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Laurence S. McWhorter, Director

Legal Counsel:	*Manuel A. Rodriguez*	*FTS/368-4024*
Editor:	*Judith A. Beeman*	*FTS/241-6098*
Assistant Editor:	*Audrey J. Williams*	*FTS/241-6098*

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TABLE OF CONTENTS

TABLE OF CONTENTS (Cont'd.)

Page

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601 D Street, N.W., Washington, D.C. 20530
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COMMENDATIONS

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

M. Kent Anderson (Oklahoma, Western District), by Brigadier General William L. Moore, Jr., Brooke Army Medical Center, Department of the Army, Fort Sam Houston, Texas, for his excellent representation and successful efforts in the prosecution of a lawsuit filed against the Medical Center.

Reese V. Bostwick (District of Arizona), by Ronald J. Dowdy, Chief Patrol Agent, Immigration and Naturalization Service, Tucson, for his outstanding assistance and valuable contribution to the success of a number of multi-defendant alien smuggling cases.

Eugene Bracamonte (District of Arizona), by Brigadier General William L. Moore, Jr., Brooke Army Medical Center, Department of the Army, Fort Sam Houston, Texas, for his assistance and support in the successful defense of an unmeritorious lawsuit filed against the Medical Center.

Edwin Brzezinski (Missouri, Eastern District), by Professor Karen Tokarz, Director of Clinical Education, Washington University, St. Louis, for his participation and valuable contribution to the Client Counseling Competition sponsored by the Law School Clinical Program.

Michael P. Carey and ***Thomas M. O'Rourke*** (District of Colorado), and ***Staff*** (particularly ***Mary Ann Castellano***), by Bruce J. Pederson, Counsel, Conflicts and Criminal Restitution Section, Federal Deposit Insurance Corporation, Washington, D.C., for their outstanding efforts in cosponsoring an interesting and informative seminar on the "Investigation and Prosecution of Financial Institution Crimes" at a recent Bank Fraud Conference.

Daniel J. Cassidy (District of Colorado), by Donald K. Shruhan, Jr., Special Agent in Charge, U.S. Customs Service, Tucson, for his successful prosecution of a complex narcotics smuggling organization.

Kim Daniel (Pennsylvania, Middle District), by Major General Paul G. Cerjan, U.S. Army War College, Carlisle Barracks, for his excellent representation in litigation over issues related to television cable services for the military community at the Barracks.

Ernest J. DiSantis, Jr. (Pennsylvania, Western District), by Thomas P. Gleason, Supervisory Special Agent, FBI, Pittsburgh, for his legal skill and professionalism in prosecuting a physician for furnishing false information to an insurance company via the United States mail.

Curtis S. Fallgatter (Florida, Middle District), by William S. Sessions, Director, FBI, Washington, D.C., for his successful prosecution of a public corruption case involving the Jacksonville city government and its independent authorities.

Annette Forde (District of Massachusetts), by Thomas A. Hughes, Special Agent in Charge, FBI, Boston, for her excellent defense of a special agent who, during an emergency situation, received a speeding ticket in the course of his official business.

Douglas N. Frazier (Florida, Middle District), by Robert L. Smith, Special Agent in Charge, Florida Department of Law Enforcement, Jacksonville, for his extraordinary efforts leading to the indictment and guilty pleas of two notorious kilogram cocaine traffickers. (Note: Mr. Frazier is currently Acting Deputy Director, Executive Office for United States Attorneys, Department of Justice, Washington, D.C.)

John Harmon (Alabama, Middle District), by Wallace Johnson, Executive Director, Public Housing Authorities Directors Assn., Washington, D.C., for his excellent presentation on asset forfeiture before the Board of Trustees and the general membership.

Ronald T. Henry (Florida, Middle District), by Gregory H. Strickland, Zone 2 Task Force, Office of the Sheriff, Jacksonville, for his valuable assistance and cooperation in the successful prosecution of a "violent offender who would have remained at large and a continued danger to society."

Rick Jancha (Florida, Middle District), by Norman R. Wolfinger, State Attorney, 18th Judicial Circuit of Florida, Titusville, for his successful prosecution of a first degree murder trial.

David R. Jennings (Florida, Middle District), by John R. Fleder, Director, Office of Consumer Litigation, Department of Justice, Washington, D.C., for his invaluable strategic and tactical advice during the trial of a conspiracy case involving a fraudulent franchising scheme.

Thomas E. Karmgard (Illinois, Central District), by John W. Beaty, Area Administrator, Office of Labor-Management Standards, Department of Labor, Chicago, for his successful efforts in the prosecution of a former Union official for embezzlement of union funds.

Gregory Kehoe (Florida, Middle District), by the Honorable Bob Graham, United States Senator, for his participation as an AmPart speaker in Brazil and his outstanding presentations on behalf of the criminal justice community and the United States as a whole.

James Kuhn (Illinois, Central District), by Thomas J. Tantillo, Assistant Regional Inspector General for Investigations, Department of Health and Human Services, Chicago, for his legal skill and professionalism in the prosecution of a sensitive welfare fraud case.

Ed Kumiega (Oklahoma, Western District), by Bob A. Ricks, Special Agent in Charge, FBI, Oklahoma City, for conducting a joint In-Service Training Program for the FBI and the U.S. Department of Agriculture, and for his presentation before employees of the Agriculture Departments from Oklahoma, Louisiana, Texas, Arkansas, Missouri, and Kansas on preparing witnesses for federal court.

John Kyles, Gary Cobe, and ***Nancy Cook*** (Texas, Southern District), by Allison T. Brown, Postal Inspector in Charge, Postal Inspection Service, Houston, for their valuable assistance and outstanding success in the trial of a major mail theft ring headed by a U.S. Postal Service letter carrier.

Ellen A. Lockwood (Texas, Western District), by G. Ted Ressler, District Counsel, Small Business Administration, San Antonio, for her valuable assistance and representation in recovering more than a half million dollars from the condemnation of certain real estate in which the agency had an interest.

Robert Long (Pennsylvania, Middle District), by Marcia Cronan, Acting Assistant Regional Director, Division of Law Enforcement, Fish and Wildlife Service, Department of the Interior, Boston, for his excellent prosecutorial skills in bringing a recent criminal trial to a successful conclusion.

J. Douglas McCullough (North Carolina, Eastern District), by Leon Snead, Inspector General, Department of Agriculture, Washington, D.C., for his valuable contributions to both the investigation and prosecution of the tobacco exporting companies who defrauded the Commodity Credit Corporation.

Michael A. MacDonald (Michigan, Western District), by William S. Sessions, Director, FBI, Washington, D.C., for his vital role in thirty convictions achieved thus far as a result of the task force investigation of drug trafficking activities in the Detroit area.

Bernard J. Malone, Jr. (New York, Northern District), by James S. Allen, Director, Office of Cable Signal Theft, National Cable Television Assn., Washington, D.C., for his demonstration of support and cooperation in successfully prosecuting a criminal case involving the illegal sale of cable television descramblers.

Ernst D. Mueller (Florida, Middle District), by Richard A. Pettigrew, Acting Commander, Lowndes/Valdosta Drug Suppression Unit, Valdosta, Georgia, for his significant contribution to curtailing drug activities in Lowndes County and the State of Georgia.

Steve Mullins (Oklahoma, Western District), his secretary ***Sandra Blackstock,*** and other staff members, by J. Christopher Kohn, Director, Commercial Litigation Branch, Civil Division, Department of Justice, Washington, D.C., for their valuable assistance and support in recovering $1.2 million in funds from a bankrupt grain elevator.

Charles R. Niven (Alabama, Middle District), by John C. Norris, Chief of Investigations, VideoCipher Division, General Instrument Corporation, San Diego, for his successful prosecution of a satellite programming piracy case resulting in a savings of several million dollars in lost revenues to the satellite programming industry.

Sam Nuchia (Texas, Southern District), by the Honorable Lynn N. Hughes, Judge, U.S. District Court, Houston, for his demonstration of scholarship, integrity, industry, courtesy, and his vigorous pursuit of the public interest.

Lester Paff and ***Kevin VanderSchel*** (Iowa, Southern District), by Dominic F. Napolski, Special Agent in Charge, U.S. Customs Service, Chicago, for obtaining a conviction in a criminal case involving multiple charges relating to sales and trafficking in drug paraphernalia and money laundering.

Reid Pixler (District of Arizona), by Donald K. Shruhan, Jr., Special Agent in Charge, U.S. Customs Service, Tucson, for his valuable assistance and dedication in the "DC-6" investigation, resulting in the seizure and forfeiture of more than $4,000,000 in assets.

Manuel Porro (Texas, Southern District), by Shirley D. Peterson, Assistant Attorney General, Tax Division, Department of Justice, Washington, D.C., for his excellent representation and prompt action on behalf of the Tax Division in a lengthy and factually complex hearing in a case involving a jeopardy assessment.

James F. Robinson (Oklahoma, Western District), by George L. Fields, Jr., Chief, Criminal Investigation Division, Internal Revenue Service, for his outstanding success in prosecutions resulting in seizure of assets in excess of $1.3 million.

Ronald A. Sarachan and ***Maureen Barden*** (Pennsylvania, Eastern District), by Martin M. Squitieri, Divisional Inspector General for Investigations, Environmental Protection Agency, Philadelphia, for their successful efforts in the continuing investigation of a corporation for violation of federal environmental statutes and with conspiracy to violate those statutes.

Whitney L. Schmidt (Florida, Middle District), by Norman S. Ward, District Director, Office of Labor-Management Standards, Department of Labor, Tampa, for his excellent prosecutive support and assistance in obtaining a record number of indictments in the past year.

Albert W. Schollaert (Pennsylvania, Western District), by Homer D. Byrd, District Counsel, Department of Veterans Affairs, Pittsburgh, for his legal skill and professionalism in obtaining a favorable settlement for the government in a Federal Medical Care Recovery Act litigation.

Stanley Serwatka (Texas, Western District), by Stephen N. Marica, Assistant Inspector General for Investigations, Small Business Administration, Washington, D.C., for his initiative, diligence and professionalism in pursuing a complicated criminal investigation.

Thomas Spina (New York, Northern District), by David A. Krasula, Regional Inspector General-Investigations, Department of Labor, New York, for his legal skill and expertise in successfully prosecuting a joint Postal Service and Department of Labor benefits fraud case involving a violation of the Federal Employees Compensation Act.

Michael Patrick Sullivan (Florida, Southern District), by Robert C. Bonner, Administrator, Drug Enforcement Administration, Washington, D.C., for his outstanding leadership and series of successes in the investigation and trial of Bolivian Colonel Luis ARCE-Gomez, and his major accomplishments thus far as lead prosecutor in the upcoming trial of Panamanian General Manuel Noriega.

Thomas P. Swaim and ***Stephen A. West*** (North Carolina, Eastern District), by Richard L. Hattendorf, Past President, North Carolina Assn. of Police Attorneys, Charlotte, for their excellent presentation on "Forfeiture Law and Issues" at a recent conference of the North Carolina Association of Police Attorneys.

Robert Teig (Iowa, Northern District), by John R. Fleder, Director, Office of Consumer Litigation, Department of Justice, Washington, D.C., for his outstanding assistance and advice during the recent successful trial of a conspiracy case involving three violations of the Food and Drug Act.

Charles Turner, United States Attorney for the District of Oregon, by Governor Neil Goldschmidt, Salem, for his public service to the people of Oregon, and for all of the energy and support he has given to make Oregon a better place to live and work.

Jack Wong (District of Oregon), by Michael P. McCarthy, District Counsel, Department of Veterans Affairs, Portland, for his excellent defense of the VA doctors, nurses, and other health care professionals in a complex medical negligence case.

Randall E. Yontz (Ohio, Southern District), by A. F. Lamden, Postal Inspector in Charge, U.S. Postal Service, Cincinnati, for obtaining guilty verdicts on all twenty counts charged in a complicated mail fraud case.

Warren A. Zimmerman (Florida, Middle District), by Ralph E. Sharpe, Director, Enforcement and Compliance Division, Comptroller of the Currency, Administrator of National Banks, Washington, D.C., for his outstanding assistance in the permanent removal of a bank director in Vail, Colorado, for obtaining a civil money penalty of $10,000, and for arranging for reimbursement to the bank of $352,000.

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SPECIAL COMMENDATION FOR THE WESTERN DISTRICT OF KENTUCKY

On February 26, 1991, ***Joseph M. Whittle, United States Attorney for the Western District of Kentucky,*** was commended by Clayton Yeutter, Secretary, Department of Agriculture, Washington, D.C., as follows:

> It is a privilege for me to commend you in recognition of meritorious debt collection services provided to the United States Department of Agriculture, Farmers Home Administration, State of Kentucky. I understand that through your leadership and management abilities during the years 1986-1990, your Kentucky office has collected Farmers Home Administration debts owed to the Federal Government totaling over $7.4 million.
>
> Your aggressive and successful prosecution of Farmers Home Administration cases involving criminal fraud have served as a nationwide deterrent against unauthorized disposition of Farmers Home Administration mortgaged properties. Further, your efforts in reducing the caseload backlog and decreasing the processing time has saved an estimated $950,000.
>
> I salute you for your diligent contributions toward attainment of Farmers Home Administration objectives. You have certainly made good on your avowal, in February of 1986, to collect debts owed to the Federal Government through both civil and criminal legal actions. The taxpayers of the Commonwealth of Kentucky and the entire Nation are fortunate to have such a knowledgeable and dedicated public servant as yourself. Best wishes for continued success.

* * * * *

MAIL BOMB CASE IN THE MIDDLE DISTRICT OF ALABAMA, THE MIDDLE, NORTHERN, AND SOUTHERN DISTRICTS OF GEORGIA, AND THE MIDDLE DISTRICT OF FLORIDA

In the United States Attorneys' Bulletin, Vol. 39, No. 2, dated February 15, 1991, at page 25, special commendations were reported for a number of Assistant United States Attorneys in Alabama and Georgia who participated in the investigation and prosecution of Walter Leroy Moody, Jr., for the mail bomb assassinations of an Eleventh Circuit Court of Appeals Judge and a Savannah Alderman. Since that publication was issued, the United States Attorneys' Bulletin has received the following additional commendation letters in connection with this case.

Ray Rukstele (Georgia, Northern District) was commended by William S. Sessions, Director, FBI, Washington, D.C., for his legal guidance in obtaining search warrants, authorization for electronic surveillance, and the use of an investigative grand jury during the first five months of the investigation. (Mr. Rukstele is currently an Assistant United States Attorney for the District of Nevada.)

Curtis S. Fallgatter, Ernst D. Mueller, and ***Robert P. Storch*** (Florida, Middle District), were commended by William S. Sessions, Director, FBI, Washington, D.C., for their outstanding assistance with court orders regarding trap and trace installations, records subpoenas and other legal matters.

Louis J. Freeh and ***Howard M. Shapiro,*** Assistant United States Attorneys for the Southern District of New York, have been appointed lead prosecutors in the trial of Walter Leroy Moody, Jr. for the mail bomb assassinations. They will be assisted at trial by ***John G. Malcolm***, Assistant United States Attorney for the Northern District of Georgia. The trial is tentatively scheduled for June 3, 1991, at a site not yet determined. Walter Moody is detained awaiting sentencing on earlier convictions for obstruction of justice, subornation of perjury and witness tampering, and is awaiting trial on the mail bomb case.

In his remarks before the Judicial Conference of the United States, which met in Washington, D.C. on March 12, 1991, Attorney General Dick Thornburgh said, "Perhaps no proceeding brought me greater satisfaction last year than the indictment of the individual charged with the dreadful mail bomb murder of your former colleague, the late Judge Robert Vance. We are all deeply concerned about judicial security, and emergency measures were taken in the Eleventh Circuit until we could apprehend and charge the man whom we believe committed this heinous crime. Because this case is pending in the courts, I will not say more, but rest assured that anyone who ever so threatens our judicial system will be prosecuted to the fullest extent that the law allows."

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CRIME ISSUES

Crime Summit

On March 4, 1991, Attorney General Dick Thornburgh delivered the keynote address at the opening assembly of the Attorney General's Summit on Law Enforcement Responses to Violent Crime, which was attended by 650 city police chiefs and other law enforcement officials. The Attorney General said, "We are here in the name of the law and for the furtherance of justice. We are not here to search for the roots of crime, or to discuss sociological theory. The American people demand action to stop criminal violence whatever its causes. The debate over the root causes of crime will go on for decades, but the carnage in our own mean streets must be halted now."

President Bush and Supreme Court Justice Sandra Day O'Connor also addressed the conference. In his statement, the President called for a "crime bill that will stop the endless, frivolous appeals that clog our habeas corpus system; one that guarantees that criminals who use serious weapons face serious time; and one that ensures that evidence gathered by good cops acting in good faith is not barred by tehnicalities that let bad people go free. And for the most heinous of crimes, we need a workable death penalty."

The President added, "We need your ideas in putting together our new crime package. And we'll need your help in getting it through Congress. But I promise you this: We're not giving up on this crime bill. We're not going to let it get watered down. And we're not going to put our crime fighters in harm's way without backing them to the hilt."

* * * * *

The President's Crime Bill

On March 11, 1991, President Bush transmitted to Congress comprehensive legislation to combat violent crime. At the signing of the new crime proposal, the President asked that each of you, as the nation's chief law enforcement officers, speak out publicly on this very important piece of legislation. Tell the American people what it is and what it does. The President urged that Congressional action on this initiative be completed within the next "One Hundred Days," stating that "If our forces could win the ground war against Iraq in 100 hours, surely the Congress can pass this legislation in One Hundred Days." At the recent United States Attorneys' Conference, the Attorney General urged Congressional action within the 100 days set as a goal for its enactment "to further beef up our capabilities to combat the armed tyrants who plague our mean streets."

The Comprehensive Violent Crime Control Act of 1991 builds on many of the provisions from the President's violent crime control proposals of 1989 that, although passed by one or both Houses, were not enacted. It also contains new and complementary provisions dealing with terrorism, obstruction of justice, violence against women, victims' rights, and gangs and juvenile offenders. The bill would:

- Provide a workable federal death penalty for the most heinous murders -- such as terrorist slayings, presidential assassination, and drug-related homicides.

- Reform habeas corpus proceedings that have fostered seemingly interminable delays in punishment and have effectively nullified the death penalty in 36 states.

- Reform the exclusionary rule, allowing a "good faith" exception for technical errors by police, so that necessary and probative evidence is not kept from juries, often allowing the criminal to go free.

- Adopt an "inclusionary rule" for firearms seized in any search, substituting a system of sanctions and civil damages for the exclusionary rule, which punishes society by letting violent offenders go free.

Attached at the Appendix of this Bulletin as Exhibit A is a Fact Sheet, Summary and Talking Points concerning this legislation, which was issued by the Office of the Press Secretary at the White House.

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UNITED STATES ATTORNEYS' CONFERENCE

The annual United States Attorneys' Conference was held on March 25-28, 1991 in Savannah, Georgia. The conference was attended by the nation's 93 United States Attorneys, Department of Justice officials, and congressional leaders to review federal law enforcement priorities. Attorney General Dick Thornburgh announced two major new federal programs to combat violent crime -- "Project Triggerlock" and "Violent Crime Task Forces."

Project Triggerlock

"Project Triggerlock" is a comprehensive effort to use federal laws pertaining to firearm violence to target the most dangerous violent criminals in each community and put them away for hard time in federal prisons. Each United States Attorney's office will establish a task force of prosecutors who will develop a strategy to identify and apprehend the most violent offenders in their area. Armed career criminals with three or more prior felony convictions for violent felonies or serious drug offenses now face a mandatory 15-year federal prison sentence while use of a firearm in the commission of certain offenses brings a minimum 5-year federal prison sentence. FBI, DEA and Bureau of Alcohol, Tobacco and Firearms investigators will participate in the targeting of major offenders together with appropriate state and local authorities.

Violent Crime Task Forces

The "Violent Crime Task Forces" are pilot projects using the 'weed and seed' strategy. In phase one, federal, state and local law enforcement will engage in a massive 'clean sweep' effort to 'pull the weeds' -- to remove violent predators and drug dealers from the target area. In phase two, federal and state agencies can 'plant the seeds' of a new tomorrow, by housing renewal and encouragement of legitimate enterprise in the target area.

Both of these initiatives will be overseen by the Justice Department's newly-established Terrorism and Violent Crime Section in the Criminal Division, and will be fully coordinated with the Organized Crime Drug Enforcement Task Forces and the United States Attorney's Organized Crime Strike Force units. General Thornburgh emphasized other federal initiatives:

- Anti-drug efforts "from the crack house to the frat house," including increased international efforts.
- A sustained effort against white collar crime -- so-called "crime in the suites," including new initiatives against insurance fraud and computer crime.
- Anti-corruption prosecutions against those at the federal, state and local level who betray the trust of public office.
- Strong enforcement of federal child exploitation and pornography laws "which victimize the most vulnerable in our society."
- Enhanced criminal prosecution of environmental polluters "who would despoil the very earth we inhabit."

The Attorney General also expressed appreciation to the Congress for the addition of 1,500 additional prosecutors and 1,400 additional FBI and DEA agents since he took office in August, 1988, as well as recent pay enhancements for all federal law enforcement officials.

* * * * *

Criminal Division Reorganization

On April 1, 1991, Robert S. Mueller, III, Assistant Attorney General, Criminal Division, issued a fact sheet concerning the reorganization of the Criminal Division. The reorganization creates two new sections, consolidates our computer crime efforts, establishes a fifth Deputy Assistant Attorney General, creates an Office of Professional Development and Training, and commences an office for international matters in Mexico City.

Money Laundering Section

In establishing a Money Laundering Section, the Criminal Division is demonstrating its commitment to expand its efforts in money laundering prosecutions, both in narcotics-related cases and in cases where the underlying offense is one other than a narcotics violation. The creation of a separate Money Laundering Section will show the Division's dedication to expanding the role of money laundering statutes to dismantle all types of criminal organizations -- whether drug-related or otherwise -- and it will unify the Division's policies and objectives in the anti-money laundering area. The Section will be staffed with fifteen attorneys and eight support staff.

Terrorism and Violent Crime Section

The creation of the Terrorism and Violent Crime Section signals the Department's commitment to improve federal law enforcement efforts aimed at terrorism and violent crime. With respect to terrorism, the establishment of this new section will facilitate the expansion of the Department's law enforcement efforts to match the dedication of other agencies and to provide experienced resources for these difficult and time-consuming investigations and prosecutions. With respect to other forms of violent crime, the Terrorism and Violent Crime Section will take on responsibility for anti-violent crime initiatives like the prosecution of violent gang activity, including coordinated efforts with branches of state, local and international governments. Attorney General Dick Thornburgh has directed that this section oversee "Operation Triggerlock" and "Operation Weed and Seed," which are both prosecution initiatives directed against violent crime in general and gang activity in particular. The Section will be staffed with fifteen attorneys and eight support staff.

Computer Crime Enforcement

The Criminal Division has decided to reassign responsibility for the prosecution of computer crime from the Fraud Section to the General Litigation and Legal Advice Section (GLLA). The potential growth in computer crime is staggering. Current efforts against computer crime have been split between the Fraud Section and GLLA. Recent trends in the nature of computer crime suggest that computer crimes most typically resemble unauthorized access to and theft of government property, crimes that have traditionally been in the province of GLLA. The Fraud Section, which has prosecuted computer fraud cases, has made resource-intensive commitments in high priority areas, such as savings and loan fraud, defense procurement, HUD, and pension plan and health care frauds. The GLLA will be able to make the enforcement of computer crime statutes a priority and will bring to bear its existing expertise regarding similar statutes intended to prevent misuse of government information.

Insurance Fraud Initiative

In recognition of the potential for financial loss through fraud in the insurance industry, the Fraud Section has formed an insurance fraud unit that will participate in all aspects of a national enforcement initiative. Its role will be to support United States Attorneys as well as to undertake on its own all aspects of our prosecutive strategy, including investigating and prosecuting select cases, and coordinating the nationwide investigative effort. That unit will consist of six attorneys and approximately three support staff.

Office of Professional Development and Training

Another organizational change is the establishment of the Office of Professional Development and Training within the Criminal Division. The principal purpose of the office will be to augment and to complement the Attorney General's Advocacy Institute and to provide the Criminal Division with centralized coordination of in-house training, publications, and other professional development. Tom Schrup, formerly Director of the Office of Legal Education in the Executive Office for United States Attorneys, will be the Director; the office will be staffed by three attorneys, including himself, and three support staff.

The Office of Professional Development and Training will have responsibility primarily for six programs: (I) In-house attorney training; (2) Orientation; (3) Publications; (4) Criminal Division Issues Training for United States Attorneys' Offices; (5) Liaison with the Attorney General's Advocacy Institute; and (6) Assistant United States Attorney details into the Criminal Division.

A Fifth Deputy Assistant Attorney General

Another change is the creation of a fifth Deputy Assistant Attorney General whose primary function within the Division would be to advance policy and legislation affecting federal criminal prosecutions. This Deputy will be a political appointee. The first such Deputy is Robert B. Bucknam, who has served as the Deputy Chief of the Criminal Division in the United States Attorney's Office for the Southern District of New York. Mr. Bucknam reported on duty on March 4, 1991.

Mexico City Office

The Criminal Division anticipates opening an office in Mexico City to assist in international matters in Mexico, Central America and South America. The operation of the Mexico City office will be patterned substantially after the office now open in Rome, Italy. The details of the operation of that office are still being made final.

Section Chief and Office Director Positions Advertised

As a result of these changes, the Division is currently undertaking to fill six Section Chief positions that are either newly established or filled by others in an acting capacity. Those positions are: 1) Chief of the Narcotic and Dangerous Drug Section; 2) Chief of the Organized Crime and Racketeering Section; 3) Chief of the General Litigation and Legal Advice Section; 4) Director of the Office of Asset Forfeiture; 5) Chief of the Terrorism and Violent Crime Section; and 6) Chief of the Money Laundering Section. The position in Mexico City will be advertised once the details have been completed.

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Police Brutality

On March 14, 1991, Attorney General Dick Thornburgh issued the following statement concerning allegations of police brutality in the Los Angeles Police Department:

> Responsible law enforcement officers condemn acts of police brutality by anyone in law enforcement. Those engaged in law enforcement must be among the first to assure the observance of the civil rights and civil liberties of all citizens. Within the past three years, the Civil Rights Division of the Department of Justice has brought criminal charges against 98 persons in official misconduct cases; of the 60 defendants thus far prosecuted, 45 have been convicted--a 75% conviction rate in what are difficult cases to obtain convictions.
>
> The FBI will continue to investigate and the Department of Justice will continue to prosecute to the fullest extent of the law those alleged to be guilty of police brutality. I have asked the Civil Rights Division to undertake a review of all official complaints filed in this area within the past six years to discern whether any pattern of misconduct is apparent. I have also asked the Office of Justice Programs, through its National Institute of Justice, to determine the correlation, if any, between the incidence of police brutality and the presence or absence of police department training programs and internal procedures to deter police brutality.

* * * * *

Gang Violence

As part of a Department-wide effort to stem the tide of violent crime, on March 13, 1991, Jimmy Gurule, Assistant Attorney General for the Office of Justice Programs, opened a two-day National Field Study on Gang Violence in Los Angeles to examine both the nature and scope of gangs, as well as to assess and examine strategies that have proven successful in preventing, disrupting, and controlling gang activity, violence, and drug trafficking. This field study is the first of site studies to help develop a targeted plan of action to assist state and local governments in stopping the gang violence that is spreading across the nation. In Los Angeles alone, gang-related homicides increased approximately 69 percent in 1990, and there were 252 gang-related deaths.

Justice Department officials and representatives from Los Angeles city and county law enforcement, probation, judicial and community agencies and organizations discussed the problem of the migration of gangs from urban centers to small cities and rural areas, the lucrative market for drugs that fuels gang involvement in illicit drug trafficking enterprises, and the violence gangs employ to protect their illicit businesses and to expand into new markets.

This field study is part of a broader Justice Department initiative to step up federal prosecutions of gangs and gang activity. It includes community outreach programs and field studies, and the establishment of prosecutorial task forces in the United States Attorneys' offices to handle firearms offenses, and the creation of a Terrorism and Violent Crime Section within the Criminal Division of the Department of Justice. This Department-wide activity is designed to gather more information about gangs, gang members, and their culture of violence. It also seeks to develop a coordinated strategy among state and local law enforcement agencies directed against drug-related gang activity and other forms of gang violence.

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Personal And Household Crime

According to preliminary estimates announced by the Bureau of Justice Statistics (BJS), Department of Justice, on March 24, 1991, combined personal and household crime in the United States fell by almost 3 percent, or 1 million offenses, last year. In addition, there were 34.8 million personal and household crimes during 1990, compared to 35.8 million during 1989. Steven D. Dillingham, Director of BJS, noted that the overall decrease results largely from last year's 8 percent decline in the rate of personal thefts without direct contact between the victim and the offender. Those thefts, which involve such offenses as stealing personal belongings from public places or from an unattended automobile parked away from home, comprise 95 percent of all personal thefts and about 66 percent of all crimes against individuals. The only crime to increase significantly last year was motor vehicle theft, which rose 19 percent to 1.4 million completed motor vehicle thefts and 770,000 attempted thefts--the highest number since the Bureau's National Crime Survey commenced in 1973. Apart from motor vehicle thefts, no major crime category increased significantly.

The rate for crimes against individuals -- rape, robbery, assault and personal theft -- was 93 per 1,000 people 12 years old and older in 1990, compared to 98 per 1,000 in 1989. The rate of household crimes -- burglary, household larceny and motor vehicle theft -- was an estimated 166 per 1,000 households, which was not significantly different from 1989's estimate.

Bureau of Census interviewers talked to about 97,000 people in about 48,000 homes last year, asking them about any crime they may have experienced during the previous six months. About 13.3 million of the personal and household crimes were reported to the police last year, which was not a significant change from 1989. About 62 percent of all National Crime Survey offenses were never brought to official attention. The Survey gathers data on personal and household crimes that are both reported and not reported to law enforcement agencies. Final 1990 estimates will be available later this year.

* * * * *

Victims' Provisions Of The Crime Control Act Of 1990

On February 19, 1990, Laurence S. McWhorter, Director, Executive Office for United States Attorneys, advised all United States Attorneys that the names of child victims and witnesses must now be redacted from indictments or other publicly disclosed documents pursuant to the Crime Control Act of 1990, P.L. 101-647 (to be codified at 18 U.S.C. 3509). You were advised that all legal questions should be directed to the Office for Victims of Crime. As a result, that office received more than 40 inquiries from United States Attorneys' offices.

Recognizing the need for information on the new victims' provisions, Donald B. Nicholson, Attorney, General Litigation and Legal Advice Section of the Criminal Division, has been designated as the resource person for child victim and witness issues arising from the Crime Control Act. Mr. Nicholson's address is: Room 6401, Bond Building, 1400 New York Avenue, N.W., Washington, D.C. 20530. The telephone number is: (202) 514-1061/(FTS) 368-1061.

The LECC/Victim Witness Staff of the Executive Office for United States Attorneys, and the Office for Victims of Crime, continue to be available to assist you in implementing the new laws.

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DRUG ISSUES

War On Drugs
(Grants Targeted For Fighting Crime And Drugs)

In February, 1991, Attorney General Dick Thornburgh announced grants to a number of states targeted for fighting crime and drugs, which was reported in the United States Attorneys' Bulletin, Vol. 39, No. 3, dated March 15, 1991, at page 54. These grants are from a $473 million formula and discretionary grant program of the Bureau of Justice Assistance (BJA), Department of Justice. Two more states have received funds to augment state and local law enforcement agencies' budgets. They are Maine and New Mexico:

Maine will receive $2,828,000, a $194,000 increase over last year. This state will use its federal funds to continue training law enforcement personnel in drug investigation techniques, improve information and recordkeeping, support its multi-jurisdictional task forces, and investigate clandestine, illegal drug laboratories. The state will continue its Drug Abuse Reduction Education program and support to victims of crime.

