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

United States Attorneys' Bulletin

Published by:
Executive Office for United States Attorneys, Washington, D.C.
Laurence S. McWhorter, Director

Editor-in-Chief: *Judith A. Beeman* *FTS/241-6098*
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VOLUME 39, NO. 8 **THIRTY-EIGHTH YEAR** **AUGUST 15, 1991**

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Please send name or address changes to:
The Editor, United States Attorneys' Bulletin
Room 6419, Patrick Henry Building
601 D Street, N.W., Washington, D.C. 20530
FTS 241-6098 Commercial: 202-501-6098

COMMENDATIONS

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

Riley J. Atkins (District of Oregon), by Robert C. Bonner, Administrator, Drug Enforcement Administration, Washington, D.C., and Patrick R. O'Connor, Acting Resident Agent in Charge, Drug Enforcement Administration, Portland, Oregon, for his outstanding leadership in the successful settlement of five proposed civil complaints against the Upjohn Company resulting in the largest civil penalty ever imposed against a firm under the civil provisions of the Controlled Substances Act.

Leon Barfield (Georgia, Southern District), by William L. Hinshaw, II, Special Agent in Charge, FBI, Atlanta, for his excellent representation and valuable assistance in bringing an "extraordinarily complex case" to court in the Southern District of Georgia.

Robert J. Boitmann, Walter J. Rothschild, and ***Gregg H. Lehman*** (Louisiana, Eastern District) received the Chief Postal Inspector's Special Award for their successful prosecution of the Louisiana Commissioner of Insurance and the principals of an insurance company in a fraud case involving a collective loss to the citizens of Louisiana in excess of $185 million.

Kathleen M. Brinkman (Ohio, Southern District), by Robert S. Mueller, III, Assistant Attorney General, Criminal Division, and Cary H. Copeland, Director, Executive Office for Asset Forfeiture, Department of Justice, Washington, D.C., for her outstanding contributions and tireless efforts throughout the past year as the Deputy Director for Program Management in the Asset Forfeiture Office.

Kenneth R. Buck (District of Colorado), by Robert J. Zavaglia, Chief, Criminal Investigation Division, Internal Revenue Service, Denver, for his excellent representation and successful resolution of a complex bank-deposit-method case.

Lynne H. Buck (Ohio, Northern District), by Lewis Nixon, Regional Counsel, Department of Housing and Urban Development, Chicago, for her legal skill and professionalism in the representation of the Government's interests in the settlement of a project management contract case.

Daniel Cassidy (District of Colorado), received a Certificate of Appreciation from Philip W. Perry, Special Agent in Charge, Drug Enforcement Administration, Denver, for his valuable assistance in obtaining a number of indictments in a lengthy and complex narcotics investigation involving the distribution of tons of marijuana by an organization in existence for over a decade.

Monte C. Clausen (District of Arizona), by Robert E. Henry, M.D., Chief of Staff, Department of Veterans Affairs Medical Center, Tucson, for obtaining the settlement of a large and difficult medical malpractice case on behalf of the Medical Center, and for his excellent presentation at a medical malpractice conference at the Veterans Hospital.

Melanie C. Conour and ***John J. Thar*** (Indiana, Southern District), by Robert J. Gofus, District Director, Internal Revenue Service, Indianapolis, for their successful prosecution of approximately 50 individuals connected with a marijuana smuggling/money laundering conspiracy responsible for importing over 200,000 pounds of marijuana into the United States and the laundering of millions of dollars in illicit drug proceeds through the Cayman Islands and Netherlands Antilles.

Patrick M. Flachs (Missouri, Eastern District), by J. Michael Fitzhugh, United States Attorney for the Western District of Arkansas, for his legal skill and expertise in successfully prosecuting a case involving the illegal disposal of hazardous waste from an aircraft refinishing business.

Patrick J. Hanley (Ohio, Southern District), by Daniel J. Walsh, District Director, Office of Labor Management Standards, Department of Labor, Cincinnati, for his excellent presentation at a training conference for Labor agents and for his continuing support of Department of Labor programs.

Richard K. Harris (District of Virgin Islands), by Gaylord A. Sprauve, Drug Policy Advisor to the Governor, Narcotics Strike Force, Government of the Virgin Islands of the United States, St. Thomas, for his valuable assistance and guidance to the Strike Force agents and for his services rendered to the Virgin Islands community.

Tony Jenkins (Florida, Northern District), by M. D. Purcell, Inspector in Charge, U.S. Postal Service, Tampa, for his success in obtaining a conviction in a complex criminal case of extreme importance to the U.S. Postal Service.

Ronald M. Kayser, Lester A. Paff, Narcotics Prosecution Division, and ***Kevin E. VanderSchel,*** Asset Forfeiture Unit (Iowa, Southern District) were presented engraved plaques by Richard Horn, Resident Agent in Charge, Drug Enforcement Administration, Des Moines, "in grateful appreciation for their strong cooperation, unselfish dedication, and notable achievements in support of the DEA mission."

Phyllis Kilbreath (District of Arizona), by Gary A. Husk, Chief Counsel, Drug Enforcement, Office of the Attorney General, Phoenix, for her outstanding success in obtaining a guilty verdict in a first degree murder case.

Joan Kouros (Indiana, Northern District), by William S. Sessions, Director, FBI, Washington, D.C., for her superlative prosecutive efforts in a gambling case, resulting in four guilty pleas and forfeitures in excess of $300,000 to the U.S. Government.

Terry Lehmann (Ohio, Southern District), by Joyce J. George, United States Attorney for the Northern District of Ohio, for his invaluable assistance rendered in filing a writ of mandamus and a motion for stay with the Court in Cincinnati.

Joseph J. Lodge (District of Arizona), by Joel Valenzuela, Regional Director, Defense Contract Audit Agency, Department of Defense, Irving, Texas, for his excellent presentation on testifying at the second annual Investigation Support Division Training Conference.

Jan Maselli Mann (Louisiana, Eastern District), received the Chief Postal Inspector's Special Award for her continuously outstanding efforts regarding the prosecution of Postal Inspection cases.

Elizabeth B. Mattingly (Ohio, Southern District), by Robert C. Bonner, Administrator, Drug Enforcement Administration, Washington, D.C., for her special assistance in the successful resolution of the Upjohn case which resulted in the largest fine ever obtained in a civil action against a DEA registrant.

John Morano (Pennsylvania, Middle District), was presented a Certificate of Appreciation by William H. Galyean, Jr., Regional Inspector General for Investigations, Department of Agriculture, Hyattsville, Maryland, for his valuable assistance in obtaining a settlement in a complex dairy termination program fraud case.

Richard G. Patrick (District of Arizona), by Gregory G. Ferris, District Counsel, Department of Veterans Affairs, Phoenix, for his legal skill and professionalism in obtaining a favorable judgment in a civil torts action charging negligence. Also, by Kenneth H. Vail, Assistant General Counsel, Department of Agriculture, Washington, D.C., for his special efforts in obtaining the court's dismissal of a complaint filed against the agency.

Thomas Payne (Mississippi, Southern District), by Tyler H. Fletcher, Chair, University of Southern Mississippi, Hattiesburg, for his excellent presentation on civil rights principles at a workshop for police sponsored by the University.

Francis L. Pico and ***Vincent J. Horn, Jr.*** (District of Wyoming), by William S. Sessions, Director, FBI, Washington, D.C., for their outstanding legal skills in the successful prosecution of a complex insurance fraud case.

Gerald Rafferty and ***Kenneth Fimberg*** (District of Colorado), by Robert H. Davenport, Regional Administrator, Securities and Exchange Commission, Denver, for their successful efforts in obtaining the first plea arising out of the "Pennycon" undercover operation indictments.

Matthew Richmond and ***Steven Biskupic*** (Wisconsin, Eastern District), by Matthew B. Hathaway, Forest Supervisor, U.S. Forest Service, Department of Agriculture, Rhinelander, for their excellent presentations on the federal prosecution process at a recent Lake States in-service conference.

Joan G. Ruffennach (District of Arizona), by William S. Sessions, Director, FBI, Washington, D.C., for her professional skill and dedicated efforts in successfully prosecuting a school teacher on the Havasupai Indian Reservation for child sexual molestation. Also, by Robert C. Brauchli, General Counsel, White Mountain Apache Tribe, Whiteriver, Arizona, for her excellent presentation on child sexual abuse, search and seizure, search warrants and probable cause before representatives of the tribal social services and law enforcement agencies.

Charles S. Sabalos (District of Arizona), by Gerard B. Murphy, Assistant Special Agent in Charge, Drug Enforcement Administration, Tucson, for his legal skill and expertise in the successful prosecution of two drug traffickers on marijuana and weapons charges.

Stanley Serwatka (Texas, Western District), by William S. Sessions, Director, FBI, Washington, D.C., for his valuable assistance and professional guidance in a criminal case involving a bank robbery in Las Vegas and the murder of a Special Agent during the course of an escape attempt.

Randy Stevens (District of Arizona), by David S. Wood, Special Agent in Charge, Drug Enforcement Administration, Phoenix, for his valuable instruction on search and seizure laws at the Basic Narcotic Investigation School for Indian Tribal Police Departments sponsored by the Phoenix Drug Enforcement Administration Field Division.

Mark D. Stuaan (Indiana, Southern District), by William R. Hendrickson, Special Agent in Charge, Bureau of Export Administration, Department of Commerce, Des Plaines, Illinois, for his outstanding efforts in the successful prosecution of a complex Export Administration Act case.

Joseph J. Terz (Pennsylvania, Middle District), by David Adelman, District Counsel, Veterans Administration, Philadelphia, for his excellent representation of the Department of Veterans Affairs and its medical personnel in a complicated case involving the diagnosis of the mental condition of a Vietnam veteran.

Sandra Teters (California, Northern District), by William S. Sessions, Director, FBI, Washington, D.C., for her legal skill and expertise in obtaining guilty pleas from two members of a large organized group engaged in numerous illegal activities, including the use of unauthorized access devices (credit cards) totaling over $600,000 in illegal goods and services.

Michael W. Whisonant and ***J. Patton Meadows*** (Alabama, Northern District), by Teddy R. Kern, Chief Inspector, Internal Revenue Service, Washington, D.C., for the excellent manner in which they provided legal assistance to IRS Inspectors on a major IRS bribery investigation.

Scott L. Wilkinson (North Carolina, Eastern District), by Paul V. Daly, Special Agent in Charge, FBI, Charlotte, for his successful prosecution of a complex bank fraud and embezzlement case.

Dale E. Williams, Jr. (Ohio, Southern District), by Richard E. Trogolo, District Counsel, Internal Revenue Service, Cincinnati, for his valuable assistance in making a presentation to the Government Witness Training Program for Cincinnati Service Center employees.

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SPECIAL COMMENDATION FOR THE DISTRICT OF CONNECTICUT

Leslie Cayer Ohta, Assistant United States Attorney for the District of Connecticut, was named "Prosecutor of the Year" at the annual meeting of the Connecticut Police Chiefs Association. ***Ms. Ohta*** was honored for her untiring efforts over the last five years in pursuing and seizing drug dealers' assets which has resulted in millions of dollars being shared with the state and local law enforcement agencies. Due to her diligence and perseverance, a total of approximately $21.4 million has been forfeited in Connecticut since 1985, of which approximately $11.9 million has been shared with state and local law enforcement agencies.

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PERSONNEL

On July 29, 1991, ***J. Michael Luttig, Assistant Attorney General, Office of Legal Counsel,*** was confirmed by the United States Senate to be a United States Circuit Judge for the Fourth Circuit.

Upon the departure of ***Richard B. Stewart*** on July 5, 1991, ***Barry M. Hartman*** became Acting Assistant Attorney General for the Environment and Natural Resources Division.

Executive Office For United States Attorneys

(Col.) ***Wayne Rich*** has rejoined the Executive Office for United States Attorneys as Principal Deputy Director, after having completed his military tour of duty as Staff Judge Advocate in California. ***Douglas Frazier*** will continue to serve as Deputy Director.

Louis G. DeFalaise, United States Attorney for the Eastern District of Kentucky, will join the Executive Office for United States Attorneys, effective upon the appointment of his replacement in Lexington, Kentucky. ***Mr. DeFalaise*** will act as Counsel to the Director having responsibility for coordination of legislative initiatives, coordination with the Office of Public Affairs, and the Priority Program Team.

Effective September 1, 1991, ***Amy Lecoque*** will become the Director of the Office of Legal Education. ***Ms. Lecoque*** was formerly an Assistant United States Attorney for the Western District of New York for one year, and Assistant United States Attorney for the Southern District of West Virginia for five years.

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SUPREME COURT ISSUES

October 1990 Supreme Court Term

On July 31, 1991 Attorney General Dick Thornburgh issued a memorandum to all Heads of Components, Offices, Boards, and Divisions, and all United States Attorneys, summarizing a recent presentation by the Solicitor General concerning the just-completed Term of the Supreme Court.

A copy is attached at the Appendix of this Bulletin as Exhibit A.

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ATTORNEY GENERAL APPEARS BEFORE THE SUPREME COURT

On June 27, 1991, the Supreme Court overruled two of its own decisions, Booth v. Maryland and South Carolina v. Gathers, in which prosecutors in death penalty cases were prevented from introducing evidence about the murder victim's character and the effect of the crime on the victim's family. Recently, in a rare high court appearance, Attorney General Dick Thornburgh argued Payne v. Tennessee. The Court upheld the conviction of a Tennessee inmate, Pervis Tyrone Payne, after victim impact evidence was used to sentence him to death.

Following the Court decision, the Attorney General said, "This decision represents an important victory for victims' rights. Too often crime victims have been the forgotten participants -- often just bystanders -- in our criminal justice process. The Supreme Court has recognized that the impact of vicious murders upon victims, their families and the community where they lived may be considered by jurors in assessing the full accountability of the defendant for his or her criminal act. This decision helps to restore a much needed balance to our criminal justice system. It calls for respecting the rights of victims as well as those of the perpetrators of violent crimes."

The following is a statement prepared by the Attorney General describing his preparation for appellate argument:

> It was my privilege this past spring to present oral argument on behalf of the United States in Payne v. Tennessee, No. 90-5721, the case in which the Supreme Court considered the admissibility of victim-impact evidence in capital sentencing proceedings. Because this is such a unique opportunity, I thought I might share some of the process of preparation I went through before my argument.
>
> In preparing for the argument, I had two principal objectives in mind. First, I was determined to get across the basic justification for our position that such evidence has an important and legitimate role to play in death penalty proceedings. Second, aware that the Court's interest in the case and the division among its members would foreclose a lengthy scripted argument, I recognized that the principal challenge (and opportunity) in the argument would be in responding to the concerns of the various Justices.

The process of preparing to meet these objectives stretched over an intense three-week period. To begin with, I familiarized myself with both the record in the case and the Court's principal death-penalty cases. In addition, although Payne concerned a discrete constitutional issue, I nevertheless thought it important to examine all of the evidence introduced during the penalty phase of the trial, including a videotape of the scene of the very violent murders at issue. I also studied with great care the principal briefs in the case.

To crystallize my thinking, I had a preliminary meeting with the Solicitor General and members of his office. The meeting was, in effect, an informal "brainstorming" session -- an opportunity to toss ideas regarding potential arguments among one another. As a result of my own study of the case and this preliminary meeting, a basic line of argument began to emerge, and I blocked out a prepared argument embodying the points to communicate to the Court.

About ten days before the argument, I had the first of two moot courts, before a panel consisting of members of my staff and the Solicitor General's Office. Both moot courts consisted of two parts. First, I delivered my proposed prepared argument, without interruption, and listened to comments from members of the panel. We agreed to shorten the prepared presentation from around seven minutes to roughly five minutes (and to tighten a brief introduction that might well have consumed all of the uninterrupted time I might be allowed by the Court). The second part was a vigorous, no-holds-barred, question-and-answer session, lasting nearly an hour, designed to expose all the issues that the Court might raise. Again, after that exchange, we discussed possible areas of refinement and improvement.

The moot court revealed a few areas in which further research was necessary. The Solicitor General's Office was commissioned to prepare responses. About a week later, I had the second of two moot courts. This time, we purposely included some new panelists, including Bob Mueller, Assistant Attorney General for the Criminal Division, and a former Department official who had filed an amicus brief, to assure a fresh perspective on the argument. Again, I delivered my prepared remarks, received comments, was subjected to a withering examination designed to probe all possible weaknesses in our position, and received further comments from each member of the panel. The entire moot court (including the post mortem) was videotaped, and I watched it later, in a more relaxed setting, to determine where further improvements were possible.

One important task remained. In this case, the United States was sharing argument time with the State of Tennessee. Consequently, it was necessary to identify and resolve any possible areas in which inconsistencies might be perceived in our presentations. Charles Burson, the Attorney General of Tennessee, participated in my moot court, and we discussed the issues that we thought were of principal importance. A short time later, General Burson delivered his argument in a moot court sponsored by the National Association of Attorneys General. Like my moot court, this one was videotaped, and I reviewed the tape to identify any other areas in which further coordination was required. After several conversations, we succeeded in refining our positions so as to avoid any conflict or impression of inconsistency.

A couple of days later, we argued before the Court, and I was at the podium for just ten minutes -- a small fraction of the time devoted to preparation, but confident that all that could be done had been done to present our views as effectively as possible.

As is apparent, I was fortunate to appear before the Court with the benefit of the most complete preparation possible. I recognize that kind of preparation is available to most of us only on the rarest of occasions. My most recent Supreme Court experience did remind me, however, not only of the rigors of appearing before the Court, but also the fine job of appellate advocacy that most Justice Department lawyers do in the face of much more limited time and resources.

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CRIME ISSUES

Attorney General Thanks The United States Attorneys

After three weeks of debate and numerous delays, the Senate late Thursday, July 11, 1991, passed a $3.3 billion comprehensive crime package. Attorney General Dick Thornburgh said, "Today's bi-partisan Senate vote in support for President Bush's tough, anti-crime legislative package sends a powerful signal. If enacted, this legislation will strengthen the ability of federal, state and local law enforcement to remove drug traffickers and violent offenders from our streets -- once and for all."

The Attorney General issued the following statement to all United States Attorneys:

I want to thank each of you for your assistance in our continuing efforts to obtain passage of the crime bill. As you know, the Senate overwhelmingly approved the measure by a 71 to 26 vote last night. Your work was a substantial factor in that victory.

Our focus will now shift to the House of Representatives, which is expected to consider the crime bill in September. Your continued support and efforts in your districts are essential to final passage. If enacted, this legislation will strengthen our ability to remove drug traffickers and violent offenders from our streets. It will enable us to once again employ the needed sanctions against public corruption by removing the restraints created by the Supreme Court's decision in McNally v. United States. And the bill will help provide meaningful protection for the public in a number of other ways as well.

Passage of the legislation is a crucial part of the President's anti-crime program, and we are counting on you for a maximum effort in the coming months.

* * * * *

Project Triggerlock

On July 17, 1991, the Department of Justice announced that 847 persons were indicted for firearms offenses in the first three months of Project Triggerlock, a new nationwide program to prosecute dangerous offenders who use firearms in a wide range of crimes. Attorney General Dick Thornburgh said that this is an impressive start for our priority effort to focus federal resources in every part of the country against the most dangerous armed criminals.

