

900 Forfeitures, Generally
910 Constitutional Issues
920 Procedural Issues, Generally
930 Delay In Filing/Waiver
940 Return of Seized Property/Equitable Relief
950 Probable Cause
960 Innocent Owner Defense

5th Circuit upholds sentencing under guidelines that went into effect two days prior to offense. (130) Defendant claimed that the district court unfairly sentenced him under a more stringent version of the guidelines that went into effect two days prior to his arrest. The 5th Circuit found that defendant was properly sentenced under the version of the guidelines in effect at the time he was arrested while committing the offense. *U.S. v. Shaw*, __ F.2d __ (5th Cir. Jan. 3, 1991) No. 90-8238.

8th Circuit rejects claim that disparate sentence requires resentencing. (140) Defendant argued that his sentence should be vacated and remanded in light of the fact that his accomplice received a shorter sentence, even though he was charged with the same offenses as defendant. Citing previous Circuit precedent, the 8th Circuit rejected this argument without discussion. *U.S. v. Cox*, __ F.2d __ (8th Cir. Dec. 18, 1990) No. 90-1670.

8th Circuit rejects sentence disparity as grounds for downward departure. (140)(722) Defendant contended that the district court erred in refusing his request for a downward departure on the ground his co-defendant received a lesser sentence than his own. The 8th Circuit ruled that a district court may not depart from the guidelines based solely on a co-defendant's sentence. *U.S. v. Torres*, __ F.2d __ (8th Cir. Dec. 21, 1990) No. 90-2355WM.

10th Circuit reverses upward departure where co-defendants received disparate sentences. (140)(746) Defendant and two co-defendants were each convicted and sentenced for maintaining a crack house. The district court departed upward in each case because of the amount of cocaine involved in the offense. However, defendant's departure was 48 months greater than one of the co-defendants and 68 months greater than the other co-defendant, even though the departure in each case was based upon the same quantity of drugs. The 10th Circuit reversed and remanded for resentencing. The purpose of the guidelines is to narrow disparity in sentences. "The district court's disproportionate upward departure from [defendant's] guideline sentence thwarts the very purpose of the guidelines and is therefore invalid." *U.S. v. Sardin*, __ F.2d __ (10th Cir. Dec. 18, 1990) No. 89-6189.

General Application Principles (Chapter 1)

10th Circuit vacates where district court failed to determine offense level or criminal history. (150)(660)(740) Defendant was sentenced to 30 years under the Armed Career Criminal Act. The case was remanded to consider guideline section 5G1.1, which requires the sentence to be within the guideline range unless the range is less than the mandatory minimum or statutory maximum. At resentencing, the court found that the defendant should receive the mandatory minimum sentence of 15 years. The court then departed upward and sentenced defendant to 30 years. The 10th Circuit vacated the sentence again. The district court failed to follow the guidelines in determining the guideline range. It improperly equated the mandatory minimum sentence with the "guideline sentence." The 10th Circuit also found that it could not review the upward departure, since the district court provided no information how it determined the offense level or criminal history. The sentence was vacated amd remanded. *U.S. v. Tisdale*, __ F.2d __ (10th Cir. Dec. 21, 1990) No. 88-2354.

9th Circuit holds that departure may be based on relevant conduct in addition to count of conviction. (170)(700) Defendant argued that the upward departure was impermissible because it was based on additional counts for which he had not been convicted. Section 5K2.0 states that "harms identified as a possible basis for departure from the guidelines should be taken into account only when they are relevant to the offense of conviction, within the limitations set forth in section 1B1.3." The 9th Circuit held that this permitted the trial court to consider defendant's conduct in manufacturing other bombs which related to the bomb which was the offense of conviction. Accordingly the upward departure was proper. *U.S. v. Loveday*, __ F.2d __ (9th Cir. Jan. 8, 1991) No. 89-50388.

5th Circuit upholds calculation of drugs based on laboratory's production capabilities. (180)(250) In calculating the quantity of methamphetamine, the district court considered the amount that could have been produced in defendant's laboratory from the phenylacetic acid that was seized at his residence. Defendant contended this was improper because several necessary precursor chemicals were absent, and synthesis required an intermediate step. When the officers entered the premises, the lab was disassembled. The 5th Circuit upheld the calculation. Defendant admitted manufacturing methamphetamine in the past. Officers smelled a strong odor associated with the manufacture of methamphetamine prior to obtaining a warrant and at the time of the search. Beakers containing trace amounts of the absent precursor chemicals were also found in the laboratory. The 5th Circuit also rejected defendant's argument that consideration of the phenylacetic acid punished him for possession of a legal chemical, which was not listed as a precursor at the time of his arrest. The chemical is a necessary ingredient in the manufacture of methamphetamine, and has virtually no legitimate use in the home. *U.S. v. Smallwood*, __ F.2d __ (5th Cir. Jan. 3, 1991) No. 90-5524.

9th Circuit states that application notes are not binding law. (180) Relying on its prior opinion in *U.S. Gross*, 897 F.2d 414 (9th Cir. 1990), the 9th Circuit held that "application notes are not binding law," but are merely "advisory commentary to assist in the application of the statute." Thus, despite the definition of "related cases" set

forth in application note 3 of guideline 4A1.3, the court followed the *Gross* case in narrowly construing the phrase "consolidated for . . . sentencing." *U.S. v. Davis*, __ F.2d __ (9th Cir. Jan. 4, 1991) No. 90-30137.

Offense Conduct, Generally (Chapter 2)

2nd Circuit upholds departure based on bribes made as part of continuing criminal relationship. (230)(745) Defendant contended that the district court improperly departed under guideline section 5K.2 rather than section 4A. Reviewing the upward departure under a "reasonableness standard," the 2nd Circuit upheld the departure. Defendant had been convicted of extorting and accepting bribes in his capacity as an Export Licensing Officer. The district court had determined that the bribes were solicited as a result of defendant's "ongoing criminal relationship" with the shipping manager of another company. Testimony revealed that defendant requested the president of that company "to make false representations to federal agents in order to stymie their investigation of [defendant's] pattern of illegal activity". *U.S. v. Stephenson*, __ F.2d __ (2nd Cir. Dec. 17, 1990) No. 90- 1365.

6th Circuit holds judge may disregard jury's determination of drug quantity. (250)(770) Although the jury found defendant guilty of conspiring to distribute less than 500 grams of cocaine, the sentencing judge determined that defendant was involved with between 500 grams and two kilograms of cocaine. The 6th Circuit upheld the judge's actions, finding that the judge was not bound by the jury's verdict. There was sufficient evidence to support the judge's determination. A witness testified as to defendant's numerous cocaine dealings. Because the judge had expressly found this witness to be credible, the determination was not clearly erroneous. *U.S. v. Nelson*, __ F.2d __ (6th Cir. Dec. 18, 1990).

6th Circuit upholds sentencing for amount of drugs defendant intended to produce with precursor chemical. (250) Defendant was arrested in possession of phenylacetic acid, a precursor of methamphetamine. Defendant pled guilty to violating 21 U.S.C. section 841(d), possession of a "listed chemical" with the intent to manufacture and distribute a controlled substance. The district court found that defendant intended to produce 500 grams of methamphetamine with the precursor chemical, and sentenced him on that basis. Defendant contended that he should be punished according to the amount of the listed chemical he possessed, not the amount of methamphetamine that he could have produced. The 6th Circuit upheld the district court's calculation. The court acknowledged that a problem is created because violators of section 841(d) have not sold or made any controlled substance, while the guidelines fix sentences based on the amount of controlled substance involved. However, it rejected defendant's theory because it found that punishing violations of section 841(d) according to the amount of controlled substances that a defendant intended to produce was "more in line with the spirit of the law." *U.S. v. Kingston*, __ F.2d __ (6th Cir. Dec. 20, 1990) No. 90-5192.

8th Circuit upholds sentencing based on total PCP mixture involved without regard to purity. (250) Defendant contended that it violated due process to sentence him on the basis of the total quantity of PCP and ether mixture which he possessed, without any regard for the quantity of pure PCP contained in the mixture. Following Circuit precedent, the 8th Circuit rejected this contention. It was not arbitrary or irrational to sentence on the basis of the quantity of the PCP mixture involved, since it "is reasonably related to the proper legislative purpose of penalizing large volume drug traffickers more harshly. Although the ether-PCP ratio was high, this would have enabled defendant to distribute more PCP-laced cigarettes. *U.S. v. Dorsey*, __ F.2d __ (8th Cir. Dec. 24, 1990) No. 90-1214.

8th Circuit upholds determination of number of marijuana plants involved in offense. (250) The government argued that the district court's finding that defendant manufactured 75 marijuana plants was clearly erroneous. The 8th Circuit upheld the calculation. Although the government claimed there was reliable evidence establishing that defendant manufactured more than 100 plants, there was also evidence that the government agents failed to distinguish tomato and marijuana plants and included cuttings from both in determining the total number of plants. *U.S. v. Malbrough*, __ F.2d __ (8th Cir. Dec. 28, 1990) No. 90-1062.

7th Circuit finds district court did not improperly shift burden of proof to defendant concerning possession of weapon. (280)(755) Defendant contended that the district court improperly shifted the burden of proof of non-possession of a weapon to the defendant by having defendant's counsel address his objections to the application of the enhancement provision before the government proceeded. The 7th Circuit rejected this argument. There was no objection by the defendant at the sentencing hearing to this procedure. Moreover, there was nothing in the record to reflect that the burden of proof had been shifted away from the government. Instead, the record reflected that the judge permitted both sides to present evidence and make their arguments. "Even if it would have been a preferred procedure to have the government make its arguments first in keeping with the fact that it had the burden of proving possession, the defendant has not demonstrated that he suffered any prejudice as a result of the district court's chosen procedure for handling objections to the presentence report." *U.S. v. Armond*, __ F.2d __ (7th Cir. Dec. 21, 1990) No. 90-1616.