New Mexico will receive $3,271,000, a $224,000 increase over last year. This state will use its federal funds to purchase surveillance secure communications equipment for border patrols, continue marijuana eradication efforts, seize clandestine, illegal drug laboratories, battle prescription drug forgeries, and investigate gang-related crime and drug distribution. The state will also improve court caseload management, establish uniform crime reporting and record-keeping and continue to support its Drug Abuse Resistance Education program.

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ASSET FORFEITURE

Increased Administrative Forfeiture Caps

On February 26, 1991, William P. Barr, Deputy Attorney General, advised all United States Attorneys, and other Department and Agency officials that the Attorney General has promulgated revised asset forfeiture regulations to implement the higher statutory ceilings for administrative forfeitures. On August 20, 1990, the President signed Public Law 101-382 which authorizes the administrative forfeiture of cash and monetary instruments without regard to value and other property up to a value of $500,000. The legislative history of this new law makes clear that Congress sought to increase the speed and efficiency of uncontested forfeiture actions, and has confidence in the notice and other safeguards built into administrative forfeiture laws.

Attached at the Appendix of this Bulletin as Exhibit B is a copy of Mr. Barr's memorandum, together with a copy of the final rule appearing in the Federal Register dated March 1, 1991. If you have any questions regarding this memorandum, or any other forfeiture issues, please call the Executive Office for Asset Forfeiture, at (202) 514-0473 or (FTS) 368-0473.

* * * * *

Effect Of Delay In Notice Required By The Anti-Drug Abuse Act Of 1988

On March 20, 1991, Cary H. Copeland, Director, Executive Office for Asset Forfeiture, advised all United States Attorneys, and other Department and Agency officials, that Sections 6079 and 6080 of the Anti-Drug Abuse Act of 1988 create expedited procedures for the release of certain classes of seized property. Section 6079 creates expedited procedures for property seized for administrative forfeitures involving the possession of controlled substances in "personal use" quantities. Section 6080 (codified at 21 U.S.C. 881-1) provides for such expedited procedures in a judicial forfeiture where a conveyance has been seized for a drug-related offense.

These provisions of law and regulation provide for two types of written notice: (1) the notice of the possessor regarding the expedited procedures given at the time of seizure, and (2) the notice to the owner concerning the legal and factual basis of the seizure given at the earliest practicable opportunity after ownership is determined. Case law is limited and does not address the effect, if any, of failure to give notice to the possessor. This may well be because it is the owner or other interested party as defined in regulations, not the possessor at the time of seizure, who has the right to avail himself or herself of the expedited procedures established. The purpose for requiring written notice to the possessor appears to have been to quickly alert the owner of a seizure in those instances where the possessor was not the owner but was in communication with him or her.

Congress did not provide a penalty for failure to provide notice within a prescribed period of time. However, it is clearly in the interests of good government that notice, whether to the possessor or owner, be provided as soon as practicable. It is the policy of the Department of Justice that written notice should be provided to the possessor(s) and owner(s) as soon as practicable but not later than within forty-five (45) days of the seizure. Where the appropriate notice has not been provided as required, the seized property should be returned and the forfeiture proceeding terminated. Exceptions in unusual circumstances may be granted by the Director of the Asset Forfeiture Office, Criminal Division, Department of Justice. This policy does not change the existing policy regarding the interpretation of the phrase "at the time of seizure" for purposes of adoptive seizures.

If you have any questions, please call the Executive Office for Asset Forfeiture, at (202) 514-0473 or (FTS) 368-0473.

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Disposition Of ADP Equipment Purchased With Assets Forfeiture Fund Allocations

Cary H. Copeland, Director, Executive Office for Asset Forfeiture, received an inquiry from a participating agency asking what policy existed regarding how long ADP equipment purchased with monies from the Assets Forfeiture Fund (AFF) retained its statutory limitation requiring its use within the asset forfeiture program. Accordingly, a policy addressing this question was developed that attempts to balance the objectives behind the legislative requirement with practical resource management considerations. This policy is applicable to all ADP equipment currently in inventory that was purchased with AFF monies, as well as ADP equipment purchased in the future, and has been coordinated with personnel within the participating agencies. No objections were received. The policy is as follows:

ADP equipment purchased with Assets Forfeiture Fund monies shall retain any statutory conditions or limitations on its use until:

1) The equipment fails or suffers serious performance degradation and it is economically impractical to invest in equipment repair; or

2) The equipment is rendered functionally obsolete for forfeiture program purposes of the using office, and

No other agency participating in the Assets Forfeiture Fund within a reasonable radius can use the equipment for forfeiture program purposes, and

The Executive Office for Asset Forfeiture is provided 30 days written notice of the intent to redirect the equipment out of the asset forfeiture program with a brief explanation of the attendant circumstances.

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SAVINGS AND LOAN ISSUES

Agreement On Investigations Of Financial Institution Fraud Matters

On November 5, 1990, the United States Secret Service was granted concurrent jurisdiction with the Federal Bureau of Investigation in the area of financial institution fraud. In an effort to promote efficiency in operation, as well as to prevent the overlapping and duplication of investigative endeavors, the Directors of the respective agencies have agreed upon certain specific issues that shall serve as guidelines for these investigations.

Attached at the Appendix of this Bulletin as Exhibit C is a copy of the Agreement entered into by William S. Sessions, Director, Federal Bureau of Investigation, and John R. Simpson, Director, United States Secret Service, on March 22, 1991.

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Privately Insured Credit Union System In Rhode Island

On March 13, 1991, Attorney General Dick Thornburgh announced a four-part effort by the Department of Justice to investigate possible violations of federal criminal law in the collapse of the privately insured Rhode Island credit union system. The effort also is designed to assist the Attorney General of Rhode Island in his ongoing criminal investigation of the collapse. The four-part initiative includes:

-- A short-term, intensive records analysis to determine whether or not violations of federal law occurred. The analysis will be conducted by a special investigative unit consisting of federal law enforcement agents from the FBI, IRS, Secret Service, and the office of the United States Attorney for the District of Rhode Island. United States Attorney Lincoln Almond and Attorney General James P. O'Neil already have established a federal-state task force to review materials at key institutions.

-- Financial and technical assistance in the organization and computerization of financial documents. The Office of Justice Programs of the Department of Justice has set aside grant money to provide assistance through the technical expertise of litigation support units to Attorney General O'Neil's investigation into violations of state law.

-- Technical training for state prosecutors through the financial institution fraud training program of the Attorney General's Advocacy Institute.

-- Training for state agents and investigators through the FBI National Training Academy in Quantico, Virginia.

The Attorney General said, "I want to assure the citizens of Rhode Island that the Department of Justice is doing everything it can to investigate where it has jurisdiction and to provide technical assistance to appropriate local officials where it does not. Federal law enforcement authorities, through the United States Attorney in Rhode Island and the Special Counsel for Financial Institution Fraud in Washington, D.C. have been monitoring events affecting privately insured financial institutions in the state. I have long advocated the benefits of cooperative law enforcement in addressing significant criminal problems."

* * * * *

Savings And Loan Prosecution Update

On February 11, 1991, the Department of Justice issued the following information describing activity in "major" savings and loan prosecutions from October 1, 1988 through January 31, 1991.

Informations/Indictments		375
Estimated S&L Losses	$	7.368 billion
Defendants Charged		653
Defendants Convicted		460
Defendants Acquitted		18
Prison Sentences		980 years
Sentenced to prison		275 (79%)
Awaiting sentence		120
Sentenced w/o prison or suspended		73
Fines Imposed	$	7.818 million
Restitution Ordered	$	250.855 million
CEOs, Board Chairmen and Presidents:		
Charged by indictment/information		77
Convicted		60
Acquitted		6
Directors and other officers:		
Charged by indictment/information		117
Convicted		93
Acquitted		3

This information is based on reports from the 94 offices of the United States Attorneys and from the Dallas Bank Fraud Task Force. All numbers are approximate.

[NOTE: "Major" is defined as (a) the amount of fraud or loss was $100,000 or more, or (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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POINTS TO REMEMBER

Money Laundering

A frequent problem faced by prosecutors who intend to file criminal money laundering charges is whether their district is a proper venue for the contemplated case. Michael Zeldin, Acting Director, and Roger G. Weiner, Trial Attorney, Money Laundering Office, Criminal Division, have prepared an article entitled "A Brief Examination of Venue in Money Laundering Prosecutions," which reviews some of the concerns that prosecutions under 18 U.S.C. §§1956 and 1957 and 31 U.S.C. §5322 may raise, and examines the elements of venue in such prosecutions. A copy of this article is attached at the Appendix of this Bulletin as Exhibit D.

If you have any questions concerning venue or other money laundering matters, or if you require assistance with a money laundering problem, please call the Money Laundering Office, at (202) 514-1758 or (FTS) 368-1758.

* * * * *

Temporary Delegation Of Authority To Authorize Grand Jury Investigation Of False Claims For Tax Refunds

On March 18, 1991, Shirley D. Peterson, Assistant Attorney General for the Tax Division, advised all United States Attorneys that, "by virtue of the authority vested in me by Part O, Subpart N of Title 28 of the Code of Federal Regulations (C.F.R.), particularly Section 0.70, regarding criminal proceedings arising under the internal revenue laws, authority to authorize grand jury investigations of false and fictitious claims for tax refunds, in violation of 18 U.S.C. §286 and 18 U.S.C. §287, is hereby conferred on all United States Attorneys."

A copy of Assistant Attorney General Peterson's memorandum, and Section 6-4.242 of the United States Attorneys' Manual, are attached at the Appendix of this Bulletin as Exhibit E.

* * * * *

Increased Settlement Authority For United States Attorneys

The authority of United States Attorneys to compromise or close claims as uncollectible has been increased effective March 1, 1991. An amendment to Section 0.168, Subpart Y, Part O, 28 CFR, provides that United States Attorneys have authority to:

1) Accept offers in compromise of claims on behalf of the United States in all cases in which the original claim did not exceed $500,000; and in all cases in which the original claim was between $500,000 and $5,000,000, so long as the difference between the gross amount of the original claim and the proposed settlement does not exceed 15 percent of the original claim.

2) Accept offers in compromise of, or settle administratively, claims against the United States in all cases where the principal amount of the proposed settlement does not exceed $500,000.

Where the amount of the offers or administrative settlement exceed the above limits, the offers are to be referred to the appropriate Assistant Attorneys General. Increased authority is also provided Assistant Attorneys General by other amendments to Subpart Y, Part O, of 28 CFR as published in the Federal Register, Vol. 56, No. 42, dated March 4, 1991, pp. 8923-8924. In the appendix to Subpart Y, Part O of 28 CFR are contained redelegations of authority to compromise and close civil claims by the litigating divisions. Compromise and closing is also extensively addressed in Title 4-3.000 of the United States Attorneys' Manual. Other information may be located by consulting the index in the United States Attorneys' Manual for each of the Department's litigating divisions.

* * * * *

Skills Bank To Be Updated

The Executive Office for United States Attorneys is currently updating the Skills Bank for JURIS. The Skills Bank was created at the advice of the Attorney General's Advisory Committee of United States Attorneys to assist personnel in locating in-house litigation experts for advice and guidance. It contains pertinent data on the education, experience, and litigation expertise of each participating Assistant United States Attorney, and is available only to United States Attorneys and the Executive Office for United States Attorneys. The litigating divisions of the Department may request information through the Executive Office for United States Attorneys Legal Counsel.

All data presently existing in the files will be expunged, and a completely new data bank will be established. In the future, the JURIS Skills Bank will be updated on a continual basis. New Assistant United States Attorneys will be added to the Skills Bank upon entering on board, and it is the responsibility of each Assistant United States Attorney to prepare an update when major changes occur.

Attached at the Appendix of this Bulletin as Exhibit F is a Survey Form to be completed by each Assistant United States Attorney, and forwarded, by May 15, 1991, to: AUSA Skills Bank Update, Legal and Information Systems Staff, Room 129, 425 I Street, NW., Washington, D.C. 20530, Attn: A. Carrigan. Detailed instructions for completing the form are also attached, plus a sample printout of a Skills Bank entry.

If you have any questions, or require assistance, please call Bonnie L. Gay, Attorney-in-Charge, or Taunya McKay, Freedom of Information Office/Privacy Act Unit, Executive Office for United States Attorneys, at (202) 501-7826 or (FTS) 241-7826.

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Reemployment Rights Of Veterans Returning From Operation Desert Shield/Desert Storm

On March 19, 1991, Joseph M. Whittle, Chairman, Attorney General's Advisory Committee, and Laurence S. McWhorter, Director, Executive Office for United States Attorneys, advised all United States Attorneys of the significant reemployment rights to which members of the National Guard and Reserves are entitled under federal law. Attached was a memorandum dated March 11, 1991, from Stuart M. Gerson, Assistant Attorney General for the Civil Division, to all United States Attorneys, regarding requests for representation under the Soldiers' and Sailors' Civil Relief Act. A copy of this memorandum is attached at the Appendix of this Bulletin as Exhibit G.

As a means of ensuring the widest dissemination of information, you are encouraged to issue a press release outlining the reemployment rights of the National Guard and Reserves and the roles of the Departments of Justice and Labor in insuring that those rights are honored. To assist you in this effort, attached at the Appendix of this Bulletin as Exhibit H is a a copy of a sample press release. The press release may take any number of forms, but you should consider the following points:

1. The pertinent provisions of law are contained in Title 38, United States Code, Section 2021 through 2026.

2. The rights generally apply to all Guard and Reserve personnel called to active duty, irrespective of whether they were called up involuntarily or volunteered.

3. For our purposes, the most important of those rights applies to those who were employed in other than temporary positions at the time of call up. It basically provides entitlement to reemployment in the same or an equivalent position, if application is made within 90 days of release from active duty;

4. The right is generally to reemployment under conditions of pay, seniority and benefits as if employment had been continuous during the period of active duty and as if the Guard member or Reservist had never left;

5. The rights apply with respect to all employers regardless of size, both private and public, including the United States government.

Returning personnel who experience reemployment problems and have continued their affiliation with the Guard or Reserve will initially be able to obtain assistance through their military component. For others, and for further assistance in attempting to negotiate such problems, the Veterans' Employment and Training Service of the U.S. Department of Labor has primary responsibility. You may wish to make reference to the appropriate address and telephone number in your area.

Finally, the public should be assured that the Department of Justice, through the offices of the United States Attorneys, will initiate the proceedings in United States Disrict Court where such action becomes necessary to enforce veterans' reemployment rights guaranteed by federal law.

* * * * *

Witness Payments To Convicted Prisoners

On March 15, 1991, the Special Authorizations Unit of the Justice Management Division, under the direction of Violet M. Foster, Chief, advised all United States Attorneys' offices that the temporary rules for payment of fact witness fees to convicted prisoners are being delayed while the progress of several congressional bills is tracked. Most of the bills are retroactive, prohibiting payment to convicted prisoners. Since it would be almost impossible to recover any payments made to these witnesses, the Special Authorizations Unit suggests that no such payments be made until one of the bills is passed.

If you have any questions, please call the Special Authorizations Unit, at (202) 501-8429 or (FTS) 241-8429.

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SENTENCING REFORM

Federal Sentencing And Forfeiture Guide

Attached at the Appendix of this Bulletin as Exhibit I is a copy of the Federal Sentencing and Forfeiture Guide, Volume 2, No. 18, dated February 25, 1991, and Volume 2, No. 19, dated March 11, 1991, which is published and copyrighted by Del Mar Legal Publications, Inc., Del Mar, California.

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LEGISLATION

Civil Rights Act Of 1991

On March 1, 1991, Attorney General Dick Thornburgh transmitted to Congress the Administration's 1991 civil rights bill amending the Civil Rights Act of 1964 to strengthen protections against discrimination in employment.

Attached at the Appendix of this Bulletin as Exhibit J is a copy of the transmittal letter to Speaker of the House Thomas S. Foley, together with a fact sheet on this legislation. On March 19, 1991, the House Judiciary Committee marked up the bill, and voted it out in its current form. Floor action in the House and the filing of the Senate bill is anticipated sometime during April.

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Federal Employee Honoraria Ban

On March 21, 1991, Department of Justice representatives met with Representative Paul Kanjorski (D-Pa) to discuss his concerns over proposals to lift the ban on receipt of honoraria by certain federal employees imposed under the Ethics in Government Act of 1989. The Administration supports lifting this ban for all but upper-level federal employees and officers.

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CIVIL RIGHTS DIVISION

Supreme Court Holds That Employers May Not Justify Sex-Specific Fetal Protection Policies Under The Bona Fide Occupational Qualification Exception to Title VII

On March 20, 1991, the Supreme Court issued its opinion in International Union, United Automobile, Aerospace & Agricultural Implement Workers v. Johnson Controls, Inc., No. 89-1215. The case addressed the standards for assessing the legality of employment policies excluding fertile women from positions involving occupational exposure to hazardous substances in the interests of avoiding risk of fetal harm.

In an opinion by Justice Blackmun, joined by Justices Marshall, Stevens, O'Connor, and Souter, the Court held that sex-specific fetal protection policies must be analyzed under the bona fide occupational qualification (bfoq) exception to Title VII. The Court observed that in using capacity to bear children as the criterion for exclusion, Johnson Controls' policy constituted explicit sex discrimination under the Pregnancy Discrimination Act, which amended Title VII to prohibit discrimination on the basis of a woman's ability to become pregnant. The Court held that the language of the bfoq provision in Title VII encompassed safety concerns only to the extent to which "sex or pregnancy actually interferes with the employee's ability to perform the job." The Court also held that liability concerns could not support the employer's policy under the bfoq defense because it was unlikely that employers would be held liable for failing to enact a policy that was unlawful under federal law, and the incremental costs of employing women do not constitute a defense under the bfoq test. Thus, the Court concluded that Title VII forbids sex-specific fetal protection policies.

A concurring opinion by Justice White, joined by Chief Justice Rehnquist and Justice Kennedy, agreed that the bfoq exception applies to sex-specific fetal protection policies and that the employer in this case had failed to meet its burden of justifying its policy under the bfoq standard, but would have allowed employers to raise concerns about fetal safety and future liability concerns in support of sex-specific workplace exclusions. In a separate concurrence, Justice Scalia agreed with the majority's general analysis, but would have given cost concerns greater weight under the bfoq test.

International Union, United Automobile, Aerospace & Agricultural Implement Workers v. Johnson Controls, Inc., No. 89-1215 (March 20, 1991). DJ # 170-85-66

Attorneys: David K Flynn - (202) 514-2195 or (FTS) 368-2195
Susan D. Carle - (202) 514-4541 or (FTS) 368-4541

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CIVIL DIVISION

Federal Scientist's Observation Of Another Scientist's Experiment Makes Government Liable For Experiment-Related Accident

In 1977, a scientist for the New York Department of Health ("DOH"), Jerome Andrulonis, was working on rabies prevention experiments under the supervision of a world-class rabies expert. The Atlanta-based Centers for Disease Control ("CDC"), a component of the Department of Health and Human Services (HHS), supplied rabies viruses at no cost, and sent the requested product accompanied by its own expert, Dr. George Baer. Dr. Baer, because of scientific curiosity, stayed at the DOH laboratory to watch the experiment. A month later, Mr. Andrulonis contracted rabies and became severely brain-damaged. He sued the federal government. Although the CDC's viruses had not been defective and although Dr. Baer had discerned no actual danger from the experiment, the government was still held liable because, according to the district court, Dr. Baer should have known that the experiment was dangerous.

The Second Circuit has now affirmed. First, the court rejected our discretionary function defense, holding that Dr. Baer's "failure to interrupt" the State's experiment did not "involve policy considerations." Second, the court of appeals held that the government, as the supplier of the viruses, was under a supplier's duty to warn of a potential unsafe use of the product, even when the product is an untested substance donated for experimental purposes to knowledgeable users. We had argued that the full rigors of products liability law properly applied only to producers of commercial products, not to public health laboratories. The court disagreed, stating that "there is probably no entity better able to spread the risk of scientific research than the government, which has the biggest 'customer' base of all -- taxpayers."

Andrulonis v. U.S., Nos. 89-6274, 90-6016, 90-6028. (2d Cir. January 28, 1991). DJ # 157-50-647.

Attorneys: Robert S. Greenspan - (202) 514-5428 or (FTS) 368-5428
William G. Cole - (202) 514-5090 or (FTS) 368-5090

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First Circuit Orders Dismissal Of Bivens Action Based On Alleged Violations Of Due Process Requirements By Farmers Home Administration Officials

Plaintiff, a chicken farmer who had two FmHA loans, brought this action against two FmHA officials in their individual capacities, claiming that they had violated his rights to due process. Plaintiff's theory was that defendants had taken certain actions (encouraging him to seek foreclosure by a private bank that held a senior mortgage, and later requesting that plaintiff voluntarily convey his farm to FmHA) without giving him individual notice of various statutory avenues of relief that might be available. Plaintiff contended that his right to such notice was "clearly established" in light of the 1982 entry of a nationwide injunction requiring such relief. The district court denied defendants' motions for dismissal or summary judgment, ruling that there were unresolved factual questions.

The court of appeals has now reversed. The court noted that the due process notice issues addressed in the earlier nationwide class action remain controversial, and that the entry of the injunction in that case did not "clearly establish" principles of constitutional law. Accordingly, the court held that, even assuming that defendants had violated the injunction, they had not violated clearly established due process principles, and were thus still entitled to qualified official immunity. This decision provides a useful precedent, both because of its specific discussion of issues affecting FmHA and for its broader implications that violations of court orders do not necessarily support Bivens claims. The decision will also be useful in that it holds that the 60-day appeal time for government cases applies as well in Bivens actions.

McBride v. Taylor, No. 90-1528 (Jan. 30, 1991). DJ # 157-34-474

Attorneys: Barbara L. Herwig - (202) 514-5425 or (FTS) 368-5425
John F. Daly - (202) 514-2496 or (FTS) 368-2496

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Third Circuit Affirms Dismissal Of Postal Employee's Damages And Equitable Claims Arising Out Of A Positive Drug Test

The plaintiff initially failed the drug test for employment then used by the Postal Service, testing positive for marijuana. After successfully retaking the test, plaintiff became employed by the Postal Service but was soon dismissed for work-related reasons. Thereafter, plaintiff brought suit under the Federal Tort Claims Act, under the Rehabilitation Act, and against the Postmaster General individually under a Bivens theory, seeking damages for the allegedly unconstitutional initial denial of employment due to the first positive drug test. Plaintiff also sought extensive equitable and declaratory relief against the Postal Service's 1985 applicant drug-testing program.

The district court dismissed his FTCA claims for failure to exhaust administrative remedies, 28 U.S.C. 2675(a), and held that plaintiff had failed to state a claim under Bivens and the Rehabilitation Act. The district court did not address plaintiff's equitable claims. In a "not for publication" opinion, the court of appeals affirmed dismissal on each of the grounds identified by the district court. In addition, the court of appeals held that plaintiff's equitable claims were moot because the Postal Service had discontinued its 1985 drug testing program in 1986, substituting a different program in 1989.

Shaughnessy v. United States Postal Service, No. 90-3565
(Feb. 15, 1991). DJ # 35-64-95.

Attorneys: Robert V. Zener - (202) 514-1597 or (FTS) 368-1597
Mark W. Pennak - (202) 514 5714 or (FTS) 368-5714

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Sixth Circuit Upholds Dismissal of Bivens Action Against Prison Officials Who Allegedly Failed To Assist An Inmate to Obtain An Abortion

Plaintiff alleged that numerous prison officials violated her Fifth, Eighth, and Ninth Amendment rights by refusing to help her obtain an abortion while she was in custody after having been convicted in federal court for armed robbery. The District Court dismissed the actions, and the Court of Appeals has now affirmed.

The Court of Appeals (Milburn, Boggs, & Engel) held that the officials, who were sued in their private capacity, were entitled to qualified immunity because their actions did not violate any rights that were "clearly established" at the relevant time. The Court noted that at the time the alleged events took place, there were no reported decisions concerning prisoners' abortion rights. The Court of Appeals also held that plaintiff had not stated a valid claim under any of her constitutional theories because the officials' actions did not constitute deliberate indifference to her rights or the intentional desire to violate her rights, and because the Ninth Amendment does not confer substantive rights.

Gibson v. Matthews, No. 89-5284 (Feb. 22, 1991). DJ # 157-30-429.

Attorneys: Barbara L. Herwig - (202) 514-5425 or (FTS) 368-5425
Lowell V. Sturgill Jr. - (202) 514-3427 or (FTS) 368-3427

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Eighth Circuit Adopts A Liberal Successor In Interest Test For Veteran Reemployment Cases

While Brian Leib was serving in the United States Air Force, his former place of employment, a St. Regis paper plant, was bought by another company, Georgia-Pacific. After his honorable discharge, Leib sought to be restored to his former job under the Veteran's Reemployment Act, but Georgia-Pacific claimed that he had no right to the job under the Act. Leib sued, represented by the United States Attorney, but the district court granted Georgia-Pacific's motion for summary judgment. The court followed the Sixth and Tenth Circuits' interpretation of the term "successor in interest" -- holding that it only applies to situations where there is continuity of ownership or control -- and ruled that since Georgia-Pacific was an entirely new owner it had no duty to hire the returning veteran.

The Eighth Circuit has reversed and remanded the case. The court of appeals accepted our argument that the strict successorship test applied by the district court was contrary to the purposes of the Act. The court adopted a liberal successorship test that examines the continuity of the business in general (e.g., whether the company uses the same employees at the same location, etc.). The court further rejected Georgia-Pacific's argument that a veteran's right to reemployment with a successor does not "vest" unless he complied with all of the statutory requirements (returning after an honorable discharge and making a timely application) before the sale. The Eighth Circuit is the first court of appeals to adopt this very favorable interpretation of the Act's successorship provision.

Brian Leib v. Georgia-Pacific Corp., No. 89-2923 (8th Cir. Feb. 5, 1991).
D.J. #151-27-189.

Attorneys: Freddi Lipstein - (202) 514-4815 or (FTS) 368-4815
Robert M. Loeb - (202) 514-4027 or (FTS) 368-4027

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Ninth Circuit Holds That The Whistleblower Protection Act Of 1989, Which Amends The Civil Service Reform Act (CSRA), Precludes Plaintiffs From Bringing Claim Of Adverse Employment Action Under The Federal Tort Claims Act And The Constitution

Plaintiff Mary Rivera claimed that her supervisor harassed her with verbal abuse and through adverse personnel actions after she notified their superior that the supervisor was often late for work and absent without notice. Plaintiff and her husband brought suit under the Federal Tort Claims Act (FTCA) and the First and Fifth Amendments to the Constitution for emotional distress and loss of consortium caused by the reprisals. She argued that the Whistleblower Protection Act of 1989 retroactively authorized suit under the FTCA and Constitution for actions that transpired prior to the passage of the Act and made additional remedies available to plaintiffs outside the CSRA.

We argued that the Whistleblower Protection Act did not apply retroactively, but even if it did, it did not authorize government employees to bring FTCA and constitutional claims based on conduct for which redress is available under the CSRA. The court of appeals held that the CSRA provides the exclusive remedy for claims of retaliation. The court found that, as an initial matter, the CSRA is a comprehensive remedial scheme providing the exclusive redress for adverse federal employment actions and thus precludes claims brought under the FTCA and the Constitution. Without addressing the retroactivity of the Whistleblower Protection Act, the court concluded that 5 U.S.C. §1222 of that Act increases protections for whistleblowers within the context of the CSRA. It does not, the court found, authorize government employees to bring FTCA claims arising out of conduct addressed by the CSRA. Therefore, plaintiffs must look to the procedures of the CSRA, as amended by the Whistleblower Protection Act, for their remedies.

Rivera v. United States, No. 90-35218 (9th Cir. Jan. 31, 1991).
DJ # 157-81-505.

Attorneys: William Kanter - (202) 514-4575 or (FTS) 368-4575
Lori M. Beranek - (202) 514-3688 or (FTS) 368-3688

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Ninth Circuit Grants Qualified Immunity To Commissary Officer Accused Of Violating First Amendment Even Though Plaintiff Was Not A Direct Government Employee

At military commissaries, the baggers (who put groceries into bags and carry them to customers' cars) are not direct employees of the commissary and are not paid by the commissary. Rather, they work for tips, under supervision of an elected head bagger, under the terms of a standard licensing agreement. The agreement allows the commissary officer to revoke the license at any time.

Plaintiff was a bagger at the Bremerton Naval Shipyard commissary. After voicing vocal objections to proposed new policies requiring baggers to wear uniforms and scheduling larger numbers of baggers, she tried to organize a new election for head bagger, circulating a petition at the commissary. Defendant, who was the commissary officer at the time, then revoked her license, calling the petition the last straw. Plaintiff sued, alleging that defendant violated her First Amendment rights. The district court refused to dismiss the action on qualified immunity grounds, and we then took an immediate appeal.

The Ninth Circuit has now reversed. Plaintiff argued that because she was a licensee rather than a direct employee, defendant could not rely on Pickering v. Board of Education, 391 U.S. 563 (1968) and Connick v. Myers, 461 U.S. 138 (1983), which allow an employee to make a First Amendment claim only if speaking out on matters of public concern. But the Ninth Circuit decided to extend Pickering and Connick to this situation because the underlying concerns over control of the workplace apply equally for baggers as for direct employees. It then found no public interest in her activities, since they concerned only internal matters relating to the workplace and she made no effort to bring her objection to the attention of the public. The court based its analysis almost entirely on direct application of First Amendment law, and only in a short final comment did it rely on the need for the violation to have been clear to survive immunity. The decision thus will be of use not only in personal liability cases, but also in cases brought directly against agencies.

Havekost v. Banzon, No. 90-35229 (Feb. 1, 1991). D.J. # 145-6-3058.

Attorneys: Barbara Herwig - (202) 514-5425 or (FTS) 368-5425
Frank A. Rosenfeld - (202) 514-2498 or (FTS) 368-2498

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Ninth Circuit Holds That A Servicemember's Family May Not Sue The Military For Failing To Warn Them That The Servicemember Might Commit Suicide, But May Sue The Military For Failing To Provide Them With Counseling

Plaintiffs are the wife and son of a servicemember who committed suicide several months after having reported to a Navy medical center with slashed wrists. The family sued the Navy, alleging that it (1) failed to provide the servicemember with appropriate medical care, (2) failed to warn the family that he might harm himself, and (3) failed to provide the family with appropriate counseling. The district court dismissed each of these claims on Feres grounds, and the Ninth Circuit has now affirmed in part and reversed in part.

The Ninth Circuit held that the first claim is directly barred by Feres and that the second claim is barred by Feres because it is derivative of the servicemember's claim. The Ninth Circuit reversed with respect to the third claim, however, concluding that counseling claims by family members are too attenuated from the servicemember's own relationship with the military to be barred by Feres. The ruling concerning the duty to warn claim represents an important victory for the military, which could have been faced with having to warn a servicemember's family every time it does something that might lead to a servicemember's injury.

Persons v. United States, (9th Cir. Jan. 30, 1991). DJ # 157-12-2882.

Attorneys: Robert S. Greenspan - (202) 514-5428 or (FTS) 368-5428
Lowell V. Sturgill Jr. - (202) 514-3427 or (FTS) 368-3427

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Tenth Circuit Slashes Damages Sharply In "Leap Of Faith" Case

In the spring of 1983, Rodney Heitzenrater, an unemployed ex-soldier, became obsessed with religious fervor. Leaving his much-abused wife and children in New York, he drove to Colorado where he was hospitalized for psychiatric reasons. He was transferred to the local VA hospital and there had a vision of the Second Coming of Christ. Breaking through the window to join "the Rapture," he fell seven stories and is now a quadriplegic. In his FTCA action for damages directed against the VA Hospital, the government admitted liability but contested damages. The district court awarded over $5 1/2 million to him and over $1 million to his wife.