A total of 419 persons were charged with federal firearms violations from Triggerlock's kickoff on April 10 through May 31. An additional 428 persons were charged with gun crimes under Triggerlock in the next 30 days. By June 30, a total of 76 Triggerlock defendants had been convicted and only three acquitted -- a conviction rate of ninety-six percent. Triggerlock prosecutors have charged 667 persons with being a felon in possession of a firearm (a prison term of up to 10 years), or carrying or using a firearm in the commission of a violent federal crime or drug crime (a five-year term added to sentence for underlying offense), or both. Fifty-two defendants were charged with the Armed Career Criminal Statute which carries a mandatory 15-year prison term for those with three violent felony or serious drug convictions who possess a firearm. The remainder of the 847 defendants were charged with othe federal firearms crimes.

Robert S. Mueller, III, Assistant Attorney General for the Criminal Division, said, "The early success of Project Triggerlock results from several factors. First, the Attorney General directed all 93 United States Attorneys to place gun cases at the top of their prosecution agendas. Second, the federal investigative agencies have matched the dedication of federal prosecutors in targeting dangerous criminals with guns. Finally, and most important, there has been close cooperation with state and local law enforcement authorities throughout the country in implementing joint task forces to carry out this urgent mission. Because federal firearms laws carry stringent penalties, they can effectively be used to incapacitate dangerous offenders who may be beyond the effective reach of state laws."

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Project Triggerlock

Summary Report

April 10, 1991 through June 30, 1991
(In Cases Indicted Since April 10, 1991)

Description	*Count*	*Description*	*Count*
Indictments/Informations	669	Sentenced to prison	5
Defendants Charged	847	Sentenced w/o prison or suspended	3
Defendants Convicted	76	Restitution Ordered	$- 0 -
Defendants Acquitted	3	Fines Ordered	$3,750
Prison Sentences	21 years 9 months		

"Significant Activity" is defined as an indictment/information, conviction, acquittal or sentencing which occurs during the time period. Increases are due to significant activity during the past month as well as significant activity since April 10 in cases not previously reported. These statistics are based on reports from 94 offices of the United States Attorneys. [NOTE: All numbers are approximate.]

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CRIMINAL DIVISION ISSUES

Guides To Drafting Indictments

Since the publication of Guides to Drafting Indictments, the Criminal Division has received a number of suggestions for amendments and additions. A revision of the Guides is planned for late 1991.

Michael D. McKay, United States Attorney for the Western District of Washington, has brought to the Division's attention the omission of the descriptive words "an Indian," following the defendant's name in the third form indictment of 18 U.S.C. §1153. Mr. McKay advised that Assistant United States Attorney Gene Porter prepared a memorandum in opposition to a motion in arrest of judgment, based on the allegedly defective indictment, filed in the case of United States v. Shane Arthur James, W.D. Wash. No. CR90-251D. The motion was denied by Judge Carolyn R. Dimmick on May 9, 1991.

A corrected page entitled "Indian Country Offenses" has been prepared by the General Litigation and Legal Advice Section, Criminal Division, and is attached at the Appendix of this Bulletin as Exhibit B. Please remove the older version and insert the corrected page in your Guides. Also, please refer to the July issue of the United States Attorneys' Bulletin, (Vol. 39, No. 7, at p. 189), in which a new form indictment for 8 U.S.C. §1326(b) (unlawful reentry of deported alien) was included as an attachment. This new form indictment should be detached from that issue of the Bulletin and placed in your Guides to replace the older version.

The Department continues to solicit your suggestions for this revision; these should be sent to the General Litigation and Legal Advice Section, Criminal Division, P.O. Box 887 - Ben Franklin Station, Washington, D.C., 20044-0887.

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Insurance Fraud By Insiders

The Economic Crime Council, an advisory body for the Department of Justice, has identified fraud and corruption in the insurance industry as an area needing intensified federal law enforcement attention. Focusing on the rapidly increasing number of insurance company insolvencies in recent years and the individual policyholders and state guaranty funds victimized by insurance frauds by insiders, the Council determined that fraud by insiders should be named as a special emphasis area for purposes of federal criminal law enforcement.

To accomplish the purposes of the Council, the Criminal Division's Fraud Section has formed an Insurance Fraud Unit that will serve several functions. Fraud section attorneys are available to coordinate multidistrict investigations and global plea agreements or cooperation agreements with individuals who are targets or subjects of investigations in more than one district. The Unit can also provide prosecutors to staff significant cases on an as-needed basis. With the assistance of the United States Attorneys' offices, the Unit will seek to develop a pleadings bank and to marshal other resource materials, such as congressional reports, reference materials, and legislative proposals pertaining to insurance matters. The Unit is also working with the Attorney General's Advocacy Institute (AGAI) to train economic crime prosecutors in regard to insurance fraud by insiders. In April 1991, lectures on insurance fraud and corruption by insiders were included as part of a basic training course on economic crime held by the AGAI. Videotapes of those lectures may be borrowed from AGAI by United States Attorneys for training programs within their offices.

According to the plan adopted by the Council, the Fraud Section and a multiagency Insurance Working Group, which is currently being formed, have been tasked with collecting and analyzing insurance fraud data in order to determine the scope of the problem, to identify types of insurance frauds, to establish priorities, to seek sources of referral, and to conduct training. To this end, the Fraud Section has met with other government agencies that have insurance regulatory and enforcement roles in an attempt to better coordinate government efforts and has been in contact with national insurance associations, state regulators, state Attorneys General, and federal investigative agencies. The first meeting of the Insurance Working Group is scheduled to be held on September 12, 1991, in Washington, D.C.

For further information, please call Karen Morrissette, Deputy Chief, Fraud Section, Criminal Division, at (FTS) 368-0640 or (202) 514-0640. For information concerning the availability of videotapes from the Attorney General's Advocacy Institute, please call Jim Miles, Paralegal Specialist, at (FTS) 268-7574 or (202) 208-7574.

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DRUG ISSUES

War On Drugs

On July 15, 1991, the Bureau of Justice Assistance, Office of Justice Programs, Department of Justice, awarded a grant of $254,782 to the District Attorney's Office in Philadelphia to assist in the expedited prosecution of accused drug dealers within that city. This award will enhance the operation of the Federal Alternatives to State Trials (F.A.S.T.) project.

This F.A.S.T. project is a joint effort by the Philadelphia District Attorney's Office and the Office of the United States Attorney for the Eastern District of Pennsylvania. Through this project selected drug cases will be transferred to federal jurisdiction through the United States Attorney's Office. The transfer from local to federal jurisdiction will substantially increase the likelihood that accused local drug dealers and other armed career criminals will remain in custody through the use of federal detention facilities pending trial. In addition, they will receive expedited trials through the use of the federal district court. If found guilty, these individuals would be sentenced under federal sentencing rules and incarcerated in a federal facility. This project provides one significant means of assisting Philadelphia in handling an increasing drug case load in the face

of the city's crowded court dockets and overcrowded detention facilities. Lack of detention space in Philadelphia has resulted in the city's inability to hold many offenders prior to trial and further resulted in many of those released failing to appear for trial when scheduled.

Under the F.A.S.T. project, three Assistant District Attorneys will be cross-designated as Special Assistant United States Attorneys. They will review cases of drug traffickers, drug dealers and other armed career criminals for transfer and prosecution in the federal courts. The Bureau of Justice Assistance will monitor and evaluate the progress of the F.A.S.T. project in the hope of making the program available for replication in other jurisdictions.

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Drug Interdiction Along The Northern Border

On July 15, 1991, the House Select Committee on Narcotics Abuse and Control, chaired by Charles B. Rangel (N.Y.), held a field hearing in Buffalo, New York, on drug interdiction efforts along the northern border of the United States. Witnesses for the Department of Justice included Dennis Vacco, United States Attorney for the Western District of New York, as well as representatives of the FBI, DEA, and the Border Patrol.

Mr. Vacco testified that the U.S.-Canadian border presents an opportunity for drug traffickers and money launderers. The four border crossings in the Western District of New York allow millions to traverse the border yearly. The openness of the shores and air space on both sides of the border further enhance accessibility. There are literally thousands of bays, inlets and private airstrips for drug traffickers to safely smuggle drugs and/or money into or out of the country. The level of cooperation between the United States and Canadian law enforcement officials is excellent across the length of the border. Not only is information regularly exchanged, but there is an intense interest in working joint investigative operations. This level of cooperation is extremely important given the proximity of Toronto and the pipeline that exists between Toronto and the New York City area.

Mr. Vacco said, "Despite all of our other pressing needs, we cannot lose sight of this insidious problem that just seems to never go away. We have to continue to be vigilant, continue to be committed, and continue to be innovative in our approach to it so that someday we can honestly say that we have won the war against drugs."

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ASSET FORFEITURE

Increased Administrative Forfeiture Authority

Attached at the Appendix of this Bulletin as Exhibit C is a memorandum dated July 5, 1991, by Cary H. Copeland, Director of the Executive Office for Asset Forfeiture, to all United States Attorneys, and other Department and Agency officials, concerning the policies and procedures to follow in implementing the increased statutory authority for administrative forfeitures. This memorandum serves as a follow-up to a previous memorandum dated February 26, 1991, by Deputy Attorney General William P. Barr, advising that the Attorney General had promulgated revised asset forfeiture regulations to implement the higher statutory ceilings for administrative forfeitures. (See, United States Attorneys' Bulletin, Vol. 39, No. 4, dated April 15, 1991, at p. 94.)

Mr. Copeland provides more detailed guidance in processing equitable sharing requests, aggregation of seizures, and early notification to the United States Attorney of all seizures of property for forfeitures. If you have any questions, please call Mr. Copeland at (202) 514-0473 or (FTS) 368-0473, or Katherine Deoudes, Assistant Director for Operations, at (202) 514-1149 or (FTS) 368-1149.

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Use Of Property Under Seizure

On April 9, 1991, Cary H. Copeland, Director, Executive Office for Asset Forfeiture, issued a memorandum to all United States Attorneys, and other Department and Agency officials, advising that, absent the final decree or court order of forfeiture of property under seizure, the United States does not have title to the property. Any use of property under seizure and pending forfeiture raises issues of liability and creates the appearance of impropriety. The following general policies govern the use of seized property:

I. Use of Seized Property by Department of Justice Personnel

Property under seizure and pending forfeiture shall not be utilized for any reason by Department personnel, including for official use, until such time as the final decree or court order of forfeiture is issued. Likewise, Department personnel shall not make such property available for use by others, including person(s) acting in the capacity of a substitute custodian, for any purpose prior to completion of the forfeiture. However, exceptions may be granted by the U.S. Marshals Service in situations such as the seizure of a ranch or business where use of equipment under seizure is necessary to maintain the ranch or business.

II. Use of Seized Property Where Custody is Retained by the State or Local Seizing Agency

This reiterates and expands upon existing Departmental policy regarding retention of custody by State or local agencies. In order to minimize storage and management costs incurred by the Department of Justice, State and local agencies which present motor vehicles for federal adoptions should generally be asked to serve as substitute custodians of the property pending forfeiture. (See, United States Attorneys' Bulletin, Vol. 38, No. 3, dated February 15, 1990, at p. 47.)

Any use of such vehicles, including official use, by State and local law enforcement officials or others is prohibited by Department of Justice policy until such time as the forfeiture is completed and the equitable transfer is made.

III. Use of Seized Real Property By Occupants

The Department's policy states that as a general rule, occupants of real property seized for forfeiture should be permitted to remain in the property pursuant to an occupancy agreement pending the forfeiture. (See, United States Attorneys' Bulletin, Vol. 38, No. 11, dated November 15, 1990, at p. 271.)

Attached at the Appendix of this Bulletin as Exhibit D is a form occupancy agreement developed by the Department which includes various restrictions (e.g., maintenance and access to the property, potential for continued illegal activity, threat to health and safety, etc.) that address Departmental concerns. Other specific restrictions that protect the best interests of the government in a particular case should be included as appropriate. If you have any questions, please call the Executive Office for Asset Forfeiture at (202) 514-0473 or (FTS) 514-0473.

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Expedited Forfeiture Settlement Policy For Mortgage Holders

On June 14, 1991, Cary H. Copeland, Director, Executive Office for Asset Forfeiture, forwarded a publication entitled "Expedited Forfeiture Settlement Policy for Mortage Holders" to all United States Attorneys and other Department and Agency officials. This policy applies to property that is restrained, arrested, seized, or charged in a civil or criminal forfeiture action on or after July 1, 1991, and is intended to resolve legal issues between the United States and financial institutions holding a perfected lien or mortgage against real property subject to federal forfeiture. It is also intended to provide consistency, predictability, and fairness in handling the claims of such financial institutions.

This publication represents the skillful efforts of Laurence E. Fann and Karen Tandy of the Asset Forfeiture Office of the Criminal Division. If you would like additional copies, please call the Asset Forfeiture Office at (202) 514-1263 or (FTS) 368-1263.

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POINTS TO REMEMBER

Congressional Relations Procedures

Laurence S. McWhorter, Director, Executive Office for United States Attorneys, reminds all United States Attorneys, their Assistants, and other support staff of the congressional relations procedures for all communications between the Department of Justice and Congress. Mr. McWhorter said that we cannot overstress the importance of this policy within the offices of the United States Attorneys.

Attached at the Appendix of this Bulletin as Exhibit E is Section 1-8.020 of the United States Attorneys' Manual, which states that the Assistant Attorney General for the Office of Legislative Affairs (OLA) is responsible for coordination of all significant communications between Congress and the Department subject to the general supervision of the Attorney General and the direction of the Deputy Attorney General. (See, also, 28 C.F.R. §0.27.) Attorney General Dick Thornburgh addressed this issue in memoranda to all Department of Justice components on August 21, 1989 and September 26, 1988. (See, United States Attorneys' Bulletin, Volume 37, No. 9, at p. 281, and Volume 36, No. 10, at p. 270.) The Attorney General stated:

If we are to fulfill the duties and obligations of the Department, it is essential that we speak with one voice to Congress. The Office of Legislative Affairs is responsible for achieving that objective. Therefore, I am asking that heads of all the Department's components ensure that all personnel under their management work closely with the Office, and carefully follow its legislative guidance. Adhering to these procedures will benefit us all.

There has been and should continue to be vigorous internal debate over legislative policy. However, once policy decisions have been made, we should work together using all of our resources to achieve the Department's legislative goals. Accordingly, all components of the Department are directed to observe operating procedures which will be promulgated from time to time by the Office of Legislative Affairs.

If you have any congressional inquiries or actions, or require any assistance or advice, please call Deborah Westbrook, Legal Counsel, Executive Office for United States Attorneys, at (FTS) 368-4024 or (202) 514-4024.

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Americans With Disabilities Act

Attorney General Dick Thornburgh announced that final regulations implementing the Americans with Disabilities Act of 1990 (ADA) were published in the Federal Register on July 26, 1991, exactly one year after President Bush signed the ADA into law. The two sets of regulations, which become effective on January 26, 1992, are designed to provide over 43 million individuals with disabilities access to public accommodations and State and local governments.

The Department's ADA Title III regulation covers over five million places of public accommodation, including restaurants, theaters, hotels, retail stores, convention centers, and recreational facilities. It establishes requirements for accessible new construction and alterations, removal of barriers in existing facilities, the provision of auxiliary aids for individuals with vision, speech or hearing impairments, and the use of nondiscriminatory requirements, policies, and procedures. The Department's Title II public sector regulation covers the programs, activities and services of state and local government. It would require, for example, that government functions, such as town meetings and court sessions, be conducted in accessible facilities and that interpreters be provided to ensure that individuals with hearing impairments have an equal opportunity to participate. The regulations are the product of a public rulemaking effort that began with the publication of draft regulations in February. A series of four public hearings was held around the country, and more than 2,500 written comments were received and analyzed.

The Attorney General said, "The goal of the ADA and of our regulations is to open the mainstream of American life to individuals with disabilities. The rules carefully maintain the crucial balance sought by this Administration between ensuring the rights of individuals with disabilities and protecting the legitimate needs of business. By publishing these new regulations on time, the Bush Administration has once again demonstrated its commitment to the civil rights of persons with disabilities."

* * * * *

Exemption From Mandatory Continuing Legal Education Requirements In The State Of California

In 1990, the California state legislature passed a bill requiring mandatory continuing education for state bar members. The law provided specific training requirements and courses, applicable mainly to attorneys in private civil practice. Only state employees were specifically exempted from participation.

During the public comment phase on implementing regulations, William Braniff, United States Attorney for the Southern District of California, circulated a letter signed by those United States Attorneys whose districts encompass the State of California seeking an exemption for federal employees. The letter, signed by Robert Brosio (Central District), David Levi (Eastern District), and Joseph Russoniello (Northern District), indicated support for continuing legal education and stated that the Department of Justice itself has a nationally renowned permanent training facility in the Attorney General's Advocacy Institute. In addition, each individual United States Attorney's office has regular training programs for its attorneys. Since the State Bar would impose fees on "providers" of legal educational courses without any available waiver for government entities, and since the federal government is unlikely to pay such fees even if it acquiesces to the paperwork requirements, the various federal training programs would not qualify to provide mandatory continuing legal education credit to federal attorneys. Lourdes Baird, who later became the United States Attorney for the Central District of California, also actively pursued this issue through testimony at public hearings on the regulations. All the United States Attorneys urged the State Bar, in drafting implementing regulations, to exempt federal attorneys from mandatory continuing legal education requirements in the same way that state, county, and local government attorneys would be exempted.

William Braniff has advised that the United States Attorneys' efforts to exempt federal employees were successful, and this joint cooperative effort has saved the attorneys considerable time and money.

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Debt Collection Procedures Act Of 1990

On July 11, 1991, the Financial Litigation Staff of the Executive Office for United States Attorneys forwarded to all United States Attorneys pre-judgment and post-judgment forms for implementing the Federal Debt Collection Procedures Act of 1990. These forms are designed to increase the effectiveness of collection debts and monies owed to the United States, and a dramatic, positive effect on debt collection should result.

The Executive Office for United States Attorneys has also gathered information from all the United States Attorneys' offices concerning what property is exempt from attachment under the laws of the various states. This information was sent to the Administrative Office of United States Courts to be forwarded to the Chief Judges of each district for approval. Approval of the notice form for using certain pre-judgment remedies is required by the Act.

If you have any questions, or require assistance, please call Richard W. Sponseller, Associate Director, or Kathleen Haggerty, of the Financial Litigation Unit at (202) 501-7017 or (FTS) 241-7017.

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Social Security Litigation In The Southern District Of Ohio

Over the years the Department of Health and Human Services and the Department of Justice have worked together in the interest of managing the Social Security litigation caseload as effectively and efficiently as possible. One important aspect of this coordination is the prompt notification to the Social Security Administration and the Office of the General Counsel of newly filed Social Security cases.