5th Circuit upholds firearms enhancement based on possession of unloaded rifles. (284) Federal agents seized four

unloaded rifles from defendant's bedroom and a handgun from a kitchen drawer. Cocaine was also found in the kitchen. A loaded revolver was found in a car parked outside defendant's residence. Although the car was registered in the name of defendant's sister, defendant had access to the car and was observed by DEA agents driving the car in connection with his drug trafficking activities. The 5th Circuit upheld the enhancement of defendant's sentence for possessing a firearm during the commission of a drug offense. "It is not necessary for possession of the weapon to play an integral role in the offense or to be sufficiently connected with the crime to warrant prosecution as an independent firearm offense." The weapons need not be loaded for the firearm enhancement to apply. The court also found that these weapons could not fairly be characterized as hunting equipment. *U.S. v. Villarreal*, __ F.2d __ (5th Cir. Jan. 2, 1991) No. 89-5671.

7th Circuit affirms firearm enhancement based on gun found under co-defendant's truck seat. (284) Defendant was arrested after making a delivery of cocaine. A gun was found under the driver's seat of the truck in which defendant had ridden to make the delivery. The 7th Circuit rejected defendant's argument that the government did not produce sufficient evidence to prove that he "possessed" the weapon. Although he testified that he did not know that his co-defendant was carrying a weapon, the district court explicitly found that defendant's testimony was not credible. The district court found that defendant knew and probably ensured that a weapon would be present while they made their deliveries. This was not a case where a defendant's sentence was enhanced based upon a co-defendant's possession of a gun. Rather, defendant's sentence was enhanced based upon his own possession of the gun. *U.S. v. Armond*, __ F.2d __ (7th Cir. Dec. 21, 1990) No. 90-1616.

10th Circuit holds prior convictions for transporting illegal aliens increase both offense level and criminal history. (340)(680) Defendant contended that the district court improperly double counted by adding points to both his offense level and his criminal history based upon his two prior convictions for transporting illegal aliens. The 10th Circuit rejected this argument. Guideline section 2L1.1(b)(2) increases a defendant's offense level if the defendant has previously been convicted of illegally transporting aliens. Application note 4 clearly states that any adjustment for a previous conviction is in addition to any points added to the criminal history score for such conviction. The court rejected defendant's argument that the sentence enhancement was arbitrary and unfair. The court also rejected defendant's argument that the judge impermissibly counted his convictions a third time when he elected to sentence defendant at the top of the guideline range. *U.S. v. Florentino*, __ F.2d __ (10th Cir. Dec. 28, 1990) No. 90-2020.

9th Circuit upholds upward departure under 5K2.0 and 5K2.14 where homemade bombs posed a risk to public safety. (330)(745) Defendant pleaded guilty to one count of possession of an unregistered homemade six-inch pipe bomb. At sentencing the district court departed upward from 16 to 24 months based on the nature of the homemade bombs made by the defendant, and the danger to society they posed. On appeal, the 9th Circuit affirmed. While the court agreed that public safety was taken into account by the Commission in drafting guideline section 2K2.2, the court found that the Commission "did not have in mind the unique dangers homemade bombs pose to public safety." Defendant supplied one bomb to another person knowing that it could inflict substantial personal injury and structural damage. The court also found that guideline section 5K2.14 provided an alternative basis for a "public safety" departure. Defendant's conduct here posed a threat substantially in excess of that ordinarily involved in the offense of possession of an unregistered firearm. *U.S. v. Loveday*, __ F.2d __ (9th Cir. Jan. 8, 1991) No. 89-50388.

Adjustments (Chapter 3)

5th Circuit upholds leadership enhancement based on de-

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fendant's role in related transaction. (430) Defendant agreed to purchase a large amount of marijuana from the agent in exchange for cash and cocaine. This transaction was aborted after defendant's associates recognized a confidential informant. Defendant pled guilty to possession of cocaine. He received a two-level increase in offense level based upon his leadership role in a criminal activity that involved more than five participants. He contended that the district court improperly based its findings on participants involved in the aborted marijuana transaction, rather than in the cocaine transaction to which he pled guilty. The 5th Circuit found that it was proper for the district court to consider defendant's role in the marijuana transaction. The proposed exchange of the cocaine and the marijuana were "interdependent." The money generated from the purchase of the marijuana would be used to bankroll the sale of cocaine. *U.S. v. Villarreal*, __ F.2d __ (5th Cir. Jan. 2, 1991) No. 89-5671.

3rd Circuit permits downward departure for minimal role where 3B1.2 was inapplicable because other participant was government agent. (310)(440)(720) Defendant purchased child pornography from an undercover postal inspector. Since the postal inspector was not criminally responsible for the crime, defendant was the sole participant in his offense and thus not eligible for a "minimal role" reduction under guideline section 3B1.2. The district court stated that it would like to depart downward, but felt that the totality of the mitigating circumstances were not sufficient to permit the court to make the departure. The 3rd Circuit held that when an adjustment for mitigating role is not available, a court may depart downward if the departure is based on conduct similar to that encompassed section 3B1.2. A departure is appropriate where there has been concerted activity, but only one participant. The case was remanded for the district court to determine whether defendant's conduct would qualify as minor or minimal had the government agent been a participant. *U.S. v. Bierley*, __ F.2d __ (3rd Cir. Dec. 28, 1990) No. 90-5099.

3rd Circuit holds there must be more than one participant in offense for any reduction based on mitigating role. (440) The district court refused to reduce defendant's offense level for his minimal role because he "was the only [d]efendant in this crime." The 3rd Circuit ruled that a sole defendant *may* be the subject of a role adjustment, either upward or downward, if there are other persons criminally responsible, even though they have not been apprehended or charged. However, relying on guideline commentary, it held that there must be more than one *participant* in the crime for any role adjustment to be applicable. In this case, since the only other individual involved in the crime was a government agent and thus not criminally responsible, defendant was the sole participant and not eligible for a reduction. *U.S. v. Bierley*, __ F.2d __ (3rd Cir. Dec. 28, 1990) No. 90-5099.

6th Circuit reverses reduction for minor role where district court failed to hear proof on the issue. (440) The district court found that defendant was a minor participant without hearing any proof from either party, relying solely upon the presentence report's determination that defendant was entitled to minor participant status. The 6th Circuit reversed, since a defendant must prove by a preponderance of the evidence entitlement to a downward revision of the appropriate offense level. Although defendant contended that the government failed to object to the presentence report prior to the sentencing hearing, the government disputed this, and the appellate court declined to resolve the factual issue. *U.S. v. Kingston*, __ F.2d __ (6th Cir. Dec. 20, 1990) No. 90-5192.

2nd Circuit reverses district court's failure to group bribery and extortion counts together. (470) Defendant was convicted of extorting and accepting a $35,000 bribe. The 2nd Circuit found that the district court erred in not grouping these counts together under guideline section 3D1.2(a), since they involved "the same victim and the same act or transaction." The error was not harmless, since grouping the counts would have resulted in a lower offense level. *U.S. v. Stephenson*, __ F.2d __ (2nd Cir. Dec. 17, 1990) No. 90-1365.

8th Circuit reverses upward departure based upon defendant's escape. (470)(746) Defendant escaped while in custody on a robbery charge. He was apprehended and eventually pled guilty to both the robbery and escape charges. The offense level for the robbery charge was 22 and for the escape charge 13, for a combined offense level of 22. The district judge sentenced defendant to eight years for the robbery, and departed upward an additional two years for the escape, stating that an eight year guideline sentence for armed robbery was too lenient, and that absent the guidelines, he would have sentenced defendant to 15 years. The 8th Circuit reversed. The guidelines merged defendant's escape charge into his robbery charge, preventing the district court from imposing a separate sentence for the escape charge. The Sentencing Commission determined how to calculate an offense level when multiple offenses are sentenced in the same proceeding. The judge's belief that defendant deserved a stiffer sentence did not justify the departure. *U.S. v. Cox*, __ F.2d __ (8th Cir. Dec. 18, 1990) No. 90-1670.

9th Circuit upholds grouping firearms offenses separately from alien offense. (470) Defendant was convicted of (1) being an alien in possession of a firearm, (2) being a felon in possession of a firearm, and (3) being an illegal alien found in the United States after deportation. Following the "grouping" rules of guideline section 3D1.2, the district court grouped the two firearms offenses together and treated the conviction for being an alien found in the United States after deportation as a separate offense category. Defendant argued that all three offenses should be lumped together into one offense category thereby reducing his total offense level from 11 to 9. The 9th Circuit upheld the district court's clas-

sification, holding that an unlawful entry into the United States after deportation "does not embody types of misconduct which typically occur in the course of unlawful possession of firearms." The court examined a number of alternative grouping arguments, and reached the same conclusion. *U.S. v. Barron-Rivera*, __ F.2d __ (9th Cir. Jan. 7, 1991) No. 90-30161.