The Tenth Circuit has now either reduced or reversed and remanded four of the five awards challenged by us on appeal. The court reduced the $2 million award for pain and suffering to $1 million. In doing so, it recognized (as we had conceded) that the Colorado damages limitation statute was adopted after the action was filed in this case. Nonetheless, the court held that the subsequent statute was important as a "strong policy statement." The court reduced the wife's $750,000 loss of consortium award to $100,000, holding that the higher award was inconsistent with Mr. Heitzenrater's "history of abuse and infidelity." Other awards for future care and spousal nursing were remanded to the district court with instructions that they be reduced.

Heitzenrater v. United States, No. 88-2770 (Feb. 22, 1991). DJ # 157-13-798.

Attorneys: Robert S. Greenspan - (202) 514-5428 or (FTS) 368-5428
William G. Cole - (202) 514-5090 or (FTS) 368-5090

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ADMINISTRATIVE ISSUES

Use Of Sick Leave For Adoption Purposes

On October 5, 1989, Attorney General Dick Thornburgh issued a memorandum to all employees advising that President Bush had endorsed adoption as an alternative solution to some of the nation's most pressing family issues. (See, United States Attorneys' Bulletin, Vol. 37, No. 11, November 15, 1989, at p. 353.) In response to this action, numerous federal employees have either begun the adoption process or have successfully adopted a child. While there are several agencies throughout the country which provide prospective parents with information on the adoption process, until now there have been no positive steps from the federal sector to assist in the complicated adoption process.

Public Law 101-509 was passed on November 5, 1990, which allows prospective parents to use sick leave in connection with the adoption process. Although this benefit is being tested for feasibility for the duration of FY 1991, it does provide some relief in the adoption process. Employees who have used annual leave or leave without pay (LWOP) since that time for adoption-related purposes may request that sick leave be substituted for the annual leave or LWOP previously used. Information on how to request sick leave and the granting of sick leave for adoption purposes has been forwarded to each United States Attorney's office for distribution to all employees within the District offices. If you have any questions, please consult your District's Administrative Officer/Personnel Officer.

* * * * *

Thrift Savings Plan Investment Limits

One thing to consider during tax season is the limit on the amount that you can contribute from your pay into the Thrift Savings Plan (TSP). Last year the Internal Revenue Service (IRS) set the limit at $7,979.00; this year they have raised it to $8,475.00. IRS adjusts this limit each year to take into account increases in the cost of living. The higher investment limit most benefits employees covered by the Federal Employees Retirement System (FERS). The Cost of Living Allowance (COLA) for nearly 8,000 executives pushed the Senior Executive Service pay range to a minimum of $87,000.00 and a maximum of $108,300.00.

The recent pay raises for certain Assistant United States Attorneys allows them to take advantage of this opportunity to invest more this year in stock, bond or treasury options of the TSP. Employees in FERS will be able to contribute the maximum allowable and get the maximum match. Even those under the CSRS system will be able to invest more this year because of the January COLA. [Note: Legislation has not changed in regard to the percentage amount CSRS employees may contribute. It continues to be no more than five percent of the participant's annual salary.]

FERS employees, with a base salary of $84,750.00 or more, should keep the contribution limit in mind when setting their payroll deduction contributions to TSP. They could lose some of their agency matching contributions if they reach the annual maximum before the end of 1991. This is because they receive the matching contributions only on the first five percent of base pay contributed each pay period. Those who reach the annual limit before the end of the year will have their contibutions, plus the agency match, stopped.

Individuals who anticipate reaching the $8,475.00 contribution limit before the end of the year may consider during the next open season (May 15 - July 31, 1991) changing their contributions from a percentage to a specific dollar amount. This would allow TSP participants to calculate contributions to the end of the year and still receive the full benefit of the government match.

For more information, please refer to your "Summary of the Thrift Savings Plan for Federal Employees, September, 1990, at p. 32.

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CAREER OPPORTUNITIES

Office Of The Inspector General

The Office of Attorney Personnel Management, Department of Justice, is recruiting an attorney for the staff of the General Counsel in the Office of the Inspector General. Responsibilities will include providing legal advice regarding the conduct and results of audits, inspections and investigations as they relate to potential criminal prosecutions, civil suits and administrative actions; handling matters arising under the Freedom of Information Act, Privacy Act and Ethics in Government Act; and preparing legal memoranda and pleadings responsive to issues that arise in the Office of the Inspector General.

To meet minimum eligibility requirements, applicants must have had a J.D. degree for at least one year and be an active member of the bar in good standing. Outstanding academic credentials and excellent writing skills are essential; experience in the areas of white collar crime enforcement, civil and administrative litigation, or the functions of an Inspector General are desirable.

Applicants should submit a resume or SF-171 (Application for Federal Employment) to: U.S. Department of Justice, Office of the Inspector General, Office of the General Counsel, Room 4706, 10th and Constitution Avenue, N.W., Washington, D.C. 20530, Attn: Howard Sribnick. Current salary and years of experience will determine the appropriate grade and salary levels. The possible range is GS-11 ($31,116 - $40,449) to GS-14 ($52,406 - $68,129). The position has potential for promotion to GM-15. The position is open until filled. More than one applicant may be hired from this announcement.

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Office of United States Trustee, Newark

The Office of Attorney Personnel Management, Department of Justice, is recruiting an attorney to manage the legal activities of the Office of United States Trustee in Newark, New Jersey. Responsibilities include assisting with the administration of cases filed under Chapters 7, 11, 12, or 13 of the Bankruptcy Code; drafting motions, pleadings, and briefs; and litigating cases in the Bankruptcy Court and the United States District Court. Outstanding academic credentials are essential and familiarity with bankruptcy law and the principles of accounting is helpful.

In order to meet minimum requirements, applicants must have had a J.D. degree for at least one year and be an active member of the bar in good standing (any jurisdiction). Applicants should submit a resume and law school transcript to: Department of Justice, Office of the U.S. Trustee, 200 Chestnut St., Room 607, Philadelphia, Pennsylvania 19106. Current salary and years of experience will determine the appropriate grade and salary level. The possible range is GS-11 ($31,116 - $40,449) to GS-14 ($52,406 -$68,129). The position is open until filled.

* * * * *

Office of United States Trustee, Wichita

The Office of Attorney Personnel Management, Department of Justice, is recruiting an experienced attorney for the Office of United States Trustee in Wichita, Kansas. Responsibilities include assisting with the administration of cases filed under Chapters 7, 11, 12, or 13 of the Bankruptcy Code; drafting motions, pleadings, and briefs; and litigating cases in the Bankruptcy Court and the United States District Court. Outstanding academic credentials are essential and familiarity with bankruptcy law and the principles of accounting is helpful.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least one year post-J.D. experience. Applicants should submit a resume and law school transcript to: Department of Justice, Office of the U.S. Trustee, 402 North Market Street, Room 180, Wichita, Kansas 67202, Attn. John R. Stonitsch. Current salary and years of experience will determine the appropriate grade and salary level. The possible range is GS-12 ($37,294 - $48,481). No telephone calls, please.

* * * * *

Federal Bureau of Prisons

The Office of Attorney Personnel Management, Department of Justice, is recruiting an attorney for the Human Resources Management Division of the Federal Bureau of Prisons, as Assistant to the Chief of the Labor-Management Relations Section. Responsibilities include monitoring the advisory and case work services of all staff for consistency and quality control, providing guidance and advice for the professional development of all staff, acting as first-line supervisor of support staff, and providing input for the performance appraisal of professional staff. Other responsibilities will include providing legal advice and assistance to central office and field managers with regard to disciplinary and adverse personnel actions and other matters covered by the Federal Service Labor-Management Relations Statute (Chapter 71 of Title 5, U.S. Code), and occasionally acting as principal attorney in preparing and presenting the government's case before Administrative Judges of the Merit Systems Protection Board, Administrative Law Judges of the EEOC and Federal Labor Relations Authority, and independent arbitrators appointed by the Federal Mediation and Concilation Service. Other significant duties include acting as primary legal advisor in the negotiation and administration of a nationwide collective bargaining agreement and with ongoing labor relations with the union, developing training programs, and serving as an instructor on labor relations matters in management training programs.

Frequent travel to field stations (up to 50% of time) will be required. Applicants must have a strong federal and/or private sector labor relations background. Applicants must possess a J.D. degree, be an active member of the bar in good standing, and must have a least four years of post-J.D. experience. Applicants should submit a resume and writing sample to: Bureau of Prisons, 320 First Street, N.W., Suite 301-NALC, Washington, D.C., 20534, Attn: Jan Schmidt. Telephone: (202) 724-8263.

Current salary and years of experience will determine the appropriate grade and salary level. The possible range is GM-13 ($44,348 - $57,650) to GM-14 ($52,406 - $68,129). The position is open until filled.

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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%	04-06-90	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%	07-27-90	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%	02-13-91	6.21%
12-14-89	7.66%	03-08-91	6.46%

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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EXHIBIT
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THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release March 11, 1991

COMBATTING VIOLENT CRIME

FACT SHEET

The President today transmitted to Congress comprehensive legislation to combat violent crime. The provisions, when enacted, will enhance the ability of Federal, State and local law enforcement officials to ensure the safety of American communities, neighborhoods and citizens.

The Comprehensive Violent Crime Control Act of 1991 builds on many of the provisions from the President's violent crime control proposals of 1989 that, although passed by one or both Houses, were not enacted. It also contains new and complementary provisions dealing with terrorism, obstruction of justice, violence against women, victims' rights, and gangs and juvenile offenders.

Fundamental Principles

Four principles guided the development of the Comprehensive Violent Crime Control Act of 1991:

- A primary purpose of government is to protect citizens and their property. Americans deserve to live in a society in which they are safe and feel secure.
- Those who commit violent criminal offenses should, and must, be held accountable for their actions.
- Our criminal justice system should seek the swift and certain apprehension, prosecution, and incarceration of those who break the law.
- Success in accomplishing our criminal justice system goals requires a sustained, cooperative effort by a coalition of Federal, State and local law enforcement officials.

The legislation transmitted to Congress today is consistant with and fosters these principles.

COMPREHENSIVE VIOLENT CRIME CONTROL ACT OF 1991

I. The Death Penalty and Equal Justice

For the most heinous Federal crimes, the Nation needs a workable and enforceable death penalty. Although various Federal laws provide the death penalty for crimes of homicide, treason and espionage, most of these laws are unenforceable. They are ineffective because they fail to meet the constitutionally required standards and procedures enunciated by the Supreme Court.

This legislation addresses those deficiencies for existing capital offenses and authorizes imposing the death penalty for several additional aggravated federal crimes. The legislation also provides effective safeguards against racial discrimination and racial bias in the administration of capital punishment and other penalties.

A. Offenses for which the Death Penalty is Authorized After Consideration of Aggravating and Mitigating Factors.

Existing Federal crimes for which the death penalty may be imposed after enactment of proper procedures include: espionage, treason and, where death results, the destruction of aircraft and aircraft facilities, mailing dangerous articles, wrecking trains, bank robbery, aircraft piracy, and violence against Members of Congress and cabinet officers.

In addition to these existing crimes, this legislation authorizes the death penalty for certain existing but currently non-capital Federal crimes: the murder of certain foreign officials, kidnapping where a death results, murder for hire, murder in aid of racketeering, murder during a hostage taking, terrorist murders of American nationals abroad, the attempted assassination of the President, and murder in furtherance of genocide.

Drug crime offenders potentially eligible for the death penalty include:

- Leaders of the largest drug trafficking enterprises who are currently subject to a mandatory term of life imprisonment;

- "Drug Kingpins" who attempt to obstruct investigations or prosecutions by attempting to kill persons in the criminal justice system; and

- Those offenders who, while acting with the requisite intent required for capital murder, engage in a Federal drug felony and a person dies in the course of the offense or from the use of drugs involved in the offense.

The legislation also authorizes the death penalty for a number of other crimes including murder by a federal prison inmate serving a life sentence, murders in violation of Federal civil rights statutes, and certain obstruction of justice and new terrorism offenses where death results.

B. Factors That May be Considered in Determining Whether the Death Penalty is Justified.

In determining whether the death penalty should be imposed, the legislation requires considering aggravating factors some of which are specifically tailored to the crime in question. Other, more general, aggravating factors include: knowingly creating a grave risk of death to one or more persons in addition to the victim of the offense; committing the offense in an especially heinous, cruel or depraved manner involving torture or serious physical abuse to the victim; or committing the offense after substantial planning and premeditation.

The legislation also requires the consideration of several mitigating factors if the death penalty is sought.

C. Procedures to be Implemented in Imposing a Sentence of Death.

The bill requires holding a special hearing to determine whether a sentence of death is justified. If the prosecution believes that a sentence of death is justified, the prosecutor must provide defendant's counsel with notice of the aggravating factors the prosecution proposes to prove at the hearing. After the hearing, the jury makes a binding recommendation as to whether the sentence of death is justified.

The bill also includes improved procedures for Federal death penalty litigation modeled on the recommendations of the Ad Hoc Committee of the Judicial Conference on Federal

Habeas Corpus in Capital Cases. These procedures include the appointment of counsel meeting specified standards of competency.

D. Equal Justice

The Equal Justice provisions include:

- Requiring administration of the death penalty and other penalties without regard to the race of the defendant or victim, and prohibiting racial quotas and other statistical tests for imposing the death panalty or other penalties;

- Guarding against racial prejudice or bias at trial by providing for the examination of potential jurors for racial bias, a change venue to avoid racial bias, and prohibiting appeals to racial bias in statements before the jury; and

- Requiring, in Federal cases, jury instructions and certifications guarding against consideration of race in capital sentencing decisions, and making the capital sentencing option consistently available for racially motivated murders in violation of the Federal civil rights laws.

II. Habeas Corpus Reform

Each year over 10,000 habeas corpus petitions are filed in the Federal courts. Many of these petitions are repetitive, raise no new issue from previous habeas corpus petitions, and are only intended for delay.

The President proposed:

- Establishing a general one-year time limitation on Federal habeas corpus applications by State prisoners;

- Requiring deference in Federal habeas corpus proceedings to the results of full and fair State court adjudications; and

- Authorizing special habeas corpus procedures to respond to problems of delay and abuse while ensuring increased fairness to defendants through broadened appointment of counsel.

III. Exclusionary Rule Reform

The President again proposed a general "good faith" exception to the exclusionary rule. This exception would permit the admission of evidence if the officers carrying out a search or seizure acted with an objectively reasonable belief that their conduct met Fourth Amendment requirements. The legislation would also clarify that, absent statutory authority, Federal courts may only exclude evidence on the basis of constitutional violations.

In addition, this legislation creates a limited exception to the exclusionary rule that would bar the suppression of firearms seized by federal officers where the firearms are to be used in a federal prosecution for a crime of violence or serious drug offense, or a federal prosecution of an offender who is disqualified from firearms possession because of a prior felony conviction or on other grounds. This exception is contingent on the establishment of alternative safeguards and sanctions to ensure compliance with the Fourth Amendment prohibition against unreasonable searches and seizures by Federal law enforcement officials. Standards and procedures would also be required for settling claims for damages for Fourth Amendment violations under the Federal Tort Claims Act.

IV. Enhanced Penalties for Firearms Violations

Violent offenders must be held fully accountable for their actions. The amendments to Federal law the President proposed addressing the criminal use of firearms include:

- Doubling the mandatory penalty from five to ten years for using a semi-automatic firearm while committing a violent crime or drug felony;

- Providing a mandatory five-year prison term for possession of firearms by felons who are disqualified from firearms possession and who have a previous conviction for a violent felony or serious drug offense;

- Allowing pre-trial preventive detention of defendants in cases involving certain serious Federal firearms and explosive offenses;

- Authorizing criminal penalties and mandatory minimum sentences for theft of a firearm; and

- Doubling the current penalty for a knowing and materially false statement in connection with acquiring a firearm from a licensed dealer.

The legislation also generally prohibits the importation, manufacture, transfer, or sale of gun magazines that allow firing over 15 rounds without reloading.

V. Gangs and Juvenile Offenders

To address the increasing problem of violent activities by juveniles and gangs, the President proposed:

- Broadening the authorization for reporting, retaining, and disclosing juvenile records for criminal justice purposes;

- Increasing options for prosecuting serious juvenile offenders and gang leaders as adults;

- Broadening the scope of the Armed Career Criminal Act to include as predicate offenses acts of juvenile delinquency that, if committed by an adult, would meet the Act's definition of a "serious drug offense";

- Increasing the penalty for Travel Act crimes involving violence; and

- Increasing the penalty for conspiracy to commit murder for hire.

VI. Terrorism

To combat terrorism more effectively, the President's violent crime legislation includes:

- An enforceable federal death penalty for the crimes most likely to be committed by terrorists in cases where death results, such as fatal bombings, hijackings, hostage takings and assassinations;

- Aviation terrorism provisions implementing an international treaty prohibiting and punishing acts of violence at international airports such as the 1985 attacks on the Rome and Vienna airports;

- Maritime terrorism provisions implementing an international treaty prohibiting and punishing hijackings, dangerous acts of violence, and threats in relation to ships and maritime platforms which was prompted by the Achille Lauro hijacking;

- Effective procedures, including provisions to deal with classified information, for removing aliens involved in terrorist activities from the United States;

- New offenses and provide increased penalties targeted on terrorism, including implementation of the international convention against torture, a new offense prohibiting and punishing the use of weapons of mass destruction against American citizens or United States property anywhere in the world, a new offense prohibiting and punishing killings and attempted killings in firearms attacks on federal facilities, a new offense for providing material support to terrorists, adding terrorist offenses to the RICO statute, authorizing forfeiture of the instrumentalities and proceeds of terrorist activities, increasing penalties for offenses involving falsification of international travel and identification documents, and directing the United States Sentencing Commission to increase penalties for offenses that involve or promote international terrorism; and

- Provisions to strengthen antiterrorism enforcement activities, including authorizing admission to the United States of a limited number of aliens who assist in antiterrorism investigations, broadening access to telephone and credit records in counterintelligence investigations, strengthening the provisions for court-ordered electronic surveillance and other interceptions of communications to facilitate their use in investigations of terrorist activities, and increasing the time available for investigation of terrorist acts committed outside the United States by extending the statutes of limitations.

VII. Sexual Violence and Child Abuse

To address sexual violence and child abuse the President's proposal:

- Broadens the admissibility of evidence of the defendant's commission of similar crimes in sexual assault and child molestation cases;
- Provides enhanced penalties for the distribution of controlled substances to pregnant women;
- Broadens the definition of "sexual act" for Federal sexual abuse offenses committed against victims below the age of 16;
- Enhances penalties for recidivist sex offenders;
- Requires HIV testing in Federal cases involving a risk of HIV transmission;
- Provides enhanced penalties for federal sex offenders who risk HIV infection of their victims; and
- Provides that victims of violent crimes and sex crimes may address the court concerning the defendant's sentence.

VIII. Drug Testing in the Criminal Justice System

To decrease drug use and increase the accountability of the Federal and state criminal justice systems the President proposed:

- Requiring drug testing of Federal offenders on post-conviction release. Federal offenders would be required to refrain form drug use as a mandatory condition of post-conviction release; and
- Requiring a drug testing program for state criminal justice systems as a condition for receipt of Federal drug grants.

THE COMPREHENSIVE VIOLENT CRIME CONTROL ACT OF 1991

A Summary

- **Death Penalty (Title I):** Establishes constitutionally sound procedures and adequate standards for imposing federal death penalties that are already on the books (including mail bombing and murder of federal officials); and authorizes the death penalty for drug kingpins and for certain heinous acts such as terrorist murders of American nationals abroad, killing of hostages, and murder for hire.

  (Almost Identical to the 1989 Violent Crime Initiative)

- **Equal Justice Act (Title X):** Strengthens assurances of equal justice regardless of race, particularly with regard to the imposition of capital punishment; Includes, e.g., prohibition of racial quotas and other statistical tests for imposing the death penalty or other penalties, safeguards against racial discrimination through examination on voir dire and change of venue, requirement, in federal cases, of jury instructions and certifications guarding against considerations of race in capital sentencing decisions, and makes the capital sentencing option consistently available for racially motivated murders in violation of the federal civil rights laws.

- **Habeas Corpus (Title II):** Proposes reforms to curb the abuse of habeas corpus by federal and State prisoners by establishing a one-year time limitation, requiring deference to full and fair State court adjudications, appointment of counsel in state capital cases, and restricting repetitive habeas petitions.

  (Combines the best of various proposals from last Congress.)

- **Exclusionary Rule (Title III):** Establishes a "good faith" exception to the exclusionary rule; clarifies that federal law does not require the exclusion of evidence obtained in "good faith" circumstances; and renders the exclusionary rule inapplicable to seizures by federal officers of firearms which are to be used as evidence against dangerous offenders. Alternative safeguards against Fourth Amendment violations are provided involving administrative and legislative oversight and compensation of victims of unlawful searches and seizures.

- **Firearms (Title IV):** Contains various provisions to strengthen federal firearms laws, e.g., ten-year mandatory prison term for using a semiautomatic firearm in a drug trafficking offense or violent felony, five-year mandatory sentence for anyone who possesses a firearm after a

conviction for a violent crime or serious drug offense, new offenses of theft of firearms or smuggling firearms in furtherance of drug trafficking or violent crimes, and increased penalties for a materially false statement in connection with a firearm purchase; Also contains general ban on gun clips and magazines that enable a firearm to fire more than fifteen rounds without reloading.

- **Obstruction of Justice (Title V):** Provides increased penalties for serious acts of violence against witnesses, jurors, and court officers in federal proceedings; and explicitly extends federal protection to state and local law enforcement officers assisting federal officers.

- **Gangs and Juvenile Offenders (Title VI):** Broadens availability of records of serious juvenile offenses; broadens adult prosecution of gang leaders and other serious juvenile offenders; and increases penalties for certain violent crimes frequently associated with gang activities.

- **Terrorism (Title VII):** Creates new criminal offenses to implement a Protocol directed against acts of terrorist violence at airports; creates new criminal offenses to implement the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and a Protocol directed against terrorist acts against maritime platforms, and contains other provisions strengthening protections against maritime terrorism and violence; provides effective procedures for removing aliens involved in terrorist activities from the United States; and authorizes sharing of electronically intercepted communications with foreign law enforcement agencies.

- **Sexual Violence and Child Abuse (Title VIII):** Provides general rule of admissibility for evidence of commission of other similar crimes by a federal defendant in sexual assault and child molestation cases; and increases penalties for drug distribution to pregnant women, for many sex offenses against victims below the age of sixteen, and for recidivist sex offenders.

- **Drug Testing (Title IX):** Generally requires drug testing for federal offenders released on probation, parole, or post-imprisonment supervised release; and requires drug testing programs in State criminal justice systems as condition of federal justice assistance funding.

AN EXCEPTION TO THE EXCLUSIONARY RULE FOR FIREARMS

Talking Points

Summary of the Proposal:

- Title III of the President's "Comprehensive Violent Crime Control Act of 1991" includes an exception to the exclusionary rule for firearms seized by federal law enforcement officers in either prosecutions for crimes of violence or serious drug trafficking offenses or cases in which the defendant is disqualified from possessing a firearm under 18 U.S.C. 922(g). (This section prohibits the possession of a firearm by dangerous individuals, including, among others, those who have been previously convicted of a felony.)

- It also establishes an alternative system of safeguards against Fourth Amendment violations through administrative sanctions, legislative oversight and compensation of victims of unlawful searches and seizures.

Justifications for the Proposal:

- The exceptional danger posed to the public by violent offenders, serious drug offenders, and other dangerous persons who use or possess firearms establishes a compelling public interest to bring such offenders to justice.

- The public does not want dangerous felons to go free simply because police officers blunder; an alternative system of sanctions for such blunders is far more preferable.

- The exclusionary rule does not deter police misconduct. The National Institute of Justice has reported that of the seven studies on this subject, six reach this conclusion. The seventh study reaches no conclusion.

- This approach to exclusionary rule reform is constitutionally permissible and fully consistent with what has been suggested by the decisions of the Supreme Court.

- The Court has stated that the need for the exclusionary rule is dependent on "the absence of a more efficacious sanction." Franks v. Delaware, 438 U.S. 154 (1978).

- In a case involving the application of the exclusionary rule to deportation proceedings, the Court observed, "[t]here comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches." INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).

U.S. Department of Justice

Office of the Deputy Attorney Genera

EXHIBIT B

The Deputy Attorney General

Washington, D.C. 20530

February 26, 1991

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, U.S. Marshals Service
Chief Postal Inspector, Postal Inspection Service
Commissioner, Internal Revenue Service
Director, Bureau of Alcohol, Tobacco and Firearms

FROM: William P. Barr WPB
Deputy Attorney General

SUBJECT: Increased Administrative Forfeiture Caps

Since 1984 virtually all forfeitures of properties valued over $100,000 have been conducted judicially. 1/ On August 20, 1990, the President signed Public Law 101-382 which authorizes the administrative forfeiture of cash and monetary instruments without regard to value and other property up to a value of $500,000.

The legislative history of this new law makes clear that Congress: (1) sought to increase the speed and efficiency of uncontested forfeiture actions, and (2) has confidence in the notice and other safeguards built into administrative forfeiture laws. Accordingly, the Attorney General has promulgated revised asset forfeiture regulations to implement the higher statutory ceilings for administrative forfeitures.

To ensure that United States Attorneys can continue to be effective in their role as Chairmen of the Law Enforcement Coordinating Committees in our various judicial districts, one

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1/ Conveyances used to transport controlled substances have been administratively forfeitable without regard to value.

change is being made in the processing of equitable sharing payments in administrative cases, as follows:

If sharing is requested in an administrative forfeiture case involving property valued in excess of $100,000, the seizing agency shall, prior to final agency action, provide the appropriate United States Attorney's Office (USAO) with a copy of the completed DAG-71 and the DAG-72 reflecting the agency's proposed sharing transfer. The USAO shall review the proposed sharing decision and complete the recommendation section providing the seizing agency with a sharing recommendation. If no USAO recommendation is received within ten days, concurrence with the agency's proposed action will be assumed.

Let me take this opportunity to re-iterate several existing policies relating to administrative forfeitures:

1. Prior Judicial Approval of Seizures. In all cases involving real property and wherever practicable in cases involving personal property (including cash and monetary instruments), seizing agents shall, in consultation with the appropriate United States Attorney's Office (USAO), secure a federal seizure warrant or a federal warrant of arrest in rem.

2. Forfeiture of Real Property. All forfeitures of real property or interests therein shall be conducted judicially.

3. Aggregation of Seizures. Where several items of property are subject to forfeiture (a) under the same statutory authority, (b) on the same factual basis, (c) have a common owner, and (d) have a combined appraised value of over $500,000 or include an item of real property, all such items shall be aggregated and forfeited judicially. This rule shall not apply if the seizures occur over a period of weeks with the result that aggregation would substantially delay the forfeiture.

I am confident that the increased administrative forfeiture authority will be exercised with utmost care and prudence. We will be monitoring implementation closely. Any questions regarding this memorandum or other forfeiture issues should be directed to the Executive Office for Asset Forfeiture, Office of the Deputy Attorney General.

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 274

Drug Enforcement Administration

21 CFR Part 1316

Office of the Attorney General

28 CFR Part 8

[Order No. 1476-91]

Seizure and Forfeiture of Conveyances; Seizure, Forfeiture, and Disposition of Property; and FBI Forfeiture Authority for Certain Statutes; Conforming Amendments

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: The Attorney General is amending certain regulations regarding jurisdictional limits for administrative civil forfeiture in order to achieve conformity with recent changes to title 19, U.S.C., section 1607, included in Public Law 101-382, enacted August 20, 1990. The regulations are also being amended to reflect the redesignation of the Drug Enforcement Administration (DEA) Asset Forfeiture Unit as the DEA Asset Forfeiture Section and to conform the Immigration and Naturalization Service (INS) procedure for the handling of cost bonds to the procedures of the DEA and the Federal Bureau of Investigation (FBI). It is anticipated that this rule will result in more efficient handling of civil forfeiture cases to the extent that more cases will be eligible to be handled administratively.

EFFECTIVE DATE: March 1, 1991.

FOR FURTHER INFORMATION CONTACT: David Yost, Office of Enforcement, Immigration and Naturalization Service, Department of Justice, Washington, DC 20536; telephone (202) 514-2554; William J. Snider, Forfeiture Counsel, Drug Enforcement Administration, Department of Justice, Washington, DC 20537; telephone (202) 307-8555; William R. Schroeder, Unit Chief, Legal Forfeiture, Legal Counsel Division, Federal Bureau of Investigation, Department of Justice, Washington, DC 20535; telephone (202) 393-6858.

SUPPLEMENTARY INFORMATION: The provisions of 8 CFR part 274, 21 CFR part 1316 and 28 CFR part 8 refer to the jurisdictional limits for administrative civil forfeitures contained in section 1607 of title 19, U.S.C. Forfeiture procedures under the customs laws, including section 1607, are incorporated by reference in forfeiture statutes enforced and administered by the Department of Justice. On August 20, 1990, Public Law 101-382 was enacted. This law amended title 19, U.S.C., section 1607 by increasing the jurisdictional limit for administrative forfeiture to $500,000, and adding monetary instruments to conveyances used to import, export, or otherwise transport or store controlled substances, as another category of administratively forfeitable property for which there is a value limitation. This final rule amends the applicable regulations governing Department of Justice procedures for civil forfeiture to achieve conformity with Public Law 101-382, to reflect the DEA's redesignation of its asset forfeiture unit as the DEA Asset Forfeiture Section, and to conform the INS procedure relating to cost bonds to the procedures used by the DEA and FBI, which direct such bonds to be forwarded to the appropriate United States Attorney for disposition in connection with judicial forfeiture proceedings.

This rule is not a major rule for the purposes of Executive Order 12291. Also, it is hereby certified that this matter will have no impact upon small entities within the meaning and intent of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*

List of Subjects

8 CFR Part 274

Administrative practice and procedure, Aircraft, Immigration, Law enforcement, Motor carriers, Motor vehicles, Seizures and forfeitures, Vessels.

21 CFR Part 1316

Administrative practice and procedure, Authority delegations (Government agencies), Drug traffic control, Research, Seizures and forfeitures.

28 CFR Part 8

Administrative practice and procedure, Arms and munitions, Communications equipment, Copyright, Crime, Gambling, Infants and children, Motor vehicles, Prisons, Seizures and forfeitures, Wiretapping and electronic surveillance.

By virtue of the authority vested in me by law, including 28 U.S.C. 509, 510 and section 122 of the Customs and Trade Act of 1990, Public Law 101-382, title 8, chapter I, title 21, chapter II, and title 28, chapter I of the CFR are amended as follows:

Title 8

CHAPTER I—IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE

PART 274—SEIZURE AND FORFEITURE OF CONVEYANCES

1. The authority citation for part 274 continues to read as follows:

Authority: 8 U.S.C. 1103, 1324(b).

§ 274.9 [Amended]

2. In § 274.9, paragraph (a) is amended by removing "$100,000" in the first phrase and adding in place thereof the words "the monetary amount set forth in title 19, U.S.C., section 1607".

§ 274.10 [Amended]

3. In § 274.10, paragraph (a) is amended by removing "$100,000" in the introductory text and adding in place thereof the words "the monetary amount set forth in title 19, U.S.C., section 1607".

4. Section 274.11 is amended by removing "$100,000" in the first phrase and adding in place thereof the words "the monetary amount set forth in title 19, U.S.C., section 1607".

§ 274.12 [Amended]

5. Section 274.12 is amended by removing "$100,000" at the two places it appears therein and adding in place thereof the words "the monetary amount set forth in title 19, United States Code, Section 1607".

6. Section 274.12 is further amended by adding the words "the claim and bond, as well as" after the words "the regional commissioner shall transmit".