Following a recent study of court orders received in the Social Security Division, Donald A. Gonya, Chief Counsel for Social Security, Department of Health and Human Services, Baltimore, praised United States Attorney D. Michael Crites, and his Assistant, Joseph E. Kane, for their prompt and timely transmission of court orders in social security cases. Mr. Gonya stated as follows:

> In the interest of defending Social Security litigation in the most effective way possible and to ensure that we have the opportunity either to implement or recommend timely the appeal of court decisions decided adversely to the Secretary, it is essential that our Office receive copies of court orders entered in Social Security cases at the earliest possible time. To achieve such results, it is critical that the Social Security Division receive court orders in Social Security cases from United States Attorneys' Offices at least within 10 days of entry by the court. This is particularly true in view of the short time frame established by the Department of Justice for receipt of appeal recommendations from federal agencies.
>
> We want to take this opportunity to express our appreciation for your Office's timely transmission of court orders to us. Surely, such early delivery contributes greatly to the Government's effective management of Social Security litigation.

* * * * *

Office Of Special Counsel For Immigration-Related Unfair Employment Practices

On June 27, 1991, the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) announced the availability of grants ranging from $40,000 to $150,000 to develop innovative public education programs addressing the rights of potential victims of employment discrimination and the responsibilities of employers under the antidiscrimination provision of the Immigration Reform and Control Act of 1986 (IRCA). The grants will be awarded to community-based and other not-for-profit organizations.

Under IRCA, employers cannot lawfully hire aliens unauthorized to work in the United States. The law also requires employers to verify the identity and work authorization of all new employees. However, an antidiscrimination provision makes it illegal for employers to refuse to hire qualified individuals because they "look or sound foreign," or because of their citizenship status or national origin. Acting Special Counsel Andrew M. Strojny said that although OSC has an extensive record of vigorous enforcement, more needs to be done to educate potential victims about their rights and employers about their responsibilities under the antidiscrimination provision of IRCA.

Last year the Office of Special Counsel awarded 15 grants ranging form $46,000 to $100,000 to community-based organizations which developed a wide variety of educational approaches including theatre presentations, English as a second language curricula, multi-lingual hot lines, manuals, flyers, posters, bilingual radio and television public service announcements, neighborhood fairs and business meetings.

For information concerning the grant program, please refer to the June 24, 1991, Federal Register. Your questions may also be directed to Juan Maldonado, Senior Trial Attorney, Office of Special Counsel for Immigration-Related Unfair Employment Practices, P.O. Box 65490, Washington, D.C. 20035-5490.

* * * * *

Prisoners In 1990

According to the Bureau of Justice Statistics, Office of Justice Programs, the number of state and federal prisoners grew 8.2 percent last year. The 1990 growth rate was more moderate than the 13.5 percent increase recorded during 1989.

-- Since 1980, the nation's prison population has increased by almost 134 percent. Last December 31, there were 771,243 inmates in state and federal custody--another record number. In comparison, on December 31, 1980, there were 329,821 such prisoners, according to Bureau figures.

-- For the first time since 1981, the increase in male prisoners during 1990 exceeded that for women. The number of male prisoners rose 8.3 percent during the year, whereas the number of female prisoners increased 7.9 percent.

-- Thirteen states and the federal system recorded increases of at least 10 percent in the number of prisoners last year, led by Vermont (up 15.9 percent), Washington (up 15.4 percent), and New Hampshire (up 15.1 percent). California's increase of about 10,000 prisoners, up 11.5 percent, was the largest of any single jurisdiction.

-- The number of prisoners increased by 8.9 percent in Western states, compared to increases of 8.3 percent in the Northeast, 7.9 percent in Southern states, and 6.9 percent in the Midwest.

-- State prison populations increased by 8 percent, compared to a 10.7 percent growth in the number of federal prisoners during 1990.

-- The number of inmates per capita also reached a new record of 293 prisoners with sentences greater than one year for every 100,000 U.S. residents. Among the states, the number of sentenced prisoners per capita was highest in South Carolina (451 per 100,000 residents), Nevada (444 per 100,000 residents), and Louisiana (427 per 100,000 residents).

-- Since 1985, two states -- California and New Hampshire -- have annually experienced double-digit growth in the number of prisoners with sentences greater than one year. For two additional states -- Colorado and Michigan -- the 1990 increases in the number of sentenced prisoners fell below the more than 10 percent annual growth recorded between 1985 and 1989.

-- The prison count analysis also found evidence indicating that during the 1980s there was an increased probability that convicted offenders would go to prison. The ratio of prison admissions to reported serious crimes and to arrests increased substantially during the period.

Single copies of the Bureau of Justice Statistics Bulletin, "Prisoners in 1990," (NCJ-129198), as well as other publications and statistical information may be obtained from the National Criminal Justice Reference Service, Box 6000, Rockville, Maryland 20850.

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SAVINGS AND LOAN ISSUES

Savings And Loan Prosecution Update

On July 17, 1991, the Department of Justice issued the following information describing activity in "major" savings and loan prosecutions from October 1, 1988 through June 30, 1991. "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.

Informations/Indictments.....	469
Estimated S&L Losses..... $	7.735 billion
Defendants Charged.....	781
Defendants Convicted.....	573 (92%)
Defendants Acquitted.....	47 *
Prison Sentences.....	1,110 years
Sentenced to prison.....	334 (79%)
Awaiting sentence.....	159
Sentenced w/o prison or suspended.....	90
Fines Imposed..... $	8.151 million
Restitution Ordered..... $	271.760 million

CEOs, Board Chairmen, and Presidents:

Charged by indictment/ information.....	97
Convicted.....	69
Acquitted.....	7

Directors and Other Officers:

Charged by indictment/ information.....	139
Convicted.....	114
Acquitted.....	4

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

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* Includes 21 acquittals in U.S. v. Saunders, Northern District of Florida.

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SENTENCING REFORM

Guidelines Sentencing Update

A copy of the Guideline Sentencing Update, Volume 4, No. 4, dated June 18, 1991 and Volume 4, No. 5, dated July 10, 1991, is attached as Exhibit F at the Appendix of this Bulletin.

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Federal Sentencing Guide

Attached at the Appendix of this Bulletin as Exhibit G is a copy of the Federal Sentencing Guide, Volume 2, No. 26, dated June 17, 1991, Volume 2, No. 27, dated July 1, 1991, and Volume 2, No. 28, dated July 15, 1991, which is published and copyrighted by Del Mar Legal Publications, Inc., Del Mar, California.

LEGISLATION

Bank Of Credit And Commerce International (BCCI)

The following Committees have expressed an intention, or have begun inquiries into BCCI:

Both the House and Senate Committees on Banking, Finance and Urban Affairs; both the House and Senate Select Committees on Intelligence; the Subcommittee on Crime and Criminal Justice of the House Judiciary Committee; the Subcommittee on Terrorism, Narcotics and International Operations of the Senate Foreign Relations Committee; and the Permanent Subcommittee on Investigations of the Senate Government Affairs Committee.

* * * * *

Federal Tort Claims Coverage For Community Health Centers

On July 17, 1991, Stuart Gerson, Assistant Attorney General for the Civil Division, testified before the House Judiciary Subcommittee on Administrative Law and Governmental Relations in opposition to H.R. 2239, the Federally Assisted Health Clinics Legal Protection Act of 1991.

This bill would extend coverage under the Federal Tort Claims Act to 550 Community and Migrant Health Centers (CHC's) and their related clinics, which receive about 40 percent of their funding through federal grants. The Administration objects to this extension because the federal government has no day-to-day supervision or control over the activities of the Centers. Hence, we would be unable to assure the quality of care rendered by their providers although the public fisc would be liable for their malpractice. Moreover, the CHCs have not provided any reliable data to support their claims that they spend $48 million per year in malpractice insurance premiums while their claims histories range from $4-$8 million. The Department of Justice will work closely with the Department of Health and Human Services to develop an Administration alternative prior to Subcommittee action on this bill.

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National Cooperative Research Act

On July 18, 1991, the Senate Judiciary Committee, by a 13-1 vote, reported S. 479, a bill to extend the antitrust protections of the National Cooperative Research Act to joint production ventures. Although the Administration supports the thrust of the bill, the Attorney General and the Secretaries of Treasury and Commerce stated in a July 18 letter to the Chairman that they would recommend a veto of the bill over provisions that would limit the benefits of the bill to only domestically based joint ventures and those demonstrating a substantial commitment to the U.S. economy. These provisions are opposed on antitrust policy grounds and interference with certain international treaties and negotiations under the General Agreement on Tariffs and Trade.

The House of Representatives has yet to take action on a similar bill, H.R. 1604, reported by the Judiciary Committee. It also contains objectionable features similar to those of S. 479 as well as a limitation on foreign participation in a joint production venture, which the Department is on record as opposing.

* * * * *

Terrorism

On July 19, 1991, representatives from the Department of Justice and the Department of State met with the Majority Counsel of the House Judiciary Committee, Subcommittee on International Law, to discuss the terrorism provisions in the President's crime bill. This subcommittee has jurisdiction over the major provisions of aviation terrorism, maritime terrorism and removal of terrorist aliens.

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RICO Reform

On July 29, 1991, the Houe Judiciary Committee marked up and ordered reported H.R. 1717, the civil RICO reform bill. Three amendments were offered during markup. The first, by Congressman Glickman (D.KS), of a clarifying and technical nature, was adopted by voice vote. The second, by Congressman Conyers (D-MI), which was defeated by voice vote, would have exempted a broad array of potential defendants from the bill's "gatekeeper" provisions. The third, offered by Congressman Boucher (D-VA), was a highly restrictive version of the Conyers amendment and was adopted by voice vote.

The bill now moves to the House floor. No counterpart bill has been introduced as yet in the Senate.

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CASE NOTES

NORTHERN DISTRICT OF OHIO

Taxpayer Held To Be Not Entitled To Fifth Amendment Defense To Court's Demand That Taxpayer Show Cause Why He Should Not Be Held In Contempt For Failure To Comply With Internal Revenue Service Summons

Taxpayer, a local University Professor, had refused to file returns with the Internal Revenue Service (IRS) since 1981 because of his contention that he did not have to pay taxes since his earnings were not taxable. When summoned by the IRS to produce documents and records to allow the IRS to prepare his tax returns for him, he decided to invoke the Fifth Amendment's protections.

Taxpayer relied upon the Supreme Court opinion, Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), which held that the compulsory production of one's private records in a suit to convict that person of a crime is prohibited by both the Fourth and Fifth Amendments to the Constitution. The Government relied on a more recent Supreme Court case, Fisher v. United States, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed. 2d 39 (1976). Fisher, decided, inter alia that a determination whether certain documents had "testimonial" effect to raise their production to the necessary level that would warrant protection under the Fifth Amendment is a matter to be decided on a case by case basis. The Government further argued that this taxpayer had filed so many briefs and provided so many admissions on the record indicating that he had the requested records in his possession and that they fit the description of the documents requested under the summons, that the taxpayer had negated any "testimonial" effect production of the records might have, so the Fifth Amendment had no application. The District Court agreed and ordered the taxpayer to produce the records under the summons.

A copy of the Order in United States of America v. Richard Paul Carroll, N.D. Ohio, No. 1:91MC0025 (June 21, 1991), is attached at the Appendix of this Bulletin as Exhibit H. If you have any questions, please call Annette G. Butler, Assistant United States Attorney, Northern District of Ohio, at (FTS) 293-3928 or (202) 363-3928.

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CIVIL DIVISION

Supreme Court Holds That EAJA's 30-Day Filing Limitation Is Triggered Only By A Judicial Entry Of Judgment In The Civil Action

The Supreme Court has held that the Equal Access to Justice Act's (EAJA) 30-day filing limitation can only be triggered by a judicial decree entering final judgment in the civil action. The Court, in a unanimous opinion, held that a "judgment" for EAJA purposes necessarily refers to a judicial decree. The Court reasoned that post-remand administrative proceedings are part of the "civil action" if and only if the court's order of remand retains jurisdiction over the action and contemplates the judicial entry of a final judgment after the administrative proceedings are

concluded. Many remands, however, including the predominant type of social security remand (i.e. a remand issued under the fourth sentence of 42 U.S.C. 405(g)) simply terminate the court's jurisdiction and therefore amount to a "final judgment" for purposes of demarcating EAJA's 30-day filing limitation. Under the Court's holding, the termination of jurisdiction will constitute a "final judgment" for purposes of EAJA.

Melkonvan v. Sullivan, No. 90-5538 (June 10, 1991). DJ # 137-12C-1252.

Attorneys: William Kanter - (202) 514-4575 or (FTS) 368-4575
Jeffrey Clair - (202) 514-4028 or (FTS) 368-4028

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The D.C. Circuit Holds That States May Not Regulate The Federal Government And Seek Custody of Unclaimed Monies In Federal Treasury Accounts Pursuant To State Law

Twenty-three states brought suit against the Secretary of Treasury and Comptroller General seeking custody of millions of dollars of funds contained in the federal unclaimed monies account for persons whose whereabouts are unknown. The D.C. Circuit affirmed the district court, declaring that the Supremacy Clause prevents states from regulating the federal government or its property. According to the D.C. Circuit, since unclaimed monies are unquestionably federal property, the states have no claim to custody pursuant to their state laws. Alternatively, the court of appeals held that the federal unclaimed monies scheme preempted the states' laws as well, and that states would only have a claim to the monies, if at all, when they acted as substitutes for the rightful owners by virtue of an escheat law.

Arizona v. Bowsher, Nos. 90-5184 & 90-5223 (June 11, 1991).
DJ # 145-121-63.

Attorneys: Barbara Biddle - (202) 514-2541 or (FTS) 368-2541
Deborah Kant - (202) 514-1838 or (FTS) 368-1838

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D.C. Circuit Upholds Privacy Act Exemption For Law Enforcement Records As Complete Bar To Suit

Two Privacy Act exemption provisions, 5 U.S.C. 552a(j) and (k), allow agencies to exempt law enforcement investigatory records from certain requirements of the Act. The FBI has accordingly exempted such records in its Central Records System (CRS) from the Act's requirement that an agency amend records in response to an individual's request. Plaintiff, seeking amendment of certain CRS files and a "letterhead memorandum" (LHM) prepared from them by the FBI as part of his employment suitability background check, successfully claimed in district court that the exemption applies only to administrative requests to amend and does not bar suit to obtain the same relief in court.

Accepting virtually all our arguments, the D.C. Circuit has rejected that holding together with plaintiff's alternate claim that despite the exemption, amendment could be required directly under other provisions of the Act requiring agencies to maintain accurate records and generally forbidding agencies from maintaining records of First Amendment exercise. The court also reaffirmed its very broad deference to a law enforcement agency's claim of a law enforcement purpose for compiling records, and that such information retains a law enforcement character even when recompiled into another document to be used for a non-law enforcement purpose (the LHM).

John Doe v. FBI, Nos. 90-5037 and 90-5038 (June 28, 1991)
DJ # 145-12-7986

Attorneys: Leonard Schaitman - (202) 514-3441 or (FTS) 368-3441
Wendy M. Keats - (202) 514-3518 or (FTS) 368-3518

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Ninth Circuit Adopts Heightened Pleading Standard In Cases In Which Subjective Intent Is An Element Of The Alleged Constitutional Tort

Tunnell, an agent of the Bureau of Land Management, investigated Branch to determine whether he was avoiding royalty payments on federal natural gas leases. In the course of the investigation, Tunnell obtained warrants to search Branch's home and office. The warrants were executed, but no criminal charges were filed after the searches.

Branch filed a Bivens action seeking damages from Tunnell alleging that Tunnell set forth inaccurate information provided by a state official in the affidavit in support of the warrant, that Tunnell included other information which he knew or should have known to be false, and that the warrant was void because much of the information provided in support of it was false and unsubstantiated. The district court denied Tunnell's motion to dismiss on qualified immunity grounds, holding that the defense of qualified immunity "usually turns on the circumstances and motivations of the defendant."

The Ninth Circuit reversed. Following the lead of the District of Columbia Circuit, the Ninth Circuit adopted a heightened pleading standard, and held that "in order to survive a motion to dismiss, plaintiffs must state in their complaint non-conclusory allegations setting forth evidence of unlawful intent." However, the Ninth Circuit refused to follow the D.C. Circuit's further requirement that such evidence must be direct rather than circumstantial, and held that non-conclusory allegations of subjective motivation may be supported by either direct or circumstantial evidence. Applying the standard to this case, the court held that plaintiff had not met his burden, because he made no effort to identify what allegations in the Tunnell affidavit are untrue, and provided no facts to indicate that Tunnell believed that Branch was innocent of wrongdoing, or had reason to believe the state official would provide false information.

Branch v. Tunnell, No. 89-35383 (June 27, 1991) DJ # 157-44-593.

Attorneys: Barbara L. Herwig - (202) 514-5425 or (FTS) 368-5425

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CIVIL RIGHTS DIVISION

Supreme Court Holds Section 2 of the Voting Rights Act Of 1965 Applies To The Election Of State Court Judges

On June 20, 1991, the Supreme Court issued its opinion in Chisom v. Roemer, No. 90-757, holding that the "results" test of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, applies to the election of state and local judges. This case challenged the apportionment plan for the election of justices of the Supreme Court of Louisiana.

The same day the Court decided Houston Lawyers' Assn. v. Attorney General of Texas, No. 90-813, which presented the issue of applying Section 2 to trial judges elected at-large from counties. The Court held that the state's interest in electing trial judges at-large from the area over which they have jurisdiction (rather than from smaller sub-districts) is a factor a court must consider within the totality of circumstances in determining whether the electoral system improperly dilutes minority voting strength.

The United States was a party in Chisom and filed a brief amicus curiae in Houston Lawyers. The Court adopted the position urged in the government's briefs. Justice Scalia, joined by the Chief Justice and Justice Kennedy, dissented from both decisions.

Chisom v. Roemer, #o. 90-757, with United States v. Roemer, No. 90-1032 (June 20, 1991) DJ # 166-32-63

Houston Lawyers' Assn. v. Attorney General of Texas, No. 90-813, with LULAC v. Attorney General of Texas, No. 90-974 (June 20, 1991) DJ # 166-76-74.

Attorneys: Jessica Dunsay Silver - (202) 514-2195 or (FTS) 368-2195
Mark L. Gross - (202) 514-2172 or (FTS) 368-2172

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Supreme Court Holds That An Intent Requirement Is Implicit In The Eighth Amendment's Ban On Cruel And Unusual Punishment, And That A "Deliberate Indifference" Standard Applies To Challenges To Conditions Of Confinement

On June 17, 1991, the Supreme Court issued its opinion in Wilson v. Seiter, No. 89-7376. The Court addressed whether a prisoner claiming that conditions of confinement constitute cruel and unusual punishment under the Eighth Amendment must show a culpable state of mind on the part of prison officials and, if so, what state of mind is required.