9th Circuit finds that court would not have given credit for acceptance of responsibility even if it had not relied on disputed fact. (480)(775) Although the defendant disputed In denying credit for acceptance of responsibility, the district court stated that defendant had denied that the firearm was at his residence. Although the defendant disputed having made the statement, the 9th Circuit concluded that based on the district court's statements, that there was no likelihood that the district court would have granted him acceptance of responsibility even if it had not relied on defendant's denial that the firearm was at his residence. *U.S. v. Barron-Rivera*, __ F.2d __ (9th Cir. Jan. 7, 1991) No. 90-30161.

5th Circuit rejects acceptance of responsibility reduction for defendant who claimed entrapment. (485) Defendant claimed he was entitled to a reduction for acceptance of responsibility because the evidence presented at trial demonstrated his sincere remorse for his drug offense. He conceded responsibility for his acts at his rearraignment and at his sentencing, consented to a search of his residence at the time of his arrest, and admitted to the federal agent that he intended to use the money seized from his residence to purchase marijuana. The 5th Circuit upheld the district court's finding. The presentence report indicated that during the presentence interview, defendant claimed that he had been entrapped into committing the drug offense by a persistent confidential informant and that the money found at the time of his arrest had been borrowed from his father and brother to establish a used car business. Although defendant's attorney claimed that defendant, for whom English was a second language, may not have known the meaning of the word entrapped, the district court acted within its discretion in rejecting this explanation. *U.S. v. Villarreal*, __ F.2d __ (5th Cir. Jan. 2, 1991) No. 89-5671.

6th Circuit denies acceptance of responsibility reduction to defendant who failed to acknowledge role in conspiracy. (485) Defendant contended that he was entitled to a reduction for acceptance of responsibility because he admitted selling cocaine to a government informant. The 6th Circuit upheld the district court's denial, noting that defendant failed to acknowledge or accept responsibility for his role in organizing and leading the criminal conspiracy for which he was found guilty. *U.S. v. Nelson*, __ F.2d __ (6th Cir. Dec. 18, 1990).

8th Circuit denies acceptance of responsibility reduction to defendant who escaped custody. (485) After pleading not guilty by reason of a mental defect to a robbery charge, defendant escaped from custody. After defendant was apprehended, he changed his plea to guilty with respect to both the robbery charge and the new escape charge. The 10th Circuit upheld the district court's denial of a reduction for acceptance of responsibility based on defendant's escape. The escape "clearly show[ed] that he did not accept responsibility for his criminal conduct." *U.S. v. Cox*, __ F.2d __ (8th Cir. Dec. 18, 1990) No. 90-1670.

9th Circuit upholds denial of acceptance of responsibility where defendant denied criminal intent. (485) Application Note 2 to guideline section 3E1.1 says that a defendant may manifest sincere contrition even if he exercises his constitutional right to a trial, for example, where he goes to trial to assert issues that do not relate to factual guilt. Here however, the court found that despite the defendant's attempt to characterize the issue as a legal question, "the central issue was over the issue of criminal intent -- a factual matter." Accordingly, the court's finding that defendant did not accept responsibility was not clearly erroneous. *U.S. v. Barron-Rivera*, __ F.2d __ (9th Cir. Jan. 7, 1991) No. 90-30161.

Criminal History (§ 4A)

6th Circuit holds that reckless driving is not a minor traffic infraction. (500) The district court excluded defendant's prior conviction for reckless driving from the calculation of his criminal history, finding that it was a "minor traffic infraction." The 6th Circuit reversed. The statutory definition of "infraction" is an offense punishable by a maximum of five days or less imprisonment. Reckless driving is punishable under applicable state law by a maximum jail term of 90 days. "[W]e are persuaded that the Guidelines use 'infraction' as a term of art, and do not intend courts to weigh the relative seriousness of traffic offenses when deciding which convictions to exclude from criminal history calculations." *U.S. v. Kingston*, __ F.2d __ (6th Cir. Dec. 20, 1990) No. 90-5192.

9th Circuit holds that question of whether cases are "related" for criminal history purposes is reviewed de novo. (500)(820) The question of whether two cases are "related" for purposes of the criminal history guideline section 4A1.2(a)(2), is a mixed question of law and fact subject to *de novo* review. *U.S. v. Davis*, __ F.2d __ (9th Cir. Jan. 4, 1991) No. 90-30137.

9th Circuit holds that fact that prior offenses share a common modus operandi does not make them "related" for criminal history purposes. (500) Defendant was arrested in 1981 in Everett Washington on three counts of issuing bad checks. Two years later, he was arrested on theft charges in Seattle. He was sentenced four days apart in two different counties for these offenses. He argued that since they were a

part of the same modus operandi, they were "related offenses" and should have been counted as a single score in computing his criminal history under guideline section 4A1.2(a)(2). The 9th Circuit rejected the argument, holding that "the sole fact that two underlying offenses share a common modus operandi has no bearing on whether the criminal cases associated with them are factually related." *U.S. v. Davis*, __ F.2d __ (9th Cir. Jan. 4, 1991) No. 90-30137.

8th Circuit reiterates that career offender provisions do not violate due process. (520) Defendant contended that the career offender guidelines violate due process because the use of a "mechanical formula" deprived him of a judge's sentencing discretion. The 8th Circuit, following its decision in *U.S. v. Green*, 902 F.2d 1311 (8th Cir. 1990), rejected this argument without discussion. *U.S. v. Torres*, __ F.2d __ (8th Cir. Dec. 21, 1990) No. 90-2355WM.

10th Circuit holds that career offender notice requirement is met if government provides notice of one prior conviction. (520) Defendant was sentenced as a career offender on the basis of two prior felony convictions. Defendant contended that it was improper to sentence him as a career offender because the government failed to allege both prior offenses in the information it filed under 21 U.S.C. section 851. After noting that the Circuits are split on this question, the 10th Circuit followed the 8th Circuit and held that section 851 is satisfied when the government provides notice of one prior conviction and the defendant's guideline sentence is within the statutory maximum. Because sentences under the career offender provision are within the maximum set forth in the recidivist provision of section 841(b)(1)(C), a defendant does not lose any procedural protection when he is sentenced as a career offender after the government gives notice of a single prior conviction. *U.S. v. Novey*, __ F.2d __ (10th Cir. Jan. 3, 1991) No. 89-6327.

10th Circuit upholds career offender status for defendant who committed felony more than 15 years ago. (520) Defendant contended that he was improperly classified as a career offender because one of his prior felonies took place more than 15 years prior to the commencement of his current offense. The 10th Circuit rejected this argument. Guideline section 4A1.2(e) clearly provides that a prior sentence of imprisonment is properly included in a defendant's criminal history if the sentence resulted in the defendant's incarceration within 15 years of the commencement of the current action. Defendant was not released from prison for his first felony until 1974, less than 15 years prior to the commencement of the current action. *U.S. v. Novey*, __ F.2d __ (10th Cir. Jan. 3, 1991) No. 89-6327.

Determining the Sentence (Chapter 5)

9th Circuit holds that probationary term began when mandate was filed reversing custodial counts. (570) The 9th Circuit held that if a district court sentences a convicted criminal to consecutive terms of imprisonment and probation, and if the sentencing court expressly provides that probation is to commence upon the completion of the prison term, and if the anchor term of imprisonment is subsequently overturned on appeal, then probation commences, as a matter of law, when the appellate court's mandate is filed with the district court. Thus the appellant's term of probation began after his sentence was reversed on the imprisonment counts, not on the day of the original sentencing. Accordingly he was still on probation when his probation was revoked. *U.S. v. Freeman*, __ F.2d __ (9th Cir. Jan. 4, 1991) No. 90-30141.

9th Circuit finds no basis for granting credit for pretrial "probation." (570)(600) Defendant argued that he should be given credit for "probation" served during pretrial release and during release pending appeal. The 9th Circuit found "no basis in law or in fact" for this argument. 18 U.S.C. section 3568 grants credit for time served in pretrial *custody*, but there is no authority for granting credit for time served on pretrial *probation*. Moreover federal case law "overwhelmingly rejects the notion of credit for release on bond pending trial or appeal." A defendant released on bond pending appeal is not entitled to credit for time served in "custody" within the meaning of 18 U.S.C. section 3568. Finally, defendant failed to present any evidence that he was in fact "on probation" during this period. *U.S. v. Freeman*, __ F.2d __ (9th Cir. Jan. 4, 1991) No. 90-30141.

10th Circuit remands for district court to clarify restitution order. (610)(800) Defendant contended that the district court improperly imposed restitution for losses resulting from acts other than those for which he was convicted. Although defendant had failed to object below to the restitution order, the 10th Circuit reviewed the issue because the Supreme Court's decision in *Hughey v. U.S.*, 110 S.Ct. 1979 (1990), changed the law in this area while the appeal was pending. The appellate court found that the record did not clearly establish whether the restitution order was based on losses caused by the conduct underlying the offense of conviction, and remanded the case for further fact-finding. *U.S. v. Novey*, __ F.2d __ (10th Cir. Jan. 3, 1991) No. 89-6327.

5th Circuit permits court prospectively to forbid sentence from being served concurrently with subsequent state sentence. (660) Defendant was convicted and sentenced for bank robbery. The district court ordered his sentence to run consecutive to any sentence imposed on related charges pending in state court. The 5th Circuit upheld the prospective prohibition, even though the state proceedings arose from identical offense conduct. Guideline section 5G1.3 did not control this issue. *U.S. v. Brown*, __ F.2d __ (5th Cir. Jan. 2, 1991) No. 90-3304.