Title 21

CHAPTER II—DRUG ENFORCEMENT ADMINISTRATION, DEPARTMENT OF JUSTICE

PART 1316—ADMINISTRATIVE FUNCTIONS, PRACTICES, AND PROCEDURES

Subpart E—Seizure, Forfeiture, and Disposition of Property

7. The authority citation for subpart E of part 1316 continues to read as follows:

Authority: 21 U.S.C. 871(b), 881, 965, 19 U.S.C. 1606, 1607, 1608, 1610, 1613, 1618, 28 U.S.C. 509, 510.

§ 1316.75 [Amended]

8. In § 1316.75, paragraph (a) is amended by removing "$100,000," in the first phrase and adding in place thereof the words "the monetary amount set forth in title 19, United States Code, Section 1607; the seized merchandise is any monetary instrument within the meaning of section 5312(a)(3) of title 31 of the United States Code".

§§ 1316.75, 1316.76, 1316.77, 1316.78, 1316.79, and 1316.81 [Amended]

9. In addition to the amendments set forth above, in 21 CFR part 1316, subpart E, remove the words "DEA Asset Forfeiture Unit" and add, in their place, the words "DEA Asset Forfeiture Section" in the following places:

(a) Section 1316.75 (a) and (b);
(b) Section 1316.76(a);
(c) Section 1316.77(a);
(d) Section 1316.78;
(e) Section 1316.79(a); and
(f) Section 1316.81.

Title 28

CHAPTER I—DEPARTMENT OF JUSTICE

PART 8—FBI FORFEITURE AUTHORITY FOR CERTAIN STATUTES

10. The authority citation for part 8 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510.

11. Section 8.7 is revised to read as follows:

§ 8.7 Judicial forfeiture.

If the appraised value exceeds the monetary amount set forth in title 19, United States Code, section 1607, or a claim and satisfactory bond have been received either for property appraised at that amount or less, or for seized merchandise which is any monetary instrument within the meaning of section 5312(a)(3) of title 31 of the United States Code, the Special Agent in Charge of the FBI field office that seized the property shall transmit the claim and bond to the U.S. Attorney for the judicial district in which the seizure was made for the purpose of instituting judicial forfeiture proceedings. Also transmitted with the claim and bond will be a description of the property and a complete statement of the facts and circumstances leading to the seizure of the property.

§ 8.8 [Amended]

12. The heading of § 8.8 is revised to read as follows:

§ 8.8 Advertisement and declaration of forfeiture.

13. In § 8.8, paragraph (a) is amended by removing the words "not exceeding $100,000 in value".

Dated: February 20, 1991.

Dick Thornburgh,

Attorney General.

[FR Doc. 91-4723 Filed 2-28-91; 8:45 am]

BILLING CODE 4410-01-M

EXHIBIT C

March 22, 1991

Special Agents in Charge,
United States Secret Service
Field Offices

Special Agents in Charge,
Federal Bureau of Investigation
Field Offices

AGREEMENT ON INVESTIGATIONS OF
FINANCIAL INSTITUTION FRAUD MATTERS

Gentlemen:

As you are aware, on November 5, 1990, the United States Secret Service (USSS) was granted concurrent jurisdiction with the Federal Bureau of Investigation (FBI) in the area of financial institution fraud. In an effort to promote efficiency in operation, as well as to prevent the overlapping and duplication of investigative endeavors, we, as Directors of our respective agencies, have agreed upon certain specific issues set forth below that shall serve as guidelines for these investigations.

The USSS will receive referrals on financial institution fraud matters directly from local FBI offices to assure coordination and avoid duplication of effort. These referrals will be of the same quality and priority as those matters being worked by the local FBI office that makes the referral. In instances wherein the USSS independently receives a referral or other information concerning financial institution fraud, the local FBI office will be notified for coordination and the USSS will seek the concurrence of the United States Attorney's Office (USAO) prior to any investigation being conducted.

Financial institution fraud matters referred to the USSS should be major investigations involving losses or exposure in excess of $100,000. If no unaddressed referrals of this quality are available in any local FBI office for referral to the USSS, then that particular office will refer any already opened priority investigation in its caseload inventory that is not receiving sufficient investigative attention due to a lack of resources.

All financial institution fraud investigations undertaken by the USSS may be investigated and supervised independently by the USSS. They may also be investigated jointly by both the USSS and the FBI by agreement of the respective Special Agents in Charge. This will be contingent on the fact that case priority, as well as FBI/USAO notification and coordination requirements as noted above have been met.

Reporting requirements under Subtitle E of the Crime Control Act of 1990 (CCA), Section 2746, will be the responsibility of the USSS in those investigations conducted solely by the USSS. In those investigations involving joint FBI/USSS participation, or conducted solely by the FBI, the reporting requirements of the CCA will be the sole responsibility of the FBI. The USSS will provide a copy of their statistical reports, which are required under the Crime Control Act of 1990, to the local FBI office and at a headquarters level to avoid inadvertent duplication.

Understandably, at times there will be situations in which the FBI and the USSS will have disagreements in these investigations. Every attempt will be made to resolve such disagreements at the local level. Should this not be possible, then the matter will be referred to the headquarters level for resolution. In the event that the matter can not be resolved at the headquarters level, the disagreement will be referred to us, as Directors, for resolution. Should we be unable to agree, then resolution will be sought from the Deputy Attorney General through his Special Counsel for Financial Institution Fraud.

Both of us have the utmost confidence that this agreement will further strengthen the working relationship that the FBI and the USSS have had as law enforcement agencies. We look forward to a rewarding future in this mutual undertaking, with the hope that our joint efforts will bring about prompt resolution of these matters.

Sincerely,

John R. Simpson
Director,
United States Secret Service

William S. Sessions
Director,
Federal Bureau of Investigation

Michael Zeldin
Acting Director
Money Laundering Office

Roger G. Weiner
Trial Attorney
Money Laundering Office

EXHIBIT D

A BRIEF EXAMINATION OF VENUE IN MONEY LAUNDERING PROSECUTIONS

Introduction

A frequent problem faced by prosecutors who intend to file criminal money laundering charges is whether their district is a proper venue for the contemplated case. This article briefly reviews some of the concerns that prosecutions under 18 U.S.C. §§ 1956 and 1957 and 31 U.S.C. § 5322 may raise and examines the elements of venue in such prosecutions.

Statutory Background

31 U.S.C. § 5322 and 18 U.S.C. §§ 1956 and 1957 lack specific venue provisions. As a result, the generic venue provisions of the criminal rules and the criminal code are applicable. Pursuant to Rule 18 of the Federal Rules of Criminal Procedure, "except as otherwise permitted by statute. . .", the defendant must be prosecuted "in a district in which the offense was committed." 18 U.S.C. § 3237(a) provides that offenses committed in more than one district, i.e., continuing offenses, may be prosecuted in any district in which the offense was begun, continued or completed. The Supreme Court has interpreted the breath of venue in continuing offenses to extend to any district within the "area through which force propelled by an offender operates." United States v. Johnson, 323 U.S. 273, 275 (1944).

Venue must be proper for each count charged. United States v. Beech-Nut Nutrition Corp., 871 F.2d 1181, 1188 (2nd Cir.), cert. denied, Lavery v. United States, 110 S.Ct. 324 (1989). Charges in addition to the money laundering counts, such as a charge pursuant to 18 U.S.C. § 2 of aiding and abetting a money laundering violation, expand the permissible venues to include not only those venues available as a result of the substantive money laundering crime, but also those venues where the accessorial acts took place. United States v. Gillette, 189 F.2d 449, 451-52 (2nd Cir. 1951), cert. denied, 342 U.S. 827, reh'g denied, 342 U.S. 879, reh'g denied, 345 U.S. 945; United States v. Buttorff, 572 F.2d 619, 627 (8th Cir. 1978), cert. denied, 437 U.S. 906, reh'g denied, 439 U.S. 884; and United States v. Kilpatrick, 458 F.2d 864, 867-68 (7th Cir. 1972).

Continuing Offenses

We believe that both the money laundering offenses prescribed at 18 U.S.C. §§ 1956 and 1957, and the reporting offenses proscribed by 31 U.S.C. § 5322 are continuing offenses that may be committed in more than one district. These statutes incorporate the concept of a financial or monetary transaction which is capable of continuing through time. For example, the laundering of monetary instruments statute includes the phrases, "conducts or

attempts to conduct. . . a financial transaction. . .",[1] and "transports, transmits, or transfers, or attempts to attempts to transport, transmit, or transfer. . ."[2] 18 U.S.C. § 1957(a) utilizes the phrase "monetary transaction." 31 U.S.C. § 5324 is directed at one who "structure[s] or assist[s] in structuring, or attempt[s] to structure or assist in structuring, any transaction with one or more financial institutions." 31 U.S.C. § 5324(3) (emphasis added). The concept of a financial transaction, an element common to each of these violations, contemplates a chain of events rather than a single, discrete incident.

Further support for the continuing offense conclusion is found in those cases interpreting the offenses of failing to file Currency Transaction Reports (CTRs) and the Currency and Monetary Instrument Reports (CMIRs). 31 U.S.C. §§ 5313, 5316, 5322. Even though, arguably, a failure to file could be seen as occurring entirely at the moment one has the duty to file but does not, the courts have found that these offenses are continuing offenses, capable of occurring in more than one district. United States v. Donahue, 885 F.2d 45, 50-51 (3rd Cir. 1989) (venue proper in Pennsylvania where defendant is charged with a CMIR violation after having travelled from Philadelphia to Miami with funds, and then travelling from Miami to the Grand Cayman Island without filing the requisite forms); United States v. Rigdon, 874 F.2d 774, (11th Cir. 1989), cert. denied, 110 S.Ct. 374 (crime of failure to file CTR began in Florida and thus venue was proper in Florida even though CTRs are ultimately filed in Washington, D.C.); and United States v. Ospina, 798 F.2d 1570, 1577 (11th Cir. 1986) (venue proper in district where cash was accumulated and transferred). See also United States v. Nicely, No. 89-3104, et al., slip op. at 16-17, (D.C. Cir. Jan. 4, 1991) (receipt and transfer of currency in the district suffices to provide venue in a prosecution for false statements).

Requisite Contacts

Assuming then that violations of these statutes can be committed in more than one district, the question is whether any part of the crime to be charged was begun, continued or completed in the home district. A crime was either begun, continued or completed in a district if the defendant's actions in connection with that activity had substantial contact with the would-be venue.

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[1] 18 U.S.C. § 1956(a)(1) and (3) (emphasis added).

[2] 18 U.S.C. § 1956(a)(2) (emphasis added).

The second circuit has held that its test for determining which districts have venue for prosecution of a particular crime, as enunciated in United States v. Johnson, supra, is best described as a substantial contacts rule which takes into account a number of factors. These factors include the elements and nature of the crimes charged, the site of defendant's acts, the locus of effect of criminal conduct and the district's suitability to the fact finding process. United States v. Reed, 773 F.2d 477, 481 (2nd Cir. 1985) (venue for perjury prosecution is proper in district where underlying proceeding is pending). See also United States v. Rooney, 866 F.2d 28, 30-32 (2nd Cir. 1989)(venue in a tax fraud prosecution existed in the district where defendant's accountant prepared the defendant's return at defendant's request); United States v. Maldonado-Rivera, 922 F.2d 955 (2nd Cir. 1990); United States v. Potamitis, 739 F.2d 784, 791 (2nd Cir. 1984), cert. denied, Argitakos v. United States, 469 U.S. 918 (1984); and United States v. Panebianco, 543 F.2d 447, 455 (2nd Cir. 1976), cert. denied, 429 U.S. 1103 (1977).

Several cases have found venue to be proper in districts with only minimal contacts with the defendant. In United States v. Cattle King Packing Co., Inc., 793 F.2d 232, 239 n. 4 (10th Cir. 1986), the defendant was charged in Colorado with shipping adulterated meats. With respect to one count, the meat had been shipped to North Carolina, where it was rejected because of spoilage. The rejected meat was then returned to a warehouse in Nebraska, where it was inspected by the defendant and then resold and shipped to a California company. After his conviction on this count, the defendant argued that no part of the crime took place in Colorado and thus venue there was improper. The 10th Circuit rejected this argument, finding that the "sale of the meat to California Provisions was made by telephone in Colorado by Kim Gillespie at the orders of [the defendant]," and thus "the crime began in Colorado."

In United States v. Cordera, 668 F.2d 32, 44 (1st Cir. 1981), the defendants were charged with conspiring to import cocaine into United States territory. After frequent telephone conversations and meetings in foreign countries, the defendants had agreed with an undercover agent to smuggle cocaine into Puerto Rico. Before the importation actually took place, the defendants were arrested in Panama and transported to Puerto Rico for trial. Defendants claimed that venue was improper in Puerto Rico because no overt acts in furtherance of the conspiracy had taken place there. The court, in dicta, considered the merits of the claim and indicated that venue was proper because the defendants had engaged in important telephone conversations with the undercover agent while the agent was in Puerto Rico. See also United States v. Goldberg, 830 F.2d 4559 (3rd Cir. 1987) (venue for wire fraud prosecution proper in district where defendant telephonically arranged for wire transfer of money from one Canadian bank to another Canadian bank).

The trend seems to be to require less contact to suffice to confer venue in a particular district. In United States v. Stephenson, 895 F.2d 867, 874-75 (2nd Cir. 1990), the court held that venue in a bribery action was proper in New York notwithstanding the fact that the defendant, a federal official located in Washington, D.C., did nothing more than place a telephone call to New York in order to make false statements which led to the charged crime. The second circuit's willingness to adopt a broad interpretation of the venue rules and statutes is illustrative of an expansive judicial attitude toward venue.

Please do not hesitate to contact the Money Laundering Office staff at (FTS) 368-1758 or 514-1758 if you have any questions concerning venue or other money laundering matters, or if you require assistance with a money laundering problem.

U.S. Department of Justice

Tax Division

EXHIBIT E

Washington, D.C. 20530

March 18, 1991

MEMORANDUM

TO: All United States Attorneys

FROM: Shirley D. Peterson
Assistant Attorney General
Tax Division

SUBJECT: Temporary Delegation of Authority to Authorize Grand Jury Investigation of False Claims for Tax Refunds

By virtue of the authority vested in me by Part 0, Subpart N of Title 28 of the Code of Federal Regulations (C.F.R.), particularly Section 0.70, regarding criminal proceedings arising under the internal revenue laws, authority to authorize grand jury investigations of false and fictitious claims for tax refunds, in violation of 18 U.S.C. §286 and 18 U.S.C. §287, is hereby conferred on all United States Attorneys.

This delegation of authority is subject to the following limitations:

1. The case has been referred to the United States Attorney by District Counsel, Internal Revenue Service, and a copy of the criminal reference letter has been forwarded to the Tax Division, Department of Justice; and,

2. District Counsel has determined, based upon the available evidence, that the case involves a situation where an individual (other than a return preparer who falsifies returns to claim refunds), for a single tax year, has filed or conspired to file multiple tax returns on behalf of himself/herself, or has filed or conspired to file multiple tax returns in the names of nonexistent tax-

payers or in the names of real taxpayers who do not intend the returns to be their own, with the intent of obtaining tax refunds to which he/she is not entitled.

Any case directly referred to a United States Attorney's office for grand jury investigation which does not fit the above fact pattern or in which a copy of the referral letter has not been forwarded to the Tax Division, Department of Justice, by District Counsel will be considered an improper referral and outside the scope of this delegation of authority. In no such case may the United States Attorney's office authorize a grand jury investigation. Instead, the case should be forwarded to the Tax Division for authorization.

This delegation of authority is intended to bring the authorization of grand jury investigations of cases under 18 U.S.C. §286 and 18 U.S.C. §287 in line with the delegation of authority to authorize prosecution of such cases (see United States Attorneys' Manual, Title 6, 4.242 -- copy attached). Because the authority to authorize prosecution in these cases was delegated prior to the time the Internal Revenue Service initiated procedures for the electronic filing of tax returns, false and fictitious claims for refunds which are submitted to the Service through electronic filing are not within the original delegation of authority to authorize prosecution. Nevertheless, such cases, subject to the limitations set out above, may be directly referred for grand jury investigation. However, although the Tax Division is reviewing and evaluating the direct referral of electronically filed false claims for refunds in light of the unique problems posed by such cases, Tax Division authorization is currently required if prosecution is deemed appropriate in an electronic filing case.

This delegation of authority is temporary, but may be made permanent following consultation with the Attorney General's Advisory Committee.

Shirley D. Peterson

Shirley D. Peterson
Assistant Attorney General
Tax Division

Approved to take effect on March 19, 1991

The Tax Division must receive this material at least sixty (60) days prior to the expiration of the statute of limitations unless the Tax Division already has agreed to handle the matter in accordance with USAM 6-4.215, *supra*.

6-4.243 Review of Direct Referral Matters

The direct referral program is designed to promote the rapid prosecution of matters that constitute an imminent drain on the U.S. Treasury. Because immediate action is often required, IRS is authorized to refer the following categories of matters directly to the U.S. Attorney for prosecution:

A. Excise taxes—all 26 U.S.C. and 18 U.S.C. offenses involving taxes imposed by Subtitles C, D and E, except Chapter 24;

B. Multiple filings of false and fictitious returns claiming refunds (18 U.S.C. §§ 286 and 287)—all offenses wherein taxpayer files two or more returns for a single tax year claiming false refunds, excluding return preparers who falsify returns to claim refunds;

C. Trust fund matters (26 U.S.C. §§ 7215 and 7512)—offenses involving alleged violations of the trust fund laws;

D. ''Ten percenter'' matters (26 U.S.C. § 7206(2))—when arrest occurs contemporaneously with the offense;

E. Returns (IRS Form 8300) relating to cash received in a trade or business pursuant to 26 U.S.C. § 6050I (26 U.S.C. §§ 7203 and 7206 only). *See* DOJ Tax Division Directive No. 87-61 (Feb. 27, 1987).

The U.S. Attorney may initiate or decline prosecution of direct referrals without prior approval from the Tax Division (whereas in all other instances the U.S. Attorney can initiate proceedings only with specific Tax Division authorization). However, once prosecution has been initiated, the indictment, information, or complaint may not be dismissed without the prior approval of the Tax Division. *See* USAM 6-4.246, *infra*.

6-4.244 Review of Noncomplex Matters

Within three months of receipt of a designated non-complex matter, the U.S. Attorney is to review the matter and initiate proceedings, request that the matter be declined (*see* USAM 6-4.245, *infra*), or request that the Tax Division handle the matter (*see* USAM 6-4.219, *supra*).

6-4.245 Request to Decline Prosecution

A. Request by U.S. Attorney

Whenever the U.S. Attorney feels that a particular tax matter should not be prosecuted, those views are to be forwarded to the Tax Division. The

EXHIBIT F

(1) _____

(ALL INFORMATION MUST BE TYPED OR PRINTED IN BLOCK LETTERS)
SKILLS BANK SURVEY FORM

LOCATOR INFORMATION (ALL AUSAS MUST COMPLETE ITEMS 1-7)

1. **NAME** (Last, First, M.I.) _____ (2)
2. **PHONE** (Commercial and FTS) _____ 8- _____ (3)
3. **DISTRICT** (e.g. NDVA) _____ (4) 4. **LOCATION** (city) _____ (5)
5. **CIRCUIT** (e.g. 02) _____ (6) 6. **YR. APPOINTED** 19____ (7)
7. **STATE BAR MEMBERSHIPS** (e.g., MD, WA): _____ (8)

SKILLS INFORMATION

CRIMINAL MATTERS: **CRM01**-Fraud; **CRM02**-General Litigation; **CRM03**-Internal Security; **CRM04**-Narcotics and Dangerous Drugs; **CRM05**-Organized Crime and Racketeering; **CRM06**-Public Integrity; **CRM07**-Procedures/Appellate/Other; **CRM08**-S&L Fraud.

CIVIL MATTERS: **CIV01**-Commercial Litigation; **CIV02**-Federal Programs; **CIV03**-Torts; **CIV04**-Immigration; **CIV05**-Procedures/Appellate/Other; **CIV06**-Affirmative Civil Litigation; **CIV07**-Asset Forfeitures.

ANTITRUST MATTERS: **ATR01**-Civil; **ATR02**-Criminal.

LANDS MATTERS: **LDN01**-Civil; **LDN02**-Criminal.

CIVIL RIGHTS MATTERS: **CRT01**-Civil; **CRT02**-Criminal.

TAX MATTERS: **TAX01**-Civil; **TAX02**-Criminal; **TAX03**-Criminal, Indirect Methods; **TAX04**-Supplemental Issues/Topics.

8. **CODE:** _____ **DESCRIPTION:** _____ (9)

_____

_____

_____

DATE (last case handled) _____ **NO. OF CASES** _____ **NO. OF MOS.** _____
CODE: _____ **DESCRIPTION:** _____

_____

_____

_____

DATE (last case handled) _____ **NO. OF CASES** _____ **NO. OF MOS.** _____
CODE: _____ **DESCRIPTION:** _____

_____

_____

_____

DATE (last case handled) _____ **NO. OF CASES** _____ **NO. OF MOS.** _____

(USE CONTINUATION SHEET IF ADDITIONAL SPACE IS NEEDED.)

9. **WORK EXPERIENCE RELEVANT TO SKILLS:**
DATE: From: 19_____ **To:** 19_____ **DESCRIPTION:** _____

_____

_____

(USE CONTINUATION SHEET IF ADDITIONAL SPACE IS NEEDED.)

PARTICIPANT'S BACKGROUND

10. **EXPERIENCE AS AGAI INSTRUCTOR:**
CIVIL _____ **From:** 19_____ **To:** 19_____
CRIMINAL _____ **From:** 19_____ **To:** 19_____
APPELLATE _____ **From:** 19_____ **To:** 19_____

11. **EDUCATION (DO NOT LIST LAW DEGREE):**
YEAR: 19_____ **DEGREE:** _____ **MAJOR:** _____
YEAR: 19_____ **DEGREE:** _____ **MAJOR:** _____

12. **SPECIAL COURSES TAKEN:**
YEAR: 19_____ **COURSE:** _____
YEAR: 19_____ **COURSE:** _____

13. **LANGUAGE FLUENCY:** _____

14. **LICENSE(S) (DO NOT LIST LICENSE TO PRACTICE LAW):**
YEAR: 19_____ **TYPE:** _____
YEAR: 19_____ **TYPE:** _____

15. **PUBLICATION(S):**
YEAR: 19_____ **TITLE:** _____

_____

YEAR: 19_____ **TITLE:** _____

_____

(USE CONTINUATION SHEET IF ADDITIONAL SPACE IS NEEDED.)

16. **MILITARY SERVICE:**
BRANCH: _____ **RANK:** _____
STATUS: _____ **NONE** _____ **READY RESERVE** _____ **STANDBY RESERVE**
_____ **RETIRED RESERVE**

PRIVACY ACT STATEMENT

The collection of this information is authorized by 5 U.S.C. section 301, 44 U.S.C. section 519. The primary use of this information is for inclusion in a JURIS SKILLS BANK. Once collected, this information will be available to United States Attorneys, Assistant United States Attorneys, and Department of Justice personnel to locate Assistant United States Attorneys who have particular expertise, skills, or specific experience in an area in which advice or assistance is sought. Additional disclosures also will be made to the Executive Office for United States Attorneys to maintain a current skills inventory. Furnishing of skills information on this information on this form is voluntary and for the convenience of employees of the United States Attorneys' Offices.

EMPLOYEE SIGNATURE: _____ **DATE:** _____

NAME: _____ _____

CONTINUATION SHEET

8. SELECT FROM THE LIST OF SKILL CODES BELOW AND GIVE A DESCRIPTION OF YOU EXPERTISE, MONTHS OR NUMBER OF CASES WORKED IN A PARTICULAR AREA.

CODE: _____ DESCRIPTION: _____

DATE (last case handled) _____ NO. OF CASES _____ NO. OF MOS. _____

CODE: _____ DESCRIPTION: _____

DATE (last case handled) _____ NO. OF CASES _____ NO. OF MOS. _____

CODE: _____ DESCRIPTION: _____

DATE (last case handled) _____ NO. OF CASES _____ NO. OF MOS. _____

9. WORK EXPERIENCE RELEVANT TO SKILLS:

DATE: From: 19_____ To: 19_____ DESCRIPTION: _____

DATE: From: 19_____ To: 19_____ DESCRIPTION: _____

11. EDUCATION (DO NOT LIST LAW DEGREE):

YEAR: 19_____ DEGREE: _____ MAJOR: _____
YEAR: 19_____ DEGREE: _____ MAJOR: _____

12. SPECIAL COURSES TAKEN:

YEAR: 19_____ COURSE: _____
YEAR: 19_____ COURSE: _____

15. PUBLICATION(S):

YEAR: 19_____ TITLE: _____

YEAR: 19_____ TITLE: _____

INSTRUCTIONS FOR COMPLETING THE AUSA SKILLS BANK SURVEY FORM

INTRODUCTION

The AUSA JURIS SKILLS BANK contains education, experience, and litigation expertise data on participating Assistants. The SKILLS BANK was developed and implemented to allow United States Attorney personnel to quickly find in-house litigation experts. The SKILLS BANK is only available to United States Attorneys' and Executive Office personnel. The litigating divisions of the Department may request information through the Executive Office for United States Attorneys' Legal Counsel. The first eight questions are mandatory. They must be answered by each Assistant. The Skills Information segment is voluntary (items 8-14).

SPECIFIC INSTRUCTIONS

Type or print all information. A continuation sheet is provided for recording additional skills.

ITEMS 1-7. Self-explanatory, follow guides on form. AUSAs MUST COMPLETE these items.

ITEM 8.

a. Select a code from the list provided. If the codes overlap, select the narrower of the two.

b. Provide an accurate and brief description of your skill area. You may describe your skill using keywords which begin with a general term and narrow to a more specific one. For example, White Collar Crime, Fraud, Advance Fee Scheme, or Torts, Asbestos, Defective Premises. Or you may describe your expertise by a citing a statute, e.g., 18 U.S.C. section 1001, False Statements.

c. Give the number of months you worked on cases and/or the number of cases you handled in your skill area.

ITEM 9. In this item, include all relevant work experiences to your skills area such judicial clerkships, law firm experience, and any legal teaching or lecturing experience.

ITEM 10. Check only if you have experience as an instructor at the Advocacy Institute and give date.

ITEM 11. List all educational degrees, EXCEPT law degree.

ITEM 12. List special courses taken, e.g. Computer Programming.

ITEM 13. List any languages in which you are fluent other than English.

ITEM 14. List any licenses you have, e.g. CPA. Do not include license to practice law.

ITEM 15. Give the year and title of any of your relevant publications (e.g. law review articles).

ITEM 16. Give branch, rank and status of military service. (**NONE** = not in a military reserve unit or retired reserve; **READY RESERVE** = liable for active duty in time of war or national emergency - by President, Congress or law; **STANDBY RESERVE** = liable for active duty in time of war or national emergency - Congress or law; **RETIRED RESERVE** = retired and, if qualified, liable for active duty only in time of war or national emergency - Congress or law.

Use the continuation form to record additional skills. Please sign and date the survey form as indicated and return to: AUSA SKILLS BANK UPDATE, Legal and Information Systems Staff, 425 I Street, NW, Rm. 129, Washington, DC 20530, ATTN: A. CARRIGAN

DOCUMENT 31

NAME:
PHONE:
809 753 4656
FTS 753 4656
DISTRICT: DIPR LOCATION: SAN JUAN CIRCUIT:
01
YEAR APPT: 83 STATE BAR:
PR
SKILLS:
CRM CRM05 POLICE CORRUPTION, MAIL FRAUD, ARSON, THEFT FROM
INTERSTATE
SHIPMENTS, DEVELOPMENT AND PROSECUTION OF CASES INVOLVING PUBLIC
CORRUPTION
AND CONNECTION WITH ORGANIZED CRIMES, CASES OF ORGANIZATIONS
DEALING WITH
INTERNATIONALLY WITH DRUGS, 60 MOS., 25 CASES, NOVEMBER 1987
WORK EXPERIENCE:
PROSECUTOR FOR THE LAST SEVENTEEN YEARS, BOTH STATE AND
FEDERAL
EDUCATION: BBA 63 MANAGEMENT
LANGUAGE FLUENCY: SPANISH
UPDATE: 1988

EXHIBIT G

U.S. Department of Justice

Civil Division

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

March 11, 1991

MEMORANDUM

TO: All United States Attorneys

FROM: Stuart M. Gerson
Assistant Attorney General
Civil Division

SUBJECT: Requests For Representation Concerning the Soldiers' and Sailors' Civil Relief Act

The deployment of our armed forces to the Arabian Gulf and the extensive reliance upon reservists to meet deployment needs may result in reservists invoking the protections of the Soldiers' and Sailors' Civil Relief Act limiting the rate of interest which they may be charged in certain circumstances. Efforts to realize the benefits of that Act may generate inquiries to your offices concerning the potential availability of representation by the United States in actions to enforce the protections. The purpose of this memorandum is to outline the provisions of the Act and appropriate procedures for processing requests.

The maximum rate of interest provision of 50 USC App. § 526 states:

> No obligation or liability bearing interest at a rate in excess of 6 per centum per annum incurred by a person in military service prior to his entry into such service shall, during any part of the period of military service which occurs after the date of enactment of the Soldiers' and Sailors Civil Relief Act Amendments of 1942 [October 6, 1942], bear interest at a rate in excess of 6 per centum per annum unless, in the opinion of the court, upon application thereto by the obligee, the ability of such person in military service to pay interest upon such obligation or liability at a rate in excess of 6 per centum per annum is not materially affected by reason of such service, in which case the court may make such order as in its opinion may be just. As used in this section the term "interest" includes service charges, renewal charges, fees, or any other charges (except bona fide insurance) in respect of such obligation or liability.

Accordingly, an individual who was subject to an obligation prior to entering on active duty and whose active duty materially affects his or her ability to pay on the obligation, is entitled to a 6 per centum cap on the obligation during the period of active duty.

Most reputable financial institutions are aware of this provision and promptly give effect to its protections upon application by the servicemember. There have, however, been reports that some institutions are not so cooperative. In the event an individual servicemember is denied this protection it is reasonable to expect that either the Civil Division or United States Attorneys will receive inquiries asking whether the United States may represent the individual. The Act does not provide for such representation. Nevertheless, Title 28 U.S.C. § 517 authorizes the Department to represent individuals when such representation is in the interests of the United States. In appropriate circumstances, a denial of Soldiers' and Sailors' Relief Act benefits would warrant such representation. An individual wishing to request Department of Justice representation concerning this provision needs to submit a signed request through the military department with which the individual served to this office for consideration by the representation committee. The request should include information sufficient to determine the precise nature of the underlying obligation, and how military service has materially affected the individual's ability to meet the obligation. The military department concerned should include its recommendation in a forwarding endorsement.

The Department of Justice views the protection of the benefits of the Act as a very serious matter particularly is this time of reliance on our reserve forces.

EXHIBIT H

MARCH , 1991 CONTACT: UNITED STATES ATTORNEY

FEDERAL LAW PROTECTS REEMPLOYMENT RIGHTS OF RETURNING RESERVISTS AND MEMBERS OF THE NATIONAL GUARD

(NAME), UNITED STATES ATTORNEY FOR THE (DISTRICT), ANNOUNCED TODAY, "THE UNITED STATES ATTORNEY'S OFFICE WILL BE EXTREMELY DILIGENT IN PROTECTING THE RIGHTS OF OUR CITIZEN SOLDIERS WHO HAVE LEFT THEIR CIVILIAN JOBS TO SERVE THE CALL OF OUR COUNTRY IN THE RECENTLY COMPLETED DESERT SHIELD - DESERT STORM OPERATION."

AS THE NATION WELCOMES HOME RESERVISTS AND MEMBERS OF THE NATIONAL GUARD WHO WERE ORDERED TO ACTIVE MILITARY DUTY, EMPLOYERS AND RETURNING VETERANS SHOULD BE AWARE THAT FEDERAL LAW PROTECTS REEMPLOYMENT RIGHTS OF RETURNING VETERANS, UNITED STATES ATTORNEY (NAME) SAID.