In an opinion by Justice Scalia (joined by Justices Rehnquist, O'Connor, Kennedy, and Souter), the Court vacated the Fifth Circuit's ruling that malicious and sadistic intent is required for there to be a violation of the Eighth Amendment. The Court first held that an intent requirement is implicit in the Eighth Amendment's ban on cruel and unusual punishment. The Court noted that in previous decisions it had held that only the "unnecessary and wanton infliction of pain" implicates the Eighth Amendment, and thus inquiry into a prison official's state of mind is required when it is claimed that a prison official has inflicted cruel and unusual punishment

during imprisonment. See, e.g., Estelle v. Gamble, 429 U.S. 97 (1976); Whitley v. Albers, 475 U.S. 312 (1986). The Court explained that "[i]f the pain inflicted is not formally meted out as punishment by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify" as cruel and unusual punishment under the Amendment. Slip op. 5.

"Having determined that Eighth Amendment claims based on official conduct that does not purport to be the penalty formally imposed for a crime require inquiry into state of mind," slip op. 7, the Court next addressed the state of mind that applies in cases challenging prison conditions. The Court concluded that the standard set forth in Estelle (involving a claim of inadequate medical care) -- "deliberate indifference" -- is the standard that is applicable in prison conditions cases. Id. at 9. The Court explained that it saw no significant distinction between claims alleging inadequate medical care and those alleging inadequate conditions of confinement. Id. at 8. The Court remanded the case for reconsideration under the appropriate standard.

Justice White filed a concurring opinion (joined by Justices Marshall, Blackmun, and Stevens). Although he agreed that the lower court had applied the wrong standard, Justice White stated that the "deliberate indifference" standard as applied by the majority is inconsistent with the Court's other prior decisions. He concluded that Eighth Amendment challenges to conditions of confinement should not implicate the subjective intent of government officials, and thus only the objective severity of the conditions should be examined.

The United States filed an amicus brief arguing that the state of mind of the officials should not be relevant in a challenge to conditions of confinement. Alternatively, the United States argued that if state of mind is relevant, the proper standard should be whether the prison officials' conduct was "deliberately indifferent" to the rights of prisoners.

Wilson v. Seiter, No. 89-7376 (June 17, 1991). DJ # 171-57-3.

Attorneys: David K. Flynn - (202) 514-2195 or (FTS) 368-2195
Thomas E. Chandler - (202) 514-3728 or (FTS) 368-3728

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TAX DIVISION

Supreme Court Upholds Authority Of The Tax Court To Appoint Special Trial Judges

On June 27, 1991, the Supreme Court affirmed the favorable judgment of the court of appeals in Freytag v. Commissioner. This case involved the statutory and constitutional authority of the chief judge of the Tax Court to appoint and assign special trial judges to hear and report on large and complex tax cases. The Supreme Court unanimously rejected petitioners' contention that Section 7443A(b)(4), which allows the chief judge of the Tax Court to assign "any other proceeding" to a special trial judge, should be construed to authorize only assignment of small cases. The Supreme Court further unanimously agreed that special trial judges are "inferior officers" whose appointments must comport with the Appointments Clause of the United States Constitution (Art. II, § 2, cl. 2) and that the appointment of these judges did not violate the Appointments Clause.

The Appointments Clause provides that "inferior officers" may be appointed by the President, the "Courts of Law," or the "Heads of Departments." A majority of the Court concluded that the Tax Court is a "Court[] of Law," notwithstanding the fact that it is not constituted under Article III of the Constitution. The four concurring justices concluded that the Tax Court is not a "Court of Law" (a term they believed would encompass only the Article III courts), but that instead it is a "Department" within the Executive Branch of Government, and the chief judge of the Tax Court is the head of that Department.

* * * * *

Supreme Court Sends Back For Further Consideration Two State Court Cases That Had Held That The Decision Of The Supreme Court In Davis v. State Of Michigan Need Not Be Applied Retroactively

On June 28, 1991, the Supreme Court granted the petitions for writ of certiorari filed by retired federal government employees in Bass v. South Carolina, 395 S.E.2d 171 (S.C.Sup.Ct. 1990), cert. granted (No. 90-673), and in Harper v. Virginia Dept. of Taxation, 401 S.E. 2d 868 (Va. Sup. Ct. 1991), cert. granted (Nos. 90-1685 and 90-1772), vacated the judgments of the lower courts and remanded the cases for the lower courts to consider whether the Court's decision in Davis v. Michigan Department of Treasury, 489 U.S. 803 (1989), should be applied retroactively in light of James B. Beam Distilling Co. v. Georgia, 59 U.S.L.W. 4735 (June 20, 1991).

In Davis, the Supreme Court held that a state's taxation of federal retirees' income at a higher rate than that imposed on income of persons retired from the state government violated the doctrine of intergovernmental tax immunity and 4 U.S.C. § 111. The plaintiffs in Bass and Harper sought a refund of state income taxes on the basis of Davis because South Carolina and Virginia's income taxes discriminated against federal workers.

The South Carolina and Virginia Supreme Courts held that Davis should not be applied retroactively. Beam Distilling appears to require retroactive application of Davis by the affected States. The Virginia and South Carolina Supreme Courts must now reconsider their decisions in light of that case. The Department of Justice, through the Office of the Solicitor General and the Tax Division, participated as amicus curiae in the Davis case, but did not participate in the Virginia and South Carolina cases.

* * * * *

Petition For Panel Rehearing Filed In Church Of Scientology Summons Case

On July 12, 1991, the Tax Division filed a petition for panel rehearing in the First Circuit in United States v. Church of Scientology of Boston. In this summons enforcement case, the First Circuit recently affirmed the District Court's adverse decision involving recently adopted provisions of the Internal Revenue Code concerning the audit of churches. (See, United States Attorneys' Bulletin, Vol. 39, No. 7, dated July 15, 1991, at p. 202.)

Under Section 7611 of the Internal Revenue Code, the Internal Revenue Service may examine "church records" only "to the extent necessary to determine" a church's tax liability. The Government argued that, while the statute limited the purposes for which such an examination could be made, the IRS was entitled to look at all potentially relevant information held by a church so long as the examination was being conducted for a permissible purpose. The First Circuit rejected this argument, holding that the "extent necessary" language in Section 7611 requires the IRS to explain why the particular documents it seeks will significantly help to further the purpose of its investigation. The issue presented in this case is central to a number of cases currently pending and is of major importance to the administration of the federal tax laws.

* * * * *

Petition For En Banc Rehearing Filed In Home Office Case

On July 12, 1991, the Tax Division filed a petition for rehearing and suggestion for rehearing en banc in the Fourth Circuit in Soliman v. Commissioner. In this case, a divided panel of the Fourth Circuit recently affirmed the adverse decision of the Tax Court which involved the deductibility of "home office" expenses. (See, United States Attorneys' Bulletin, Vol. 39, No. 7, dated July 15, 1991, at p. 202.)

The Tax Court majority concluded that a home office should be deemed a taxpayer's "principal place of business" within the meaning of Section 280A whenever the office is essential to the taxpayer's business, he spends substantial time there, and no other location is available to perform the office functions of the business. This test, in our view, essentially emasculated Section 280A. On appeal, we argued that the statute, in allowing a deduction only if the home office is the taxpayer's "principal" place of business, requires comparison of the importance of the various locations where a taxpayer carries out his trade or business. The Fourth Circuit majority disagreed and endorsed the Tax Court's liberal approach to the interpretation of Section 280A. The Tax Division believes the Court erred as a matter of law in its reading of Section 280A and thus are seeking rehearing en banc.

* * * * *

Agreement Between The United States And The Commonwealth Of Puerto Rico With Respect To Taxation Of Federal Workers In Puerto Rico

The United States District Court for the District of Puerto Rico in the consolidated cases of Pedro Romero v. Brady, American Fed. of Gov't Employees v. Brady and American Postal Workers Union. AFL-CIO v. Brady recently determined that an agreement between the United States and the Commonwealth of Puerto Rico, effective November 29, 1988, which provided that Puerto Rican income tax would be withheld from the salaries of federal workers in Puerto Rico and thereafter turned over to Puerto Rico, was valid and should be implemented. The plaintiffs' argued, inter alia, that the Secretary of the Treasury is only authorized to enter into such agreements with a "State, territory and possession," and not the Commonwealth of Puerto Rico and that such an agreement is an exercise of legislative rulemaking and the lack of public notice and hearing violated the Administrative Procedures Act. The District Court rejected each of these arguments.

* * * * *

Second Circuit Reverses Tax Fraud Convictions In Princeton Newport Case

On June 28, 1991, the Second Circuit reversed in part, affirmed in part, and remanded in part, convictions for tax and securities violations in United States v. Regan, et al., the so-called "Princeton Newport" case. The Court affirmed the defendants' conspiracy and securities fraud convictions, but reversed and remanded the tax fraud convictions holding that the District Court failed to properly instruct the jury on the issue of intent.

At trial, the defense contended that losses on certain securities transactions were claimed based on their good faith interpretation of Section 1058 of the Internal Revenue Code. The trial court rejected defendants' contention and some of the evidence offered to show defendants' good faith reliance on their interpretation of the Code. The appellate court, in its majority opinion, stated that the trial court's "generalized instruction on good faith" was insufficient to instruct the jury concerning the "good faith belief" defense based on the defendants' interpretation of Section 1058.

This appeal was handled by the United States Attorney's Office for the Southern District of New York in consultation with the Tax Division.

* * * * *

Fifth Circuit Rules On IRS's Burden Of Proof In Cases Involving Failures To Report Income Shown On Forms 1099 Submitted By Third Parties

On June 11, 1991, the Fifth Circuit reversed in part and affirmed in part the Tax Court's decision in Portillo v. Commissioner. The Court held that computerized matching of forms received from payors with income tax returns filed by recipients of income constituted a determination of a taxpayer's tax liability for purposes of issuing a statutory notice of deficiency. The Commissioner's determination in this case was based solely on a Form 1099 sent to the IRS indicating that the taxpayer received $24,505 more in income than he had reported on his tax return and was made in the face of taxpayer's denial that he had received that additional income and the alleged payor's inability to substantiate the payments reflected on the Form 1099.

The Court nevertheless found that the notice of deficiency was arbitrary and, therefore, not entitled to the normal presumption of correctness because it was a naked assessment without any foundation. The Court held that in a case like this involving unreported income the presumption of correctness does not apply to the notice of deficiency unless the Commissioner presents some predicate evidence supporting his determination. Such evidence was lacking here.

Thousands of deficiency determinations are made each year based on a matching of Forms 1099 and the related Forms 1040, and could pose serious administrative problems.

* * * * *

Sixth Circuit Reverses Adverse Tax Court Decision Involving The Computation Of The Disabled American Veterans' Unrelated Business Taxable Income

On July 5, 1991, the Sixth Circuit reversed the unfavorable decision in Disabled American Veterans v. Commissioner, which involved over $4 million. Disabled American Veterans (DAV), an exempt organization, received income from other organizations for the use of names from its donor list. The Commissioner determined that these amounts constituted unrelated business taxable income within the meaning of Section 512 of the Internal Revenue Code. DAV argued that the amounts received constituted royalties within the meaning of Section 512(b)(2) and therefore were not includable in its unrelated business taxable income.

The parties previously litigated this issue in Disabled American Veterans v. United States, 650 F.2d 1178 (Ct.Cl. 1981), which was decided adversely to the taxpayer. Here, the Tax Court held that the Court of Claims was wrong in holding that the payments were royalties, rejecting the Commissioner's argument that DAV was barred from litigating the issue by the doctrine of collateral estoppel. In reversing the Tax Court's decision, a divided panel of the Sixth Circuit held that the action was barred by collateral estoppel.

* * * * *

Eighth Circuit Rejects Adverse Holding Of Seventh Circuit That Compliance With The "Safe Harbor" Interest Rate Provided Under Section 483 Of The Code Protects Taxpayers From A Determination That An Installment Sale At A Below-Market Interest Rate Constitutes, In Part, A Taxable Gift

On June 27, 1991, the Eighth Circuit affirmed the favorable decision of the Tax Court in Krabbenhoft v. Commissioner. Taxpayers conveyed farmland worth $400,000 to their children in exchange for the children's execution of a $400,000 promissory note. The promissory note was payable over 30 years at 6 percent rate of interest. The Internal Revenue Service determined that the fair market value of the note was substantially less than its face value because the interest rate provided in the note was far below the prevailing market rate of interest. As a consequence, the IRS treated the excess of the fair market value of the farmland over the fair market value of United States District Court for the Central District of California to conspiring to defraud the Internal Revenue Service and filing a false claim for a refund.

Between February and April of 1991, Smyers submitted false Forms W-2 to tax return the note as a taxable gift. The taxpayers, relying on the Seventh Circuit's decision in Ballard v. Commissioner, 854 F.2d 185 (1988), contended that Section 483 of the Internal Revenue Code (pertaining to the imputation of interest income on installment sales of property) provides that a 6 percent rate of interest should be respected under these circumstances. The Eighth Circuit declined to follow Ballard, holding that Section 483 does not protect a taxpayer from a determination that a below-market interest rate constitutes a taxable gift.

* * * * *

ADMINISTRATIVE ISSUES

Employee Assistance Program, Justice Management Division

Ben Elliott, Administrator of the Employee Assistance Program (EAP), Justice Management Division, has recently transmitted educational materials concerning the Employee Assistance Program to the Offices of the United States Attorneys. With advertisement comes business, and Mr. Elliott, the only EAP counselor, has received a large number of new cases.

In order to provide services to all employees, Betsy Tompkins Lile has been added as an additional counselor to assist the United States Attorneys' offices whenever an EAP-related issue arises. Ms. Lile has been with the Department of Justice for fifteen years, and has been with EAP for over five years. She holds an undergraduate degree in biology and psychology, with a graduate degree in education, and is also certified as an addictions counselor.

The Employee Assistance Program is located in Room 1234A of the Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. You may call Ben Elliott at (FTS) 368-1036 or (202) 514-1036, or Betsy Tompkins Lile at (FTS) 368-3194 or (202) 514-3194. Their FAX number is : (FTS) 368-8797 or (202) 514-8797.

* * * * *

Career Opportunities

General Litigation And Legal Advice Section, Criminal Division

The Office of Attorney Personnel Management is seeking attorneys for the Criminal Division's General Litigation and Legal Advice Section in Washington, D.C. with particular emphasis in recruiting lawyers to prosecute computer crime. Specific activities will include conducting investigations and grand jury presentations, litigating cases in U.S. District and Appellate Courts, working with U.S. and international law enforcement agencies, and participating in a wide range of investigative and trial matters throughout the United States. Domestic and perhaps international travel is likely.

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 have a strong academic background and substantial jury trial experience. An interest in and knowledge of computers and emerging technologies is highly desirable. Please submit a resume and writing sample to: Donald A. Chendorain, Director, Office of Administration, Criminal Division, Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530.

Current salary and years of experience will determine the appropriate grade and salary levels. The possible range is GS-12 ($37,294 - $48,481) to GS-14 ($52,406 - $68,129). Experienced attorneys may be promoted up to $80,138. This advertisement will be open until filled.

* * * * *

Drug Enforcement Administration

The Office of Attorney Personnel Management is seeking experienced attorneys in two sections of the Office of Chief Counsel, Drug Enforcement Administration (DEA): the newly established Civil Litigation Section and the Asset Forfeiture Section. All positions are at DEA Headquarters in Arlington, Virginia.

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. Strong legal research and writing skills are required. Specialized experience in the following areas is preferred: FTCA, Bivens, EEO, Environmental, Civil Litigation, and/or Asset Forfeiture. Please submit a current SF-171 (Application for Federal Employment) and at least one writing sample for each Section for which you wish to be considered to: Office of Chief Counsel, Drug Enforcement Administration, Washington, D.C. 20537. 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).

* * * * *

Office Of The U.S. Trustee, Fresno, California

The Office of Attorney Personnel Management is recruiting an experienced attorney for the United States Trustees Office in Fresno, California. 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 U.S. District Court.

Applicants must possess a J.D. degree for at least one year and be an active member of the bar in good standing (any jurisdiction). Outstanding academic credentials are essential and familiarity with bankruptcy law and the principles of accounting is helpful. Please submit a resume and law school transcript to: Office of the United States Trustee, Department of Justice, 1130 O Street, Suite 1110, Fresno, California 93721, Attn: Edward R. Kandler.

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). This position is open until filled.

* * * * *

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	Effective Date	Annual Rate
10-21-88	8.15%	01-12-90	7.74%	04-05-91	6.26%
11-18-88	8.55%	02-14-90	7.97%	05-03-91	6.07%
12-16-88	9.20%	03-09-90	8.36%	05-31-91	6.09%
01-13-89	9.16%	04-06-90	8.32%	06-28-91	6.39%
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
Alaska	Wevley William Shea
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North Mariana Islands	D. Paul Vernier

* * * * *

EXHIBIT
A

October 1990 Supreme Court Term

Supreme Court Terms are typically remembered in two respects: changes in the Court's personnel, exemplified this past Term by the retirement of Justice Brennan and the arrival of Justice Souter, and the Court's major constitutional decisions that capture the attention of the American people. Of the 125 to 170 cases that are decided in a typical Term, the American people will typically focus on no more than five or ten at most.

This Term was no exception. In October of last year, the Court began with the Oklahoma City case, one of the most important school desegregation cases in the last 15 years. November brought with it the high visibility case of Rust v. Sullivan (abortion counseling), which once again made clear that the government, when it is creating and funding programs, can have viewpoints. The government, for example, can be anti-smoking without violating the First Amendment rights of those who hold a contrary view.

With the winter sittings came United States v. Gaubert, argued by Assistant Attorney General Gerson, a case involving the ability of thrift regulators to step in and take appropriate remedial action without being subjected to the Draconian threat of enormous damage actions against the government. Our win in that case was vitally important to the ongoing regulatory efforts in the troubled thrift industry. With spring came important Fourth Amendment cases, such as Florida v. Bostick (bus searches), and victims rights cases, most dramatically evidenced by Payne v. Tennessee, argued by the Attorney General, involving the ability of

prosecutors in capital cases to introduce evidence of the impact of the crime on the victims.

But important milestones along the way provide only a roadmap to the Court's vast territory. The terrain itself can best be charted and graphed by focusing on recurring themes that suggest the nature and thrust of the Court under the stewardship of Chief Justice Rehnquist. Once again, this Term was highly instructive in that respect:

-- The Court continues to be strongly textualist in interpretation. It takes the laws as they come and gives those laws a straightforward, natural interpretation. In doing so, the Court doesn't play favorites. Thus, federal prosecutors have experienced notable setbacks in recent Terms by a Court that does not generously, expansively interpret federal criminal laws (McCormick v. United States - a public integrity case, in which the Court narrowly interpreted the Hobbs Act used in public corruption prosecutions), in much the same manner as various civil rights groups have found that the Court interprets the statutes as it finds them (EEOC v. Aramco) -- Title VII does not apply outside the territorial limits of the United States). The Court increasingly relies on the "plain meaning" of the statute. At times, this textualist approach produces results that pundits, with their penchant for labels, will call "liberal." Johnson Controls (interpreting Title VII so as to invalidate an employer's fetal protection policy) provides one of the Term's most powerful examples of a supposedly "conservative" Court issuing a "liberal"

decision. Statutory interpretation -- the less publicly visible aspect of the Court's work -- is nonetheless the most prominent feature of the Court's daily work; for the past generation, the Congress of the United States has been actively engaged in passing a wide variety of laws (environmental, civil rights, health and safety regulation etc.), and the Court's interpretive method in resolving issues arising under those statutes is of pivotal importance in determining how we the people are governed.