9th Circuit holds change from concurrent to consecutive sentences in commuting death sentence did not violate double jeopardy. (680) Petitioner was sentenced to death for murder, with concurrent terms for kidnapping and robbery. On appeal, the Arizona Supreme Court commuted his death sentence to life imprisonment and ordered the robbery and kidnapping sentences to be served after the life sentence. In his federal habeas petition, petitioner claimed that the change from concurrent to consecutive sentences violated the double jeopardy clause. The 9th Circuit rejected the argument, holding that where, as here, the overall effect of the modification is to reduce rather than increase the punishment, the modification does not violate the double jeopardy clause. *McDaniel v. Arizona*, __ F.2d __ (9th Cir. Dec. 28, 1990) No. 89-15510.

10th Circuit, en banc, clarifies guidelines for reviewing reasonableness of departures. (680)(700) In *U.S. v. White*, 893 F.2d 276 (10th Cir. 1990), the 10th Circuit determined that in reviewing a district court's degree of departure, it would consider the "the district court's proffered justifications, as well as such factors as . . . the seriousness of the offense, the need for just punishment, deterrence, protection of the public, correctional treatment, the sentencing pattern of the Guidelines, and the need to avoid unwarranted sentencing disparities." In this en banc rehearing of *U.S. v. Jackson*, 903 F.2d 1313 (10th Cir. 1990), the 10th Circuit further clarified *White* by holding that the district court's proffered reason for the departure is an "absolute requirement," and that an appellate court will not "rationalize a district court's departure from the Guidelines." Thus, "the district court's enunciation of an adequate explanation for a departure sentence is a threshold requirement, mandated by statute." An appellate court can only consider the other indicia of reasonableness if this requirement has been met. *U.S. v. Jackson*, __ F.2d __ (10th Cir. Dec. 17, 1990) No. 89-6118 (en banc).

9th Circuit rejects extreme alcoholism as a basis for downward departure. (690)(722) Guidelines section 5H1.4 states that "drug dependance or alcohol abuse is not a reason for imposing a sentence below the guidelines." Accordingly the 9th Circuit agreed with other circuits that a district court has no discretion to depart downward based on an appellant's alcoholism, "irrespective of its extreme nature." *U.S. v. Page*, __ F.2d __, (9th Cir. Jan. 2, 1991) No. 90-50019.

Departures Generally (§ 5K)

10th Circuit, en banc, reverses where district court failed to explain reasons for extent of departure. (700)(730) The district court departed upward from 10 to 60 months based on several previous convictions which were excluded from defendant's criminal history calculation, the lenient treatment that defendant had received for his previous convictions, and the relationship between drugs and violence in defendant's criminal history. In this en banc rehearing of *U.S. v. Jackson*, 903 F.2d 1313 (10th Cir. 1990), the 10th Circuit reversed, finding that the district court had failed to provide any justification for the extent of its departure. The district court failed to find analogous levels and principles in the guidelines to guide its departure, and did not clarify whether the departure was based upon aggravating circumstances not considered by the Commission, or an underrepresented criminal history, or both. Moreover, the court "apparently abandoned the Sentencing Guidelines entirely by imposing a sentence beyond the range appropriate to [criminal history] category VI," which is appropriate only in "extraordinary circumstances." *U.S. v. Jackson*, __ F.2d __ (10th Cir. Dec. 17, 1990) No. 89-6118 (en banc).

6th Circuit upholds requirement of government motion for substantial assistance departure. (710) Defendant argued that guideline section 5K1.1 should not be read to require a government motion in order for the court to make a downward departure for substantial assistance. He also argued that if a motion was required, the provision was unconstitutional. The 6th Circuit rejected both arguments summarily, noting that it previously resolved these issues in *U.S. v. Levy*, 904 F.2d 1026 (6th Cir. 1990). *U.S. v. Dumas*, __ F.2d __ (6th Cir. Dec. 17, 1990) No. 90-3130.

6th Circuit holds that section 5K1.1 permits downward departures from statutory minimum sentences but not "mandatory" sentences. (710) Defendant pled guilty to distributing crack cocaine and carrying a firearm during a drug trafficking offense. Pursuant to a government motion, the district court departed downward for defendant's substantial assistance to the government, lowering defendant's offense level from 22 to 13 for the distribution charge. However, it refused to depart downward on the 18 U.S.C 924(c) firearms charge, which carried a mandatory 60 month sentence. Defendant received a 12 month sentence on the distribution charge, to run consecutively to the 60 month sentence. The 6th Circuit upheld the district court's refusal to depart downward on the 924(c) charge. 18 U.S.C 3553(e) and section 5K1.1 only authorize "downward departures from statutory 'minimum' sentences, not statutory mandatory sentences." "Section 924(c) creates a mandatory sentence." *U.S. v. Dumas*, __ F.2d __ (6th Cir. Dec. 17, 1990) No. 90-3130.

10th Circuit vacates sentence where district court declared guideline 5K1.1 violative of separation of powers. (710) The district court held that guideline section 5K1.1 violated the separation of powers doctrine. Therefore, even though the government never filed a motion, the district judge held an evidentiary hearing to determine whether defendant had in fact "made a good faith effort to provide substantial assistance" to the government. After determining that he had, the district court departed downward from the mandatory five year sentence and sentenced defendant to two years im-

prisonment. The 10th Circuit vacated the sentence and remanded for resentencing. Recent 10th Circuit cases clearly hold that the guideline does not violate due process. The argument that the guideline violated the separation of powers doctrine was "merely a variant of the due process claim." *U.S. v. Snell*, __ F.2d __ (10th Cir. Dec. 28, 1990) No. 90-4003.

8th Circuit holds it lacks authority to review failure to depart downward. (720)(800) Defendant argued that the district court abused its discretion by not departing downward on the basis of mitigating circumstances that were not adequately considered in the guidelines. The 8th Circuit refused to review the issue, holding that it lacked authority to do so under 18 U.S.C. section 3742(e). *U.S. v. Dorsey*, __ F.2d __ (8th Cir. Dec. 24, 1990) No. 90-1214.

1st Circuit reverses where downward departure was based on absence of violence and small amount of money stolen. (722) Defendant committed two bank robberies that netted about $3,000. Defendant was found to be a career offender with a guideline range of 210 to 262 months. The district court departed down from the guidelines and sentenced defendant to six years, based on the fact that no "real violence [was] involved, [defendant] obtained $3,000 total, and to impose 20 years in a situation like this . . . would constitute a miscarriage of justice." The 1st Circuit reversed. The record was clear that a significant threat of violence was present during both of the subject robberies. The fact that defendant only obtained a small amount of money was not grounds for a downward departure. The perceived excessiveness of the sentence was also an improper ground for a downward departure. *U.S. v. Norflett*, __ F.2d __ (1st Cir. Dec. 28, 1990) No. 90-1736.

10th Circuit, en banc, articulates guidelines for departures based on inadequate offense level. (740) The 10th Circuit recommended a method for the district courts to follow in making departures based upon an inadequate offense level. A district court must look to the guidelines for guidance in determining the seriousness of the aggravating circumstances to determine the proper degree of departure. There are two basic approaches. First, a court might add to the defendant's offense level the points assigned in the guidelines to the conduct that is most analogous to defendant's actions. Alternatively, a court may treat the aggravating factor as a separate crime, and sentence defendant as if convicted of the conduct. However, in departing from the guidelines, "the district court cannot impose a sentence exceeding the sentence the defendant would have received had she been convicted on the basis of the acts that warrant a departure." A court need not assign offense level points to aggravating circumstances as the Sentencing Commission did, and no "mathematical exactitude" is required. *U.S. v. Jackson*, __ F.2d __ (10th Cir. Dec. 17, 1990) No. 89-6118 (en banc).

10th Circuit finds district court adequately explained extent of departure. (745) After the 10th Circuit remanded this case, the sentencing judge filed a memorandum opinion setting forth his reasons for the extent of the departure. Defendant had pled guilty to maintaining a crack house, with a base offense level of 16. However, as part of that offense defendant had been involved in the distribution of 36 ounces of cocaine base. If convicted, defendant's offense level would have been 34 with a guideline range of 151 to 188 months. However, there were a number of mitigating factors which offset the large quantity of drugs, including defendant's very young age, peer pressure, and defendant's continuous involvement in mental health counseling. Given this, the sentencing judge determined that a 36 month sentence was appropriate. The 10th Circuit affirmed, finding that the district judge had satisfactorily articulated the method he used in departing upward. *U.S. v. Davis*, __ F.2d __ (10th Cir. Dec. 28, 1990) No. 89-6194.

Sentencing Hearing (§ 6A)

8th Circuit holds preponderance of the evidence standard applies at sentencing hearings. (755) The government contended that the district court improperly applied the "clear and convincing evidence" standard of proof in making findings of fact in sentencing defendant. The 8th Circuit rejected this argument. Although the district court stated that the government must establish the number of marijuana plants involved "by convincing evidence," the appellate court found that the district court did not apply the "clear and convincing" standard. It further held that the preponderance of the evidence standard of proof is to be applied in sentencing determinations. *U.S. v. Malbrough*, __ F.2d __ (8th Cir. Dec. 28, 1990) No. 90-1062.

11th Circuit holds cocaine weight need only be established by a preponderance of the evidence. (755) Defendant maintained that the district court erred in allowing the government to establish the weight of the cocaine for sentencing purposes under a preponderance of the evidence standard. The 11th Circuit rejected this contention. Due process only requires a district court to make factual determinations at sentencing by a preponderance of the evidence. The statute under which defendant was convicted did not include weight or quantity as an element of the offense. The weight of the cocaine was established by the testimony of a DEA agent, and a logbook entry from the drug storage warehouse. This was sufficient to establish the weight by a preponderance of the evidence. *U.S. v. Mieres-Borges*, __ F.2d __ (11th Cir. Dec. 18, 1990) No. 89-5643.