THE VETERANS' REEMPLOYMENT RIGHTS ACT, TITLE 38 U.S.C. SECTIONS 2021-2026 (VRR), PROVIDES THAT EMPLOYEES ORDERED TO ACTIVE DUTY IN THE ARMED FORCES OR THE PUBLIC HEALTH SERVICE AND HONORABLY DISCHARGED FROM THAT DUTY ARE ENTITLED TO REEMPLOYMENT RIGHTS AND BENEFITS. THESE RIGHTS GENERALLY INCLUDE RESTORATION TO THE POSITION HELD PRIOR TO MOBILIZATION OR TO A POSITION OF SIMILAR SENIORITY OR PAY. THESE RIGHTS APPLY TO ALL EMPLOYERS REGARDLESS OF SIZE, BOTH PRIVATE AND PUBLIC, INCLUDING THE UNITED STATES GOVERNMENT.

IN ORDER TO BE ENTITLED TO THESE RIGHTS, A RETURNING VETERAN MUST MEET FIVE BASIC ELIGIBILITY CRITERIA:

1. HE OR SHE MUST HOLD AN "OTHER THAN TEMPORARY" CIVILIAN JOB. (THE JOB NEED NOT BE DESIGNATED "PERMANENT.")

2. HE OR SHE MUST HAVE LEFT THE CIVILIAN JOB FOR THE PURPOSE OF GOING ON ACTIVE DUTY.

3. HE OR SHE MUST NOT REMAIN ON ACTIVE DUTY LONGER THAN FOUR YEARS, UNLESS THE PERIOD BEYOND FOUR YEARS (UP TO ONE ADDITIONAL YEAR) IS "AT THE REQUEST FOR THE CONVENIENCE OF THE FEDERAL GOVERNMENT."

4. HE OR SHE MUST BE DISCHARGED OR RELEASED FROM ACTIVE DUTY "UNDER HONORABLE CONDITIONS."

5. HE OR SHE MUST APPLY FOR REEMPLOYMENT WITH THE PRE-SERVICE EMPLOYER WITHIN 90 DAYS AFTER SEPARATION FROM ACTIVE DUTY. (ALL PERSONNEL ARE ADVISED TO CONTACT THEIR EMPLOYERS AS SOON AS POSSIBLE AFTER RELEASE FROM ACTIVE DUTY.)

A PERSON MEETING THESE CRITERIA MAY EVEN BE ENTITLED TO A BETTER POSITION THAN THE ONE HE OR SHE HELD PRIOR TO MOBILIZATION. THE UNITED STATES SUPREME COURT IN CONSTRUING THE

VRR STATED, "[A RETURNING VETERAN] DOES NOT STEP BACK ON THE SENIORITY ESCALATOR AT THE POINT HE STEPPED OFF. HE STEPS BACK ON AT THE PRECISE POINT HE WOULD HAVE OCCUPIED HAD HE KEPT HIS POSITION CONTINUOUSLY DURING [HIS MILITARY SERVICE]." THIS PRINCIPLE, KNOWN AS THE ESCALATOR PRINCIPLE, HAS BEEN EXPRESSLY RATIFIED BY CONGRESS.

THE VRR APPLIES TO PERSONS WHO VOLUNTEER DIRECTLY FOR ACTIVE DUTY AND TO RESERVISTS AND MEMBERS OF THE NATIONAL GUARD WHO ARE CALLED TO ACTIVE DUTY VOLUNTARILY OR INVOLUNTARILY.

IT IS NOT ANTICIPATED THAT THERE WILL BE SUBSTANTIAL PROBLEMS INVOLVING THE REEMPLOYMENT OF RESERVISTS AND MEMBERS OF THE NATIONAL GUARD. HOWEVER, FEDERAL LAW DOES PROVIDE THAT IF EMPLOYERS WRONGFULLY REFUSE TO REEMPLOY RESERVISTS AND GUARD MEMBERS, ACTION MAY BE TAKEN BY THE UNITED STATES ATTORNEY IN THE UNITED STATES DISTRICT COURT TO ENFORCE REEMPLOYMENT RIGHTS.

RESERVISTS AND NATIONAL GUARD MEMBERS EXPERIENCING DIFFICULTIES UPON THEIR RELEASE FROM ACTIVE DUTY SHOULD INITIALLY DISCUSS THESE MATTERS WITH THEIR APPROPRIATE SERVICING LEGAL OFFICERS. IF MATTERS CANNOT BE RESOLVED INFORMALLY THROUGH THEIR SERVICE LEGAL OFFICERS OR THE NATIONAL COMMITTEE FOR SUPPORT OF GUARD AND RESERVISTS (TOLL FREE NO. 1-800-336-4590), THEY SHOULD CONTACT THE NEAREST OFFICE OF THE VETERANS' EMPLOYMENT AND TRAINING SERVICE OF THE UNITED STATES DEPARTMENT OF LABOR (LOCAL ADDRESS AND PHONE NUMBER).

UNDER THE LAW, THE DEPARTMENT OF LABOR IS RESPONSIBLE FOR INVESTIGATING COMPLAINTS INVOLVING REEMPLOYMENT MATTERS. IF THE DEPARTMENT OF LABOR IS UNABLE TO SUCCESSFULLY RESOLVE THE MATTER, IT WILL BE REFERRED TO THE UNITED STATES ATTORNEY'S OFFICE FOR ENFORCEMENT WHERE IT HAS BEEN DEEMED THAT THE REFUSAL TO REEMPLOY IS WRONGFUL.

IN ORDER TO ENSURE THE VIGOROUS ENFORCEMENT OF OUR CITIZEN SOLDIERS' RIGHTS UNDER THE VRR OR ANY OTHER FEDERAL LAW, UNITED STATES ATTORNEY (NAME) HAS NAMED ASSISTANT UNITED STATES ATTORNEY (NAME) TO SERVE AS THE POINT OF CONTACT FOR ANY SUCH COMPLAINTS. MR. (NAME) CAN BE REACHED AT (TELEPHONE NUMBER).

EXHIBIT I

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

Vol. 2, No. 19 | Federal Sentencing Guidelines and Forfeiture Cases from All Circuits. | March 11, 1991

IN THIS ISSUE:

Guideline Sentences, Generally

2nd Circuit rejects due process argument that guidelines allow prosecutor to manipulate sentence. (115) Defendant argued that the guidelines violate due process by improperly giving the prosecutor power to manipulate a sentence by deciding which criminal statutes to enforce. The 2nd Circuit rejected this argument. That a particular penalty may be a factor in the prosecutor's charging calculus is not, by itself, a due process violation. There is no procedural due process right to an individualized sentence. In the absence of a prosecutor's bad faith or discrimination, the guidelines do not vest undue sentencing authority in the prosecutor. *U.S. v. Delibac*, __ F.2d __ (2nd Cir. Feb. 19, 1991) No. 90-1398.

5th Circuit finds no separation of powers violation in government's determination of money involved in "sting" operation. (115)(360) Defendant was convicted of two counts of money laundering in connection with a "sting" operation run by government agents. Under guideline section 2S1.1, a defendant's offense level may be increased based upon the amount of money involved in the offense. Defendant argued that the power of the executive branch to determine a defendant's sentence based on the amount of money that undercover agents bring to the table in a sting operation violates the separation of powers doctrine. The 5th Circuit found no violation, since the district court retains the authority to find that money brought by the government was not legitimately part of the laundering conspiracy and was therefore not relevant conduct. Moreover, the government did not violate due process by unfairly manipulating the amount of money involved in the offense. Evidence showed that defendant repeatedly asked for larger sums to launder, and suggested additional laundering scenarios. *U.S. v. Richardson*, __ F.2d __ (5th Cir. Feb. 19, 1991) No. 90-3172.

9th Circuit holds that guidelines do not "presume" that a weapon is connected to a drug offense. (115)(284) Defendant argued that the Commentary to section 2D1.1 presumed that a weapon is connected to an offense upon proof of mere possession. He argued that the burden was then shift-

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)
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

ed to the defendant to show that the weapon was not connected with the offense, and that this presumption and burden-shifting violated due process. The 9th Circuit noted that it had already rejected this argument in an earlier decision, holding that the Commentary "creates an exception to the terms of the guideline, not a presumption that a connection existed." Moreover the court noted that the Supreme Court in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) held that "enhancement of sentences based on sentencing factors which came into play *after* a defendant has been found guilty do not violate due process." *U.S. v. Stewart*, __ F.2d __ (9th Cir. Feb. 25, 1991) No. 90-30016.

9th Circuit reiterates that sentencing guidelines are constitutional. (115) Relying on numerous prior cases, the 9th Circuit rejected the defendant's arguments that the guidelines are unconstitutional because they limit judicial discretion, transfer sentencing power to the prosecutor, and violate the right against self incrimination. *U.S. v. Mondello*, __ F.2d __ (9th Cir. March 7, 1991) No. 90-50121.

4th Circuit remands where application of amended guideline section 3A1.2(b) violated ex post facto clause. (130) (410) Defendant was convicted of being a felon in possession of a firearm. His offense level was increased by three under guideline section 3A1.2(b) for his assault on the police officer who was questioning him. Subsection (b) of 3A1.2 did not come into existence until November 1989, after defendant's arrest. The 4th Circuit found that applying section 3A1.2(b) to defendant violated the ex post facto clause, since it was not in effect at the time of his crime. The previous version of section 3A1.2 did not authorize an increase in this instance since the police officer was not a victim of defendant's crime. *U.S. v. Morrow*, __ F.2d __ (4th Cir. Feb. 20, 1991) No. 90-5336.

General Application Principles (Chapter 1)

1st Circuit affirms that conduct underlying dismissed count was part of same course of conduct as convicted counts. (170)(270) In the first four counts, an undercover agent provided immigration documents to defendant in return for heroin from Hong Kong. In the dismissed count, defendant, with the assistance of the same undercover agent, attempted to smuggle heroin into the United States from Bangkok. Defendant pointed out that the dismissed count took place at a later time, involved drugs coming from a different place, and may have involved different participants. However, the district court relied on the fact that the two key participants, defendant and the undercover agent, were the same. Early in their relationship they discussed the possibility of a later "big deal," (the later Bangkok attempt), and immigration documents obtained by the undercover agents played a role in the import efforts. Although admitting that the matter was one of judgment, the 1st Circuit upheld the determination that the five counts involved a single course of conduct. *U.S. v. Mak*, __ F.2d __ (1st Cir. Feb. 28, 1991) No. 90-1685.

3rd Circuit upholds consideration of evidence suppressed due to Fourth Amendment violation. (170)(270)(790) Defendant challenged the consideration at sentencing of one kilogram of cocaine which the district court had earlier suppressed due to a Fourth Amendment violation. The 3rd Circuit upheld the district court's consideration of this evidence, citing "two strong currents in the law, one urging caution in invoking the exclusionary rule in Fourth Amendment cases, and the other permitting broad discretion in receiving evidence of conduct relevant to sentencing." However, because defendant's plea agreement stipulated to a lesser amount of cocaine, the court remanded the case to give defendant the opportunity to withdraw his plea. Although the plea agreement stated that the judge was not bound by any stipulations, the defendant may not have understood this to apply to the stipulated drug amount. Neither the prosecutor nor the defense anticipated this unexpected legal issue of first impression, which "frustrated an agreement clearly contemplated by all concerned." *U.S. v. Torres*, __ F.2d __ (3rd Cir. March 1, 1991) No. 90-5545.

4th Circuit holds pre-guidelines conduct may be considered relevant conduct. (170) Defendant argued that Congress did not intend for pre-guidelines activity to be considered as rel-

Editors:

- Roger W. Haines, Jr.
- Kevin Cole, Associate Professor of Law, University of San Diego
- Jennifer C. Woll

Publication Manager:

- Beverly Boothroyd

evant conduct for computing sentences under the guidelines since the guidelines were expressly amended to limit application to criminal offenses committed after the effective date. The 4th Circuit rejected defendant's argument, noting in the publication entitled "Questions Most Frequently Asked About the Sentencing Guidelines," the Sentencing Commission states that relevant conduct for guideline offenses is to be determined without regard to the implementation date of the guidelines. *U.S. v. Turner*, __ F.2d __ (4th Cir. Feb. 19, 1991) No. 90-5021.

4th Circuit holds statute of limitations does not bar consideration of prior fraudulent acts. (170) Defendant contended that his fraudulent conduct in 1982 and 1983 could not be considered as relevant conduct because the statute of limitations bars punishment for these offenses. The 4th Circuit rejected this contention, finding that the statute of limitations does not deal with the question of whether a court may consider uncharged conduct when fashioning an appropriate sentence. The guidelines expressly provide for the consideration of all prior relevant conduct at sentencing. To the extent this conflicts with the statute of limitations, the statute of limitations begins by stating that "[e]xcept as otherwise expressly provided by law." *U.S. v. Turner*, __ F.2d __ (4th Cir. Feb. 19, 1991) No. 90-5021.

4th Circuit upholds consideration of prior uncharged crimes against due process challenge. (170) Defendant contended that it violated due process to consider his prior uncharged acts of tax fraud at sentencing. The 4th Circuit upheld the consideration of the prior uncharged crimes. Due process rights are not as extensive at sentencing as they are at trial. A judge may rely, at sentencing, upon any information so long as it has sufficient indicia of reliability. For defendant to prevail, he would have to show that the information concerning his prior acts of tax fraud was false and unreliable. Instead, the court below found by a preponderance of the evidence that these offenses had occurred. Therefore, there was no due process violation. *U.S. v. Turner*, __ F.2d __ (4th Cir. Feb. 19, 1991) No. 90-5021.

5th Circuit finds use of stolen car to be relevant conduct for stolen credit card offense. (170)(220) Defendant was arrested after unsuccessfully attempting to cash a stolen payroll check. He was in possession of a stolen rental card containing several stolen checks and credit cars. Defendant pled guilty to unlawfully possessing a stolen credit card. The 5th Circuit found that defendant's use of the stolen rental car was relevant conduct under guideline section 1B1.3 for defendant's credit card offense, especially since the stolen cards and checks were found in the car. *U.S. v. Cryer*, __ F.2d __ (5th Cir. Feb. 27, 1991) No. 90-1258.

5th Circuit upholds consideration of funds involved in transactions that were part of same course of conduct. (170)(360) Defendant pled guilty to two counts of structuring transactions to evade reporting requirements. His offense level was increased under guideline section 2S1.3 because the district court found that the value of the funds involved exceeded $100,000. Defendant argued that this was improper since the money involved in the offense of conviction was less than $100,000. The 5th Circuit upheld the enhancement, finding that the district court could properly consider funds involved in transactions which were part of the same course of conduct or common scheme as the offense of conviction. *U.S. v. Rodriguez*, __ F.2d __ (5th Cir. Feb. 19, 1991) No. 90-5562.

5th Circuit upholds consideration of related transactions to determine leadership role. (170)(430) Defendant pled guilty to two counts of structuring transactions to evade reporting requirements. Defendant contended that the district court improperly determined that he was a leader based upon evidence that defendant directed participants in currency transactions other than the those for which he was convicted. The 5th Circuit found that the leadership enhancement was proper because the transactions in which defendant controlled other persons were part of the same underlying scheme and course of conduct as the offense of conviction. Following its recent opinion in *U.S. v. Mir*, 919 F.2d 940 (5th Cir. 1990), the court found that it was proper for the sentencing court to consider all conduct linked to the transaction, "even if it falls outside the four corners of the conviction itself." *U.S. v. Rodriguez*, __ F.2d __ (5th Cir. Feb. 19, 1991) No. 90-5562.

8th Circuit upholds consideration of additional firearms distributed by defendant. (170)(330)(820) Defendant pled guilty to possession of an unregistered firearm. His offense level was increased under guideline section 2K2.2(b)(1)(B) based upon his distribution of six firearms. The 8th Circuit rejected defendant's contention that this was improper since he was indicted for possessing only a single weapon. In drug cases, an appellate court may sentence on the basis of uncharged but relevant conduct to calculate offense levels. The amount of drugs and the relevancy of conduct are factual findings reversible only for clear error. The court found that the same rationale was applicable here. *U.S. v. Dennis*, __ F.2d __ (8th Cir. Feb. 27, 1991) No. 90-5407SD.

9th Circuit says court should not accept plea bargain and then later consider dismissed charges in sentencing. (170)(770)(780) The policy statement for guideline section 6B1.2(a) says that where a plea agreement includes the dismissal of any charges, the court may accept the agreement if it determines that the "remaining charges adequately reflect the seriousness of the actual offense behavior." The 9th Circuit stated that the "plain implication of this section is that if the sentencing court believes that the remaining charges do not adequately reflect the seriousness of the defendant's behavior, the court should not accept the plea agreement." Accordingly the court held that "the sentencing court should

reject a plea bargain that does not reflect the seriousness of the defendant's behavior and should not accept a plea bargain and then later count dismissed charges in calculating the defendant's sentence." The court acknowledged that its holding was in conflict with two other circuits, *U.S. v. Kim*, 896 F.2d 678, 684 (2nd Cir. 1990), and *U.S. v. Zamarripa*, 905 F.2d 337, 341 (10th Cir. 1990), but said that its holding was "faithful not only to the guidelines but to the fundamental concept of plea bargaining." "To let the defendant pled to certain charges and then be penalized on charges that have, by agreement, been dismissed is not only unfair; it violates the spirit if not the letter of the bargain." *U.S. v. Castro-Cervantez*, 911 F.2d 222 (9th Cir. 1990), *as amended*, __ F.2d __ (9th Cir. March 6, 1991) No. 89-50145.

Offense Conduct, Generally (Chapter 2)

11th Circuit affirms upward departure based upon physical injuries and property damage caused by drunk driver. (210)(745) Defendant was convicted of DUI manslaughter in connection with an accident in which one person was killed, several others were injured, and property damage occurred. The 11th Circuit affirmed an upward departure from a guideline range of 24 to 30 months and sentenced defendant to 60 months. Defendant conceded that the guideline for involuntary manslaughter does not take into account physical injury sustained by persons other than the decedent, or property damage, and that physical injury and property damage are grounds for departure under guideline sections 5K2.2 and 5K2.5. Given the type of personal injuries and property damage sustained as a result of defendant's conduct, the extent of the departure was not unreasonable. *U.S. v. Sasnett*, __ F.2d __ (11th Cir. March 4, 1991) No. 89-4010.

11th Circuit says court may use acquitted conduct in sentencing manslaughter defendant. (210)(770) Defendant contended that since he had been acquitted of involuntary manslaughter, which requires reckless conduct, and convicted of DUI manslaughter, which only requires a lack of care, his conduct should not have been classified as reckless for sentencing purposes. The 11th Circuit rejected this contention, noting that a district court is free to consider conduct for which defendant was acquitted. However, in this case, the district court did not make an independent determination, but relied on a misinterpretation of state law. Therefore, the case was remanded for the district court to make an independent determination as to whether defendant's conduct should have been classified as reckless or criminally negligent. *U.S. v. Sasnett*, __ F.2d __ (11th Cir. March 4, 1991) No. 89-4010.

2nd Circuit remands where, in departing downward, court mistakenly believed mandatory minimum sentence applied. (245) The presentence report and plea agreement incorrectly stated that defendant was subject to a mandatory minimum five-year sentence. In departing downward for substantial assistance, the court relied on 18 U.S.C. section 3553(e), which deals only with downward departures below a minimum level established by statute. The 2nd Circuit remanded for resentencing, because the court obviously felt that the mandatory minimum term applied. Since the appellate court could not assume that the same 48-month sentence would have been imposed in the absence of the error, the case was remanded for resentencing. *U.S. v. Moon*, __ F.2d __ (2nd Cir. Feb. 15, 1991) No. 90-1375.

2nd Circuit says defendant not responsible for drugs calculated on basis of co-conspirator's unexplained income. (250) (275) The district court estimated that the conspiracy distributed over 50 kilograms of cocaine, based on a co-conspirator's unexplained income of $2,000,000. The court attributed the full amount to defendant, but the 2nd Circuit reversed. In general, where the quantity seized does not reflect the scale of the offense, it is proper to approximate the quantity based on financial records. However, it was improper to attribute the full approximated quantity to the defendant. This unfairly held him accountable for four years of his cooconspirator's unreported income. The funds may have been accumulated at any prior time, and may have come from any source, including the co-conspirator's independent personal transactions or some other narcotics conspiracy. *U.S. v. Mickens*, __ F.2d __ (2nd Cir. Feb. 26, 1991) No. 90-1061.

4th Circuit says drug equivalency tables cannot be used as manufacturing conversion ratios. (250) Defendant was convicted of conspiracy to manufacture crack after police found cocaine in his apartment. A chemist testified that 100 grams of cocaine would yield 88 grams of crack, so the district court multiplied the cocaine by .88 to determine how much crack defendant could have manufactured. On appeal, defendant argued that the drug equivalency tables of the guidelines use a conversion ration of 100 grams of cocaine to one gram of crack. The 4th Circuit upheld the district court's calculation. The drug equivalency tables in note 10 of the commentary to guideline section 2D1.1 are not manufacturing conversion ratios. Rather, the tables simply provide a means for combining different controlled substances to obtain a single offense level. Since defendant was convicted of conspiracy to manufacture only one substance, crack, the tables had no application in this case. *U.S. v. Paz*, __ F.2d __ (4th Cir. March 4, 1991) No. 90-5307.

10th Circuit upholds calculation of P-2-P based on entire weight of liquid containing drug. (250) The district court determined defendant's base offense level by multiplying the 94 liters of liquid containing P-2-P found in defendant's laboratory by the .375 cocaine equivalency formula contained in the guidelines. Defendant's chemist testified that the most P-2-P that could be produced from the laboratory was 8.85

kilograms. Defendant argued that the correct weight in a manufacturing case should be the maximum amount of drugs that could be produced from the manufacturing process, and that the waste product should not be included. The 10th Circuit found that the district court had properly calculated the drug equivalency. A footnote to the drug quantity table in guideline section 2D1.1(c) states that the weight of a controlled substance refers to "the entire weight of any mixture or substance containing a detectable amount of the controlled substance." *U.S. v. Dorrough*, __ F.2d __ (10th Cir. Feb. 28, 1991) No. 89-7086.

11th Circuit upholds calculation of amount of pharmaceutical drugs based on gross weight. (250) Defendant, a pharmacist, pled guilty to distributing controlled substances. He argued that the district court erred in using the gross weight of the drugs sold rather than the net weight, or dosage weight, to compute the heroin equivalency. The 11th Circuit found that the drug quantity table unambiguously requires gross weight of the drugs to be used in calculating the heroin equivalency, even for pharmaceutical drugs. The reference to the Anti-Drug Abuse Act did not create an ambiguity. Moreover, even if it did, the Act does not reflect a Congressional intent to treat pharmaceutical drugs differently from street drugs. *U.S. v. Lazarchik*, __ F.2d __ (11th Cir. Feb. 21, 1991) No. 90-3111.

11th Circuit upholds determination of amount of cocaine where defendant failed to object to presentence report. (250)(760) The 11th Circuit rejected defendant's challenge to his base offense level because he failed to object to the presentence report's determination that 15 kilograms were involved in the offenses. The district court specifically adopted the Probation Department's finding of fact on the basis of defendant's failure to object. Moreover, the district court's determination of the amount of cocaine was not clearly erroneous, given (a) the size of the conspiracy, (b) the amount of cocaine seized, (c) the triple-beam scales, heat-sealing machine and large number of zip-lock bags found, and (d) a co-conspirator's testimony as to the value of cocaine she sold on a daily basis. *U.S. v. Christopher*, __ F.2d __ (11th Cir. Feb. 21, 1991) No. 89-7035.

9th Circuit upholds managerial role for defendant convicted of managing a building for distributing heroin. (250)(430) Defendant was convicted of renting or managing a building for the purpose of storing, distributing and/or using heroin, in violation of 21 U.S.C. section 856. He argued that it was error to add two offense levels for his role as an organizer or manager under guideline section 3B1.1(c) because the offense incorporated his status as a manager. The 9th Circuit rejected the argument, noting that section 856 criminalizes only the managing of the building, and does not address other forms of management. Here there was ample evidence that the defendant managed other drug related activities and people, going beyond mere control of the drug house. The court held that this related information could be considered "relevant conduct" in calculating the base offense level. *U.S. v. Martinez-Duran*, __ F.2d __ (9th Cir. Feb. 28, 1991) No. 89-50583.

9th Circuit reverses departure where no showing that 46% pure heroin was "of unusually high purity." (250)(746) Application Note 9 to guideline section 2D1.1 provides that trafficking in controlled substances of unusually high purity may warrant an upward departure, particularly in the case of heroin. Here however, the 9th Circuit found no evidence to support a finding that heroin of 46% purity is of "unusually high purity." Nor did the district court make such a finding. Although the government purported to rely upon "narcotics experts" for the proposition that 46% purity is "consistent with what is considered to be of good quality," it provided no factual proof, and in any event its contention that the heroin was either of "good quality" or "fairly high purity" was insufficient to warrant departure. *U.S. v. Martinez-Duran*, __ F.2d __ (9th Cir. Feb. 28, 1991) No. 89-50583.

11th Circuit remands for resentencing where court failed to follow procedural safeguards. (250)(770) At the time defendant entered his plea, the district court had held the guidelines unconstitutional. The 11th Circuit ordered resentencing because the district court failed to follow many of the procedural safeguards required by the guidelines. First, the court made no findings of fact regarding the amount of cocaine. Second, even assuming that the court determined that 15 kilograms of cocaine were involved, that conclusion was clearly erroneous. The presentence report only contained a conclusory statement to this effect. No evidence was introduced at the sentencing hearing regarding the amount. To the extent that the 15 kilogram finding was based upon testimony offered at the trial of certain co-defendants, the evidence could not be used, without more, in light of defendant's objection. *U.S. v. Christopher*, __ F.2d __ (11th Cir. Feb. 21, 1991) No. 89-7035.

9th Circuit upholds departure from telephone count guideline. (255)(745) Defendant pled guilty to use of a communication facility in committing a drug offense. Under guideline section 2D1.6, the top of the guideline range was 12 months. The district court departed upward to 20 months, and on appeal, the 9th Circuit affirmed. The district court did not clearly err in deciding that defendant's actions constituted far more than a mere telephone call. Defendant was present when the instructions to deliver the heroin were given, carried the heroin to the car, and was present at the sale to the DEA agent. *U.S. v. Martinez-Duran*, __ F.2d __ (9th Cir. Feb. 28, 1991) No. 89-50583.

2nd Circuit reverses determination that defendant was accountable for cocaine he never purchased. (265)(275) Defendant negotiated to obtain a kilogram of cocaine to sell to an undercover government agent, but ultimately bought from

another source because it was being sold for a better price. The district court sentenced him based on two kilograms of cocaine. The 2nd Circuit reversed, ruling that the object of the conspiracy was to obtain only one kilogram to sell to the government agent. The kilogram eventually obtained was in lieu of, not in addition to, the kilogram on which defendant had negotiated to buy. This would have reduced his offense level from 78 months to 63 months. Although the court departed downward to 48 months for defendant's substantial assistance, the court remanded for resentencing. There was no way of knowing what sentence would have been imposed had the court known the correct guideline range. *U.S. v. Moon*, __ F.2d __ (2nd Cir. Feb. 15, 1991) No. 90-1375.

8th Circuit upholds sentencing defendant on the basis of drugs intercepted by authorities. (270) A postal inspector intercepted a parcel directed to defendant's address. Law enforcement officers removed almost four kilograms of cocaine from the package, leaving one ounce in the package with several packages of flour to simulate the weight of the removed cocaine. Defendant argued that it was improper to sentence him on the basis of the four kilograms of cocaine never delivered to him. Following the 7th Circuit's decision in *U.S. v. White*, 888 F.2d 490 (7th Cir. 1989), the 8th Circuit rejected this argument. It would perpetuate irrational distinctions to make a large sentencing difference depend upon whether the government decided to drain most of the drugs from a package directed to defendant. *U.S. v. Franklin*, __ F.2d __ (8th Cir. Feb. 22, 1991) No. 90- 1946.

4th Circuit permits reliance on uncorroborated testimony to support enhancement for firearm. (284)(770) A government informant who sold marijuana to defendant testified that during the transaction, an individual opened his jacket to reveal a gun sticking in the waistband of his pants. The 4th Circuit found that it was permissible for the district court to rely upon this uncorroborated testimony to support the enhancement for possession of a weapon. The type of information that may be considered at sentencing is unlimited. The presentence report advised defendant of this evidence. The testimony was under oath, and defendant had an opportunity to cross-examine the witness and present rebuttal evidence. The 4th Circuit also rejected defendant's argument that sentencing him on the basis of the firearm violated the 6th Amendment's notice requirements. The procedure followed at sentencing clearly gave defendant all of his 6th Amendment notice rights. *U.S. v. Bowman*, __ F.2d __ (4th Cir. March 1, 1991) No. 89-5824.

9th Circuit upholds enhancement despite fifteen mile distance between drugs and gun. (284) Guideline section 2D1.1 provides for a two level increase over the base offense level if "a firearm or other dangerous weapon was possessed during commission of the [drug] offense." Here the weapon was possessed at defendant's home fifteen miles away from the act of distribution in furtherance of the conspiracy. Relying on its recent opinion in *U.S. v. Willard*, 919 F.2d 606 (9th Cir. 1990), the 9th Circuit reiterated that the statutory language "possessed during the commission of the offense" refers to the *entire course of criminal conduct*, not only the offense of conviction. Thus the question is "whether the gun was possessed during the course of criminal conduct, not whether it was 'present' at the site." Here the defendant was convicted of conspiracy, and the court found no indication that the conspiracy was limited to the site of the distribution. *U.S. v. Stewart*, __ F.2d __ (9th Cir. Feb. 25, 1991) No. 90-30016.

11th Circuit finds firearm enhancement proper even if defendants were unaware of co-conspirator's firearm. (284)(755) The 11th Circuit rejected defendants' arguments that a sentence enhancement based on their co-conspirator's possession of a firearm during the commission of a drug offense was improper because they were unaware of the firearm. The district court found that the co-conspirator's possession of the firearm was reasonably foreseeable. Basing the sentencing enhancement upon proof by a preponderance of the evidence rather than beyond a reasonable doubt did not violate due process. It was not unconstitutional to permit the district court to consider relevant conduct for which the defendant was neither charged nor convicted, so long as proof of that conduct has a reasonable indicia of reliability. *U.S. v. Martinez*, __ F.2d __ (11th Cir. Feb. 21, 1991) No. 89-3535.

6th Circuit affirms upward departure based upon extent of harm and number of victims. (300)(745) Defendant established a fraudulent investment company through which he solicited more than 3.8 million dollars from over 600 investors in 22 states. Although the guideline range for the counts governed by the guidelines was 27 to 33 months, the district court departed upward to 60 months. The 6th Circuit upheld the departure, based on the extremely large scope of the fraud, the number of victims, and the extent of the harm. The guidelines acknowledge that the dollar loss caused by a defendant's fraud often does not fully capture the harmfulness and seriousness of a defendant's conduct. Defendant's criminal activities continued for nearly five years, resulting in the loss of over 3 million dollars from more than 600 investors, many of whom were disabled or elderly. *U.S. v. Benskin*, __ F.2d __ (6th Cir. Feb. 26, 1991) No. 90-5707.

11th Circuit upholds 60-month sentence for bail jumping. (320)(390) Defendant was convicted of criminal contempt in connection with jumping bail. Because the kinds of conduct constituting contempt vary significantly, the applicable guideline, section 2J1.1, does not contain a specific offense level but directs a court to impose a sentence based on the purposes for sentencing. An application note refers to guideline 2X5.1, which instructs a district court to look to analogous guidelines. The district court found there was no analogous guideline, and imposed a 60-month sentence. The 11th Circuit affirmed. Although defendant argued that section 2J1.6 -- failure to appear -- was an analogous guideline,

the 11th Circuit agreed that defendant's actions were more serious than just failing to appear. Defendant fled shortly before trial, leaving behind a videotape explaining the reasons for his flight. Extensive efforts were necessary to recapture him, and resulted in two trials. *U.S. v. Gabay*, __ F.2d __ (11th Cir. Feb. 21, 1991) No. 89-6059.