-- The Court has continued to pursue its moral vision of a justice system purged of racial discrimination. This Term saw an aggressive extension of the Court's watershed decision several Terms ago in Batson v. Kentucky (prohibiting prosecutors from taking race into account in making peremptory challenges to potential jurors), with two important decisions extending Batson's protections to civil cases (Edmonson v. Leesville Concrete) and, in criminal cases, to white defendants whose jury panels include black persons who the prosecutor seeks to strike from the venire (Powers v. Ohio).

-- In death penalty cases, the Court insisted that state supreme courts engage in a careful, exacting review of the record (Florida v. Riley) and that a defendant be given clear warning that the death penalty might be imposed by the judge (Langford v. Idaho). At the same time, the Court has made clear that federal habeas corpus review both in capital and non-capital cases is not an unlimited process, but that a state defendant seeking federal habeas relief from a state conviction must (absent extraordinary

circumstances) come forward with all his assertions of error in the first habeas petition. The Court, in short, has insisted on greater finality in the criminal justice process (McCleskey v. Zant; Coleman v. Thompson; Ylst v. Nunnamaker).

-- The Court stands ready to reconsider its precedents and to overrule those it finds wanting. This was most dramatically illustrated in Payne v. Tennessee, in which the Court overruled two recent cases, Booth v. Maryland and South Carolina v. Gathers. At the same time, the Court declined to overrule a decision that was deemed to be more firmly rooted in the history of the Court's constitutional decisions (Solem v. Helm, which two Justices would have overruled in the case of Harmelin v. Michigan (upholding a mandatory life sentence with no possibility of parole for a first-time drug offense)), and the Court took the opportunity in the Term's most important Fifth Amendment case, Minnick v. Mississippi, to ringingly reaffirm Miranda v. Arizona.

-- The Court continues to be skeptical of the Fourth Amendment exclusionary rule. In a series of decisions, the Court continued on its recent course of cabining the exclusionary rule. (Florida v. Bostick; California v. Acevedo; California v. Hodari D.; and Florida v. Jimeno).

-- The Court continues to be traditionalist and prudent, declining to sail into unchartered constitutional waters. After sending strong signals of its concern with the present state of punitive damage awards in the States (with numerous reports of skyrocketing, runaway awards with a Las Vegas jackpot-type

quality), the Court stepped back and declined to "constitutionalize" this arena. In a manner that bore strong similarity to the Court's sense of restraint last Term in the right-to-die case (Cruzan), the Court declined to interpret the Constitution as imposing upon the States a single "right" answer. That sense of restraint as to federal constitutional power was also visible in the most aggressive doctrinal development of the Term -- the Court's active vindication of federalism values. In recent years, the Court has signaled its concern about federal intrusions into the traditional enclaves of state authority, and in one of the most important cases of the Term (Gregory v. Ashcroft, involving a mandatory retirement age for state judges imposed by the state Constitution), has required the Congress -- before an intrusion into such sensitive arenas of state governance will be upheld -- to speak with crystalline clarity. But the Court's abiding sense of restraint, of caution, of lawyerlike professionalism, was then evidenced in the Term's most important civil rights case, Chisom v. Roemer, which concluded that section 2 of the Voting Rights Act applies to the election of state judges. Chisom powerfully illustrates that federalism concerns, albeit strong, can be overcome by clear statement of Congress's own will that a vital area of concern -- the elimination of discriminatory barriers in voting -- will be vindicated by a statute that a lawyerlike, professional Court will interpret in a careful and respectful fashion.

-- Finally, the Court has shown a renewed interest in and sensitivity to separation of powers concerns. This is good news indeed for an Executive Branch committed at the highest levels to preservation of our structure of government.

EXHIBIT
B

INDIAN COUNTRY OFFENSES

(18 U.S.C. 1153)

On or about the ____ day of _____ , 19_____ , in the_____ District of_____, within the Indian country, on the _____ Indian Reservation, the defendant, _____, an Indian with premeditation and deliberation, did murder _____ ____, by shooting him with a firearm, in violation of Title 18, United States Code, Sections 1111, 1151 and 1153.

On or about the _____ day of _____, 19_, in the _____District of _____, within the Indian country, on the _____ Indian Reservation, the defendant, _____, an Indian, did commit the offense of incest with _____ , in violation of section _____ of the Penal Code of the State of _____, and in violation of Title 18, United States Code, Sections 1151 and 1153.

On or about the _____ day of _____, 19 _____, in the _____ District of _____, within the Indian country, on the _____ Indian Reservation, the defendant, _____, an Indian, did commit an offense which is a felony under chapter 109A of Title 19, United States Code, in that he knowingly caused _____ to engage in a sexual act by using force against said _____, inviolation of Title 18, United States Code, Sections 1151, 1153 and 2241(a).

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

EXHIBIT C

July 5, 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
Commissioner, Internal Revenue Service
Director, Bureau of Alcohol, Tobacco and Firearms

FROM: Cary H. Copeland CHC
Director

SUBJECT: Forfeiture Procedures Pursuant to Increased Administrative Forfeiture Authority

On February 26, 1991, Deputy Attorney General Barr notified you of the policies and procedures to follow in implementing the increased statutory authority for administrative forfeitures. This memorandum provides more detailed guidance on this policy.

1. Processing Equitable Sharing Requests

As stated in the Deputy Attorney General's memorandum, in all administrative cases involving property of any kind valued in excess of $100,000, the seizing field office shall notify the United States Attorney's office (USAO) of its recommendation on equitable sharing.

The following procedures will be followed:

A. The seizing agency field office will provide a copy of the Application for Transfer of Federally Forfeited Property (DAG-71) and the "preliminary" Decision for Transfer of Federally Forfeited Property (DAG-72) to the pertinent USAO for all (what ever the value) administrative and judicial forfeiture actions. The originals of these forms will be concurrently forwarded to the agency's headquarters decision-maker. A USAO may choose not to receive copies of the DAG-71 and/or the preliminary DAG-72 for

property appraised at $100,000 or less. Written notification of this decision to the seizing agency is required for their records.

B. In an administrative forfeiture action (for property valued in excess of $100,000) where the USAO does not agree with the seizing agency's sharing decision, the USAO must notify the appropriate headquarters unit of the seizing agency within ten (10) working days of receipt. If no agreement can be reached within five (5) working days, the headquarters unit will forward the DAG-71 and 72 to the Executive Office for Asset Forfeiture (EOAF) for resolution.

C. In a judicial forfeiture action where the USAO does not elect to follow the sharing recommendation of the seizing agency, the USAO will advise the headquarters unit of the seizing agency. If no agreement is reached, the USAO will advise EOAF in writing at the time the DAG-71 and 72 are sent to the Asset Forfeiture Office, Criminal Division.

D. EOAF will resolve disputes in subparagraph B. and C. above regarding sharing matters in administrative or judicial forfeiture actions. It will notify the parties and the U.S. Marshals Service (USMS) of the final decision.

E. The following FAX numbers should be used:

FBI :Forfeiture and Seized Property Unit
Attn: Paul V. King, Jr., Unit Chief
FAX No. (202) 347-1748

DEA :Forfeiture Unit
Attn: William J. Snider
FAX No. (202) 307-7641

INS :Office of Asset Forfeiture
Attn: Dan Stephan
FAX No. (202) 514-4186

USPS :Forfeiture Branch
Attn: P.M. Renzulli
FAX No. (202) 268-4563

IRS :Operations Assistance Branch 1
Attn: Kelly Daigle
FAX No. (202) 566-6743

ATF :Planning and Analysis Division
Attn: Yvonne White
FAX No. (202) 786-8518

2. Aggregation of Seizures

In the Deputy Attorney General's February 26, 1991, memorandum the Department's longstanding policy for aggregating civilly forfeited property is reiterated.

The increase in administrative forfeiture monetary caps alters the application of this policy in two respects. The policy now exempts from aggregation, monetary instruments as defined by 31 U.S.C. § 5312(a)(3) and Part 103 of Title 31, C.F.R., and the previous requirement to judicially forfeit personalty simply because realty had also been seized for forfeiture. The aggregation forfeiture policy is amended to read as follows:

A. Administrative Forfeiture

Properties subject to administrative forfeiture must be forfeited administratively unless one or more of three exceptions applies. The three exceptions are:

(1) Where several items of personalty are subject to civil 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 in excess of $500,000, they shall all be forfeited judicially. Monetary instruments as defined by 31 U.S.C. § 5312(a)(3) and Part 103 of Title 31, C.F.R., hauling conveyances or seizures of personalty that occur over a period of weeks are not subject to this aggregation policy.

(2) Prosecutive considerations dictate the criminal forfeiture of the property as part of a criminal prosecution;

(3) The Department's Criminal Division has expressly authorized judicial forfeiture based upon exceptional circumstances.

3. Early Notification to the United States Attorney of All Seizures of Property for Forfeiture

In order to keep USAOs apprised of pending forfeiture activity in their judicial districts, seizing agencies are to forward a copy of the seizure form for all seizures to the pertinent USAO within twenty-five (25) days of the seizure.

A USAO may choose not to receive copies of all the seizure forms. Written notification of this decision to the seizing agency is required for the seizing agency records.

Questions regarding the above may be referred to me or to Katherine Deoudes at FTS 368-1149.

EXHIBIT D

OCCUPANCY AGREEMENT

(Caption of the case.)

ORDER AND OCCUPANCY AGREEMENT

This Occupancy Agreement ("Agreement") is made between _____ and the United States Marshals Service (USMS) for the District of _____.

On _____(date)_____, the United States of America, by and through the USMS, seized under authority of a warrant in rem bearing civil number _____, under the provisions of and authority of _____ U.S.C. § _____, a parcel of real property ("property") located at _____ _____, which includes all fixtures and appurtenances thereto, and which is described as follows:

(address/description)

[The United States, by and through the USMS, also seized the following personal property which may, at the option of the USMS, remain on the property for the duration of this Agreement:

(description/attached list)]

The undersigned ("Occupant"), _____, resided on the property when it was seized by the USMS, and desires to continue to reside there pending the disposition of the forfeiture proceeding with respect to the property.

Therefore, it is hereby agreed, upon execution of the Agreement, and in compliance with all the terms and conditions stated herein, that the Occupant may continue to occupy the

property until such time as an order for interlocutory sale or a final disposition order is entered by the Court.

TERMS AND CONDITIONS

1. Occupant shall be permitted to occupy the residence located on the property subject to the terms and conditions of this Agreement as long as the Court permits. It is understood by the Occupant that this Agreement does not create any interest in the land or a tenancy of any kind, but rather this Agreement is a license by USMS of this property under custody of the Court subject to revocation by the Court at the discretion of the Court or for violations of the terms and conditions of this Agreement.

2. The USMS shall have the right to re-enter the property, with or without the consent of Occupant, at reasonable times to inspect and/or appraise the property, or for any other purpose consistent with this Agreement.

3. Occupant shall maintain the property at Occupant's expense in the same, or better, condition and repair as when seized. The term "maintain" shall include, but not be limited to keeping the property free of hazards and/or structural defects; keeping all heating, air conditioning, plumbing, electrical, gas, oil, or other power facilities in good working condition and repair; keeping the property clean and performing such necessary sanitation and waste removal; maintaining the property and grounds in good condition by providing snow removal, lawn mowing and all other ordinary and necessary routine maintenance.

4. Occupant shall maintain casualty and fire insurance equal to the full replacement cost of the property and all improvements thereon, and shall maintain liability insurance for injuries occurring on or resulting from use of the property, or activities or conditions thereon, in the minimum amount of __(appraised value). Additionally, Occupant shall arrange for a rider to all above-mentioned policies naming the United States as a loss payee and additional insured for the life of the Agreement. Occupant shall deliver proof of such insurance to the USMS no later than the seventh calendar day following the execution of this Agreement.

5. Occupant shall timely pay any and all mortgage, home equity loan, rent, utilities, sewer, trash, maintenance, cable television, tax and/or other obligations, otherwise necessary and due on the property, for the life of this Agreement. Moreover, Occupant shall abide by all laws, codes, regulations, ordinances, covenants, rules, bylaws, binding agreements and/or stipulations or conditions pertaining to the care, maintenance, control and use of the property.

6. Occupant shall not convey, transfer, sell, lease, or encumber in any way, title to the property. Nor shall he/she permit any other person, other than his/her immediate family, and temporary house guests, to occupy the property.

7. Occupant shall not remove, destroy, alienate, transfer, detract from, remodel or alter in any way, the property or any fixture, which is part of the property, ordinary wear excepted,

without express written consent of the USMS.

8. Occupant shall not use the property for any illegal purposes or permit the use of the property for such purposes; use the property so that it poses a danger to the health or safety of the public or a danger to law enforcement; or use the property so that it adversely affects the ability of the U.S. Marshal or his designee to manage the property.

9. Occupant agrees to provide the USMS with thirty (30) days' advance notice, in writing, in the event he/she chooses to vacate the property.

10. The USMS may require Occupant to vacate the property when the interests of the United States so requires. Except for the circumstances described in paragraph 11, or in exigent circumstances, the USMS agrees to provide Occupant with thirty (30) days' advance notice to vacate the property. However, at the discretion of the Court or if Occupant fails to vacate the property within that period, the USMS, upon notice to Occupant and all parties to the forfeiture action, may immediately petition the Court for directions to remove Occupant, and all other persons occupying the property, pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims, Rule E(4)(d).

11. If Occupant violates any term or condition of this Agreement, except Paragraph 10, the USMS shall notify Occupant that he/she has ten (10) days to correct the violation(s). If Occupant fails to correct the violation(s) cited by the USMS within that period, the USMS, upon notice to Occupant and all

parties to the forfeiture action, may immediately petition the Court for directions to remove Occupant, and all other persons occupying the property, pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims, Rule E(4)(d).

12. Occupant, on behalf of himself/herself, his/her heirs, statutory survivors, executors, administrators, representatives, successors and assignees ["potential claimants"], agrees that he/she does hereby release the United States, its agencies, agents, assigns and employees ["potential federal defendants"] in their official and individual capacities, from any and all pending or future injuries, claims, demands, damages, suits and causes of actions arising from Occupant's possession, maintenance, occupancy and/or use of the property.

13. Occupant, on behalf of himself/herself and other potential claimants, further agrees to indemnify the United States, and other potential federal defendants, as to any and all pending or future claims, demands, damages, suits and causes of actions regarding any damage or personal injuries incurred on, or as a result of, the property while Occupant resides there.

14. Occupant acknowledges that violation of the contents of this Agreement as it pertains to the removal or destruction of property under the care, custody, or control of the USMS constitutes a violation of federal criminal law, specifically, 18 U.S.C. §2233 entitled "Rescue of Seized Property". That section provides for a fine not exceeding $2,000, or imprisonment not exceeding two (2) years, or both.

15. This Agreement shall be construed in accordance with federal law, and any conflict over the terms and conditions of this Agreement must be decided by the Court as part of the forfeiture action.

[If applicable add:

__. Occupant agrees to protect, feed and provide all reasonable and necessary veterinary care for any domestic animals permitted by the USMS to remain upon the seized property.]

_____ _____
Date Occupant

_____ _____
Date U.S. Marshal for the District of _____

[If applicable:

Entered as an Order of this Court, dated this _____ day of _____, 199_.

_____
UNITED STATES DISTRICT JUDGE]

EXHIBIT E

1-8.000 CONGRESSIONAL RELATIONS

The Assistant Attorney General, Office of Legislative Affairs (OLA), is responsible for coordination of all significant communications between Congress and the Department subject to the general supervision of the Attorney General and the direction of the Deputy Attorney General. *See* 28 C.F.R. § 0.27.

1-8.010 Routine Matters Not Requiring Advance Clearance

The Assistant Attorney General, OLA, shall be provided with copies of all written communications with Members of Congress or Committees of Congress even when such communications are routine in nature. Routine matters to which United States Attorneys may respond if copies are furnished to OLA include:

A. Requests for information related to employment, such as current job openings, recommendations for employment, and general personnel procedures;

B. Requests for public information concerning specific cases, *e.g.* the status of cases, copies of grand jury indictments, and trial or hearing dates;

C. Inquiries concerning general legal procedures, *e.g.* processes clearly defined in statutes, rules and regulations (but not to include the provision of legal advice); and

E. Inquiries which can be answered by providing copies of Department news releases, reports or other publications.

All other Congressional inquiries, whether received in writing or by telephone, should be referred to the Assistant Attorney General, OLA. Any questions as to whether the request is routine should be resolved in favor of reference to OLA.

1-8.020 Congressional Requests for Non-Routine Assistance

Any Congressional request for assistance, other than routine inquiries described at USAM 1-8.010 above, must be reduced to writing, signed by the Member of Congress or committee or subcommittee chairman, and addressed to the Assistant Attorney General, OLA.

All Congressional inquiries and requests not falling within the description of USAM 1-8.010 should be referred to OLA as follows:

A. Telephone requests should be answered by asking the Congressional caller to telephone OLA at FTS 633-2141 or 202-633-2141 and

B. Written requests from Congress should be responded to, in the form of an interim letter, as follows:

> This office is pleased to assist Congress whenever possible. Pursuant to 28 C.F.R. § 0.27, however, the Assistant Attorney General, Office of Legislative Affairs, is responsible for liaison between the Department of Justice and Congress. Directives established by the Department and set out at Section 1-8.000 *et seq.* of the *United States Attorneys' Manual* provide that requests by Congress must be submitted to the Office of Legislative Affairs.
>
> Consistent with Department policy, therefore, I am forwarding your letter of *(date)* to the Office of Legislative Affairs which will be responding to your request shortly.

Examples of non-routine inquiries include requests:

A. To interview United States Attorneys, Assistant United States Attorneys, or other Department personnel;

B. To be briefed by Department personnel;

C. To visit United States Attorneys' offices;

D. To obtain non-public information concerning Department litigation or other activities; or

E. To arrange for Department personnel to testify at Congressional hearings.

To the extent that United States Attorneys are in possession of information necessary to respond to such a Congressional inquiry, such data should be forwarded to OLA by telephone or memorandum.

1-8.030 Department Clearance Policy Concerning Legislation

Under no circumstances shall a proposal for new legislation or a proposed amendment to existing law be submitted for consideration by Congress or by any committee or individual Member of Congress or Congressional staff without the prior approval of the Assistant Attorney General, OLA. Similarly, no request calling for other action by the Congress or any committee, individual member or Congressional staff member shall be submitted without advance approval by the Assistant Attorney General, OLA. Views of United States Attorneys concerning the need for legislation or the desirability of legislative proposals under consideration by the Congress should be forwarded to the Assistant Attorney General.

All Congressional requests for statements or opinions concerning pending legislative proposals, the need for legislation and similar inquiries shall be referred to the Assistant Attorney General, OLA.

1-8.040 Special Procedures for Congressional Hearings

Invitations for Department personnel to testify at Congressional hearings must come from an established committee or subcommittee of the Congress, be reduced to writing and signed by the chairman of such committee or subcommittee, and delivered to the Assistant Attorney General, OLA, at least *fourteen days in advance* of the date of the hearing. Telephone requests or written requests signed by Congressional staff may not serve in lieu of written requests signed by a committee or subcommittee chairman.