1st Circuit upholds denial of right to cross-examine live witnesses at sentencing. (760)(770) Defendants claimed that they were improperly denied the opportunity to cross-examine live witnesses concerning the quantity of cocaine involved

in their offense at sentencing. The 1st Circuit upheld the district court's action. Defendants raised only general objections to the presentence report. They laid no foundation establishing the need for cross- examination of witnesses. They made no effort to interview and record statements by the witnesses, and made no demand that they be produced or subpoenaed. Their request made only on the day of sentencing. The district court's reliance on the testimony introduced by the government was proper. Each witness had testified under oath, either at trial or before a grand jury, and was corroborated generally by the many witnesses who testified at trial. Moreover, the sentencing judge was also the presiding judge and had the opportunity to make an independent assessment of the credibility of the witnesses. *U.S. v. Zuleta-Alvarez*, __ F.2d __ (1st Cir. Dec. 21, 1990) No. 89-2104.

Appeal of Sentence (18 U.S.C. 3742)

9th Circuit has jurisdiction to review dispute over proper sentencing range. (810) In *U.S. v. Pelaya-Bautista*, 907 F.2d 99 (9th Cir. 1990), the 9th Circuit held that it lacked jurisdiction to hear a sentencing challenge regarding a sentence within the applicable guideline range. Here however, the parties plainly disagreed on the relevant range. Therefore the court held that it had jurisdiction under 18 U.S.C. section 3742(a)(2) to entertain the appellant's claim. *U.S. v. Barron-Rivera*, __ F.2d __ 91 D.A.R. 273 (9th Cir. Jan. 7, 1991) No. 90-30161.

Forfeiture Cases

1st Circuit holds forfeiture complaint was stated with sufficient particularity. (920) The government alleged in its forfeiture complaint that a certain portion of the defendant's property had been purchased with drug proceeds. The district court dismissed the complaint because it was not "narrowly tailored to precisely identify the portion of the property" subject to forfeiture. The 1st Circuit reversed. "Whether none, all or only a portion of the defendant property is forfeitable is not determined at the pleadings stage, but at trial." The government need not meet a more exacting standard of proof at the complaint stage than is required at trial. The government's complaint was sufficient because it alleged facts sufficient to establish "a reasonable belief that the government could demonstrate probable cause that the down payment and mortgage payments on the defendant property were traceable, for the most part if not entirely, to illegal drug proceeds." *U.S. v. One Parcel of Real Property*, __ F.2d __ (1st Cir. Dec. 20, 1990) No. 89-2168.

1st Circuit upholds dismissal of claim where claimants failed to file timely claim or answer. (930) As a result of claimants' failure to file a timely claim or answer, the district court dismissed claimants' claim to property seized by the government. The 1st Circuit upheld the dismissal. The case did not present any mitigating factors which would excuse the claimants from the results of their inaction. Although the claimants were served with the government's complaint November 3, 1989, they did not file claims requesting protection of their interests in the properties until December 11, 1989. An answer to the government's complaint was not filed until December 27, 1989. Claimants also did not oppose the government's motion to dismiss the claims as untimely, or any other subsequent motions by the government. *U.S. v. One Dairy Farm*, 918 F.2d 310 (1st Cir. 1990).

11th Circuit holds that property used to negotiate drug transaction is forfeitable even though no drugs were ever present. (950) The claimant owned five contiguous parcels, including the subject parcel, which contained his home. Claimant and several co-conspirators met at the home three times and made plans to use another of the five parcels as a landing strip for the importation of cocaine. The meetings on the property were not general discussions about unspecified drug activity, rather, "the property was used to negotiate and plan an essential component of a specific drug transaction that actually took place." The fact that the drugs were never on the property or intended to be on the property was irrelevant. The 11th Circuit declined to determine whether the government must prove the real property had a "substantial connection" to the illegal activity or whether the government need only show that the real property had "more than incidental or fortuitous connection" to the crime, since the more stringent test had been met here. The district court's ruling was reversed. *U.S. v. Approximately 50 Acres of Real Property Located at 42450 Highway 441 North Fort Drum, Okeechobee County, Florida*, __ F.2d __ (11th Cir. Jan. 10, 1991) No. 90-5354.

Rehearing en banc

(110)(680)(700)(730) *U.S. v. Jackson*, 903 F.2d 1313 (10th Cir. 1990), *reheard en banc*, __ F.2d __ (10th Cir. Dec. 17, 1990) No. 89-6118 (en banc).

Certiorari granted

(115)(245)(250) *U.S. v. Marshall*, 908 F.2d 1312 (7th Cir. 1990) (en banc), *cert. granted sub nom. Chapman v. U.S.*, __ U.S. __, 111 S.Ct. __ (Dec. 10, 1990), No.90-5744

Federal Sentencing and Forfeiture Guide NEWSLETTER

by Roger W. Haines Jr., Kevin Cole and Jennifer C. Woll

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IN THIS ISSUE:

Pre-Guidelines Sentencing, Generally

9th Circuit finds that 16 years on death row does not constitute cruel and unusual punishment. (105)(860) Petitioner argued that fulfillment of his sentence after 16 years on death row would constitute cruel and unusual punishment. The 9th Circuit rejected this argument noting that while a defendant must not be penalized for pursuing his constitutional rights, he should not be able to benefit from the ultimately unsuccessful pursuit of those rights. It would be "a mockery of justice if the delay incurred during the prosecution of claims that fail on the merits could accrue into a claim to the very relief that had been sought and properly denied in the first place." *Richmond v. Lewis*, __ F.2d __ 90 D.A.R. 14517 (9th Cir. Dec. 26, 1990) No. 86-2382.

Guidelines Sentencing, Generally

7th Circuit rejects comparison to pre-guidelines sentence as grounds for upward departure. (110)(734) In 1982, under pre-guidelines law, defendant received a 10-year sentence for threatening the life of the President. Defendant was convicted in 1990 for a similar offense, and was sentenced under the guidelines. The sentencing judge said that giving defendant less than another 10 years for the renewed threats would "not only deprecate the seriousness of this repeat offense behavior, but also would represent a disparate sentence." The 7th Circuit rejected this as a ground for an upward criminal history departure. A five-year guideline sentence might be more severe than a 10-year pre-guideline sentence, since there is no parole and good time credits have been cut back severely. "It would perpetuate the disparities that the guidelines aim to root out to use pre-guideline sentences as benchmarks for sentence under the new rules." *U.S. v. Fonner*, __ F.2d __ (7th Cir. Dec. 14, 1990) No. 89-3054.

10th Circuit upholds acceptance of responsibility provisions against 5th and 6th Amendment challenges. (115)(480)

SECTION SECTION

Defendant argued that the acceptance of responsibility provisions of the guidelines violate the 5th and 6th Amendments by requiring him to plead guilty to all of the charges against him in order to obtain the benefit of a reduction. Defendant claimed that he clearly accepted responsibility for a drug trafficking charge, but was denied the reduction because he did not accept responsibility for a firearms charge. The 10th Circuit rejected this claim. "The denial of a downward adjustment under section 3E1.1 does not constitute a penalty or an enhancement of sentence." There is a difference between increasing the severity of a sentence for failure to demonstrate remorse and refusing to grant a reduction from the prescribed base offense level. *U.S. v. Ross*, __ F.2d __ (10th Cir. Dec. 11, 1990) No. 90-3134.

8th Circuit upholds career offender provisions against 8th Amendment challenge. (115)(520) Defendant complained that enhancement of his sentence under the career offender provisions of the guidelines constituted cruel and unusual punishment in violation of the 8th Amendment. The 8th Circuit rejected this argument, finding that as a matter of law, sentences under the guidelines "are sentences within statutorily prescribed ranges and therefore do not violate the 8th Amendment." *U.S. v. Foote*, __ F.2d __ (8th Cir. Dec. 10, 1990) No. 90-5065MN.

1st Circuit refuses to apply amended guidelines which would result in higher base offense level. (130) Defendant was sentenced three months after the November, 1989, amendments to the guidelines took effect. Under guideline section 2B1.1(b), defendant's base offense level would have increased from 13 to 17 under the amended provisions. Since this would have raised ex post facto concerns, the 1st Circuit found that defendant was properly sentenced under the 1987 version of the guidelines in effect at the time defendant committed the offense. *U.S. v. Harotunian*, __ F.2d __ (1st Cir. Dec. 5, 1990) No. 90-1393.

General Application Principles (Chapter 1)

5th Circuit permits consideration of defendant's potential for rehabilitation in sentencing within the range. (150)(690) The district court erroneously concluded that defendant's rehabilitative potential was irrelevant in determining his sentence within the applicable guideline range. The 5th Circuit vacated the sentence and remanded. Although a defendant's personal characteristics may not be considered as support for a downward departure, a court has broad discretion in imposing a particular sentence within the guideline range. Although the sentencing guidelines reject the rehabilitation model, they do not preclude consideration of a defendant's rehabilitative potential as a mitigating factor within the applicable range. *U.S. v. Lara-Velasquez*, __ F.2d __ (5th Cir. Dec. 11, 1990) No. 90-8125.

1st Circuit upholds 360-month sentence imposed upon 54-year-old man. (150)(690) Defendant asserted that the imposition of a 360-month sentence on a 54-year old man amounted to a life sentence, and that the district court failed to consider whether a life sentence was appropriate for his crimes. The 1st Circuit rejected this argument. A defendant's age is not relevant in determining a sentence, except when the offender is elderly and infirm. Since defendant was neither, the district court correctly applied the sentencing guidelines. *U.S. v. Doe*, __ F.2d __ (1st Cir. Dec. 13, 1990) No. 88-1864.