4th Circuit upholds determination that weapons were not possessed for sporting or collection purposes. (330) Defendant was convicted of being a felon in possession of a firearm. The 4th Circuit upheld the district court's refusal to reduce defendant's offense level under guideline section 2K2.1(b)(1) based on his contention that he possessed the firearms for sporting or collection purposes. Defendant sold a stolen semi-automatic assault rifle and three handguns with silver-tipped hollow-point ammunition to a federal agent, and advised him that one of the weapons was "hot." He sold the guns for cash and did not complete transfer forms. Even given defendant's evidence that he was a collector and frequently took target practice, the district court's conclusion that defendant did not possess the weapons for sporting or collection purposes was not clearly erroneous. *U.S. v. Smith*, __ F.2d __ (4th Cir. Sept. 20, 1990) No. 90-5323.

8th Circuit finds no double jeopardy violation in increasing sentence based upon possession of stolen weapon. (330) Defendant argued that increasing his offense level under guideline 2K2.2(b)(2) for possessing a stolen weapon subjected him to double jeopardy because he was serving a state sentence for receiving stolen property that included the weapon. The 8th Circuit rejected this argument, since both the federal government and a state government may punish a defendant for the same conduct without implicating double jeopardy concerns. *U.S. v. Dennis*, __ F.2d __ (8th Cir. Feb. 27, 1991) No. 90-5407SD.

5th Circuit upholds determination that defendant participated in money laundering scheme involving $450,000. (360) The 5th Circuit affirmed the increase in defendant's offense level under section 2S1.1(b)(2) for laundering $450,000. Even if defendant did not know at the time that the initial $225,000 transaction was illegal, his knowledge of its illegality at the time he agreed to the second money laundering transaction rendered the initial transaction relevant conduct under the guidelines. The court rejected defendant's argument that it was improper to consider the second $225,000 transaction because he never touched the money and did not intend to launder it. His intention to take the money was obvious from his arrival at the scene with a valise and a loaded pistol. A co-conspirator counted the money, put the money in the valise, and placed the valise near defendant. His intent was also supported by his extensive conversation with agents concerning his laundering expertise. *U.S. v. Richardson*, __ F.2d __ (5th Cir. Feb. 19, 1991) No. 90-3172.

4th Circuit finds 1982 and 1983 tax fraud to be part of same course of conduct as 1987 tax fraud. (370)(470) Defendant pled guilty to making a false claim on his 1987 federal tax return. The sentencing court determined that defendant's uncharged acts of tax fraud committed in 1982 and 1983 should be considered as relevant conduct under guideline section 1B1.3(a)(2) because these offenses would have to be grouped under guideline section 3D1.2(d) and were part of the same course of conduct as the offense of conviction. The 4th Circuit rejected defendant's argument that the grouping of multiple counts applies only to counts for which there has been an indictment. Moreover, the alleged 1982 and 1983 acts were part of the same course of conduct as defendant's 1987 tax conviction. Defendant defrauded the government using the same technique each time and did so every successive year that he had the opportunity. Temporally "distant" acts may be considered as part of the same course of conduct. *U.S. v. Turner*, __ F.2d __ (4th Cir. Feb. 19, 1991) No. 90-5021.

Adjustments (Chapter 3)

2nd Circuit finds failure to hold a hearing concerning defendant's managerial status to be erroneous. (430) In remanding the case on other grounds, the 2nd Circuit noted that it was erroneous for the district court to ascribe managerial status to defendant without holding a hearing, since both the probation department and the prosecution agreed a hearing was necessary. *U.S. v. Mickens*, __ F.2d __ (2nd Cir. Feb. 26, 1991) No. 90-1061.

4th Circuit affirms managerial status of defendant who controlled money, drugs and residences. (430) Defendant objected to his classification as a manager, arguing that he was a courier. The 4th Circuit upheld defendant's managerial status based on evidence that defendant controlled the money, drug products and residences where the drug trafficking was performed. *U.S. v. Paz*, __ F.2d __ (4th Cir. March 4, 1991) No. 90-5307.

4th Circuit rejects minor or minimal status for defendant who drove conspirators to bomb site. (440) Several former mine workers were convicted of bombing a coal mine. Defendant contended that he was entitled to minor or minimal role status because he merely drove the miners to the site and did not actually place any explosives or take a leadership role in any of the meetings. Another co-conspirator who went with defendant on an earlier failed mission and waited with defendant in the car did receive a reduction. The 4th Circuit upheld the district court's rejection of minor or minimal status for defendant. Defendant had the burden of proving his entitlement to such a reduction and did not carry this burden. The district court found that defendant was a key part of the conspiracy. Defendant transported the dynamite with a clear understanding of what explosives can do

and waited while the others planted the bomb. *U.S. v. Sharp*, __ F.2d __ (4th Cir. March 4, 1991) No. 90- 5491.

5th Circuit rejects minor status despite contrary conclusion in presentence report. (440) Defendant contended that he was just a "runner" entitled to minor status in a money laundering operation. Defendant was sent by a co-conspirator to pick up money from government agents conducting a "sting" operation. In a telephone conversation with one of the agents, the co-conspirator referred to defendant as simply a "runner," and "not an Einstein." Despite the "reluctant" conclusion of the presentence report that defendant was a minor participant, the 5th Circuit upheld the denial of a reduction based on his minor role. The district court reviewed a videotape of defendant's meeting with the government agents, during which defendant engaged in a lengthy discussion about methods of laundering drug money. Moreover, the presentence report found that defendant was more than a mere runner and that his knowledge of money laundering was evident. This was a sufficient basis for the district judge to reach a conclusion contrary to the presentence report. *U.S. v. Richardson*, __ F.2d __ (5th Cir. Feb. 19, 1991) No. 90-3172.

8th Circuit rejects minimal or minor status based upon quantity of cocaine. (440)(810) The 8th Circuit rejected defendant's argument that he was entitled to minor or minimal participant status. Given the 3.5 to 4 kilograms of cocaine stipulated by defendant in his plea agreement, and defendant's participation throughout the entire drug transaction, the district court's determination that defendant was not a minor or minimal participant was not clearly erroneous. The court also found that defendant's request that he be sentenced at the low end of the guidelines range was non-reviewable. *U.S. v. Hutchinson*, __ F.2d __ (8th Cir. Feb. 22, 1991) No. 90-5192.

5th Circuit upholds upward departure where public official's fraudulent conduct disrupted a government function. (450)(745) Defendant was a local sheriff who fraudulently authorized payments to a co-defendant for services never rendered, in return for a kickback. These payments represented a significant portion of the sheriff's operating budget, and the loss caused a serious disruption of a government function. Accordingly, the court departed upward from 14 to 24 months. The 5th Circuit upheld the departure, rejecting defendant's contention that he had already been penalized by the increase in offense level for abuse of a public trust under section 3B1.3. *U.S. v. Hatch*, __ F.2d __ (5th Cir. Feb. 28, 1991) No. 90-4184.

1st Circuit upholds obstruction enhancement based on defendant's false testimony at trial. (460) Defendant testified that he came to the apartment only to borrow his cousin's car, and that he had arrived only 45 minutes prior to the police. This testimony was rebutted by a police officer who had watched the apartment for over two hours before the arrests, and testified that defendant did not enter the apartment during that period. The 1st Circuit upheld an enhancement for obstruction of justice based on defendant's untruthful testimony. Defendant was not punished for refusing to admit his guilt. No defendant has a constitutional right to testify falsely. The commentary which provides that a defendant's testimony be evaluated in the light most favorable to him does not require the district court to resolve all factual disputes in favor of the defendant. *U.S. v. Batista-Polanco*, __ F.2d __ (1st Cir. Feb. 28, 1991) No. 89-2197.

9th Circuit upholds obstruction enhancement where defendant fled from car after police pursuit. (460) Defendant's flight did not occur in the immediate aftermath of his crime. The crime had taken place three weeks before. He had already been arrested for the offense and told that he was a suspect in a criminal case. The 9th Circuit found that this was far from the situation where a criminal is surprised in the act of committing a crime and makes "an evasive dodge" to avoid apprehension. For two weeks prior to his arrest defendant played a cat-and-mouse game of avoiding the authorities, though he knew he was expected to surrender himself voluntarily. Moreover, upon fleeing his car, he forced the arresting officers to chase him for over 40 minutes before they captured him. Judge Beezer dissented, arguing that these facts did not justify an obstruction enhancement. *U.S. v. Mondello*, __ F.2d __ (9th Cir. March 7, 1991) No. 90-50121.

11th Circuit upholds obstruction of justice enhancement because judge made independent finding of defendant's perjury. (460) Defendant claimed that the district court improperly enhanced his sentence for obstruction of justice solely because the jury found against his version of the facts. The 11th Circuit rejected this contention, finding that the district court made an independent determination that defendant committed perjury. The district court found that defendant "blatantly, intentionally and willfully lie[d] in material respects with regard to the offense charged, so as to create additional problems for the jury." *U.S. v. Husky*, __ F.2d __ (11th Cir. Feb. 21, 1991) No. 90-7081.

2nd Circuit rejects acceptance of responsibility and jury's recommendation of leniency as grounds for downward departure. (480)(722) The 2nd Circuit found that the district court's downward departure was improperly based upon defendant's acceptance of responsibility and on the request for leniency made by the jury in announcing its guilty verdict. The district court believed that the two-point reduction for acceptance of responsibility did not adequately reflect the degree of defendant's contrition. Although the appellate court did not foreclose the possibility that this rationale might, in appropriate circumstances, support a downward departure, this was not such a case. It was also error for the judge to rely upon the jury's plea for leniency as grounds for

departure. Although the jury's sympathy for defendant might reflect circumstances that would justify a departure, the judge must make an independent determination of these circumstances. *U.S. v. Mickens*, __ F.2d __ (2nd Cir. Feb. 26, 1991) No. 90-1061.

6th Circuit rules that Alford plea does not bar acceptance of responsibility reduction. (480)(485) Defendant was denied a reduction for acceptance of responsibility because she pled guilty pursuant to an Alford plea. Under an Alford plea a defendant pleads guilty in order to forego a trial but maintains his or her innocence. The 6th Circuit ruled that an Alford plea does not necessarily bar a reduction for acceptance of responsibility. First, the guidelines state that a trial court may not consider that a guilty plea is based on the practical certainty of conviction at trial. Second, the factors to be considered for an acceptance of responsibility reduction are not inconsistent with Alford pleas. However, defendant was not entitled to a reduction because the record did not contain any facts suggesting that defendant accepted responsibility. *U.S. v. Tucker*, __ F.2d __ (6th Cir. Feb. 19, 1991) No. 90-5101.

Criminal History (§ 4A)

4th Circuit upholds inclusion of shoplifting charge in criminal history calculation. (500) Defendant contended that the district court improperly included two prior convictions for shoplifting in her criminal history. One offense occurred in 1988 and was prosecuted under a local ordinance. The other offense occurred in 1983 and was prosecuted under a state statute. Defendant relied upon guideline section 4A1.2(c)(1), which provides that local ordinance violations and similar offenses are not counted in a defendant's criminal history unless there is a sentence of at least one year probation or 30 days' imprisonment or the offense is similar to the instant offense. The 4th Circuit did not address this argument, finding that even if the 1988 conviction was improper, there was no basis for discounting the 1983 conviction. Reduction of one point did not change defendant's criminal history category. *U.S. v. Simon*, __ F.2d __ (4th Cir. Feb. 28, 1991) No. 90-5511.

New York District Court rules that possession of a firearm by a felon is not a crime of violence. (520) Disagreeing with the 9th Circuit's opinion in *U.S. v. O'Neal*, 910 F.2d 663 (9th Cir. 1990), the Southern District of New York ruled that the offense of being a felon in possession of a firearm was not a crime of violence. Although the underlying circumstances did involve violence, the court ruled that it was barred from considering those circumstances. Therefore the court could not sentence defendant as a career offender. *U.S. v. Hernandez*, __ F.Supp. __ (S.D.N.Y. Dec. 31, 1990) No. 89 CR. 999(MBM).

New York District Court departs upward because defendant did not technically qualify as a career offender. (520) (733)(745) The district court stated that if it had been permitted to consider the underlying circumstances, it would have found that defendant's possession of the firearm was a crime of violence. It found this a sufficient basis to depart upward from criminal history category IV to criminal history category VI. The court also found that defendant possessed the weapon while engaged in drug trafficking, and rejected defendant's suggestion that the extent of the departure should be determined by analogy to the guidelines' two points for possession of a weapon during a drug transaction. To a 30-month sentence the district court added the five-year sentence that Congress made applicable to a defendant who used a weapon in the course of committing a drug offense, and sentenced defendant to 90 months. *U.S. v. Hernandez*, __ F.Supp. __ (S.D.N.Y. Dec. 31, 1990) No. 89 CR. 999(MBM).

3rd Circuit will not review underlying circumstances to determine whether offense listed in application notes is crime of violence. (520) The 3rd Circuit found that since robbery was specifically listed in the application notes as a crime of violence, robberies are "per se crimes of violence," and it was error not to sentence defendant as a career offender. The court left open the possibility that a review of the underlying circumstances might be proper in cases involving offenses other than those specifically enumerated in the application notes. *U.S. v. McAllister*, __ F.2d __ (3rd Cir. March 1, 1991) No. 90- 1741.

5th Circuit upholds consideration of entire value of stolen rental car to determine criminal income. (540) Four months after escaping from a halfway house, defendant was arrested in possession of stolen checks and credit cards, and a stolen rental car valued at $15,000. The district court enhanced his sentence under guideline section 4B1.3 for criminal livelihood. Defendant claimed he did not meet the criminal livelihood requirements because (a) he did not earn at least $6,700 from his pattern of criminal behavior, and (b) the criminal conduct was not his "primary occupation" during the prior 12-month period. The 5th Circuit rejected both of these arguments. The district court could have properly treated the entire market value of the stolen rental car as income for the year in which defendant stole it. Second, a defendant need not engage in criminal activity for 12 months to qualify for this enhancement; it need only be his primary occupation during the 12-month period. *U.S. v. Cryer*, __ F.2d __ (5th Cir. Feb. 27, 1991) No. 90-1258.

Determining the Sentence (Chapter 5)

9th Circuit says probation guidelines are consistent with congressional intent. (560) Relying on prior cases, the 9th

Circuit reiterated that the sentencing guidelines' restriction on probation does not violate congressional intent. *U.S. v. Mondello*, __ F.2d __ (9th Cir. March 7, 1991) No. 90-50121.

5th Circuit rules that failure to explain effect of supervised release was harmless error. (580) Defendant was informed that he could receive a term of supervised release of at least five years. However, the district court failed to advise him of the effect of that term as required by Fed. R. Crim. P. 11. The 11th Circuit held that this failure was an "inadequate address," and the error was harmless. No substantial rights were affected because defendant was unable to show that he was prejudiced by the failure. He could not argue that he would not have pled guilty but for the error. The evidence of his guilt was substantial. The conditions of supervised release were not so onerous that they would deter him from pleading guilty particularly where, as here, the total sentence of imprisonment plus supervised release was far less than the life sentence he might otherwise have received. *U.S. v. Tuangmaneeratmun*, __ F.2d __ (5th Cir. Feb. 21, 1991) No. 90-2036.

9th Circuit reaffirms supervised release guidelines as consistent with intent of Congress. (580) Defendant claimed that section 5D1.1(a) of the guidelines which requires supervised release when a sentence of more than one year is imposed, is contrary to the intent of Congress. He made the same claim with respect to section 5D1.2, which establishes mandatory minimum terms of supervised release. The 9th Circuit noted that these arguments had been recently rejected. *U.S. v. Mondello*, __ F.2d __ (9th Cir. March 7, 1991) No. 90-50121.

4th Circuit reverses restitution order based upon lost profits. (610) Nine former miners were ordered to pay restitution in excess of $112,000 as a result of their involvement in bombing a mine. The 4th Circuit found that this figure improperly included $28,200 in lost profits. Section 3663(b) of the Victim and Witness Protection Act does not provide for the recovery of lost profits. Although section 3663(a) does provide for the recovery of lost income, this section only applies to an offense involving bodily injury to a victim. The inclusion of the cost of repairing the mine was proper. The VWPA also requires the district judge to balance the victim's interest in compensation against the financial resources and circumstances of the defendant. On remand, the district court was also ordered to make clear findings of fact as to the defendants' resources and financial needs. *U.S. v. Sharp*, __ F.2d __ (4th Cir. March 4, 1991) No. 90-5491.

9th Circuit holds that limit on restitution to count of conviction applies only to restitution under VWPA. (610) In *Hughey v. United States*, 110 S.Ct. 1979 (1990), the Supreme Court held that the language of the Victim Witness Protection Act, 18 U.S.C. section 3663 evidenced "Congress' intent to authorize an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction." Based on *Hughey*, the defendant here argued that his restitution should have been limited to the amount of the loss suffered by persons in the counts to which he pled guilty. The 9th Circuit rejected the argument, holding that *Hughey* applied only to restitution under the Victim and Witness Protection Act. In the present case, restitution was imposed as a special condition of probation under 18 U.S.C. section 3651. The 9th Circuit upheld the order to pay $1.7 million in restitution, declining to extend the *Hughey* decision to cases where restitution is imposed as a special condition of probation. *U.S. v. Duvall*, __ F.2d __ (9th Cir. Feb. 21, 1991) No. 90-10197.

9th Circuit holds that restitution under VWPA is limited to offenses of conviction even when the conviction involves a conspiracy or scheme. (610) In *Hughey v. U.S.*, 110 S.Ct. 1979 (1990), the Supreme Court limited restitution under the Victim and Witness Protection Act, (VWPA) to the offense of conviction. Although the 9th Circuit had previously held that a single count of wire fraud encompassed liability for the entire scheme, see *U.S. v. Pomazi*, 851 F.2d 244 (9th Cir. 1988), the court in this case read *Hughey* to overrule *Pomazi* and "limited restitution in a wire fraud scheme to the amount specified in the count to which the guilty plea was made." The court rejected the government's attempt to distinguish *Hughey* on the ground that the count to which defendant pleaded *nolo contendere* charged that a $3,000 fraudulent transfer was part of an overall scheme which defrauded various victims of $8.5 million. The court said that "even when the offense of conviction involves a conspiracy or scheme, restitution must be limited to the loss attributable to the specific conduct underlying the conviction." *U.S. v. Sharp*, __ F.2d __ (9th Cir. March 6, 1991) No. 88-5122.

11th Circuit says sentencing court cannot leave restitution issue open. (610) At sentencing, the district court determined that defendant did not have the present financial ability to make restitution. However, in light of the possibility that he could earn money in the future, the court stated that the issue of restitution could be reopened at such time as defendant might begin earning money. The 11th Circuit found no authority for a sentencing court to leave the question of restitution open until an uncertain date, and remanded for an immediate determination as to restitution. *U.S. v. Sasnett*, __ F.2d __ (11th Cir. March 4, 1991) No. 89-4010.

11th Circuit holds district court cannot order restitution to compensate victim for mental suffering. (610) Defendant was convicted of raping and sodomizing a female correctional officer in his prison cell. Defendant contended that the district court improperly ordered that he pay $500,000 restitution to the victim to compensate for psychological and mental suffering from post-traumatic stress. The 11th Circuit found that the restitution order was an improper at-

tempt to compensate the victim for her mental suffering. Agreeing with the 9th and 2nd Circuits, the court found that the list of compensable harms set forth in 18 U.S.C. section 3663 is exclusive. Therefore, the district court lacked the authority to order the defendant to pay restitution to compensate the victim for mental anguish. *U.S. v. Husky*, __ F.2d __ (11th Cir. Feb. 21, 1991) No. 90-7081.

9th Circuit refuses to consider challenge to fine raised for the first time on appeal. (630)(800) Defendant argued that the fine provision of the guidelines were contrary to statutory authority and that the district court erred in failing to determine whether he was financially able to bear the fine assessed. However, the defendant did not contest the fine in the district court. The 9th Circuit held that as a general rule it will not consider an issue raised for the first time on appeal. Accordingly it refused to consider the defendant's claim. *U.S. v. Mondello*, __ F.2d __ (9th Cir. March 7, 1991) No. 90-50121.

9th Circuit holds that a federal sentence cannot be ordered to run consecutively to a state sentence not yet imposed. (660) Based on its interpretation of 18 U.S.C. section 3584(a) and prior case law, the 9th Circuit held that "a federal district court does not have the authority to direct that a federal sentence be served consecutive to a state sentence not yet imposed." The court noted however, that if the district court had delayed sentencing until the state sentence had been imposed, it could have imposed a consecutive sentence. The case was remanded to permit the trial court to resentence the defendant. *U.S. v. Clayton*, __ F.2d __ (9th Cir. March 6, 1991) No. 89-30361.

9th Circuit upholds Commission's decision to make offender characteristics "not ordinarily relevant." (690) Defendant argued that guideline section 5H1.1 was contrary to the intent of Congress because it provides that certain aspects of a defendant's background and character are "not ordinarily relevant in determining whether a sentence should be outside the guidelines." The 9th Circuit rejected the argument, noting that even in the ordinary case, a court may still consider any of these factors in making adjustments within the guideline range. The court held that the Commission's decision to deem these factors "not ordinarily relevant" to departure determinations "accords fully with Congress's expression in 18 U.S.C. section 994(c) of the 'general inappropriateness' of considering them in sentencing." *U.S. v. Mondello*, __ F.2d __ (9th Cir. March 7, 1991) No. 90-50121.

Departures Generally (§ 5K)

9th Circuit says court need not affirmatively acknowledge that it has authority to depart downward. (700)(810) Defendant argued that he should be allowed to appeal the district court's failure to depart downward, because the record was silent on whether the court recognized that it had authority to depart below the guideline range. The 9th Circuit rejected the argument, holding that the court's silence was not sufficient to indicate that it believed it lacked power to depart. The court held that "the district court has no obligation affirmatively to state that it has authority to depart when it sentences within the guideline range." *U.S. v. Garcia-Garcia*, __ F.2d __ (9th Cir. March 4, 1991) No. 90-50100.

4th Circuit upholds refusal to depart downward for substantial assistance in absence of government motion. (710) Since the government failed to make a motion for a downward departure for defendant's substantial assistance, the district court properly ruled that it lacked authority to make such a downward departure. However, the 4th Circuit expressed concern that the government originally dealt with an unrepresented and uncharged man. They made representations to him in order to induce him to wear a wire to gather evidence against his co-conspirators. It was unclear exactly what representations were made, but a layperson's understanding of "doing all we can with the guidelines" might encompass a promise to move for a downward departure. The government appeared to be following "a practice of making unclear oral representations to unrepresented criminal defendants which they may misinterpret as promises upon which they can rely." *U.S. v. Sharp*, __ F.2d __ (4th Cir. March 4, 1991) No. 90-5491.

11th Circuit upholds upward departure for drug dealer who involved his own children in the offense. (733)(745) Defendant was convicted of several drug offenses. The district court departed upward and sentenced him to life imprisonment without parole. The 11th Circuit upheld the departure as reasonable and consistent with the aims of the guidelines. Among the factors which warranted an upward departure were defendant's extensive criminal history which was not adequately reflected by his criminal history category, and his willingness to corrupt members of his family, including his own children, by involving them in criminal activities. *U.S. v. Christopher*, __ F.2d __ (11th Cir. Feb. 21, 1991) No. 89-7035.

Sentencing Hearing (§ 6A)

5th Circuit rules district court need not state reasons for imposing sentence at top of guideline range. (775) Defendant contended that the trial court erred in imposing a 46-month sentence which was at the top of his guideline range, with no articulated reason, when the probation office recommended only 36 months. Following *U.S. v. Ehret*, 885 F.2d 441 (8th Cir. 1989), the 5th Circuit held that when the spread of an applicable guideline range is less than 24 months, the district court is not required to state its reasons for imposing a sentence within the applicable range. Since defendant's guideline range was between 37 and 46 months, the judge was not required to state his reasons for imposing

a 46-month sentence. *U.S. v. Richardson*, __ F.2d __ (5th Cir. Feb. 19, 1991) No. 90-3172.

Plea Agreements, Generally (§ 6B)

5th Circuit finds district court did not improperly fail to explain application of guidelines. (790) Defendant argued that the district court improperly failed to explain the application of the guidelines to him at his plea hearing. The 5th Circuit rejected this argument. Under Fed. R. Crim. P. 11, in effect at the time defendant was sentenced, the district court was not required to inform a defendant about the applicable guideline range. Moreover, the provisions in defendant's plea agreement concerning offense level and acceptance of responsibility demonstrated that he was aware of the applicability of the guidelines. Even as amended, Rule 11 does not require a court to calculate and explain the guideline sentence before accepting a guilty plea. *U.S. v. Tuangmaneeratmun*, __ F.2d __ (5th Cir. Feb. 21, 1991) No. 90-2036.

5th Circuit finds no breach of plea agreement in prosecutor's seeking enhancement for conduct outside offense of conviction. (790) The 5th Circuit rejected defendant's contention that the U.S. Attorney's office breached the plea agreement by seeking a sentence enhancement based upon offenses not included in defendant's indictment. A prosecutor may inform the court of mitigating and aggravating factors in the determination of the sentence. As part of the plea agreement, the prosecutor merely agreed not to prosecute defendant for these offenses, not to withhold facts from the court. *U.S. v. Rodriguez*, __ F.2d __ (5th Cir. Feb. 19, 1991) No. 90-5562.

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

2nd Circuit reviews defendant's sentence even though issues not raised in district court. (800) Defendant contended for the first time on appeal that the district court erred in accepting the presentence report's calculation of his base offense level and that a five year minimum sentence did not apply to him. Even though defendant failed to raise these issues in the district court, the 2nd Circuit decided to review his arguments, finding that they presented "serious questions of law," and that there was "no indication in the record that [defendant] deliberately failed to present them to the district court." *U.S. v. Moon*, __ F.2d __ (2nd Cir. Feb. 15, 1991) No. 90-1375.

11th Circuit finds appeal of sentence enhancement moot where defendant completed sentence. (800) Defendant argued that the district court improperly enhanced his offense level by two for obstruction of justice. The 11th Circuit found that defendant's appeal was moot, since defendant had completed his sentence. *U.S. v. Farmer*, __ F.2d __ (11th Cir. Feb. 21, 1991) No. 89-8868.

Forfeiture Cases

1st Circuit affirms trial court's refusal to disclose identity of confidential informant in forfeiture case. (900) A confidential informant advised police that he had made a controlled purchase of marijuana from claimant in claimant's van A search warrant revealed marijuana, weapons and some cash, and the van was seized. The 1st Circuit upheld the trial court's refusal to disclose the identity of the informant. The government's privilege to withhold the identity of informants applies in civil cases, and the privilege is less likely to yield. Balancing the government's interest in protecting the flow of informant information against claimant's interest in exploring the circumstances of the controlled purchase, the balance tipped in favor of non-disclosure. The government's forfeiture did not rely upon the controlled purchase, but on the results of the government's search of the van. *U.S. v. One 1986 Chevrolet Van*, __ F.2d __ (1st Cir. March 4, 1991) No. 90-1332.

1st Circuit upholds consideration of hearsay to determine probable cause. (900)(950) Claimant objected to the admission of a toxicology report verifying that a substance found in the van was marijuana, and a police officer's affidavit containing an informant's statement that he had purchased marijuana from claimant. Although the claimant conceded that hearsay may be used to show probable cause, he contended that hearsay could not be the sole basis for a probable cause finding. The 1st Circuit upheld the probable cause determination, ruling that the hearsay evidence was sufficiently reliable. Moreover, the hearsay did not constitute the sole basis for the probable cause determination. An officer who searched the van testified that he discovered three plastic bags and a small container containing a brown leafy substance, two hand-rolled cigarettes, several loaded guns and a bag containing ammunition. *U.S. v. One 1986 Chevrolet Van*, __ F.2d __ (1st Cir. March 4, 1991) No. 90-1332.

1st Circuit upholds subject matter jurisdiction despite pending state criminal case against claimant. (900) Claimant contended that the district court lacked subject matter jurisdiction because a state court already had jurisdiction over the matter. The 1st Circuit rejected this argument. The state never instituted a forfeiture action against the subject van. The only action in state court was an in personam criminal action against claimant for possession of marijuana. A forfeiture action under section 881 is a civil in rem proceeding which is independent of any factually related criminal action. This fact was not altered by the fact that the van was seized following a search conducted pursuant to a state search warrant. *U.S. v. One 1986 Chevrolet Van*, __ F.2d __ (1st Cir. March 4, 1991) No. 90-1332.

11th Circuit finds no ex post facto violation in forfeiture of substitute property. (910) As a result of defendants' RICO violations, a forfeiture verdict was entered against certain of defendants' property. Since the current property owners were innocent bona fide purchasers for value, the district court entered a forfeiture order of substitute property under 18 U.S.C. section 1963(m). Defendants contended that the application of section 1963(m) violated the ex post facto clause because it was enacted after the RICO violations took place. The 11th Circuit found no ex post facto violation in the forfeiture of substitute property. Section 1963(m) did not change the quantum of punishment under RICO nor add any new penalty. It merely provided for an alternative method of collecting a forfeiture judgment. *U.S. v. Reed*, __ F.2d __ (11th Cir. Feb. 27, 1991) No. 89-9036.

1st Circuit upholds summary judgment where claimant failed to file affidavits or dispute facts. (920) The claimant filed an opposition to the government's motion for summary judgment but failed to file an affidavit or a statement of disputed facts. The 1st Circuit upheld the grant of summary judgment, because the claimant failed to present any facts to oppose the government motion. The court rejected counsel's argument that he was unable to prepare an affidavit because the claimant was unavailable. The district court waited nine months before granting the government's motion. The case did not need to be remanded to consider claimant's "counterclaim" for personal property in the vehicle. The forfeiture order did not extend to personal property in the vehicle, and if the claimant wanted it returned, he could seek it administratively, by a motion in the underlying criminal case, or by an independent civil action. *U.S. v. One Lot of U.S. Currency*, __ F.2d __ (1st Cir. March 4, 1991) No. 90-2073.

11th Circuit upholds valuation of property. (920) The district court entered an forfeiture order of substitute property under 18 U.S.C. section 1963(m), finding defendants jointly and severally liable to the government for approximately $164,000. The 11th Circuit rejected defendants' arguments that the district court should have conducted a hearing to determine the value of the property. The forfeiture statute contains no provision authorizing a hearing to determine the value of forfeited property. Nor was the amount owed on a 1983 mortgage required to be deducted from the value of the property. All right to the property vested in the government in 1981, before defendants encumbered the property. Finally, using the 1989 sale price as the value of the property was proper. The government was entitled to any increase in the property's value since 1981. *U.S. v. Reed*, __ F.2d __ (11th Cir. Feb. 27, 1991) No. 89-9036.

11th Circuit upholds forfeiture of substitute property despite three-year delay between forfeiture verdict and forfeiture order. (920) Defendants contended that the district court erred in authorizing the forfeiture of substitute assets because defendants were not responsible for the loss of the originally-forfeited property, as required by 18 U.S.C. section 1963(m). They contended that the property was lost because the government acted in a dilatory manner by waiting three years after the forfeiture verdict before obtaining a forfeiture order. The 11th Circuit rejected the argument, ruling that all right to the property vested in the United States in 1981 when defendants committed the RICO offenses. Defendants encumbered the property in 1983 by executing a mortgage, transferred their interests to relatives, and allowed the property to fall into foreclosure. These actions placed the property out of reach of the United States, and beyond the jurisdiction of the court, and required the district court to order the forfeiture of substitute property to satisfy the judgment. The delay between the forfeiture verdict and the forfeiture verdict did not violate due process. *U.S. v. Reed*, __ F.2d __ (11th Cir. Feb. 27, 1991) No. 89-9036.