The Attorney General reserves the right to determine whether the Department will be represented at any Congressional hearing and, if so, who will appear on behalf of the Department. Department officials approved to represent the Department at Congressional hearings should prepare written testimony and submit it to OLA at least *seven days in advance* of the hearing for clearance within the Department and Administration. OLA can assist in determining appropriate testimony format, style and content.

1-8.050 Congressional Questionnaires and Surveys

Any survey or questionnaire from a Member of Congress or Congressional committee shall be coordinated by the Executive Office for United States Attorneys consistent with the procedures set out at USAM 1-10.300.

1-8.060 Congressional Access to Case Files

As a general rule, Congressional access to case files shall be governed by USAM 1-10.130 (closed case files) and USAM 1-10.140 (open case files). The Assistant Attorney General, OLA, shall be advised of any Congressional request for non-public Department documents.

1-8.070 Communications with Components of the Congress

Department communications with the General Accounting Office are coordinated by the Justice Management Division, FTS 633-3452. Requests or inquiries from other components of the Congress shall be treated on the same basis as requests from Members of Congress or Congressional committees and cleared with the Assistant Attorney General, OLA.

Other components of the Congress include the Office of Technology Assessment, the Congressional Research Service and the various caucuses, study groups and other organizations comprising the Legislative Branch of government.

1-8.080 Cooperation with Office of Legislative Affairs

Because the Office of Legislative Affairs is intended to serve as the clearinghouse for all Department communications with Congress, the As-

sistant Attorney General, OLA, shall be kept informed at all times regarding Congressional interest in any component of the Department.

1-8.090 Department Comments on State Legislation

As a general rule, the Department avoids commenting on state or local legislation. This policy reflects our deference to state sovereignty and a desire to avoid being perceived as attempting to dictate to the states or local governments how to order their internal affairs. U.S. Attorneys in particular may periodically be invited to testify on law enforcement issues before state legislatures. Where it is consistent with DOJ Policy and will be of assistance to the state legislative bodies U.S. Attorneys will be authorized to testify upon approval of the Attorney General through the Office of Legislative Affairs.

Prior to accepting such invitations the United States Attorney will contact the Office of Legislative Affairs and furnish the following information:

1) The date, time and legislative body before which the testimony is to be presented;

2) A description of subject being considered by the legislative body; and,

3) A synopsis of the proposed testimony of the U.S. Attorney or DOJ representative.

As a general rule OLA will respond to the requestor within 48 hours. Where the request raises sensitive subject matter issues regarding DOJ policies or positions so that approval must be obtained from higher levels more time may be required.

As with other legislative appearances, the Attorney General reserves the right to determine whether the Department will appear and, if so, to select the witness who will represent the Department at such formal legislative appearances.

Guideline Sentencing Update

FEDER

EXHIBIT F

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

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

VOLUME 4 • NUMBER 5 • JULY 10, 1991

Departures

MITIGATING CIRCUMSTANCES

D.C. Circuit holds that "socio-economic status," U.S.S.G. § 5H1.10, p.s., does not include defendant's personal history. Defendant pled guilty to conspiring to distribute cocaine and requested downward departures on three grounds: his criminal history was significantly overstated; his youth—he was 18 when arrested; and his personal history, which included domestic violence and other traumatic experiences. The district court reduced the criminal history category pursuant to § 4A1.3, p.s., but denied the other two requests, concluding that defendant's youth was not sufficiently unusual to warrant departure under § 5H1.1, p.s., and that it had no discretion under § 5H1.10, p.s. to depart on the basis of defendant's "socioeconomic standing or background."

The appellate court held that the district court properly exercised its discretion not to depart on the basis of youth. The court further held that the Guidelines do not violate due process by restricting consideration of age and that defendant could not challenge, under 28 U.S.C. § 994(x), the adequacy of the Sentencing Commission's reasons for this restriction.

However, the court set aside the refusal to consider departure for personal history, finding that the district court "mischaracterized certain elements of that history as 'socio-economic.'" The court reasoned that "the phrase 'socio-economic status' refers to an individual's status in society as determined by objective criteria such as education, income, and employment; it does not refer to the particulars of an individual life." The district court had expressed concern about "the tragic circumstances that make up what we call the socioeconomic class, that is, the death of his mother by his stepfather murdering her, [the stepfather's] threats, that he had to leave town to avoid problems, his growing up in the slum areas of New York and of Puerto Rico and not fitting in because of his . . . dual background," but concluded that "socioeconomic standing or background . . . can make no difference to the Court."

The appellate court held that consideration of these factors is not precluded by § 5H1.10: "It is undoubtedly true that individuals in certain social strata are apt to be exposed to far more violence and human ugliness than those who enjoy more privileged lives, but the court erred in concluding that all the experiences he described as 'tragic' fell within the rubric of 'socio-economic status.' . . . The characteristics listed in section 5H1.10 . . . are all objective; they reflect the kind of data that might be found in a census taker's checklist. They do not take cognizance of the traumatic experiences to which offenders of whatever characteristics might have been exposed. Violence among family members and its attendant dislocations do not follow class lines, nor should class lines determine whether a sentencing judge may consider them."

The court left to the district court to decide on remand whether consideration of such factors might be limited by other sections of the Guidelines, including § 5H1.3 (Mental and Emotional Conditions), or, conversely, whether the "not ordinarily relevant" language in § 5H1.3 might, "in extraordinary circumstances," provide sentencing courts with "a general authority to depart." *Cf. U.S. v. Deigert*, 916 F.2d 916, 918–19 (4th Cir. 1990) (district court has discretion to determine whether defendant's "tragic personal background and family history" is "extraordinary" and thus ground for downward departure).

U.S. v. Lopez, No. 90-3020 (D.C. Cir. June 28, 1991) (Buckley, J.).

Second Circuit upholds downward departure for "less than minimal" role in offense and extraordinary family circumstances. Defendant pled guilty to drug conspiracy charges. He received a reduction for minimal role in the offense, and his guideline range was 41–51 months. The district court departed and imposed a sentence of six months in a halfway house because (1) defendant did not realize he was involved in a drug transaction until it was almost completed and his participation was very limited; (2) his incarceration could result in the destruction of his family; (3) he was not aware of the specific amount of drugs involved; and (4) a discrepancy between his guideline sentence and that of another defendant appeared unwarranted.

The appellate court upheld the first two grounds. "The sentencing court did not abuse its discretion when it downwardly departed based in part on the extremely limited nature of [defendant's] involvement in the transaction: . . . [A] departure based on a factor envisioned by the Commission is permissible if the degree to which it was contemplated was inadequate . . . . [T]his record presents an instance in which . . . the defendant's role in the offense was less than minimal and [the court could] depart further downward from the guidelines."

The court also held that defendant's family circumstances were extraordinary and that § 5H1.6, p.s. did not preclude their consideration for departure. Defendant's wife, two daughters, disabled father, and grandmother depended upon him for support, and he worked two jobs to provide for them. "Clearly his is a close-knit family whose stability depends upon [defendant's] continued presence," and the district court's conclusion that departure was warranted because his incarceration "might well result in the destruction of an otherwise strong family unit" was "not an abuse of discretion."

The court held that the other two bases for departure were not proper. Defendant's lack of knowledge of the amount of drugs was part of his minimal involvement and thus not a separate ground. As to the sentencing disparity, the court noted it had "recently held that disparity of sentences between

co-defendants may not properly serve as a reason for departure." *See U.S. v. Joyner*, 924 F.2d 454, 459–61 (2d Cir. 1991).

On the issue of whether remand is automatically required when departure is based on both proper and improper grounds, the court determined that "the adoption of a per se rule seems imprudent. Instead, we hold the reviewing court should decide on a case-by-case basis whether remand is required." Here, the court held that remand was necessary because it could not conclude that the same sentence would have been imposed absent the improper factors. There is a split in the circuits as to whether remand is always required or a case-by-case decision should be made. See cases cited in 4 *GSU* #3 summary of *U.S. v. Diaz-Bastardo*, 929 F.2d 798 (1st Cir. 1991).

U.S. v. Alba, No. 90-1523 (2d Cir. May 23, 1991) (Cardamone, J.).

U.S. v. Prestemon, 929 F.2d 1275 (8th Cir. 1991) (District court erred in departing, from 33–41-month range to 24 months, on basis of 21-year-old first-time offender's background—he was bi-racial child adopted at age three months by white couple who did not know he was bi-racial. The appellate court acknowledged there is some evidence that bi-racial adopted children "often experience severe identity crises" and have more trouble with the law, but held that "race or racial background cannot be a basis for departure," U.S.S.G. § 5H1.10, p.s. Court also held that "adoption, even cross-racial or cross-cultural adoption, . . . is [not] so unusual or atypical that the Sentencing Commission did not adequately take such circumstances into consideration," and thus it is not a basis for departure for unusual family circumstances, § 5H1.6, p.s.).

Substantial Assistance

Fourth Circuit holds that, absent commitment to move for departure in plea agreement, defendant has no right to explanation of government's refusal to move for substantial assistance departure. Defendant began cooperating with the government shortly after arrest, without benefit of a plea bargain, and provided valuable assistance in other prosecutions. The government, however, did not move for downward departure under U.S.S.G. § 5K1.1, p.s., and defendant was sentenced to the mandatory statutory minimum sentences for his two offenses. He argued on appeal that the district court had authority to depart on the basis of his substantial assistance notwithstanding the government's refusal to move for departure, and that he should be allowed to inquire into the government's reasons for its refusal in order to determine whether the government acted arbitrarily or in bad faith.

The appellate court rejected both arguments: "Our reading of 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n) . . . leads us to the conclusion that the government alone has the right to decide, in its discretion, whether to file a motion for a downward departure based on the substantial assistance of a defendant. . . . [Thus] § 3553(e) of logical necessity excludes any claim of right by a defendant to demand that a motion for a departure be filed upon his unilaterally initiated cooperation efforts. . . . [It also] follows that the defendant may not inquire into the government's reasons and motives if the government does not make the motion. To conclude otherwise would result in undue intrusion by the courts into the prosecutorial discretion granted by the statute to the government."

The court noted that defendants could "negotiate a plea agreement with the government under which the defendant agrees to provide valuable cooperation for the government's commitment to file a motion for a downward departure. [By doing so], the defendant obtains rights to require the government to fulfill its promise. To those circumstances we apply the general law of contracts to determine whether the government has breached the agreement. *See U.S. v. Connor*, 930 F.2d 1073, 1076 (4th Cir. 1991). If substantial assistance is provided and the bargain reached in the plea agreement is frustrated, the district court may then order specific performance or other equitable relief, or it may permit the plea to be withdrawn." *See also Connor, supra* (defendant has burden of proving, by preponderance of evidence, that government breached agreement).

The court also noted its agreement with *U.S. v. Keene*, 933 F.2d 711 (9th Cir. 1991) [4 *GSU* #3], stating: "Section 5K1.1 governs all departures from guideline sentencing for substantial assistance, and its scope includes departures from mandatory minimum sentences permitted by 18 U.S.C. § 3553(e)."

U.S. v. Wade, No. 90-5805 (4th Cir. June 12, 1991) (Niemeyer, J.).

Fifth Circuit holds that government commitment in plea agreement cover letter to move for departure if defendant provided substantial assistance is enforceable. The assistant U.S. Attorney sent defendant's attorney a proposed plea agreement with a cover letter that stated: "In addition, I will recommend departure to the court based upon your client's full and complete debriefing and substantial assistance to the government." The plea agreement itself, which was accepted, was silent on the issue of departure. At sentencing the AUSA told the court defendant had complied with the terms of the plea agreement, but did not move for departure and none was granted by the court. Defendant appealed, arguing that the government breached the agreement.

The appellate court remanded: "This matter turns on the legal significance we give to the AUSA's transmittal letter. . . . Although the letter is not part of the plea agreement proper it does contain an offer by the government which [defendant] ostensibly accepted. . . . 'The two documents, when read together, demonstrate the agreement that if Appellant gave a full debriefing and his full cooperation then the government would recommend a downward departure.'" The court could not determine from the record whether defendant did fully cooperate, but held that if defendant, "in reliance on the letter, accepted the government's offer and did his part, or stood ready to perform but was unable to do so because the government had no further need or opted not to use him, the government is obliged to move for a downward departure."

U.S. v. Melton, 930 F.2d 1096 (5th Cir. 1991).

Sentencing Procedure

U.S. v. Melton, 930 F.2d 1096 (5th Cir. 1991) (Remanded for specific reasons for refusal to grant § 3B1.2 reduction for minor participant status. When defendant sought factual basis and reasoning for court's refusal, court "merely reiterated the finding that Melton was an average participant." Appellate court held: "The sentencing court must state for the record the factual basis upon which it concludes that a requested reduction for minor participation is, or is not, appropriate.").

Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

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VOLUME 4 • NUMBER 4 • JUNE 18, 1991

The U.S. Supreme Court recently decided three cases involving the Sentencing Guidelines. All are summarized in this issue of *GSU*.

Relevant Conduct

STIPULATION TO MORE SERIOUS OFFENSE

Supreme Court declines to decide whether § 1B1.2(a) "stipulation" may be oral, finds that facts did not "specifically establish" a more serious offense. When U.S. marshals went to arrest defendant they had to kick the door open twice in an attempt to enter his apartment. Both times defendant fired a gun in the direction of the door, and both bullets lodged in the door. The marshals withdrew, and eventually defendant surrendered. He was charged with attempting to kill a deputy U.S. marshal, assault on a deputy marshal, and use of a firearm during a crime of violence. At the plea hearing pursuant to Fed. R. Crim. P. 11(f), defendant pled guilty to the latter two counts, but not guilty to attempted murder. There was no plea agreement, but during the hearing defendant generally agreed with the facts described by the government.

At sentencing on the assault and firearm charges, the district court held that defendant's oral agreement to the government's rendition of the facts amounted to a "stipulation that specifically establishe[d] a more serious offense than the offense of conviction," U.S.S.G. § 1B1.2(a), and applied the guideline for an attempt to kill a U.S. marshal. The appellate court affirmed, holding that a formal written stipulation as part of a plea agreement is not required and it is "only necessary that the facts presented to the court establish a more serious crime and that the defendant agree to the statement of facts." *U.S. v. Braxton*, 903 F.2d 292, 298 (4th Cir. 1990) [3 *GSU* #8]. *But cf. U.S. v. McCall*, 915 F.2d 811, 816 n.4 (2d Cir. 1990) ("Without expressing any opinion as to whether a Section 1B1.2(a) stipulation must be in writing, we note that our decision in [*U.S. v.*] *Guerrero*[, 863 F.2d 245 (2d Cir. 1988)] requires that any stipulation be a part of the plea agreement, whether oral or written."); *U.S. v. Warters*, 885 F.2d 1266, 1273 n.5 (5th Cir. 1989) (indicating a "formal stipulation of [defendant's] guilt" is required under § 1B1.2(a)).

The Supreme Court did not resolve the question of how to interpret "stipulation" in § 1B1.2(a). Instead, the Court determin d that the facts simply did not support a finding that defendan. had the requisite intent for attempted murder: "[E]ven if one could properly conclude that the stipulation 'specifically established' that Braxton had shot 'at the marshals,' it would also have to have established that he did so with the intent of killing them. Not only is there nothing in the stipulation from which that could even be inferred, but the statements of Braxton's attorney at the hearing flatly deny it."

The Court also determined that clarification of § 1B1.2(a) could be left to the Sentencing Commission. The enabling legislation indicates that Congress intended the Commission to "periodically review the work of the courts, and . . . make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." The statute also grants the Commission "the unusual explicit power to decide whether and to what extent its amendments reducing sentences will be given retroactive effect, 28 U.S.C. § 994(u)." After certiorari was granted in this case the Commission requested public comment on whether § 1B1.2(a) should be amended to resolve this issue. These factors, plus the ability to decide the specific controversy here on other grounds, led the Court to "choose not to resolve" the issue of what is required by the phrase "containing a stipulation."

Braxton v. U.S., 111 S. Ct. 1854 (1990).

Offense Conduct

CALCULATING WEIGHT OF DRUGS

Supreme Court holds that weight of "mixture or substance" containing LSD includes weight of carrier medium. Petitioners were convicted of selling 1,000 doses of LSD on ten sheets of blotter paper. The drug alone weighed 50 milligrams, but the paper and drug together weighed 5.7 grams. The district court used the total weight to determine the sentences under the Guidelines and under the relevant statute, 21 U.S.C. § 841(b)(1)(B)(v), which mandates a minimum sentence of five years for distribution of "1 gram or more of a mixture or substance containing a detectable amount of" LSD. The Seventh Circuit affirmed, holding that "mixture or substance" includes the carrier medium. *U.S. v. Marshall*, 908 F.2d 1312, 1317–18 (7th Cir. 1990) (en banc).

The Supreme Court also affirmed: "We hold that the statute requires the weight of the carrier medium to be included when determining the appropriate sentence for trafficking in LSD, and this construction is neither a violation of due process, nor unconstitutionally vague." The Court noted that every appellate court that had ruled on this issue held that the carrier medium should be included.

Chapman v. U.S., 111 S. Ct. 1919 (1991).

U.S. v. Shabazz, No. 90-3244 (D.C. Cir. May 28, 1991) (Thomas, J.) (offense level for distribution of dilaudid pills, whose active ingredient is the schedule II substance

hydromorphone, is based on gross weight of pills, not net weight of hydromorphone). *Accord U.S. v. Lazarchick*, 924 F.2d 211 (11th Cir. 1991); *U.S. v. Meitinger*, 901 F.2d 27 (4th Cir.), *cert. denied*, 111 S. Ct. 519 (1990). *See also U.S. v. Callihan*, 915 F.2d 1462 (10th Cir. 1990) (amphetamine mixture); *U.S. v. McKeever*, 906 F.2d 129 (5th Cir. 1990) (same), *cert. denied*, 111 S. Ct. 790 (1991); *U.S. v. Murphy*, 899 F.2d 714 (8th Cir. 1990) (methamphetamine); *U.S. v. Gurgiolo*, 894 F.2d 56 (3d Cir. 1990) (schedule II, III, and IV substances).

Departures

Notice Required Before Departure

Supreme Court holds that Fed. R. Crim. P. 32 requires "reasonable notice" of specific grounds before district court departs from Guidelines. Defendant pled guilty to three charges relating to theft of government funds. The plea agreement stated the expectation that defendant would be sentenced within a certain guideline range. Consistent with this expectation, the presentence report found the applicable range to be 30–37 months and specifically stated that there were no factors warranting departure. At the conclusion of the sentencing hearing, however, the district court departed upward to impose a 60-month sentence. The appellate court affirmed, reasoning that neither the Guidelines nor Fed. R. Crim. P. 32 required advance notice of the decision to depart, the facts providing the basis for departure were contained in the presentence report (although not identified as such), and the defendant had both the opportunity to challenge the departure during allocution and the right to appeal his sentence. *U.S. v. Burns*, 893 F.2d 1343, 1348 (D.C. Cir. 1990).