4th Circuit determines role based on relevant conduct, not just offense of conviction. (170)(430) The 4th Circuit, disagreeing with several other Circuits, held that defendant's role determination was to be based upon his role in the entirety of his relevant conduct, not solely on his role in the offense of conviction. A court should look beyond the count of conviction when considering adjusting his sentence based on his role in the offense, and consider all relevant conduct. Thus defendant's sentence was properly adjusted for his leadership role, even though he was not a leader for the counts on which he was convicted. *U.S. v. Fells*, __ F.2d __ (4th Cir. Dec. 10, 1990) No. 89-5649.

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10th Circuit rejects claim that government wrongfully used information provided by defendant. (185)(820) Defendant argued that the district court departed upward based on information obtained from him under his plea agreement, which provided such information would not be used against him. The government insisted that his co-defendants were independent sources for the information. The 10th Circuit found defendant's claim unfounded. The government provided testimony, based on interviews with his co-defendants, that 50 ounces of cocaine were imported by the conspiracy of which defendant was a member. Defense counsel failed to rebut that testimony, or allege any facts which would rebut the lower's court implicit finding that defendant was not the source of this information. Use of the co-defendant's information did not violate any of defendant's rights. *U.S. v. St. Julian*, __ F.2d __ (10th Cir. Dec. 17, 1990) No. 89-6249.

Offense Conduct, Generally (Chapter 2)

1st Circuit affirms upward departure based on large amount of money embezzled. (220)(745) The district court departed upward because the amount of money defendant embezzled was far in excess of the highest dollar amount mentioned in the 1987 version of guideline section 2B1.1(b)(1). Losses over $5 million require a 13 level upward adjustment in offense level, and defendant had embezzled $11 million. The 1st Circuit agreed that the magnitude of the amount embezzled "was sufficiently unique and meaningful to warrant a departure," and the two level increase in offense level was reasonable. It was proper for the district court to compare defendant's sentence to the sentence he would have received under the amended guidelines. *U.S. v. Harotunian*, __ F.2d __ (1st Cir. Dec. 5, 1990) No. 90-1393.

5th Circuit finds defendant need not have previously fenced property to be in the business of receiving and selling stolen goods. (220) Defendant contended that it was improper to enhance his sentence under guideline section 2B1.2(b)(3)(A) for being in the business of receiving and selling stolen goods because there was no evidence that he had previously fenced stolen property. He argued that the phrase "in the business of" implies a prior course of conduct exclusive of the conduct that forms the basis of the immediate charge. The 5th Circuit rejected this interpretation of the guidelines. A finding that a defendant has previously engaged in fencing activities is not a prerequisite for offense level enhancement under guideline section 2B1.2(b)(3)(A). The fact that defendant was gainfully employed in a legitimate business did not preclude the enhancement. *U.S. v. Esquivel*, __ F.2d __ (5th Cir. Dec. 12, 1990) No. 90-5542.

10th Circuit upholds estimate of drug quantity. (250) Defendant contended that the district court erred in accepting the calculations of the probation officer as to the amount of drugs involved in his offense. The 10th Circuit upheld the calculation. The probation officer stated that two persons interviewed by the government had admitted purchasing drugs from defendant on many occasions. Each individual estimated that he had purchased two pounds of methamphetamine from defendant. The probation officer had used these estimated quantities and added the amount seized from defendant at the time of his arrest to arrive at the quantity listed in the presentence report. The 10th Circuit found that even though the quantity was based upon estimates, it was established by a preponderance of the evidence. The district court's finding was not clearly erroneous. *U.S. v. Easterling*, __ F.2d __ (10th Cir. Dec. 17, 1990) No. 90-6000.

8th Circuit upholds calculation of offense level based upon drugs found in defendant's apartment. (260) Defendant was arrested with a co-defendant in an apartment rented in the name of a relative of defendant. A lock box containing cocaine, $500 and various drug paraphernalia was found underneath the couch where the two were sitting. Two keys to the box were found, one in a purse also containing defendant's driver's license. Defendant argued that the evidence did not show a connection between her and the drug quantities involved to support her sentence. The 8th Circuit rejected this argument. Defendant had constructive possession of the quantities of drugs seized at the apartment. Therefore, her base offense level was properly calculated. *U.S. v. Foote*, __ F.2d __ (8th Cir. Dec. 10, 1990) No. 90-5065MN.

10th Circuit upholds consideration of drugs not stipulated in plea agreement. (260)(795) Defendant's plea agreement stipulated that he was involved in .8 grams of methamphetamine, which was reflected in his presentence report. The district court found the presentence report unsatisfactory, and ordered the probation office to amend the report to reflect the actual seriousness of defendant's conduct. The amended report indicated that defendant was involved in the distribution of 1,815 grams of methamphetamine. Defendant was sentenced on this basis, and contended that the government breached the plea agreement by attempting to circumvent the amount of drugs stipulated in the agreement. The 10th Circuit rejected this argument. A court may consider information not stipulated in a plea agreement. Moreover, the government's actions did not breach the agreement, because it provided that the government could provide additional facts at sentencing concerning the offense. *U.S. v. Easterling*, __ F.2d __ (10th Cir. Dec. 17, 1990) No. 90-6000.

10th Circuit affirms calculation of cocaine based on drug records. (270)(770) When defendant was arrested, agents found two notebooks containing entries appearing to be cocaine sales according to a government agent's testimony.

Defendant's offense level was calculated based upon the sales represented in the notebooks. Defendant contended that the agent's interpretation of the entries was "too speculative and conjectural" to sentence him on this basis. The 10th Circuit disagreed. The agent also testified that he had contacted over a dozen of the entries in the notebook and many of the people had admitted that they had purchased the cocaine listed in the notebook from defendant. Although several people also denied buying cocaine from defendant, the evidence was sufficient to corroborate the agent's theory. *U.S. v. Ross*, __ F.2d __ (10th Cir. Dec. 11, 1990) No. 90-3134.

5th Circuit upholds consideration of more cocaine than mentioned in plea agreement. (270) Defendant contended that the district court erred by considering more cocaine than the 27 grams to which he pled guilty as part of his plea bargain. The 5th Circuit rejected this argument. A court can consider quantities of drugs not specified in the count of conviction if they are part of the same course of conduct or common scheme or plan. The facts detailed in the presentence report established that defendant was involved in a conspiracy that distributed over 231 grams of cocaine. Although defendant objected to certain portions of the presentence report, he offered no evidence to rebut any of these facts. *U.S. v. Mir*, __ F.2d __ (5th Cir. Dec. 11, 1990) No. 89-5695.

2nd Circuit determines that stun gun is a dangerous weapon justifying enhancement. (284) The 2nd Circuit upheld an enhancement under guideline section 2D1.1(b) based upon defendant's possession of a stun gun. A weapon need not permanently impair in order to be dangerous. The incapacitation caused by a stun gun constituted sufficient "impairment," particularly in light of the increased violence that occurs when drug traffickers possess weapons. *U.S. v. Agron*, __ F.2d __(10th Cir. Dec. 7, 1990) No. 90-1404.

10th Circuit upholds firearms enhancement for defendant who maintained crack house. (284) Defendant's offense level was increased by two under guideline section 2D1.8 for possession of a firearm during the commission of the offense of maintaining a crack house. The 10th Circuit upheld the enhancement. Testimony placed defendant with the packaging for two semi-automatic firearms in a motel room from which drugs were distributed. There was also testimony that defendant was present in a stolen automobile containing the firearms, and with co-defendants who selected and arranged the purchase of the weapons, although he was not with them when the weapons were actually purchased. There was also testimony that the weapons were purchased to provide protection during the drug sales. The district court was "entitled, if not required," to attribute to defendant weapons possessed by the co-conspirators. *U.S. v. St. Julian*, __ F.2d __ (10th Cir. Dec. 17, 1990) No. 89-6249.

Adjustments (Chapter 3)

8th Circuit affirms that defendant who controlled pricing and distribution of cocaine was organizer. (430) The district court found that defendant controlled both the pricing and distribution of cocaine and that his profits indicated that he performed an aggravating role in a large conspiracy. In addition, the district court found that the amount defendant sold to individuals made it reasonable to conclude that some of his buyers were reselling the cocaine. Based on these facts, the 8th Circuit found that the district court's conclusion that defendant was an organizer, leader, manager or supervisor was not clearly erroneous. *U.S. v. Olesen*, __ F.2d __ (8th Cir. Dec. 4, 1990) No. 90-1025SI.

4th Circuit upholds finding that defendant was leader even though government agents are not counted as participants. (430) Defendant's base offense level was increased by four based on a finding that he was a leader of a criminal activity that involved five or more participants. The district court named five individuals it counted as participants, including an undercover police officer and an undercover informant who was acting at the direction of the government. The 4th Circuit found that neither government agent could be counted as a participant because neither was criminally responsible. However, the record supported a finding that defendant supplied cocaine to at least 17 other individuals who were themselves distributors. Although not identified by name, they were properly considered by the district court, and therefore, the enhancement was not clearly erroneous. *U.S. v. Fells*, __ F.2d __ (4th Cir. Dec. 10, 1990) No. 89-5649.