AMENDED OPINIONS

(220)(420)(700)(745)(746) *U.S. v. Castro-Cervantes*, 911 F.2d 222 (9th Cir. 1990), *amended*, __ F.2d __ (9th Cir. March 6, 1991) No. 89-50145.

(450) *U.S. v. Foreman*, 905 F.2d 1335 (9th Cir. 1990), *amended*, __ F.2d __ (Feb. 26, 1991) No. 89-50038.

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

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IN THIS ISSUE:

Guideline Sentences, Generally

D.C. Circuit upholds transfer to federal court to enable defendants to be sentenced under guidelines. (110)(115) Although initially charged in the D.C. Superior Court, defendants' cases were transferred to federal court pursuant to a new federal policy to bring more D.C. drug cases in federal court in order to take advantage of the stricter penalties available under the federal sentencing guidelines. The D.C. Circuit reversed the district court's rulings in *U.S. v. Holland*, 729 F.Supp. 125 (D.D.C. 1990) and *U.S. v. Roberts*, 726 F.Supp. 1359 (D.D.C. 1989), that this transfer violated due process. The guidelines do not violate due process by shifting influence over sentencing from the judiciary to the prosecutor, since a defendant is not entitled to an individualized sentence determined by a judge. The U.S. Attorney's office may "select one alternative charge over another precisely *because* the selected offense carries a more severe sentence." Moreover, the court found no vindictiveness or violation of due process in the fact that the prosecutor warned some of the defendants in plea negotiations that their cases would be transfered if they did not plead guilty. *U.S. v. Mills*, __ F.2d __ (D.C. Cir. Feb. 8, 1991) No. 90-3007.

9th Circuit holds that guidelines do not unconstitutionally transfer sentencing authority from the judge to prosecutor. (115) Defendant argued that the sentencing guidelines violate substantive and procedural due process because they place too much authority in the hands of the prosecutor. The 9th Circuit rejected the argument holding that the sentencing guidelines do not unconstitutionally transfer sentencing authority from the judge to the prosecutor. *U.S. v. Fuentes*, __ F.2d __ (9th Cir. Feb. 15, 1991) No. 90-50033.

9th Circuit reaffirms that guidelines do not violate due process. (115) Defendant argued that the guidelines violate the requirement that every criminal sentence be imposed individually through the exercise of judicial discretion. The 9th Circuit noted this argument had been rejected in previous cases. The court also rejected defendant's argument based

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)
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

on *U.S. v. Davis*, 715 F.Supp. 1473 (C.D. Cal. 1989) that the guidelines offend due process because they require judges to make findings without considering the reliability of the underlying facts, and do not require those facts to be proved beyond a reasonable doubt. The court noted that these arguments, too, had been foreclosed by prior decisions. *U.S. v. Bertrand*, __ F.2d __, 91 D.A.R. 1979 (9th Cir. Feb. 15, 1991) No. 90-30015.

7th Circuit rejects separation of powers challenge to substantial assistance provision. (115)(710) The 7th Circuit joined other circuits in upholding section 5K1.1 against a claim that it violated the separation of powers doctrine by delegating judicial authority to the executive branch. Congress has the power to eliminate discretion in sentencing altogether. Defendant has no constitutional right to have his cooperation considered in sentencing, therefore, he cannot challenge the procedure for enacting the provision. Defendant's argument also ignores the traditional charging power exercised by the executive branch. *U.S. v. Spillman*, __ F.2d __ (7th Cir. Feb. 12, 1991) No. 89- 2473.

10th Circuit upholds guidelines and mandatory minimum sentence against due process challenges. (115)(245) Defendant claimed that the guidelines violate due process by impermissibly limiting the court's consideration of the circumstances of the case, precluding defendants from demonstrating to the judge by relevant evidence that a downward departure is justified, and allows the prosecutor to determine the sentence. The 10th Circuit, noting that it had previously decided these issues, summarily rejected the arguments. The court also rejected defendant's contention that the mandatory minimum sentence improperly removed a judge's sentencing discretion. *U.S. v. Hatch*, __ F.2d __ (10th Cir. Feb. 7, 1991) No. 89-4148.

4th Circuit upholds finding that defendant's crimes did not straddle effective date of guidelines. (125)(380) Defendant contended that his crimes straddled the effective date of the guidelines, and therefore he should have been sentenced under the guidelines. The 4th Circuit found no evidence to support the contention that defendant committed a straddle crime. Defendant pointed to the indictment, which charged that the conspiracy continued until the present time. The ending date stated in an indictment does not govern whether a crime is a straddle crime, since these dates are tentative and subject to change as information is revealed during the course of legal proceedings. The only evidence which supported defendant's claim was the testimony of a witness who misidentified a fund-raising brochure he received in 1988 as being from defendant's organization. *U.S. v. Bakker*, __ F.2d __ (4th Cir. Feb. 11, 1991) No. 89-5687.

7th Circuit remands for determination of date conspiracy ended. (125)(380)(660) Defendants were sentenced for conspiracy under pre-guidelines law. The 7th Circuit found that this was proper, assuming the conspiracy ended prior to November 1, 1987. However, the district court made no finding as to when the conspiracy ended. The case was remanded for determination of the date the conspiracy ended, and a resentencing of defendants on this count if the court found that the conspiracy ended after the guidelines took effect. If the court sentences defendants under the guidelines for the conspiracy count, then the district judge should be governed by guideline section 5G1.2(d) in determining whether the new sentences should be concurrent or consecutive to the defendants' pre-guideline sentences. *U.S. v. Masters*, __ F.2d __ (7th Cir. Feb. 6, 1991) No. 89-2851.

8th Circuit upholds use of professional hypnotist as government agent. (125) Defendant was convicted of a conspiracy that "straddled" the effective date of the guidelines, thus making the guidelines applicable to the offense. Defendant argued that a government agent who was a professional hypnotist used his skills as a hypnotist, improperly inducing defendant to sell the agent some cocaine in 1988. This caused the guidelines to apply to defendant's offense. The 8th Circuit found no due process violation in the use of the hypnotist as a government agent. The hypnotist was a friend of defendant's and defendant testified at his sentencing that once he was presented with an opportunity to sell cocaine, he went along with it. He did not raise an entrapment defense or allege that the hypnotist unduly influenced him. *U.S. v. Pregler*, __ F.2d __ (8th Cir. Feb. 14, 1991) No. 90-2228.

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Editors:
- Roger W. Haines, Jr.
- Kevin Cole, Associate Professor of Law, University of San Diego
- Jennifer C. Woll

Publication Manager:
- Beverly Boothroyd

11th Circuit reverses obstruction enhancement because misrepresentation to probation officer was not material. (130)(460) The district court increased defendant's offense level for obstruction of justice because it found that defendant failed to reveal the extent of his prior drug transactions with a co-defendant to the probation office during the presentence interview. The 11th Circuit reversed the enhancement because it found that the misrepresentation was not material. It stated that a court should consider clarifying amendments when interpreting the guidelines, even when sentencing defendants convicted before the effective date of the amendments. Under the commentary to the guidelines that became effective November 1, 1990, a two level enhancement is not warranted where the defendant provides incomplete or misleading information not amounting to a material falsehood in a presentence interview. Defendant had informed DEA agents shortly after his arrest that he had made several trips in the past to deliver cocaine to his co-defendant. Therefore, his failure to repeat this information to the probation officer was not a material falsehood. *U.S. v. Howard*, __ F.2d __ (11th Cir. Feb. 19, 1991) No. 90-8123.

2nd Circuit rejects downward departure intended to increase difference between defendant's and co-defendant's sentence. (140)(722) The district court departed downward for two defendants because it felt that the difference between their guideline sentences and two more culpable co-defendants was too small. The more culpable co-defendants had received 90-month sentences, while the less culpable defendants had guideline ranges of 63 to 78 months, and 57 to 71 months. The district court sentenced them to 40 months and 18 months, respectively. The 2nd Circuit reversed, finding that the Sentencing Commission fully considered the disparities that would result among co-defendants. Although a guideline range may seem harsh or lenient when compared to that of a co-defendant, the same range is applicable throughout the country. A defendant should not be favored simply because his sentencing range is not as distant from that of his co-defendant as the sentencing judge thinks appropriate. *U.S. v. Joyner*, __ F.2d __ (2nd Cir. Jan. 24, 1991) No. 90-1171.

7th Circuit rejects claim based on disparity of co-defendant's sentence. (140)(800) Defendant argued that his 51-month sentence violated the 8th Amendment because a co-defendant received only a 37-month sentence for the same offense. The 7th Circuit found the argument to be without merit. It also rejected the government's argument that it lacked jurisdiction to consider the claim. Although defendant did not argue that the district court misapplied the guidelines, he did argue that his sentence was imposed in violation of law, which gave the court appellate jurisdiction under 18 U.S.C. section 3742(a)(1). *U.S. v. Evans*, __ F.2d __ (7th Cir. Feb. 11, 1991).

General Application Principles (Chapter 1)

7th Circuit upholds use of uncharged conduct to which defendant stipulated in plea agreement. (165) In a plea agreement, the government promised not to charge defendant with using a false Social Security number in return for stipulating to 10 such violations. The plea agreement also provided that these 10 violations could be used for determining the appropriate sentencing guideline range. The 7th Circuit found that guideline section 1B1.2(c) authorized the district court to consider the uncharged crimes in setting his offense level. Stipulated offenses are to be treated as offenses of conviction. Judge Cudahy concurred to point out the dangers of "bootstrapping" offenses in this manner, particularly when the stipulated charges are unrelated to the offense of conviction. *U.S. v. Eske*, __ F.2d __ (7th Cir. Feb. 15, 1991) No. 90-1282.

7th Circuit upholds calculation of criminal history from the date of earliest stipulated offense. (165)(500) Defendant was convicted of firearms offenses. In his plea agreement, he stipulated to using a false Social Security number on 10 separate occasions. The 7th Circuit rejected defendant's contention that his criminal history score must be calculated based on sentences imposed during the 10-year period prior to the date of the firearms offenses. Stipulated offenses are treated as offenses of conviction, and therefore, defendant's criminal history was properly based upon the 10-year period prior to the earliest stipulated offense. *U.S. v. Eske*, __ F.2d __ (7th Cir. Feb. 15, 1991) No. 90-1282.

2nd Circuit upholds calculation of "dime bag" seller's offense level based upon quantity possessed by supplier. (170)(275) Defendant pled guilty to distributing two vials of crack which he purchased for $20 from a co-defendant. Defendant was not charged or convicted of conspiracy, and argued it was improper to calculate his offense level based upon the 586 vials of crack possessed by the co-defendant at the time of his arrest. The 2nd Circuit rejected defendant's argument that under the pre-1989 version of the guidelines, only a defendant guilty of conspiracy could be held responsible for the foreseeable conduct of others in furtherance of jointly-undertaken criminal activity. Here, the district judge was entitled to find that defendant was accountable for the co-defendant's possession of 586 vials of crack. Although defendant was a mere "dime bag seller on the street," there was sufficient evidence to conclude that defendant was ready, willing and able to sell as many dime bags as the co- defendant could supply. *U.S. v. Joyner*, __ F.2d __ (2nd Cir. Jan. 24, 1991) No. 90-1171.

5th Circuit upholds consecutive sentences for pre-guidelines and guidelines offenses even though pre-guideline conduct was used to determine guideline offense level. (170)(660)

Defendant was convicted of making 27 bogus loans to herself total-ling $280,000. Twenty-four of the loans occurred before the effective date of the guidelines. Although the total amounts of the loans made after the effective date of the guidelines was $25,500, the trial court used the $280,000 figure to calculate her offense level. Defendant received a 30 month sentence for the guidelines counts, to run consecutively to the 60 month sentence she received for the pre-guidelines counts. The 5th Circuit found no misapplication of the guidelines. Pre-guidelines conduct may be considered as relevant conduct under guideline section 1B1.3. Although courts commonly order concurrent sentences for defendants in this situation, and an advisory issued by the Sentencing Commission suggests that defendants such as this should usually receive concurrent sentences, the guidelines do not mandate this result. *U.S. v. Parks*, __ F.2d __ (5th Cir. Feb. 6, 1991) No. 90-5552.

5th Circuit finds information relied on by district court was unreliable. (185)(770) Defendant cooperated with authorities pursuant to his plea agreement, which provided that defendant was involved with 9 pounds of amphetamine. Defendant objected to the inclusion of 66 pounds in the calculation of his offense level on the grounds that this amount was not reliably known to the government prior to his cooperation, and that the use of self-incriminating statements he made while cooperating violated guideline section 1B1.8. The 5th Circuit agreed, and found that without the defendant's incriminating statements, there was insufficient evidence to support the additional 66 pounds. The probation officer testified that prior to defendant's plea the government knew of the 66 pounds, but the source of this information was unclear. Moreover, the government conceded that at the time of defendant's plea, it knew of the lab, but could only confirm 9 pounds of amphetamine attributable to defendant. *U.S. v. Shacklett*, 921 F.2d 580 (5th Cir. 1991).

Offense Conduct, Generally (Chapter 2)

8th Circuit upholds sentencing defendant convicted of incest under criminal sexual assault guideline. (210)(390) Defendant pled guilty to incest within Indian country. Because the guidelines do not contain a specific offense guideline for incest, under guideline section 2X5.1 the district court was directed to apply the guideline most analogous to defendant's offense. The 8th Circuit upheld the district court's determination that guideline section 2A3.1, criminal sexual abuse, was the most analogous. The district court looked to the underlying circumstances and found that defendant's offense involved several nonconsensual acts of sexual intercourse. This finding was not clearly erroneous. *U.S. v. Clown*, __ F.2d __ (8th Cir. Feb. 15, 1991) No. 90-5216.

3rd Circuit exercises plenary review over question of which guideline is applicable. (220)(820) Defendant argued that the district court erroneously applied the extortion guideline, section 2B3.2, to his case rather than the blackmail guideline, section 2B3.3. Both defendant and the government agreed that serious economic harm must be threatened before the extortion guideline is applicable. The government, however, contended that whether the extortioner's threat is serious enough to meet the guidelines test is a factual issue reviewed by the appellate court for clear error. The 3rd Circuit, however, agreed with defendant that the review is plenary because the question of which section is applicable is a legal determination. *U.S. v. Inigo*, __ F.2d __ (3rd Cir. Feb. 1, 1991) No. 90-3142.

3rd Circuit reverses district court's misapplication of extortion guideline. (220) Defendant attempted to extort $10 million from DuPont by threatening to use stolen proprietary information to compete with them. The 3rd Circuit found that the district court erroneously applied the extortion guideline, section 2B3.2, rather than the blackmail guideline, section 2B3.3. The extortion section requires either a physical threat or an economic threat so severe as to threaten the existence of the victim. No such threat was made in this case. The consequences of defendant's crime, if completed, would have been purely economic. Physical force was not involved. *U.S. v. Inigo*, __ F.2d __ (3rd Cir. Feb. 1, 1991) No. 90-3142.

7th Circuit rejects argument that marijuana should have been dried prior to weighing. (250) Defendant contended that the district court erred when it calculated his offense level based upon weight of damp marijuana. The 7th Circuit found that the guidelines do not require that the marijuana be dried prior to weighing. The weight to be considered includes the entire weight of any mixture or substance, including water or mildew, containing a detectable amount of the marijuana. This approach minimizes "judicial concerns about when the marijuana was harvested, how (or if) it was dried, and how it was processed and stored." *U.S. v. Garcia*, __ F.2d __ (7th Cir. Feb. 6, 1991) No. 90-1323.

9th Circuit upholds sentence for "potential" methamphetamine based on chemicals found at laboratory. (250) The police seized seven kilograms of methamphetamine, plus seventy-five kilograms of ephedrine and eight pounds of red phosphorus from defendant's trailer. The presentence report stated that seventy-five kilograms of ephedrine would produce approximately sixty to seventy kilograms of methamphetamine, when combined with hydriodic acid and red phosphorus. Accordingly, the district court sentenced the defendants based on a "potential" amount of methamphetamine estimated at seventy-one kilograms. The 9th Circuit affirmed, holding that the district court correctly took into account the "potential" methamphetamine because the seven kilograms seized did not reflect the scale of defendants'

offense. *U.S. v. Bertrand*, __ F.2d __ (9th Cir. Feb. 15, 1991) No. 90-30015.

2nd Circuit finds defendant not accountable for drugs distributed prior to his entry into conspiracy. (275) The 2nd Circuit found that defendant's offense level had been improperly calculated on the basis of drugs distributed prior to his entry into a drug conspiracy. A late-entering co-conspirator can be sentenced on the basis of the full quantity of drugs distributed by other members of the conspiracy only if, when he joined the conspiracy, he could reasonably foresee the distributions of future amounts, or knew or reasonably should have known what the past quantities were. The district court failed to find that defendant should have known that his co-conspirator's prior sales had totaled four kilograms, and the record did not support such a finding. The conspiracy existed for four years, and defendant was a member for less than a day. Although it was inferable from a defendant's conversation with the co-conspirator that there had been two or more sales during the four-year period, and that these past distributions involved more than minimal quantities, the vague conversation was equally consistent with lesser sales. *U.S. v. Miranda-Ortiz*, __ F.2d __ (2nd Cir. Feb. 12, 1991) No. 90-1148.

7th Circuit upholds firearm enhancement based on gun found in cushions of living room couch. (284) The 7th Circuit upheld an increase in defendant's offense level under guideline section 2D1.1(b)(1) for possession of a loaded, 9mm automatic pistol during the commission of a drug offense. The weapon was found in the cushions of the living room couch in defendant's home where marijuana was seized. The weapon was a handgun typically used for personal protection. Its location made it secretly, but readily, accessible to defendant. Finally, the fact that drugs were stored in, and delivered from, defendant's house made it more probable that the gun was connected to the drug offenses. *U.S. v. Garcia*, __ F.2d __ (7th Cir. Feb. 6, 1991) No. 90-1323.

1st Circuit affirms upward departure where guidelines did not reflect increased penalties under statute. (340)(745) Defendant was convicted of being a deported alien unlawfully in the United States. The statute had recently been amended to increase the maximum penalty from two to five years. However, the guidelines lagged behind, not incorporating these changes until the November 1989 amendments. Defendant was sentenced under the 1987 version of the guidelines. The 1st Circuit upheld the district court's departure based on the lag time between the statutory amendments and the corresponding update of the guidelines, finding that the Sentencing Commission could not have considered the increased penalties when formulating the 1987 guidelines. The 1st Circuit also found it was proper for the district court to determine the scope of the departure using the amended version of the guidelines as a guide. "In the relatively rare situation presented here, where the defendant committed an offense after the applicable statute was amended but before the corresponding guideline had been revised to reflect the change, resort to the eventual guideline revision for guidance appears to be a sensible, fair-minded approach." *U.S. v. Aymelek*, __ F.2d __ (1st Cir. Feb. 15, 1991) No. 90-1510.

5th Circuit remands because district court was under mistaken belief that three-year term of supervised release was mandatory. (380)(580)(810) Defendant was convicted of conspiracy under the pre-amendment version of 21 U.S.C. section 846. This version did not provide for a term of supervised release. However, because defendant committed a Class C felony, the guidelines required a term of supervised release of at least two years but not more than three years. The presentence report erroneously indicated that the amended version of section 846 governed defendant's conviction, requiring a minimum three-year term of supervised release. The judge sentenced defendant on this basis. The 5th Circuit remanded for resentencing. Although defendant's sentence was within the proper guideline range, it was proper to remand the case because the district court was unaware of its discretion to sentence defendant to a two year term of supervised release. *U.S. v. Badger*, __ F.2d __ (5th Cir. Feb. 14, 1991) No. 90-8114.

Adjustments (Chapter 3)

2nd Circuit rejects official victim adjustment for defendant who forced undercover police officer to snort cocaine. (410) Defendant was convicted of possessing and distributing cocaine to an undercover police officer. Defendant forced the officer at gunpoint to snort cocaine. The 2nd Circuit reversed an upward adjustment in defendant's offense level based on the police officer's status as an official victim. The district court had found that defendant forced the officer to snort the cocaine because defendant "believe[d] that there was a possibility he might be a police officer." However, guideline section 3A1.2(b) requires a defendant to commit an assault "knowing or having reasonable cause to believe" that a person was a law enforcement officer. The district court's word choice suggested that any belief defendant had "was more the product of speculation rather than the product of reasoning." *U.S. v. Castillo*, __ F.2d __ (2nd Cir. Feb. 4, 1991) No. 90-1342L.

1st Circuit upholds managerial adjustment based upon unusual purity of cocaine. (430) The district court found that defendant played a managerial role in a cocaine conspiracy based upon the fact that defendant was found in possession of "unusually pure" cocaine. The 1st Circuit upheld the enhancement. Such a high level of purity, in and of itself, could be sufficient to support the adjustment because such proximity to the source denotes a managerial role in the commis-

sion of the offense. However, the sentencing court also relied upon the large quantity of cocaine involved. These identified factors were sufficient to support the adjustment. Defendant claimed that his status as a simple courier was supported by the fact that he ran into trouble with his contacts in Colombia for selling the drugs on credit. However, the district court could have rationally believed that he had the authority to sell the drugs without receiving payment. *U.S. v. Iguaran-Palmar*, __ F.2d __ (1st Cir. Feb. 4, 1991) No. 89-2143.

3rd Circuit upholds finding that people were "participants" in underlying conduct which facilitated offense. (430) Defendant attempted to extort $10 million from DuPont by threatening to use stolen proprietary information to compete with them. Defendant contended that his offense did not involve five or more participants, and therefore it was improper to increase his offense level by four based upon his leadership role. The 3rd Circuit upheld the enhancement, finding that participants include persons who are used to facilitate a criminal scheme. The three people who stole the proprietary information and used it to design a plant for defendant were "participants" under guideline section 3B1.1(a). That the evidence was insufficient to convict them of extortion was not controlling, as long as their own criminal conduct made the scheme possible. One other individual was a participant because he interviewed DuPont employees that defendant sought to hire. Another individual was a participant because he permitted his home to be used as headquarters for the conspiracy, and his presence gave the deal credence in the eyes of others. *U.S. v. Inigo*, __ F.2d __ (3rd Cir. Feb. 1, 1991) No. 90-3142.

7th Circuit upholds leadership enhancement for defendant who exercised authority over other members of conspiracy. (430) (755)(820) The 7th Circuit rejected defendant's contention that the government needed to prove he was a manager of a drug conspiracy by proof beyond a reasonable doubt, finding that the appropriate standard is a preponderance of the evidence. Reviewing this issue under the clearly erroneous standard, the court upheld the district court's findings. Defendant received the greatest share of the profits, he recruited an individual to procure a loan to purchase methamphetamine for distribution, he directed another member of the conspiracy, he asserted to an undercover agent that he could obtain methamphetamine directly from the "cooker," and he assured the undercover agent that he would "corner the [local] methamphetamine market." *U.S. v. Spillman*, __ F.2d __ (7th Cir. Feb. 12, 1991) No. 89-2473.

11th Circuit finds defendant who sold cocaine on credit exercised managerial control over buyer. (430) The district court increased defendant's offense level by three for his managerial role in the offense. This was based on the fact that defendant "fronted" cocaine to his buyer, who in turn sold the drug and turned the money over to defendant in payment for the cocaine. The district court noted that but for the credit that defendant was willing to extend, the buyer would not have been able to purchase cocaine to sell to others. As a source of credit, defendant maintained at least constructive control over his buyer. The 11th Circuit found that this factual conclusion was not clearly erroneous, and affirmed the increase. *U.S. v. Howard*, __ F.2d __ (11th Cir. Feb. 19, 1991) No. 90-8123.

1st Circuit refuses minimal participant status to defendant who was involved in initial planning of drug operation. (440) Defendant was involved in a plan to smuggle cocaine into the United States by dropping the cocaine in coolers from a plane into the ocean, and then retrieving the coolers by boat. Defendant contended he was entitled to minimal participant status because unlike his co-conspirators, he did not drive a boat, was not a mechanic, and did not carry money. The 1st Circuit rejected this argument, noting that it ignored the fact that defendant (a) was involved in the initial planning of the operation, (b) helped ready the boats, (c) travelled in the plane to Colombia to obtain the cocaine, (d) was responsible for throwing the cocaine into the water, and (e) was the one who dealt with customs officials. *U.S. v. Llado-Ortiz*, __ F.2d __ (1st Cir. Feb. 7, 1991) No. 90-1073.

1st Circuit denies reduction for minor role to defendant notwithstanding factual error in presentence report. (440)(520) Defendant contended that a factual error in his presentence report, which erroneously stated that he had handed cocaine to an undercover government agent, prevented him from receiving a reduction for being a minor or minimal participant. The 1st Circuit found that despite the asserted mistake, the record did not support a finding that defendant had a minor or minimal role in the offense. Defendant drove the car containing the cocaine, initiated the contact with the buyers, gave the signal to an accomplice to produce the drug, and accompanied the government agent to his car to receive payment. Moreover, a reduction for his role in the offense would not have helped defendant. As a career offender, his offense level of 34, derived from the table in guideline section 4B1.1, was greater than the offense level that would result if he had received the greatest mitigating role in the offense adjustment. *U.S. v. Morales-Diaz*, __ F.2d __ (1st Cir. Feb. 15, 1991) No. 90-1306.

2nd Circuit rejects minor role for drug courier. (440) Defendant claimed he was a minor participant because he was merely a drug courier. The 2nd Circuit rejected this contention, noting that a courier is not automatically entitled to a minor role adjustment based on that status. The "determination is to be made not with regard to status in the abstract but rather with regard to the defendant's culpability in the context of the facts of the case." A courier's culpability depends upon "the nature of the defendant's relationship to other participants, the importance of the defendant's action

to the success of the venture, and the defendant's awareness of the nature and scope of the criminal enterprise." *U.S. v. Garcia*, 920 F.2d 153 (2nd Cir. 1990).

5th Circuit denies minimal or minor status to defendant who transported marijuana. (440) Defendant was arrested at a border checkpoint after a search of the borrowed car he was driving revealed 198 pounds of marijuana. The 5th Circuit rejected defendant's contention that he was entitled to a reduction based on his minimal or minor role in the offense. The record showed that defendant was a person of substantial eduction who could be certain to realize the seriousness of the offense he was committing. He knew the car he was driving contained a large quantity of marijuana, and that the contraband represented part of a broad conspiracy to transport large amounts of marijuana. Before his apprehension at the checkpoint, defendant had already transported the marijuana a great distance, and thus had plenty of time to distance himself from the conspiracy during the trip. *U.S. v. Badger*, __ F.2d __ (5th Cir. Feb. 14, 1991) No. 90-8114.

11th Circuit refuses minor participant status for defendant characterized in presentence report as least culpable. (440) The 11th Circuit rejected defendant's contention that because he was characterized in the presentence report as the least culpable member of the conspiracy, he was a minor participant. "It is entirely possible for conspiracies to exist in which there are no minor participants or for which the least culpable participants, for whatever reasons, were not indicted." Defendant knowingly assisted in the illegal importation of approximately 800 kilograms of cocaine in exchange for $75,000. Given the large amount of money involved, the district court's conclusion that defendant was not a minor participant was not clearly erroneous. *U.S. v. Zaccardi*, __ F.2d __ (11th Cir. Feb. 19, 1991) No. 90- 5209.

1st Circuit upholds obstruction enhancement for defendant who attempted to mislead the court. (460)(770) Defendant's offense level was increased by two points for obstruction of justice for misrepresenting that (a) he had been denied access to a law library while incarcerated, and (b) he had not been given an opportunity to review his presentence report. He argued that it was improper to rely on his detention officer's affidavit because it was hearsay. The 1st Circuit found no impropriety, as defendant did not suggest that the officer lacked personal knowledge or had reason to lie. The commentary to guideline section 3C1.1, suggesting that testimony should be evaluated in a light most favorable to a defendant, does not require settlement of all evidentiary disputes favorably to the defendant. Finally, the court rejected defendant's argument that the adjustment was a disguised punishment for defendant's failure to accept responsibility. *U.S. v. Aymelek*, __ F.2d __ (1st Cir. Feb. 15, 1991) No. 90-1510.

11th Circuit remands where district court may have improperly denied acceptance of responsibility reduction. (480) Defendant was a former Air Force Reserve officer convicted of violating the government employee conflict of interest statutes. Although defendant admitted committing the conduct in question, he argued that the statute did not apply to his conduct. The 11th Circuit found that the district court may have improperly denied defendant a reduction for acceptance of responsibility because defendant did not accept the criminality of his conduct. The commentary to guideline section 3E1.1 specifically states that a defendant who goes to trial to challenge the applicability of a statute to his conduct may be entitled to a reduction for acceptance of responsibility. The case was remanded for the district court to articulate its reasons for the denial. *U.S. v. Schaltenbrand*, __ F.2d __ (11th Cir. Feb. 7, 1991) No. 90-8228.

1st Circuit finds district court did not apply a per se rule denying acceptance of responsibility reduction to a defendant who enters an Alford plea. (485) Defendant entered an *Alford* plea, under which he pled guilty in order to serve his best interests, notwithstanding protestations of innocence. Defendant claimed that the district court erroneously applied a per se rule denying a reduction for acceptance of responsibility to any defendant who enters an Alford plea. The 1st Circuit rejected this argument, finding the record contained "a host of other statements" which reflected that the judge relied upon additional factors in denying the reduction. They included statements that defendant did not demonstrate that he was a "reformed character" and that defendant was attempting to minimize in his own mind his culpability. Although the judge made statements that indicated that he believed the sincerity of defendant's remorse, the judge drew a distinction between remorse and acceptance of responsibility. *U.S. v. Burns*, __ F.2d __ (1st Cir. Feb. 7, 1991) No. 90-1668.

4th Circuit reverses acceptance of responsibility reduction for defendants who simply accepted jury verdict. (485) Defendants were convicted of cultivating marijuana in a national forest. At trial they contended that they were hunting in the forest. The 4th Circuit reversed the district court's reduction for acceptance of responsibility, finding defendants' acceptance of the jury verdict to be insufficient. Defendants did not accept responsibility for their criminal conduct, but contined to insist that they were only in the woods to hunt. *U.S. v. Haselden*, __ F.2d __ (4th Cir. Feb. 14, 1991) No. 90-5618.

7th Circuit finds no acceptance of responsibility by defendant who lied to federal agents and attempted to hide evidence. (485) The 7th Circuit found that the district court's denial of a reduction for acceptance of responsibility was supported by the facts. Defendant initially lied to federal agents, attempted to conceal several heroin-filled balloons by passing them from his system, and denied that he knew that

the balloons contained heroin at his initial plea hearing. *U.S. v. Oduloye*, __ F.2d __ (7th Cir. Feb. 5, 1991) No. 90-1538.

8th Circuit finds no acceptance of responsibility by defendant who failed to provide information to probation officer. (485) The 8th Circuit found that the record supported the district court's denial of a reduction for acceptance of responsibility. The record indicated that defendant failed to provide information to his probation officer. Therefore, it also rejected defendant's claim that he was denied the reduction because he asserted his constitutional right to a trial. *U.S. v. Payne*, __ F.2d __ (8th Cir. Jan. 14, 1991) No. 90-5175MN.

11th Circuit reverses denial of acceptance of responsibility reduction because defendant substantially assisted government. (490) The district court denied defendant a reduction for acceptance of responsibility because it found that defendant had failed to provide complete information to the probation officer during the presentence interview. The 11th Circuit reversed, finding that defendant's voluntary cooperation with the authorities immediately following his arrest justified the reduction. Immediately upon his arrest, defendant assisted the police in arresting his accomplice, which led officials to apprehend six other individuals involved in drug offenses. Defendant's assistance provided "a classic example of the kind of conduct the sentencing court should credit as indicative of an acceptance of responsibility." *U.S. v. Howard*, __ F.2d __ (11th Cir. Feb. 19, 1991) No. 90-8123.