The Supreme Court reversed, holding that under Rule 32 some form of prior notice is required. The Court noted that in "the ordinary case, the presentence report or the Government's own recommendation will notify the defendant that an upward departure will be at issue and of the facts that allegedly support such a departure," and reasoned that allowing district courts "to depart from the Guidelines sua sponte without first affording notice to the parties" would be "contrary to the text of Rule 32(a)(1) because it renders meaningless the parties' express right 'to comment upon . . . matters relating to the appropriate sentence.'"

The Court held that "before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government, Rule 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling. This notice must specifically identify the ground on which the district court is contemplating an upward departure." In a footnote the Court indicated that the same rule should apply for the prosecution in downward departures because "it is clear that the defendant and the Government enjoy equal procedural entitlements" under Rule 32.

The Court did not, however, answer "the question of the timing of the reasonable notice required by Rule 32 . . . . Rather, we leave it to the lower courts, which, of course, remain free to adopt appropriate procedures by local rule." Most appellate courts have held that the requirements of Rule 32 are met in one of two ways: the factors warranting departure are identified as such in the presentence report, or the sentencing court advises defendant before or at the sentencing hearing that it is considering departure and gives defendant opportunity to comment before imposition of sentence. *See, e.g., U.S. v. Contractor*, 926 F.2d 128 (2d Cir. 1991); *U.S. v. Williams*, 901 F.2d 1394 (7th Cir. 1990); *U.S. v. Anders*, 899 F.2d 570 (6th Cir.), *cert. denied*, 111 S. Ct. 532 (1990); *U.S. v. Hernandez*, 896 F.2d 642 (1st Cir. 1990); *U.S. v. Nuno-Para*, 877 F.2d 1409 (9th Cir. 1989).

Burns v. U.S., No. 89-7260 (U.S. June 13, 1991) (Marshall, J.).

Aggravating Circumstances

U.S. v. Roth, No. 90-4028 (10th Cir. May. 24, 1991) (Logan, J.) (Upward departure was warranted for Air Force security policeman convicted of theft of government property from military base, including four F-16 jet engines: the amount of loss involved, $10 million, was sufficiently "unusual" compared to maximum of $5 million considered by guidelines; the deleterious effect of thefts on the "morale and pride of the military" resulted in a "significant disruption of a governmental function," U.S.S.G. § 5K2.7, p.s.; and the sale of the jet engines "could have endangered national security," § 5K2.14, p.s. The extent of the departure, however, to 120 months from the guideline maximum of 37 months, was not sufficiently explained to allow the appellate court to review for reasonableness: "[T]he sentencing court should draw analogies to offense characteristic levels, criminal history categories, and other principles in the guidelines to determine the appropriate degree of departure.").

Substantial Assistance

U.S. v. Doe, No. 90-3027 (D.C. Cir. May 24, 1991) (Mikva, C.J.) (rejecting constitutional and statutory challenges to requirement for government motion in U.S.S.G. § 5K1.1, p.s., but noting that "review by the district court remains available in cases where the government's refusal to move for a departure violates the terms of a cooperation agreement, is intended to punish the defendant for exercising her constitutional rights, or is based on some unjustifiable standard or classification such as race"; also noting that a "court may always consider a defendant's assistance in selecting a sentence from within the guideline range").

Adjustments

Role in Offense

U.S. v. Andrus, 925 F.2d 335 (9th Cir. 1991) (original opinion [3 *GSU* #20], which established two-part test for determining role in offense using relative culpability of defendant compared to codefendants and also to average participant in that type of crime, was amended March 25 prior to publication in bound volume—court deleted that part of opinion and held that it need not decide whether two-part test was proper because district court's refusal to grant minor participant status was proper under any test).

EXHIBIT G

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

Vol. 2, No. 27 | FEDERAL SENTENCING GUIDELINES AND FORFEITURE CASES FROM ALL CIRCUITS. | July 1, 1991

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Cruel and Unusual Punishment

Supreme Court holds that prisoner who claims conditions of confinement violate 8th Amendment must show a culpable state of mind on the part of prison officials. (105) Petitioner, a state prisoner, alleged that the conditions of his confinement in inadequate and unsanitary prison facilities constituted cruel and unusual punishment. In an opinion written by Justice Scalia, the Supreme Court emphasized that the 8th Amendment only bans cruel and unusual *punishment*. "If the pain inflicted is not formally meted out as *punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify." The court held that this mental element can be satisfied by showing "deliberate indifference" on the part of prison officials. The judgment was vacated and the case remanded for reconsideration. Justices White, Marshall, Blackmun and Stevens concurred in the judgment but dissented from the holding that prisoners challenging the conditions of their confinement must show "deliberate indifference." *Wilson v. Seiter*, __ U.S. __, 111 S.Ct. __ (June 17, 1991) No. 89-7376.

Supreme Court holds life without parole for first time offender with 1-1/2 pounds of cocaine is not cruel and unusual. (105) In a 5-4 decision, the Supreme Court upheld a sentence of life without parole for possession of 1-1/2 pounds of cocaine, as not cruel and unusual, even though this was the defendant's first conviction. Justice Scalia, joined by Chief Justice Rehnquist, said that the Eighth Amendment does not require a sentence to fit the crime, noting that "severe mandatory penalties may be cruel, but they are not unusual, in the constitutional sense, having been employed in various forms throughout our nation's history." Justices Kennedy, O'Connor and Souter agreed for the most part, but left open the possibility that "extreme sentences that are 'grossly disproportionate' to the crime" could be considered unconstitutional. Justices Marshall, White, Blackmun and Stevens dissented. *Harmelin v. Michigan*, __ U.S. __, 111 S.Ct. __ (June 27, 1991) No. 89-7272.

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9th Circuit holds that two consecutive life sentences for kidnapping did not constitute cruel and unusual punishment. (105) Defendant was sentenced to life in prison for first degree kidnapping with a consecutive life sentence for his use of a weapon to commit the kidnapping. Under the applicable Nevada statute, it appeared that defendant would be eligible for parole on the kidnapping conviction and weapon enhancement in ten years. The 9th Circuit reviewed the sentence in light of the factors set out in *Solem v. Helm*, 463 U.S. 277, 290 (1983) and concluded that the sentence was not cruel and unusual punishment under the 8th Amendment. *Eckert v. Tansy*, __ F.2d __ (9th Cir. June 17, 1991) No. 89-16478.

Guideline Sentences, Generally

2nd Circuit reverses downward departure intended to make defendant's sentence proportionate to co-defendants'. (140)(722) The 2nd Circuit ruled that it was improper to depart downward based upon a desire to sentence defendant proportionately with his more culpable co-defendants. A mere difference between co-defendants' guideline ranges does not justify a departure. However, "a sentencing judge is entitled to achieve a result that coincidentally increases or decreases the gap between sentencing ranges applicable to co-defendants if the judge finds in good faith that the statutory criterion for a departure has been met." Defendant could thus argue on remand for a revisitation of his role in the offense or acceptance of responsibility, since he was denied a reduction for both at sentencing. *U.S. v. Restrepo*, slip copy (2nd Cir. June 12, 1991), No. 89-1596.

Offense Conduct, Generally (Chapter 2)

2nd Circuit rules evidence insufficient to determine that amount of drugs was foreseeable to defendant. (240)(275) Defendant was convicted of possessing certain "listed chemicals" with intent to manufacture cocaine. A chemist testified that the chemicals might be used to produce eight to ten kilograms of cocaine, and the sentence was based on an intent to produce in excess of five kilograms. The 2nd Circuit reversed, ruling that there was insufficient evidence to support a finding that defendant actually knew or could have foreseen that more than five kilograms could have been produced. The cocaine "recipe" was not written in defendant's handwriting and there was no evidence that defendant had any knowledge of how much cocaine might have been produced with the chemicals. Moreover, some ingredients were missing. Although the absence of those ingredients might not prevent a court from determining the amount of drugs that probably could have been produced, they were costly and difficult to obtain. Since no reliable estimate could be made, defendant should have been sentenced under guideline section 2D1.10. *U.S. v. Perrone*, slip copy (2nd Cir. June 13, 1991) No. 90-1630.

9th Circuit holds cocaine base is not defined solely by presence of a hydroxyl ion. (240) Defendants argued that the legal definition of "cocaine base" is a cocaine compound containing a hydroxyl ion (OH-), such that it is a "base" as that term is used in chemistry. The 9th Circuit rejected the argument, holding that as long as cocaine base is objectively distinguished from cocaine hydrochloride, a defendant may be sentenced for distributing cocaine base. In this case, the chemist testified that cocaine base has a distinguishable chemical formula and has different properties from cocaine hydrochloride. He identified the substance involved here as cocaine base. The 9th Circuit concluded that Congress and the Sentencing Commission must have intended the term "cocaine base" to include "crack," or "rock cocaine" which "we understand to mean cocaine that can be smoked, unlike cocaine hydrochloride." Since the district court erred in defining "cocaine base" to mean cocaine that contains a hydroxyl ion, the sentence was vacated and remanded for resentencing. *U.S. v. Shaw*, __ F.2d __ (9th Cir. June 11, 1991) No. 90-50242.

1st Circuit affirms that defendant intended to purchase in excess of 100 kilograms of marijuana. (250) Although defendant pled guilty to attempting to possess with intent to distribute marijuana, he contended that he sought to pur-

chase only one pound of marijuana. The district court found, however, that defendant attempted to possess in excess of 100 kilograms of marijuana. The 1st Circuit affirmed. There was sufficient evidence to infer that defendant dealt in drugs on a significant scale, and was financially capable of purchasing a large quantity of marijuana. Moreover, a co-defendant testified that defendant gave him $80,000 to buy "two bales of pot" and that defendant also told him he wanted to purchase 500 pounds of marijuana to start, and would want an additional 300 pounds two to three hours later. Defendant subsequently told him he was a bit unsure about the deal but still wanted the 300. Thus, although the record was somewhat unclear, the court's finding that defendant intended to purchase more than 100 kilograms was supported by the record. *U.S. v. Marino*, __ F.2d __ (1st Cir. June 18, 1991) No. 90-1920.

9th Circuit upholds constitutionality of "1 plant = 100 gm." equivalency. (250) Defendants were sentenced under the 1988 guidelines for growing 1838 marijuana plants, each treated as the equivalent of 100 grams of marijuana. They challenged the constitutionality of the "1 plant = 100 gram" equivalency on the basis that there was no evidence that it was accurate. The 9th Circuit rejected the argument, stating that the defendants "misunderstand the significance of the conversion table." The table does not state that the yield of a plant is 100 grams but rather that the "offense level for a crime involving one marijuana plant is the level that would apply in a case involving 100 grams of dried marijuana." There is no constitutional requirement that the penalty for an offense involving one marijuana plant be equal to the penalty for an offense involving the quantity of dried marijuana the plant would yield. *U.S. v. Motz*, __ F.2d __ (9th Cir. June 17, 1991) No. 90-30174.

10th Circuit holds that weight of carrier medium is included with LSD, despite lack of "mixture" language. (250) In *Chapman v. U.S.*, 111 S.Ct. __ (May 30, 1991) No. 90-5744, the Supreme Court held that the weight of the carrier medium is included when calculating the weight of LSD. *Chapman* dealt with 21 U.S.C. section 841(b)(1)(A)(v) and (B)(v), which imposes minimum and maximum penalties based upon specified weights of a "mixture or substance" containing a detectable amount of LSD. Subparagraph (C) of section 841(b)(1) covers violations involving less than one gram of LSD, and does not contain the "mixture or substance" language. Defendant contended that this meant that the weight of the carrier medium could not be included in calculating his sentence. The 10th Circuit rejected this argument, since the sentencing guidelines apply the "mixture or substance" language to all quantities of LSD in determining base offense levels. Defendant was not "charged" or sentenced under section (b)(1)(C), he was charged with violating section 841(a)(1). He was sentenced under the guidelines, which according to the Supreme Court, require the carrier medium to be used in determining the weight of the LSD. *U.S. v. Leazenby*, __ F.2d __ (10th Cir. June 18, 1991) No. 90-8089.

9th Circuit finds no error in approximating quantity of drugs in "reverse sting" based on prevailing prices. (265) The district court approximated the quantity of drugs in light of the fact that there was no drug seizure because the transaction was a reverse sting, in which the government controlled the amount of cocaine. *See* U.S.S.G. section 2D1.4, application note 2, and section 1B1.3, application note 1. The government appealed, arguing that defendant was responsible for the full ten kilos under negotiation, or at least for five kilos, since he provided half the money. The 9th Circuit rejected the argument, ruling that the district court's findings were not clearly erroneous. *U.S. v. Hill*, __ F.2d __ 91 D.A.R. 7462 (9th Cir. June 24, 1991) No. 89-10643.

7th Circuit affirms that drug dealer was accountable for all drugs involved in conspiracy. (275) Defendant purchased cocaine for resale from several drug suppliers involved in a large drug conspiracy. He was often present when the conspirators divided their drug shipment into smaller packages to pass on to other distributors and he also knew many of the other dealers who were buying from the conspirators. One conspirator described defendant as a "mainstay" of his "operation," and said that he coordinated his cocaine purchases with defendant, determining how much defendant needed before he went to his sources to obtain it. The 7th Circuit ruled that the fact that defendant was indicted separately from the other conspirators did not constitute a concession by the government that defendant was not a member of the conspiracy. It was more likely that defendant was indicted later simply because the government did not have sufficient information until the conspirators began supplying information. *U.S. v. Sergio*, __ F.2d __ (7th Cir. June 11, 1991) No. 90-1942.

9th Circuit holds that defendant was responsible for marijuana plants grown by his neighbor. (275) Evidence showed that defendant's neighbor was involved in a marijuana growing operation with the defendant. The neighbor stated that the defendant had instructed him on growing methods and had delivered money to finance the operation. Thus the district court's conclusion that the marijuana plants grown by the neighbor were part of the same course of conduct or common scheme or plan as defendant's own growing operation was not clearly erroneous. *U.S. v. Motz*, __ F.2d __ (9th Cir. June 17, 1991) No. 90-30174.

8th Circuit affirms firearm enhancement based on weapon and drugs found in defendant's home. (284) The 8th Circuit found no abuse of discretion in increasing defendant's offense level for possession of a firearm during the commission of a drug trafficking crime. According to the presentence investigation report, a search of defendant's home uncovered

23 grams of a cocaine-like substance, two scales and a .22 caliber revolver. *U.S. v. Duke*, __ F.2d __ (8th Cir. June 10, 1991) No. 90-5351.

2nd Circuit affirms four-level downward departure based upon minimal role of defendants in money laundering scheme. (360)(440)(721) Based on their minimal role in a money laundering offense, defendants received both a four-level offense level reduction for minimal role under guideline section 3B1.2 and a four-level downward departure. The 2nd Circuit affirmed, holding that such a departure beyond the adjustments in section 3B1.2 is authorized where the minimal role is "extraordinary." Defendants' case presented such a situation. As a result of the large amount of cash involved, defendants received a nine-level increase in offense level. This single factor raised defendants' guideline range from 33-41 months to 87 to 108 months. The sentencing commission apparently contemplated some connection between the quantity of money implicated and the extent of a defendant's role in the offense. No such correlation was involved here. Defendants' sole role in the offense was to load boxes of money in a warehouse on one particular date. *U.S. v. Restrepo*, slip copy (2nd Cir. June 12, 1991), No. 89-1596.

4th Circuit reverses determination of tax loss based on personal income which was improperly reported on trust return. (370) Defendants were convicted of various federal tax law violations in connection with a scheme to sell trusts to individuals. Participants in the scheme could assign personal income to the trusts, take otherwise unavailable deductions for purely personal expenses, and avoid further taxes on their income by making "distributions" of their income to a financial institution in the Marshall Islands. Guideline section 2T1.3 directs a court to use the offense level from the tax table in section 2T4.1 corresponding to the tax loss. Under this guideline "tax loss" is 28 percent of the amount by which the greater of gross income and taxable income was understated. The district court determined the tax loss as 28 percent of the total amount of income that the trust purchasers had improperly listed on their trust tax returns. The 4th Circuit rejected this method of computation. "The government simply is not suffering a 'tax loss' merely because the taxpayer reports his income on a trust return rather than an individual return." The understated gross income was represented only by non-legitimate deductions and any income distributed to the off-shore financial institution. *U.S. v. Schmidt*, __ F.2d __ (4th Cir. June 11, 1991) No. 90-5902.

7th Circuit rules that wire fraud had been completed. (380) Defendants placed fraudulent telephone orders at a bank that resulted in $70 million being wired out of the bank. The funds were headed for three forged bank accounts set up by defendants in Vienna, Austria. The funds made it as far as two banks in New York City before the scheme was discovered. Guideline section 2X1.1, entitled "Attempt, Solicitation, or Conspiracy Not Covered by a Specific Guideline," provides that the base offense level for the object offense shall apply. However for conspiracies, the offense level is reduced by three unless defendant or a co-conspirator completed all of the acts the conspirators believed necessary for the completion of the offense. The 7th Circuit rejected defendants' contention that they should receive this three-level reduction. Although defendants had yet to obtain and enjoy the fruits of their fraud, "obtaining and spending the proceeds of the fraud are not . . . 'necessary acts of the object offense[s]' of wire and bank fraud." *U.S. v. Strickland*, __ F.2d __ (7th Cir. June 11, 1991) No. 89-3099.

Adjustments (Chapter 3)

9th Circuit upholds "leader or organizer" enhancement based on defendant's financial backing for the marijuana growing operation. (430) Defendant financed the marijuana growing operation in return for which the co-defendants were obligated to sell their crops to him. Without defendant there would have been no financial backing for the operation. Therefore the district court's finding that defendant was the leader of the conspiracy was not clearly erroneous. *U.S. v. Motz*, __ F.2d __ 91 D.A.R. 7109 (9th Cir. June 17, 1991) No. 90-30174.

11th Circuit holds defendant need not take greater share of profits in order to be manager of drug conspiracy. (430) Defendant contended that he was merely a subordinate of the leader of a drug ring, and that under the background commentary of guideline section 3B1.1, a manager or supervisor must profit more from the criminal enterprise than the other participants, be a greater danger to the public, or be more likely to be a recidivist. The 11th Circuit upheld a three-point leadership enhancement. Defendant's subordinate role to the conspiracy's leader did not absolve him of the supervisory role he played in coordinating and managing the delivery and transportation of the marijuana from Jamaica into the United States. Defendant helped his co-conspirators plan the operational aspects of the smuggling efforts. He made unilateral decisions regarding landing and loading locations and the timing of such trips. Moreover, defendant misread the commentary background of section 3B1.1. *U.S. v. Jones*, __ F.2d __ (11th Cir. June 19, 1991) No. 90-8338.