5th Circuit upholds role adjustment based on relevant conduct in underlying scheme. (430) The 5th Circuit explained that its recent decision in *U.S. v. Barbontin*, 907 F.2d 1494 (5th Cir. 1990) merely established that under section 3B1.1, the government cannot "delve into unrelated transactions in an attempt to round up the requisite number of conspirators." Although *Barbontin* said that leadership should be evaluated in the context of the transactional participants, it did not define section 3B1.1's "offense" so narrowly as to limit it to the precise activity comprising the bare elements of the offense charged. "[T]he plain language of section 3B1.1 permits the sentencing court to consider all conduct linked to the transaction, even if it falls outside the four corners of the conviction itself." In this case, the "anchoring transaction "was the sale of 27 grams of cocaine. Although this sale did not involve other participants, the upward adjustment was still proper. Defendant controlled his own source of drugs, and his drug distribution ring was the source of the 27 grams of cocaine sold. *U.S. v. Mir*, __ F.2d __ (5th Cir. Dec. 11, 1990) No. 89-5695.

5th Circuit upholds determination that four other participants were involved in offense. (430) Defendant did not deny

that he managed or supervised a drug sale to an undercover agent, but denied that there were four other people involved in the sale. The 5th Circuit rejected this argument. The presentence report indicated that the undercover agent was taken by defendant to the rear of defendant's bail bonds business where the agent observed four people cutting or testing heroin. Defendant contended that two of these individuals were merely employees of his bail bonds business who did not participate in the sale. This assertion merely created a credibility question for the trial judge, who chose to accept the facts in the presentence report. *U.S. v. Alfaro*, __ F.2d __ (5th Cir. Dec. 13, 1990) No. 89-5634.

10th Circuit upholds obstruction of justice enhancement based on defendant's failure to appear at sentencing hearing. (460) Defendant failed to appear for his sentencing hearing. He turned himself in and was sentenced several days later. The 10th Circuit upheld an enhancement for obstruction of justice based on defendant's original failure to appear at his sentencing hearing. Although his failure to appear did not "closely resemble" the examples provided in the guidelines, it did "impede[] or obstruct[] ... the administration of justice during the ... prosecution of the instant offense ... by delaying the imposition of his sentence for some ten days." *U.S. v. St. Julian*, __ F.2d __ (10th Cir. Dec. 17, 1990) No. 89-6249.

5th Circuit denies reduction where defendant did not accept responsibility for all relevant conduct. (485) Although defendant said that he accepted responsibility for his offense of conviction, he denied his involvement in six other documented drug transactions between himself and an undercover agent. The 5th Circuit found that this was sufficient to deny defendant a reduction for acceptance of responsibility. To obtain a reduction under guideline section 3E1.1, the defendant must show that he accepted responsibility for all his relevant criminal conduct. *U.S. v. Alfaro*, __ F.2d __ (5th Cir. Dec. 13, 1990) No. 89-5634.

7th Circuit refuses acceptance of responsibility reduction to defendant who refused to cooperate in presentence investigation. (485) Although at trial and at sentencing defendant expressed remorse, he "fought tooth and nail to avoid conviction, and he refused to cooperate with the probation office's presentence investigation." Therefore, the district judge did not abuse his discretion in determining that defendant's last minute apology was "a deceitful little show." *U.S. v. Fonner*, __ F.2d __ (7th Cir. Dec. 14, 1990) No. 89) 3054.

Departures, Generally (§ 5K)

1st Circuit holds that only one departure can occur in any given sentence. (700)(800) The district court elected to depart in both directions at once, departing upward by four based on the large sum of money embezzled by defendant and downward by two based on defendant's substantial assistance. The 1st Circuit upheld the sentence but rejected the characterization of defendant's sentence as embodying dual departures. "Whether or not circumstances exist that might support departures in both directions, it is indisputable that the sentence finally imposed can only fall below, within, or above the GSR." Therefore, "in any given sentencing, there can be at most one departure, up or down." This is important, because only the party aggrieved by the departure can appeal. In this case, where the sentence actually imposed was above the guideline range, the only party entitled to appeal was the defendant. *U.S. v. Harotunian*, __ F.2d __ (1st Cir. Dec. 5, 1990) No. 90-1393.

2nd Circuit announces procedure for challenging government's refusal to move for downward departure. (710) The plea agreement stated that if the government determined that defendant "made a good faith effort to provide substantial assistance" it would move for a downward departure under section 5K1. The 2nd Circuit found that two steps are involved when the government fails to move for a downward departure pursuant to such an agreement. First, a defendant must first allege that the government acted in bad faith. At this step the defendant has no burden to make any showing of prosecutorial bad faith. The prosecutor must then briefly explain the government's reasons for refusing to make a motion. Following the government's explanation, the defendant must show bad faith "sufficient to trigger some sort of hearing on that issue." In this case, defendant never took the first step of alleging bad faith. Therefore, the district court properly denied the request to review the government's refusal to move for a downward departure. *U.S. v. Khan*, __ F.2d __ (2nd Cir. Dec. 7, 1990) No. 89-1429.

2nd Circuit upholds failure to depart downward for substantial assistance. (710)(720) Defendant contended that even in the absence of a government motion for a downward departure for substantial assistance under section 5K1.1, the district court was empowered to depart downward under section 5K2.0. The 2nd Circuit agreed that such a downward departure was "theoretically possible," but the existence of section 5K1.1 demonstrates that the guidelines already consider assistance to the government. The only exception "is where the defendant offers information regarding actions he took, which could not be used by the government to prosecute other individuals (rendering 5K1.1 inapplicable), but which could be construed as a "mitigating circumstance" for purpose of section 5K2.0." Defendant alleged that he provided information that saved the life of a confidential informant. This could have provided grounds for a downward departure under guideline section 5K2.0, but since defendant failed to raise the issue at sentencing, he could not now claim that the district court erred. *U.S. v. Khan*, __ F.2d __ (2nd Cir. Dec. 7, 1990) No. 89-1429.

1st Circuit refuses to review refusal to depart downward. (720)(800) Defendant argued that the district court erred in refusing to depart below the guideline range in light of his diminished capacity, duress and substantial assistance to the government. The 1st Circuit held that a defendant cannot appeal a discretionary decision not to depart downward, and therefore it lacked jurisdiction to consider the claim. *U.S. v. Harotunian*, __ F.2d __ (1st Cir. Dec. 5, 1990) No. 90-1393.

11th Circuit holds district court was aware of ability to depart based upon its departure for co-defendant. (720)(800) Defendant argued that the district court was unaware that it could sentence him below the sentencing guidelines. The 11th Circuit found defendant's argument without merit because the trial judge sentenced a co-defendant below the guidelines, "an obvious indication that the judge was cognizant that he could give a lesser sentence than the sentencing guidelines specify." *U.S. v. Smith*, 918 F.2d 1551 (11th Cir. 1990).

10th Circuit upholds criminal history departure where unrelated cases had been consolidated for sentencing. (733) Defendant committed three prior felonies on separate days over a 30-day period. However, because the felonies were consolidated for sentencing, they were considered related cases for criminal history purposes. Consequently, defendant had only three criminal history points and fell within criminal history category II. The 10th Circuit upheld the district court's departure to criminal history category IV. The circumstances "fell squarely within the caveat of section 4A1.3," which provides that the definition of related cases may be "overly broad" in certain circumstances. Judge Ebel dissented, arguing that the three felonies were related because they occurred within a three-week period, shared a common set of facts, and involved a common third party. *U.S. v. Bishop*, __ F.2d __ (10th Cir. Dec. 17, 1990) No.90-6129.

10th Circuit affirms upward departure based on defendant's repeated robberies. (734) Defendant's criminal history included four separate and distinct bank robberies dating back to 1981. The cases were consolidated for sentencing purposes. The district court departed upward and sentenced defendant as a career offender, after giving defendant a two level reduction for acceptance of responsibility. The 10th Circuit affirmed, finding that the district court's departure was not unreasonable. Before going to jail in 1981, defendant "repeatedly" engaged in bank robbery. Within a year of his release, he began robbing banks again. Had each of his offenses been counted as separate crimes, he would have qualified as a career offender. *U.S. v. Williams*, __ F.2d __ (10th Cir. Dec. 19, 1990) No. 90-6085.

7th Circuit reverses as unreasonable an upward departure of four times the guideline range. (734) Defendant was convicted of mailing threatening letters, which resulted in a guideline range of 30 to 37 months. The district court departed upward and imposed the statutory maximum of 120 months, based in part on the fact that defendant had previously killed a police officer, but had been acquitted on self-defense grounds. The 7th Circuit found the extent of the departure unreasonable. A defendant's past cannot justify an increase in criminal history category exceeding the level that would have been appropriate had the facts the court relied upon for the departure been expressly considered in calculating defendant criminal history. Here, even if defendant had been convicted of killing the officer, this would not have increased defendant's criminal history category to the level imposed by the district court. *U.S. v. Fonner*, __ F.2d __ (7th Cir. Dec. 14, 1990) No. 89-3054.

7th Circuit rejects 10-year-old dissimilar petty offenses as grounds for departure. (734) The district court departed upward based in part on defendant's eight convictions for minor offenses that were not included in his criminal history score. Five of them were more than 10 years old with sentences of less than 13 months. The other three resulted in sentences of less than 30 days. The 7th Circuit rejected this as a ground for an upward criminal history departure. The guidelines expressly provide that remote, dissimilar minor offenses should not be included in a defendant's criminal history. However, the guidelines do permit convictions for petty offenses with sentences of less than 30 days to be counted if the offenses are similar to the instant offense. Since this was not the case, it was improper for the district court to consider the prior convictions as a grounds for departure. *U.S. v. Fonner*, __ F.2d __ (7th Cir. Dec. 14, 1990) No. 89-3054.