Criminal History (§ 4A)

6th Circuit rules that prior misdemeanor conviction should not have been included in criminal history calculation. (500) The 6th Circuit found that a prior state misdemeanor sentence should not have been included in the calculation of defendant's criminal history score because the conviction was invalid. The plea colloquy read into the record at the sentencing hearing revealed that the state court failed to advise defendant of the penalties for the misdemeanor charge to which he was offering to plead, as required by applicable Tennessee law. Therefore, defendant met his burden of proving the plea itself was invalid under state law in effect at the time of the plea, and the conviction could not be included in defendant's criminal history calculation. *U.S. v. Bradley*, 922 F.2d 1306 (6th Cir. 1991).

Washington District Court holds that felon's possession of a firearm is not a crime of violence for career offender purposes. (520) Defendant, who had two prior violent felonies, was convicted of being a felon in possession of a firearm. The District Court held that this was not a crime of violence, despite the 9th Circuit's opinion in *U.S. v. O'Neal*, 910 F.2d 663 (9th Cir. 1990), which defined a crime of violence under earlier guidelines as a felony awhich by its nature involves a substantial risk that physical force may be used. In contrast, the current guidelines define a crime of violence as an offense "that presents a serious potential risk of physical injury to another." Here, there was no conduct presenting a serious potential risk of physical injury. Police officers searching defendant's residence on an unrelated charge found the unloaded firearm under a mattress in a bedroom. Defendant made no attempt to use or take possession of the firearm, and no ammunition was found. *U.S. v. Coble*, __ F.Supp. __ (E.D. Wash. Jan. 11, 1991) No. CR-90-207-JLQ.

1st Circuit rules that making threatening statements constitutes a crime of violence for career offender purposes. (520) Defendant contended that he was not a career offender because his prior state offense for "High and Aggravated Oral Threatening" was not a crime of violence. The 1st Circuit rejected defendant's argument. Even if the statute covered many kinds of conduct which did not involve the risk of injury, it was proper for the district court to look beyond the statute and review the specific circumstances of defendant's conduct. Defendant's conduct involved a serious risk of injury. Defendant had threatened to "blow away" two police officers performing their official duties. Whether or not defendant actually possessed a gun, the officers, faced with such language, might have thought themselves in danger, and defendant, the officers, or a third party might have been hurt. *U.S. v. Leavitt*, __ F.2d __ (1st Cir. Feb. 11, 1991) No. 90-1597.

1st Circuit refuses to consider whether Puerto Rican conviction can be counted for career offender purposes. (520)(800) Defendant contended that the district court erred in counting his Puerto Rican conviction towards career offender status. The 1st Circuit declined to resolve the issue because defendant failed to raise it below. Moreover, defendant did not present a developed argument to the court, contending only that because Puerto Rico is not a state, the conviction was not an "offense under a federal or state law." Defendant completely ignored the body of case law recognizing that Congress has accorded Puerto Rico the degree of autonomy and independence normally associated with a state. *U.S. v. Morales-Diaz*, __ F.2d __ (1st Cir. Feb. 15, 1991) No. 90-1306.

7th Circuit, en banc, finds that crime of violence cannot be a non-violent offense for departure purposes. (520)(722) Defendant was sentenced as a career offender for writing threatening letters to the President. She had a long history of making similar threats, and the government conceded that she had no intent to carry out her threats. The district court found that it had no authority to depart downward based on defendant's reduced mental capacity under guideline section 5K2.13, since defendant had committed a crime of violence. Defendant argued that even if her crime was a crime of violence for career offender purposes, it was still a "non-violent

offense" within the meaning of guideline section 5K2.13. The 7th Circuit rejected the argument, finding that the term "crime of violence" under the career offender guidelines and the term "non-violent offense" in guideline section 5K2.13 are mutually exclusive. Judges Easterbrook, Cudahy, Posner, Coffey and Manion dissented, arguing that the two terms are not mutually exclusive. *U.S. v. Poff*, __ F.2d __ (7th Cir. Feb. 14, 1991) No. 89-3017 (en banc).

Determining the Sentence (Chapter 5)

6th Circuit finds language designating place of imprisonment was surplusage which did not invalidate sentence. (550) The district court originally sentenced defendant to 10 months imprisonment and ordered that he serve his sentence at the Community Treatment Center. On defendant's petition for habeas corpus after being transferred to a different facility, the district court determined that it did not have authority to make a binding designation of defendant's place of confinement, and vacated defendant's sentence as being not authorized by law. The court then departed downward and sentenced defendant to five years probation. The 6th Circuit found that the original 10-month sentence was lawful and that the language in the order regarding the place of confinement constituted "mere surplusage." The district court did not have jurisdiction under 28 U.S.C. section 2255 to hear defendant's challenge, since defendant was attacking the execution of his sentence, rather than the validity of the sentence. Therefore, the district court was not authorized to vacate the original sentence. *U.S. v. Jallili*, __ F.2d __ (6th Cir. Feb. 5, 1991) No. 90-1629.

8th Circuit remands for resentencing under guidelines after probation revocation. (560) After revocation of defendant's probation, the district court sentenced defendant to three years imprisonment, and did not apply the sentencing guidelines. In a one paragraph opinion, the 8th Circuit remanded for resentencing, noting that it had recently held that when probation is revoked, the defendant must be sentenced in accordance with the guidelines. *U.S. v. Sanders*, __ F.2d __ (8th Cir. Feb. 5, 1991) No. 90-1726.

1st Circuit finds guidelines do not govern length of imprisonment following revocation of supervised release. (580) Upon release from prison where he had served four months for possession of a stolen treasury check, defendant began a three year term of supervised release. After testing positive for narcotics use on 16 different occasions, defendant's supervised release was revoked and he was sentenced to two years' imprisonment. The 1st Circuit rejected defendant's argument that the district court should have based his term of imprisonment on the guideline sentence for unlawful possession of heroin. Following the 11th Circuit's opinion in *U.S. v. Scroggins*, 910 F.2d 768 (11th Cir. 1990), the court found that the guidelines only set norms for sentencing for original criminal offenses. The most relevant statutory provision is 18 U.S.C. section 3583(g), which provides that if a defendant is found in possession of a controlled substance, the court shall terminate the supervised release and shall require the defendant to serve a prison term not less than one-third of the term of supervised release. Defendant's two-year sentence was in compliance with this. *U.S. v. Ramos-Santiago*, __ F.2d __ (1st Cir. Feb. 4, 1991) No. 90-1758.

1st Circuit finds defendant received adequate notice of terms of supervised release. (580) Defendant's supervised release was revoked as a result of his drug use. He contended that the district court had erred by not directing the probation officer to provide him with a written statement setting forth the conditions of his supervised release, as required by 18 U.S.C. section 3583(f). The 1st Circuit found that defendant had received adequate notice. Upon being sentenced by the district court, defendant and his counsel received copies of the sentence, to which were attached the conditions of his supervised release. This clearly stated that one of the conditions of the supervised release was that defendant not purchase, possess, use or distribute any narcotic. *U.S. v. Ramos-Santiago*, __ F.2d __ (1st Cir. Feb. 4, 1991) No. 90-1758.

5th Circuit remands case where district court failed to advise defendant that he was subject to term of supervised release. (580)(750) During the plea colloquy the district court entirely failed to mention to defendant that he could be sentenced to a term of supervised release. The 5th Circuit found that this was a failure to address one of the core concerns of Fed. R. Crim. P. 11, and reversed the conviction to permit the defendant to plead anew. The government argued that no substantive rights were affected and that the court should follow a harmless error standard. The court agreed that the government's arguments were "logically compelling," but found that it was bound by Circuit precedent that dictated, without exception, that the conviction be vacated when the district court fails entirely to inform the defendant of a possible term of supervised release and the defendant is ultimately sentenced to supervised release. *U.S. v. Bachynsky*, __ F.2d __ (5th Cir. Feb. 13, 1991) No. 89-2742.

Supreme Court holds that supervised release applies to drug offenses committed after October 27, 1986. (580) The Sentencing Reform Act of 1984 eliminated special parole and replaced it with supervised release. However, the SRA did not become effective until November 1, 1987. In the meantime, effective October 27, 1986, Congress passed the Anti-Drug Abuse Act of 1986, mandating supervised release for certain drug offenses. Defendant argued that the ADAA's supervised release provisions did not become effective until the SRA became effective in 1987. The Supreme Court rejected the argument in a unanimous opinion written by Justice Kennedy. The court ruled that even though the

SRA was not yet "operational" when the ADAA became effective, it was reasonable to assume that Congress legislated with reference to the "supervised release" provisions of the SRA. *Gozlon-Peretz v. U.S.*, __ U.S. __, 111 S.Ct. __ (February 19, 1991) No. 89-7370.

8th Circuit upholds imposition of consecutive sentences for guidelines and non-guidelines offenses. (660) Defendant was convicted of arson and mail fraud in connection with burning down his grocery store and attempting to collect on his insurance. The arson took place prior to the effective date of the guidelines and the mail fraud took place after the effective date of the guidelines. Following the 4th and 5th Circuits, the 8th Circuit upheld the imposition of consecutive sentences for the pre-guidelines and guidelines offenses. A district court may order consecutive sentences in such a situation even if the guidelines would have mandated concurrent sentences if both offenses were subject to the guidelines. *U.S. v. Lincoln*, __ F.2d __ (8th Cir. Feb. 6, 1991) No. 90-5172MN.

Departures Generally (§ 5K)

2nd Circuit upholds downward departure based on defendant's assistance to judicial system. (710)(721) Defendant agreed to testify against his two co-defendants, which resulted in their changing their pleas from not guilty to guilty. The district court departed downward because it found that defendant's cooperation, in "break[ing] the log-jam in a multi-defendant case" in an over-clogged judicial system, "facilitated the proper administration of justice." The 2nd Circuit upheld the departure, finding that this type of assistance was not adequately considered by the guidelines. Guideline section 5k1.1, relating to substantial assistance to authorities, focuses only on assistance that a defendant provides to the government, rather than the judicial system. Defendant not only helped the government develop the case, his cooperation resulted in the disposition of charges against the remaining two defendants. Defendant's willingness to testify also amounted to more than mere acceptance of responsibility. *U.S. v. Garcia*, __ F.2d __ (2nd Cir. Feb. 8, 1991) No. 90-1274.

7th Circuit finds no breach of plea agreement in government's recommendation of sentence at upper end of guideline range. (710)(790) Defendant provided what the government termed "complete and valuable information." However, the government did not move for a downward departure under guideline section 5K1, but instead recommended the upper end of the guideline range. The 7th Circuit found no breach of the plea agreement. The government told the court about defendant's cooperation, but also said that he qualified for an upward departure based on his criminal history. Because of defendant's substantial cooperation, the government decided to forego seeking the upward departure. Under the terms of the plea agreement, the government was permitted to recommend a sentence up to and including the statutory maximum of 20 years. In addition, the plea agreement did not require the government to move for a downward departure for substantial assistance. *U.S. v. Spillman*, __ F.2d __ (7th Cir. Feb. 12, 1991) No. 89-2473.

10th Circuit finds no breach of plea agreement in government failure to move for downward departure. (710)(790) The 10th Circuit rejected defendant's argument that the government breached her plea agreement by not recommending a downward departure. The government promised only to dismiss one count in exchange for defendant's information and future testimony. The government retained absolute discretion to determine whether defendant's cooperation merited a downward departure under section 5K1.1. Defendant was unable to participate in a controlled buy, because the district court denied a joint motion to release her from custody. "It was not unreasonable for the government to conclude that, in the absence of the controlled buy, defendant's cooperation did not amount to substantial assistance." Although the government admitted that it was aware that the district court did not favorably view using defendants in undercover situations, there was no evidence that the government acted in bad faith. The district court had no authority to depart in the absence of a government motion. *U.S. v. Vargas*, __ F.2d __ (10th Cir. Feb. 7, 1991) No. 89-1267.

9th Circuit requires government motion for "substantial assistance" departures. (710) The 9th Circuit held that a government motion is ordinarily required before a court may depart downward for substantial assistance under Section 5K1.1. Here the district court took into account the defendant's cooperation, among other factors, in departing downward pursuant to section 5K2.0. Thus the defendant did receive some benefit as a result of his cooperation. Agreeing with the 8th Circuit, the court concluded "that while there may be extreme situations in which the defendant's reliance on the government's inducements may permit a downward departure in the absence of a government motion, this is not such a case." The court said that a departure based exclusively upon cooperation with the government in this case "would have amounted to unwarranted interference with the discretion committed to the prosecution under 5K1.1." *U.S. v. Mena*, __ F.2d __ (9th Cir. Feb. 8, 1991) No. 89-10434.

10th Circuit finds district court could have granted motion to release defendant to permit controlled drug buy. (710) Two days before sentencing, the government and defendant filed a joint motion requesting that custody of defendant be transferred to a special FBI agent so defendant could arrange a controlled drug buy. The district court denied the motion, concluding that it did not have authority to permit the defendant to participate in new criminal activity and that granting the motion would violate separation of powers by

improperly involving the judiciary in the prosecutorial function. The 10th Circuit found that these were improper grounds on which to deny the motion, and remanded the case for reconsideration. Controlled buys, and other undercover operations, do not contain the requisite criminal intent to convert the action into a crime. Moreover, neither the constitutional strictures of Article III nor separation of powers prohibited the district court from granting the motion. *U.S. v. Vargas*, __ F.2d __ (10th Cir. Feb. 7, 1991) No. 89-1267.

7th Circuit, en banc, holds decision not to depart is reviewable on appeal if based on determination that judge lacks authority to depart. (720)(810) The district court found that it could not depart downward based on defendant's reduced mental capacity because she had committed a crime of violence. The 7th Circuit rejected the government's contention that it lacked jurisdiction to review the refusal to depart, holding that a decision not to depart is reviewable on appeal the judge thought he lacked the authority to depart. *U.S. v. Poff*, __ F.2d __ (7th Cir. Feb. 14, 1991) No. 89-3017 (en banc).

7th Circuit remands for district court to determine whether defendant's mental condition justified downward departure. (720) Defendant was convicted of making a false report of food tampering. He made the false report to attract attention rather than for extortion. The district court departed downward to 12 months from a guideline range of 21 to 27 months, stating that defendant's case was "atypical," and that he suffered from reduced mental capacity. The 7th Circuit remanded for resentencing. Defendant's case was not sufficiently unusual. The Sentencing Commission considered the difference between false reports of food tampering involving extortion and those that did not by providing for an increase in offense level if extortion was involved. Moreover, the record showed no reduced mental capacity. On remand, the district court was instructed to consider the questions of severity and causation, and whether a false report of food tampering is a non-violent offense. *U.S. v. Gentry*, __ F.2d __ (7th Cir. Feb. 12, 1991) No. 89-3491.

9th Circuit holds that extent of downward departure is not reviewable. (720) The 9th Circuit held that in so far as the defendant sought review of the extent of the downward departure or the court's failure to depart below the statutory minimum, "these issues are not reviewable." *U.S. v. Fuentes*, __ F.2d __ (9th Cir. Feb. 15, 1991) No. 90-50033.

1st Circuit rejects downward departure based upon government misconduct and failure to establish amount of cocaine. (722) The district court departed downward for several defendants because it found that the government failed to prove that the cocaine it seized was the same cocaine that the defendants conspired to import. The court determined that there was insufficient evidence of the actual amount of cocaine involved. In addition, the court referred to the government's "false testimony" before the grand jury as reason for refusing to rely upon the quantities of cocaine advanced by the government. The 1st Circuit rejected both of these as grounds for a downward departure. A departure is not warranted in response to conduct of the government or an independent third party. Moreover, the district court should have determined the reliability of the evidence as to the quantity of cocaine involved prior to setting defendant's offense levels. *U.S. v. Llado-Ortiz*, __ F.2d __ (1st Cir. Feb. 7, 1991) No. 90-1073.

1st Circuit upholds use of outdated dissimilar convictions as basis for departure in certain situations. (733) Defendant had seven prior convictions which were excluded from his criminal history score because they occurred more than 10 years prior to the offense of conviction. Because at least some of these convictions were serious, the district court used this as a basis for a departure from criminal history category V to VI. The 1st Circuit upheld the departure, holding that an upward criminal history departure may be based upon a defendant's remote convictions, even if dissimilar to the offense of conviction, "if those convictions evince some significantly unusual penchant for serious criminality, sufficient to remove the offender from the mine-run of other offenders." Here, the departure was justified because defendant's seven earlier convictions, though outdated, were distinguished by their numerosity and dangerousness. *U.S. v. Aymelek*, __ F.2d __ (1st Cir. Feb. 15, 1991) No. 90-1510.

11th Circuit affirms upward departure for defendant whose sentence was enhanced under Armed Career Criminal Act. (733) Defendant was convicted of possession of a firearm by a felon. His guideline range was 18 to 24 months. However, since he had at least three prior violent felonies, the Armed Career Criminal Act prescribed a mandatory minimum sentence of 15 years. The district court departed upward and imposed a 50-year sentence, based on his obstruction of justice and numerous convictions in excess of the three necessary to qualify as an armed career criminal. The 11th Circuit upheld the upward departure. Neither the statute nor the guidelines provide any means to factor an enhancement for obstruction of justice into the offense level or to adjust defendant's criminal history category based on conduct not used in calculating his statutory sentence. It was not impermissible double counting to consider his prior convictions. In reaching the 15-year sentence, the court only considered the predicate offense and the three prior qualifying offenses. The extent of the departure, although harsh, was also reasonable. *U.S. v. Simmons*, __ F.2d __ (11th Cir. Feb. 19, 1991) No. 89- 5848.

2nd Circuit finds defendant received adequate notice of upward departure. (740)(750) Defendant argued that he did not receive proper prior notice of the district court's intent to

depart upward, as required by prior Circuit precedent. The 2nd Circuit found that defendant had received adequate notice, since the presentence report expressly warned the defendant of the exact ground for departure relied upon by the sentencing judge. Defendant had access to the report substantially prior to the sentence and had full opportunity to challenge its findings. Nothing in prior cases requires the judge to personally communicate notice to the defendant of the intent to depart upward. *U.S. v. Contractor*, __ F.2d __ (2nd Cir. Feb. 11, 1991) No. 89-1026.

1st Circuit upholds upward departure based upon defendant's expressed intent to commit crime again. (745) Defendant was convicted of being a deported alien unlawfully present in the United States. The district court departed upward based on defendant's vow, when arrested, to continue his efforts to reenter the country illegally if deported once more. The 1st Circuit upheld the departure, finding that such "brazen defiance of authority, in the form of assured recidivism, can be considered an atypical factor sufficient to take a case beyond the heartland for the offense of conviction." *U.S. v. Aymelek*, __ F.2d __ (1st Cir. Feb. 15, 1991) No. 90-1510.

2nd Circuit upholds upward departure based upon finding that defendants' "intended" or "knowingly risked" another's death. (745) The district court originally departed upward under guideline section 5K2.1 because it found that the offense of conviction was "intertwined" with the death of a woman. The 2nd Circuit had remanded the case, *U.S. v. Rivalta*, 892 F.2d 223 (2d Cir. 1989), because it found that an upward departure would only be justified under guideline 5K1.2 if the defendants had "intended" or "knowingly risked" the woman's death. The district court then made this finding and reimposed the same sentences. The 2nd Circuit upheld the upward departure. *U.S. v. Rivalta*, __ F.2d __ (2nd Cir. Feb. 12, 1991) No. 90-1268.

2nd Circuit rejects upward departure based upon transaction in which defendant was not involved. (746) The district court departed upward based upon the high degree of purity of heroin involved. The 2nd Circuit reversed, finding that defendant was not involved in the transaction in question. There were two pertinent transactions. One was a delivery by a co-defendant of 1,944 grams of 96% pure heroin. The second was the conspiratorial undertaking by defendant to deliver 2 kilograms of heroin. The government conceded at sentencing that defendant had no involvement in the delivery of the 1,944 grams of heroin, yet the sentencing judge expressly referred to the "96% purity" as the basis for the upward departure. *U.S. v. Contractor*, __ F.2d __ (2nd Cir. Feb. 11, 1991) No. 89-1026.

Plea Agreements, Generally (§ 6B)

7th Circuit finds probation officer's failure to disclose prospective employment with FBI did not require new presentence report. (760) Defendant claimed that he was entitled to a new presentence report since his probation officer had sought and received a job offer from the FBI during the time she prepared defendant's presentence report. The 7th Circuit found that an appearance of impropriety was raised by the probation officer's failure to disclose her change in employment, but that it did not require a new presentence report. Although the prosecutor denied knowledge of the job change, the appellate court found it "quite difficult to believe" that no one in the U.S. Attorney's office knew of the change, and that it was "incumbent on the U.S. Attorney to ensure that this employment information was revealed to judges in this and other cases to avoid the appearance of impropriety." Nonetheless, no new presentence report was required. The sentencing judge indicated that the probation officer's statements were of "nominal significance," and that the outcome of the sentencing decision would be no different if a new presentence report were prepared. *U.S. v. Oduloye*, __ F.2d __ (7th Cir. Feb. 5, 1991) No. 90-1538.

9th Circuit holds that district court sufficiently indicated it would not rely on alleged inaccuracies in presentence report. (760) Rule 32(c)(3)(D) provides that when the defendant alleges factual inaccuracies in the presentence report, the judge must either make a "finding as to the allegation," or state that "no such finding is necessary because the matter controverted will not be taken into account in sentencing." The finding must be in writing and attached to the presentence report that is sent to the Bureau of Prisons. Here the district judge stated that since the alleged inaccuracies did not "affect the sentencing in this matter, I believe I may proceed with it." The 9th Circuit concluded that this statement "sufficiently indicates that the district judge's sentence would not be based on the alleged inaccuracies." The judge's failure to attach his ruling to the presentence report was only a "technical violation of the rule" and could be remedied by ordering the district court to send a new copy of the presentence report to the Bureau of Prisons with the statement attached. *U.S. v. Houtchens*, __ F.2d __ (9th Cir. Feb. 14, 1991) No. 90-50052.

3rd Circuit upholds use of hearsay testimony in sentencing defendant for extortion. (770) Defendant attempted to extort $10 million from DuPont by threatening to use stolen proprietary information to compete with them. Defendant contended that it was improper for the court to rely upon hearsay testimony of a competitor that defendant had stolen the proprietary information from DuPont. The 3rd Circuit found that any error involved was harmless, since there was sufficient evidence at trial to show that defendant's technology was stolen from DuPont. *U.S. v. Inigo*, __ F.2d __ (3rd Cir. Feb. 1, 1991) No. 90-3142.

2nd Circuit finds no grounds for withdrawal of guilty plea. (790) Defendant argued that the district court should have allowed him to withdraw his guilty plea because it was the result of undue pressure. Defendant was told by his attorney that his co-defendant would suffer unless defendant pled guilty. The 2nd Circuit found that pressure based on a benefit to a mere friend is not an adequate basis for withdrawal of a guilty plea. Defendant also contended that the district court, by denying him the opportunity to present a defense, indirectly coerced him into pleading guilty. The 2nd Circuit found that by pleading guilty, defendant waived any right to appeal the district court's decision that it intended to preclude any evidence related to this defense. Defendant also claimed that the factual basis for his guilty plea to conspiracy was inadequate, since a government agent was involved. The 2nd Circuit also rejected this argument, noting that defendant was aware that co-conspirators other than the government agent were involved in the offense. *U.S. v. Contractor*, __ F.2d __ (2nd Cir. Feb. 11, 1991) No. 89-1026.

8th Circuit rejects claim of inadequate legal counsel prior to signing plea agreement. (790) Defendant contended that he received inadequate legal advice prior to signing the plea agreement because he was not informed of the possible sentence he could receive at the time of plea signing. The 8th Circuit found the mere fact that defendant did not have counsel when he entered into the agreement was not a basis for error. There also was no support for defendant's argument that his base offense level should have been calculated using only the information the government had before the plea agreement. *U.S. v. Pregler*, __ F.2d __ (8th Cir. Feb. 14, 1991) No. 90-2228.

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

9th Circuit refuses to review dispute that would not affect sentence. (800) Defendant argued that he should have been given a two level reduction for acceptance of responsibility and that the court incorrectly calculated his criminal history. However, even if the district court had accepted defendant's arguments, the sentencing range would have been above the actual sentence, because the judge departed downward. Therefore, since the disputes raised by the defendant would not impact his sentence, the court declined to address them. *U.S. v. Fuentes*, __ F.2d __ (9th Cir. Feb. 15, 1991) No. 90-50033.

Forfeiture Cases

7th Circuit finds local police had no authority to transfer van to federal authorities for forfeiture. (920) At the request of local police, the FBI began administrative forfeiture proceedings against defendant's van, and the van was transferred to FBI custody. Several months later, the state of Illinois filed a forfeiture complaint in state court. A month later, a federal forfeiture action was filed. The state then voluntarily dismissed its action, and the federal court ordered the vehicle forfeited. On appeal, the 7th Circuit reversed, ruling that the transfer of the van to federal authorities violated Illinois forfeiture statutes. At the time the federal complaint was filed, the state court had exclusive jurisdiction over the van, notwithstanding the federal government's possession of it. The fact that the federal authorities "muscled in" on the van and began an administrative forfeiture proceeding before the state court action was filed did not confer jurisdiction on the federal court, nor did the state's voluntary dismissal result in the loss of state jurisdiction. *U.S. v. One 1979 Chevrolet C-20 Van*, __ F.2d __ (7th Cir. Feb. 6, 1991) No. 90-1595.

REVERSED CASE

(115) *U.S. v. Roberts*, 726 F.Supp. 1359 (D.D.C. 1989), *reversed sub nom. U.S. v. Mills*, __ F.2d __ (D.C. Circuit Feb. 8, 1991) No. 90-3007.

AMENDED OPINION

(480)(760) *U.S. v. Herrera-Figueroa*, 918 F.2d 1430 (9th Cir. 1990), *amended*, __ F.2d __ (9th Cir. Feb. 5, 1991) No. 89-50660.

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

EXHIBIT
J

March 1, 1991

Honorable Thomas S. Foley
Speaker
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I am pleased to transmit a legislative proposal to make several significant improvements in our Nation's employment discrimination laws, along with a section-by-section analysis explaining the proposal. This bill reflects the President's longstanding commitment, recently reaffirmed in his State of the Union Address, to strengthening the legal tools designed to eliminate the intolerable blight of discrimination from our society. This package will accomplish the four major objectives the President set out in his address to civil rights leaders on May 17, 1990.

First, as the President has said, any civil rights bill must "operate to obliterate consideration of factors such as race, color, religion, sex, or national origin from employment decisions." Under this proposal, employers will be encouraged and required to provide equal opportunity for all workers without resorting to quotas or other unfair preferences. The bill codifies a cause of action for "disparate impact," as recognized in Griggs v. Duke Power Co., 401 U.S. 424 (1971), which outlawed certain practices that unintentionally but disproportionately exclude individuals from certain jobs because of their race, color, religion, sex, or national origin. With respect to these "disparate impact" cases, the bill places the burden of proof on the employer to demonstrate "business necessity," thereby overruling a contrary ruling in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989).

The bill greatly expands the prohibition against racial discrimination in the performance of contracts under 42 U.S.C. 1981, and overturns the decision in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989). In addition, this proposal amends Title VII to eliminate a needless and unfair limitation on the time for filing challenges to discriminatory seniority systems, overruling Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989). Similarly, in the interest of ensuring that legitimate

claims can be pursued, the bill extends the time for filing a Title VII claim against the Federal government from 30 to 90 days.

The bill also permits the courts to make awards to prevailing parties for the fees of expert witnesses, and authorizes the award of interest in actions against the Federal government on the same terms on which such awards are available against other parties.

The second requirement established by the President is that a bill must "reflect fundamental principles of fairness that apply throughout our legal system." Accordingly, this bill expressly provides that the Federal Rules of Civil Procedure shall apply in determining who is bound by an employment discrimination decree, just as they apply in other civil causes of action. This provision ensures that the standard rules of joinder and intervention will operate to give all victims of illegal discrimination a fair opportunity to protect their constitutional and civil rights in court.

The third essential element of a civil rights bill is a provision to ensure that Federal law provides an adequate deterrent against sexual harassment in the workplace. Under current law, the only judicial remedy for many cases of such harassment is a directive to refrain from such conduct in the future. This cannot provide adequate deterrence. In order to rectify this shortcoming, the bill makes available new monetary remedies for the victims of illegal harassment under Title VII.

The President has also insisted, however, that our civil rights laws not be "turned into some lawyer's bonanza, encouraging litigation at the expense of conciliation, mediation, or settlement." Accordingly, this proposal for the creation of a new monetary remedy under Title VII provides for bench trials, and it caps the monetary award at $150,000. The bill also includes special incentives for employers to develop and implement meaningful internal complaint procedures for harassment claims, while allowing employees to obtain emergency relief from the courts when employers fail to respond quickly and effectively to complaints of illegal behavior. More generally, the bill encourages the use of alternatives to litigation in resolving disputes under our civil rights laws.

Fourth, the President has said that the Congress should live by the same requirements it prescribes for others. Accordingly, this bill eliminates the congressional exemption from Title VII of the Civil Rights Act of 1964, and gives congressional employees the same fundamental protections that employees of the Executive branch have enjoyed for many years. The bill gives the

Executive no role in enforcing the law against the Congress, allowing the Congress to establish its own mechanisms for enforcement. Congressional employees, like employees of the Executive branch, will be able to maintain a private right of action upon exhaustion of their administrative remedies.

Finally, the President has observed that the Congress must also take action in other areas to enhance equal opportunity. The elimination of employment discrimination, which is the aim of this bill, will have little meaning unless jobs are available and individuals have the skills and education needed to fill them. Nor can we expect young people to achieve their full potential if they grow up in neighborhoods and schools permeated by violence, drugs, and hopelessness. The Administration is proposing several initiatives to enable individual Americans to claim control over their own lives and futures. Enactment of those initiatives, along with this bill, will achieve real advances for the cause of equal opportunity.

Very truly yours,

Dick Thornburgh
Attorney General

U.S. Department of Justice

Office of Public Affairs

March 1, 1991

Washington, D.C. 20530

FACT SHEET ON
ADMINISTRATION CIVIL RIGHTS BILL

- The Administration is committed to strengthening the strong employment discrimination laws that now exist. These improvements will operate to obliterate consideration of factors such as race, religion, sex, or national origin from employment decisions.

- A major objective of the Administration is to ensure that Federal law provides strong new remedies for harassment based on race, sex, religion, or national origin. The Administration proposes to create a new monetary remedy, up to $150,000, for these forms of discrimination.

- In addition, the Administration proposes to extend 42 U.S.C. 1981 to outlaw racial discrimination in the performance of contracts, overruling Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989).

- The Administration also proposes legislation overturning the Supreme Court's decision in Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989), which unfairly limits the time for challenging discriminatory seniority systems.

- The administration also proposes to codify the "disparate impact" cause of action for employment practices that unintentionally exclude disproportionate numbers of certain groups from some jobs. This codifies Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Administration bill shifts the burden of proof to the employer to justify practices having a disparate impact under the rule of "business necessity." This overrules the contrary decision in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126 (1989).

- In order to help curtail unnecessary litigation, the use of alternative dispute resolution mechanisms will be encouraged.

- The time has come for Congress to bring itself under the same antidiscrimination requirements it prescribes for others. This will promote both fair treatment for congressional employees and a greater appreciation by Congress of the consequences of new legislative initiatives.

(MORE)

- Other improvements, including changes in certain provisions affecting the statute of limitations and expert witness fees, will also enhance the administration of Title VII of the 1964 Civil Rights Act.

- The Administration bill strengthens our civil rights laws without encouraging the use of quotas or unfair preferences, without departing from the fundamental principles of fairness that apply throughout our legal system, and without creating a litigation bonanza that brings more benefits to lawyers than to victims.

- The Administration recognizes that equal opportunity can never be a reality unless there are decent schools, safe streets, and revitalized local economies. Therefore, in addition to this bill it seeks Congressional action to promote choice and opportunity on several fronts: educational choice and flexibility; home-ownership opportunity; enterprise zones and community opportunity areas; and heightened anti-crime efforts.