7th Circuit rejects mental health and likelihood of recidivism as grounds for upward criminal history departure. (734) The district court departed upward at least in part because it found that defendant's mental instability made it more likely that he would commit additional offenses. The 7th Circuit vacated the sentence based upon the extent of the departure, and then noted that "[m]ental health is not a solid basis on which to depart upward." Guideline section 5H1.3 bans upward departures on this basis. A defendant's unusual likelihood to commit more crimes might be a proper basis for departure, but this overlaps the recidivism penalty built into the guidelines. Here, defendant already received three criminal history points under guideline section 4A1.1(e) for committing the current offense while under supervision. A belief that defendant was likely to continue committing offenses "cannot support a substantial increase above this, or the limit on the recidivism penalty built into the guidelines would be defeated." *U.S. v. Fonner*, __ F.2d __ (7th Cir. Dec. 14, 1990) No. 89-3054.

5th Circuit upholds 25 percent upward departure. (745) The district court departed upward from a guideline range of 41-51 months and sentenced defendant to 63 months. The

departure was justified by defendant's allowing drug use in front of children in her home, being the chief financial supply for the purchase of cocaine, coercing others, and concealing her role as a drug trafficker. The 5th Circuit upheld the departure. Even if some of the stated grounds were considered by the guidelines, guideline section 5K2.0 permits a departure if the district court determines that, "in light of unusual circumstances, the guidelines level attached to the factors is inadequate." *U.S. v. Wylie*, __ F.2d __ (5th Cir. Dec. 13, 1990) No. 89-6105.

7th Circuit permits departure based on a killing for which defendant had been acquitted. (745) Defendant killed a state police officer and was acquitted. More than 15 years later defendant mailed a death threat to a police commander who had previously worked with the slain officer. The district court departed upward based in part on the prior killing. Defendant contended that this was improper since he had been acquitted of murder. The 7th Circuit rejected this argument. Nothing prevents a judge from taking into account a defendant's prior conduct, regardless of an acquittal. A not guilty verdict means only that the prosecution failed to establish guilt beyond a reasonable doubt. The prior killing was relevant to the seriousness of defendant's threat to the slain officer's co-worker. *U.S. v. Fonner*, __ F.2d __(7th Cir. Dec. 14, 1990) No. 89-3054.

10th Circuit upholds upward departure based on drug quantity but remands for explanation of extent of departure. (745) Defendant was convicted of maintaining a crackhouse. Based on its finding that defendant was involved with 36 ounces of cocaine base, the district court departed upward from a guideline range of 30-37 months, and sentenced defendant to 72 months. The 10th Circuit upheld the use of drug quantity as a ground for an upward departure for the crackhouse offense. However, it found that the district court failed to properly explain its reasons for the extent of the departure. Although "the degree of departure is a matter within the sound discretion of the sentencing court," this does not mean that once a decision to depart has been made, "a sentence may be imposed anywhere between the minimum and maximum authorized by statute." *U.S. v. St. Julian*, __ F.2d __ (10th Cir. Dec. 17, 1990) No. 89-6249.

Plea Agreements, Generally (§ 6B)

3rd Circuit remands case to determine whether government was released from stipulation. (795) In defendant's plea agreement, the government agreed to stipulate at sentencing that defendant had accepted responsibility, provided the government did not receive additional evidence in conflict with this stipulation. At sentencing, the government argued that defendant had not accepted responsibility. The district court found that defendant had not accepted responsibility, but made no finding as to whether the government remained bound by its stipulation. The 3rd Circuit remanded, holding that the government could withdraw from the stipulation only upon a showing that would trigger the proviso, and the district court made no finding as to that. Even though the district court would not have been bound by the government's stipulation, the government had to keep its bargain. The sentence was vacated so that a hearing could be held to determine whether the government carried its burden of showing that the terms of the proviso had been satisfied. *U.S. v. Trujillo*, __ F.2d __ (3rd Cir. Dec. 5, 1990) No. 90-5245.

Appeal of Sentence (18 U.S.C. 3742)

10th Circuit defers to district court's consideration of mitigating facts. (810) Defendant alleged that the district court improperly failed to consider, in sentencing defendant within the guideline range, various mitigating facts. The 10th Circuit rejected this contention, noting that the lower court had expressly stated it had taken into consideration "the nature and circumstances of the offense and history and characteristics of the Defendant." The sentence was within the applicable guideline range. Therefore, the court "defer[red] to the district court in its apportionment of the mitigating circumstances in imposing defendant's sentence." *U.S. v. Easterling*, __ F.2d __ (10th Cir. Dec. 17, 1990) No. 90-6000.

Death Penalty

9th Circuit holds that death sentence was based upon a sufficient finding of intent to kill. (860) Petitioner argued that because the trial court never specifically found that he caused, intended to cause, or attempted to cause the victim's death, imposition of the death penalty would violate the rule of *Enmund v. Florida*, 458 U.S. 782 (1982). The 9th Circuit distinguished *Enmund*, noting that the jury here received instructions on both premeditated and felony murder and the record "clearly provides sufficient evidence for a finding that [petitioner] expressly intended to participate in and facilitate that murder." The court noted that "*Enmund* does not stand for the blanket proposition that capital punishment is unconstitutional in cases of felony murder." The Arizona Supreme Court explicitly considered *Enmund* and set forth findings sufficient to satisfy the *Enmund* test. Accordingly petitioner's sentence was based upon a sufficient finding of criminal intent. *Richmond v. Lewis*, __ F.2d __ 90 D.A.R. 14517 (9th Cir. Dec. 26, 1990) No. 86-2382.

9th Circuit rejects proffer that the death penalty is racially, sexually, and socioeconomically discriminatory. (860) Petitioner proffered statistical evidence that the death penalty is racially, sexually and socioeconomically discriminatory. The 9th Circuit rejected this evidence, noting that it was "precisely the sort of generalized statistical evidence that was

rejected as unactionable by the Supreme Court" in *McKleskey v. Kemp*, 481 U.S. 279 (1987). The court noted that to prevail in challenging his sentence under the equal protection clause, petitioner "must prove that the decision makers in *his* case acted with discriminatory purpose." The petitioner here alleged no facts to suggest that either the Arizona Supreme Court, the state trial court or the prosecutor's office acted with prejudicial or discriminatory purpose in either seeking or imposing his sentence. Accordingly the district court properly denied his request for an evidentiary hearing on this issue. *Richmond v. Lewis*, __ F.2d __ 90 D.A.R. 14517 (9th Cir. Dec. 26, 1990) No. 86-2382.

9th Circuit holds that the phrase "in an especially heinous cruel or depraved manner," is not unconstitutionally vague. **(865)** The 9th Circuit noted that in *Walton v. Arizona*, 110 S.Ct. 3047 (1990), the Supreme Court agreed that the phrase "in an especially heinous, cruel, depraved manner," was vague but did not agree that it was unconstitutional. "In essence, the court held that facial vagueness alone does not decide the question." Safeguards built into the sentencing scheme through other provisions -- and even extra-statutory procedural safeguards -- may preserve the scheme's constitutional integrity. Here, as in *Walton*, the sentence was (a) imposed by a trial judge presumably knowledgeable in the law, (b) thoroughly and independently reviewed by the Arizona Supreme Court, and (c) reimposed under a sufficiently limiting construction. Accordingly the 9th Circuit rejected the petitioner's vagueness argument. *Richmond v. Lewis*, __ F.2d __ 90 D.A.R. 14517 (9th Cir. Dec. 26, 1990) No. 86-2382.

9th Circuit holds that invalidation of one of three aggravating circumstances for death penalty, did not require resentencing. **(865)** The 9th Circuit rejected the petitioner's argument that the *en banc* decision in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (*en banc*), cert. denied sub nom. *Lewis v. Adamson*, 110 S.Ct. 3287 (1990), required remand per se when one aggravating factor for opposing the death penalty was eliminated on appeal. In this case the Arizona Supreme Court rested its affirmance of the sentence upon a finding of not one, but three aggravating circumstances and an insufficient showing of mitigating circumstances. Even assuming that one factor were eliminated, this would still leave enough support for petitioner's sentence. The court distinguished *Clemons v. Mississippi*, 110 S.Ct. 1441 (1990) on the ground that the statute at issue here was not a "weighing" statute. *Richmond v. Lewis*, __ F.2d __ 90 D.A.R. 14517 (9th Cir. Dec. 26, 1990) No. 86-2382.

9th Circuit, relying on Walton v. Arizona, upholds Arizona death sentence. **(865)** Petitioner argued that the judge's determination of the existence or nonexistence of aggravating circumstances impermissibly usurped the jury's fact-finding function. He also claimed that requiring the defense to establish the existence of any mitigating circumstances illegitimately shifted the burden of proof, and that the Arizona statute created an unconstitutional presumption that death is the proper sentence. The 9th Circuit, relying on *Walton v. Arizona*, 110 S.Ct. 3047 (1990), rejected each of these arguments. The court noted that the Supreme Court had specifically rejected each of these arguments in the course of reviewing the very same statute. *Richmond v. Lewis*, __ F.2d __ 90 D.A.R. 14517 (9th Cir. Dec. 26, 1990) No. 86-2382.

AMENDED OPINION

(590) *Rizzo v. Armstrong*, 912 F.2d 1111 (9th Cir. 1990), *amended*, __ F.2d __ (9th Cir. Dec. 17, 1990) No. 89-55389.