7th Circuit affirms managerial role of defendant who supervised crack house. (430) The 7th Circuit upheld the district court's determination that defendant had a managerial role in a drug distribution ring. The evidence clearly established that defendant played a larger role in the drug ring than most of the other participants. Two conspirators testified that the leader of the drug ring would frequently hand defendant cocaine in exchange for money. Another conspirator testified that it was defendant who distributed guns to the street dealers, and who was one of only three people who

cooked cocaine at the crack house. Another conspirator testified that after he made sales, he gave the money to defendant. He also described defendant as directing the work of numerous street dealers who operated out of the crack house. This view of defendant's role was joined by the conspirator who managed the other crack house in the operation. *U.S. v. Jackson*, __ F.2d __ (7th Cir. June 14, 1991) No. 89-3287.

7th Circuit rules defendant waived right to claim reduction for minor role. (440) Although defendant contended that he was entitled to a reduction based upon his minor role, the 7th Circuit found that defendant waived this issue by failing to request such a reduction during sentencing. Defendant did not implicitly request the reduction when he asked the district court to consider the relatively small amount of cocaine that he personally handled. That request was part of defendant's general plea to the court to exercise "any discretion" left to it by the guidelines. "A defendant cannot claim, merely by reciting to the court a list of mitigating facts, that he has properly invoked any guideline provision to which those facts might be relevant." Moreover, even if he did raise this issue, the district court's implicit conclusion that defendant was not a minor participant was not clearly erroneous. Although defendant may have been less culpable than his suppliers, he was more culpable than the other dealers. Defendant was identified by one supplier as his principal distributor, and by another supplier as his second largest customer. *U.S. v. Sergio*, __ F.2d __ (7th Cir. June 11, 1991) No. 90-1942.

9th Circuit affirms district court's ruling that "money man" was minor participant. (440) The government appealed the district court's downward adjustment for defendant's minor role, arguing that a "money man" could never be a minor participant. The 9th Circuit rejected the argument, noting that although the defendant provided the money for the drug transaction, the district court found that he was the least culpable of the three conspirators, and "[t]hat decision was not clearly erroneous." *U.S. v. Hill*, __ F.2d __ 91 D.A.R. 7462 (9th Cir. June 24, 1991) No. 89-10643.

D.C. Circuit reverses minor role determination based solely upon defendant's status as a courier. (440) The district court reduced defendant's offense level by two levels under guideline section 3B1.1, saying that it was "unfortunate" that Congress imposed such "extraordinarily high mandatory minimum sentences" for people like defendant who "are just couriers and do not have major responsibility for the drug plague that plagues this country." The D.C. Circuit reversed, finding that defendant's status as a courier, by itself, was insufficient to support a finding that defendant was a minor participant. Nevertheless, the court rejected the government's contention that since defendant was convicted of a crime that did not involve any other participants, he could not, as a matter of law, be a minor participant. Despite its opinion to that effect in *U.S. v. Williams*, 891 F.2d 921 (D.C. Cir. 1989), the court noted that the November 1, 1990 amendments to the guidelines provide that a defendant's role in the offense is to be determined on the basis of all relevant conduct, and not solely on the basis of the acts cited in the offense of conviction. Thus, defendant could be a minor participant. *U.S. v. Caballero*, __ F.2d __ (D.C. Cir. June 21, 1991) No. 90-3129.

2nd Circuit holds de novo standard applicable to review of application of abuse of trust enhancement. (450)(820) Defendant challenged the district court's two-level enhancement under guideline section 3B1.3 for abuse of trust. The 2nd Circuit concluded that the proper standard of review for this question was *de novo*. The significant facts in the case were not in dispute. "The question whether an interpretation of the guideline embraces those facts is, in our view, a legal question which we review *de novo*." Judge Mahoney believed that the case should be reviewed on a due deference, rather than a *de novo*, basis. *U.S. v. Castagnet*, __ F.2d __ (2nd Cir. June 6, 1991) No. 90-1380.

2nd Circuit affirms that former airline employee abused position of trust. (450) Defendant formerly was a junior station agent for an airline with access to the airline's computer access code. After defendant's employment was terminated, he slipped behind airline ticket counters and used the code to issue tickets to himself. The 2nd Circuit upheld an enhancement under guideline section 3B1.3 based on defendant's abuse of a position of trust. The court rejected defendant's contention that he did not hold a position of trust since he was no longer employed by the airline. "[W]hether the defendant was in a position of trust must be viewed from the perspective of the victim." Here, defendant's relationship with the airline provided defendant with the ability to commit the crime. He committed the crimes under circumstances which enabled him to be unobserved and leave the area before the crime was discovered. Judge Altimari dissented, finding defendant's position had no more trust or responsibility than a bank teller. *U.S. v. Castagnet*, __ F.2d __ (2nd Cir. June 6, 1991) No. 90-1380.

1st Circuit affirms obstruction enhancement based upon perjury. (460) The 1st Circuit affirmed a two-point enhancement for obstruction of justice based on defendant's false testimony at a presentence evidentiary hearing. The district court found that defendant testified falsely, first, in denying that he was involved in a transaction to purchase and distribute 4,000 pounds of marijuana, and second, in explaining his $60,000 debt to a co-defendant. Defendant denied his involvement with the marijuana, notwithstanding overwhelming evidence of his guilt. With respect to the $60,000 debt, defendant first conceded that he owed it. He then asserted his 5th Amendment privilege against self-incrimination. Later, he denied that he ever owed it. The debt was material to the purposes of the conspiracy, since another

co-defendant testified that defendant was to receive a portion of the profits on all the marijuana which he sold in order to repay the $60,000. *U.S. v. Marino*, __ F.2d __ (1st Cir. June 18, 1991) No. 90-1920.

1st Circuit affirms obstruction based on defendant's false testimony that he only intended to purchase one pound of marijuana. (460)(485) The district court found that defendant testified falsely that he only attempted to purchase one pound of marijuana and in providing the same false information in his written statement of acceptance of responsibility reproduced in the presentence report. The district court stated that it "defie[d] one's imagination to expect people to believe that somebody is going to inspect . . . a 40-pound bale . . . for the purpose of buying one pound." This was also grounds to deny defendant a reduction for acceptance of responsibility. *U.S. v. Marino*, __ F.2d __ (1st Cir. June 18, 1991) No. 90-1920.

2nd Circuit reverses downward departure which was based defendants' civil contempt penalty for obstruction. (460) (722) Defendants received civil contempt sentences as a result of their refusal to provide the court with handwriting exemplars. Since defendants were already in pretrial detention, the civil contempt sentence resulted in defendants' not being given credit for time spent in custody before trial. At sentencing, the court enhanced defendants' sentences for obstruction of justice based on the failure to provide the exemplars, but offset this increase with an equivalent downward departure, concluding that the guidelines did not consider the imprisonment for civil contempt. The 2nd Circuit reversed, disagreeing with the district court's equation of the goals of civil contempt and the sentence enhancement for obstruction of justice. The court also found the extent of the departures unreasonable, since they exceeded the amount of time served for civil contempt. *U.S. v. Restrepo*, slip copy (2nd Cir. June 12, 1991), No. 89- 1596.

7th Circuit reverses obstruction enhancement based upon defendant's "misstatements" to investigators. (460) During a meeting with investigators, defendant described his activities at a crack house, identifying the supervisor of the crack house, and the leader of the conspiracy. The district court enhanced defendant's sentence for obstruction of justice after finding that defendant gave a false statement to investigators concerning the activities of the leader. The 7th Circuit reversed, noting that defendant had provided a great deal of truthful information and that the government did not identify a single false statement. The defendant's failure to provide more information was due as much to the government's questions as to a failure to divulge information. It is natural for a cooperating witness not to reveal all he knows, for reasons ranging from retribution to a desire to keep the government interested in helping him. Moreover, even if defendant did willfully underplay the leader's involvement, it was doubtful that the government could establish that defendant's failure to disclose information "significantly" obstructed or impeded efforts to bring the drug conspiracy to an end. *U.S. v. Jackson*, __ F.2d __ (7th Cir. June 14, 1991) No. 89-3287.

8th Circuit upholds obstruction enhancement despite denial of government's request to withdraw from plea agreement. (460) Defendant's plea agreement required defendant to provide truthful information to the government about narcotics activities. After a series of interviews, the government concluded that defendant had been less than forthright, and moved to withdraw from the plea agreement. The district court denied this motion. Defendant contended that a two-level enhancement for obstruction of justice was inconsistent with the district court's decision not to allow the government to withdraw from the plea. The 8th Circuit disagreed, finding that the two actions were not inconsistent. *U.S. v. Duke*, __ F.2d __ (8th Cir. June 10, 1991) No. 90-5351.

9th Circuit upholds obstruction enhancement even though defendant pled guilty to a less serious offense. (460) Defendant perjured himself during his first trial, and later pled guilty to a less serious offense based on the same criminal conduct. On appeal, he argued that it was improper to enhance his sentence for obstruction of justice based on the perjury because under section 3C1.1, the obstruction must occur during the prosecution of "the instant offense." He argued that his perjury during the prior trial occurred during a separate prosecution for a separate offense. The 9th Circuit disagreed, holding that the "mere fact that, after a mistrial, appellant pled guilty to a less serious offense based on the same criminal conduct does not make the plea bargain into a separate prosecution." The element of guilty knowledge was at issue in both charges and the appellant's perjury "obstructed the government's attempt to prove that guilty knowledge." *U.S. v. Stout*, __ F.2d __ (9th Cir. June 17, 1991) No. 90-50483.

9th Circuit holds that defendant's attempt to flush counterfeit bill down the toilet was obstruction of justice. (460) After his arrest, defendant feigned illness so he could go to the bathroom where he tried to flush a counterfeit bill down the toilet. He argued that this was not willful obstruction of justice, as required by section 3C1.1, because it was "an act of panic." The 9th Circuit rejected the argument, noting that a "substantial period of time had passed after appellant was initially apprehended and before he attempted to destroy the bill." Moreover, the appellant had to develop the plan of feigning illness in order to attempt to destroy the bill. *U.S. v. Stout*, __ F.2d __ (9th Cir. June 17, 1991) No. 90-50483.

2nd Circuit affirms separate grouping of offenses for defendant who bribed police to assist escapes. (470) Defendant attempted to bribe an undercover police officer to assist in the escape of four federal prisoners who had recently been arrested in New York. During the course of the negotiations

over a five-month period, defendant also requested the officer to arrange for the escape of two additional prisoners in custody in Texas. The 2nd Circuit upheld the district court's decision to group the offenses involving the New York escapes separately from the offenses involving the Texas escapes. Although defendant was in occasional contact with the undercover officer for over five months, there was no single escape plan. Two distinct bribery payments were independently negotiated for the separate escapes of two prisoner groups located in different states. Defendant never approached the subject of aiding prisoners in Texas until more than a month after making a down payment on the escape of the New York prisoners. "Mere similarities between the agreements do not make them a common plan." *U.S. v. Ahuja*, slip copy (2nd Cir. June 12, 1991), No. 90-1044.

4th Circuit affirms separate grouping of firearms offenses. (470) Defendant pled guilty to 22 different firearms offenses in connection with his possession of weapons in three different states over a period of several years. The 4th Circuit upheld the district court's decision to group the offenses into three different groups under guideline section 3D1.2. Under the 1987 version of the guidelines, the firearms offenses are not offenses for which the guidelines either require or prohibit grouping. The district court could properly conclude that the events involved in defendant's offenses constituted three independent courses of criminal conduct. Defendant had three separate plans to supply himself with an arsenal, each plan arising after a seizure of his supply of weapons required him to replenish his gun supply. The passage of time between each group of offenses supported the district court's determination. *U.S. v. Wessells*, __ F.2d __ (4th Cir. June 11, 1991) No. 90-5196.

8th Circuit rules no double jeopardy in conviction of jury tampering and enhancement for obstruction of justice. (460)(470)(680) Defendant was convicted of fraudulently selling cattle and timber. As a result of his efforts to improperly influence two of the jurors in his case, defendant received a two-level enhancement for obstruction of justice. He was then convicted of jury tampering, but the district court voided the jury tampering sentence because it thought that such a sentence would constitute double jeopardy, since the fraud sentence had been enhanced on the basis of jury tampering. The 8th Circuit reversed. The defendant was not put "in jeopardy" for the jury tampering until the actual trial for jury tampering. Defendant merely received a harsher sentence for the fraud offense that he otherwise would have received. The guidelines handle this situation in section 3D1.2(c), which provides that when conduct that represents a separate count, such as obstruction of justice, is also a specific offense characteristic or other adjustment to another count, the count represented by the conduct is to be "grouped" with the count to which it constitutes as aggravating factor. Thus, the guidelines required the grouping of the cattle case and the jury tampering case. *U.S. v. Williams*, __ F.2d __ (8th Cir. June 12, 1991) No. 90-2331.

1st Circuit denies credit for acceptance of responsibility based on defendant's continued criminal behavior. (485) The 1st Circuit ruled that the district court did not base its denial of credit for acceptance of responsibility on uncharged conduct. The court stated that it thought defendant had not accepted responsibility for the present offense "or generally with respect to other legal requirements." This remark made it clear that the court did not require defendant to accept responsibility for the uncharged conduct. Rather, it considered defendant's later conduct as evidence that defendant did not accept responsibility for the instant offense. "The fact that a defendant engages in later, undesirable behavior does not necessarily prove that he is not sorry for an earlier offense; but it certainly could shed light on the sincerity of a defendant's claims of remorse." *U.S. v. O'Neil*, __ F.2d __ (1st Cir. June 19, 1991) No. 90-2135.

8th Circuit upholds denial of acceptance of responsibility reduction despite guilty plea and agreement to cooperate. (485) The 8th Circuit affirmed the district court's denial of a reduction for acceptance of responsibility. Defendant's guilty plea and his agreement to cooperate with the government were factors to be considered, but they did not "compel the conclusion that the District Court could not exercise its discretion by denying the requested reduction, especially in light of the Court's decision to apply the obstruction of justice sentencing enhancement." *U.S. v. Duke*, __ F.2d __ (8th Cir. June 10, 1991) No. 90-5351.

9th Circuit denies reduction for acceptance of responsibility where defendant perjured himself during related trial. (485) Defendant argued that the district court's consideration of his perjury was improper under *U.S. v. Piper*, 918 F.2d 839 (9th Cir. 1990), because it did not concern the crime to which he ultimately pled guilty. *Piper* held that a reduction for an acceptance of responsibility should not be denied solely upon the ground that defendant failed to confess to other crimes of which he was accused. Nevertheless, *Piper* also held that evidence of criminal activity "may be used to cast doubt on a defendant's sincere acceptance of responsibility *for the offense of conviction*," as long as the defendant is not required to admit "other criminal conduct." Here, the defendant was not required to admit unrelated crimes of perjury, rather he was required to admit that he knew the bill that he attempted to flush down the toilet was counterfeit. The denial of credit for acceptance of responsibility was proper. *U.S. v. Stout*, __ F.2d __ (9th Cir. June 17, 1991) No. 90-50483.

10th Circuit denies acceptance of responsibility reduction to defendant who went to trial. (485) Defendant was convicted by a jury of drug charges. He maintained his innocence throughout the trial and immediately after his conviction, but

ultimately wrote a letter to the trial judge admitting his guilt. The 10th Circuit affirmed the district court's decision to deny defendant a reduction for acceptance of responsibility, noting that the district court has "substantial discretion on the issue of timeliness of the acceptance of responsibility." "The Sentencing Commission recognized that this guideline was not intended to apply to a defendant that puts the prosecution to its burden of proof at trial by denying the essential elements of the offense, is convicted, and post-trial admits guilt and expresses remorse." *U.S. v. Ochoa-Fabian*, __ F.2d __ (10th Cir. June 10, 1991) No. 89-2283.

2nd Circuit upholds acceptance of responsibility reduction despite enhancement for obstruction of justice. (490) The 2nd Circuit upheld a reduction for acceptance of responsibility even though the district court had also enhanced defendant's sentence for obstruction of justice. The enhancement was based upon defendant's failure to provide the court with a handwriting exemplar. However, the district court could properly have found that defendant's acceptance of responsibility was exceptional. Defendant pled guilty to all charges in a four count indictment, and admitted in some detail his activities in connection with the criminal enterprise. *U.S. v. Restrepo*, slip copy (2nd Cir. June 12, 1991), No. 89-1596.

9th Circuit upholds defendant's "eleventh hour" acceptance of responsibility as not clearly erroneous. (490) The government appealed from the sentence in this case, arguing that the defendant should not have been given credit for acceptance of responsibility since it came at the "eleventh hour." However, the 9th Circuit gave "great deference" to the sentencing judge's ruling, as required by guideline section 3E1.1, application note 5, and found no clear error. *U.S. v. Hill*, __ F.2d __ 91 D.A.R. 7462 (9th Cir. June 24, 1991) No. 89-10643.

Criminal History (§ 4A)

3rd Circuit holds court may review facts underlying prior conviction to determine whether it is a crime of violence. (520) The 3rd Circuit upheld a finding that defendant's prior conviction for grand larceny was a crime of violence for career offender purposes on the ground that the conduct underlying the conviction presented a serious potential risk of physical injury to another. This was not inconsistent with *Taylor v. U.S.*, 110 S.Ct. 2143 (1990), which held that for crimes specifically enumerated, the government may not prove by reference to actual conduct that a prior conviction constituted a "violent felony" when the crime for which the defendant was convicted did not conform to the generic, common-law definition of the crime. Nor did it conflict with *U.S. v. McAllister*, 927 F.2d 136 (3rd Cir. 1991), which held that where the predicate offense is expressly listed as a crime of violence, a more detailed inquiry into the underlying facts is inappropriate. Larceny is not so listed, and defendant's larceny did "present a serious potential risk of physical injury to another." Defendant and two associates entered a house and threatened the occupants with a gun to obtain property and money. *U.S. v. John*, __ F.2d __ (3rd Cir. June 13, 1991) No. 90-3680.

3rd Circuit rejects claim that career offender classification violated 5th and 8th Amendments. (520) Because of his youth at the time of the 1976 offense, and the long lapse between that offense and the instant offense, defendant argued that the severe sentence imposed upon him as a career offender violated the 5th and 8th Amendments. The 3rd Circuit upheld the sentence. The career offender guidelines direct the sentencing commission to assure that career offenders are sentenced at or near the maximum term of imprisonment authorized by statute. Defendant's sentence was two years less than the statutory maximum for the offense. Moreover, "the career offender legislation scheme bears a rational relationship to a legitimate governmental purpose -- to prevent repeat offenders from continuing to victimize society -- hence it easily survives due process challenge." Defendant's 210-month sentence for a controlled substance offense did not violate the 8th Amendment, given the more severe sentences that have survived 8th Amendment challenge. *U.S. v. John*, __ F.2d __ (3rd Cir. June 13, 1991) No. 90-3680.

Determining the Sentence (Chapter 5)

4th Circuit rules prosecutor is not required to explain refusal to move for substantial assistance departure. (710) (780) The 4th Circuit held that absent a motion filed by the government, the district court has no authority to depart downward from a mandatory minimum sentence for a defendant's substantial assistance. Moreover, the decision whether to make such a motion is a "prosecutorial tool which may be exercised in the sole discretion of the government." Thus, a defendant may not inquire into the government's reasons and motives for refusing to make such a motion. Neither 18 U.S.C. section 3553(e) nor 28 U.S.C. section 994(n) gives a defendant a beneficial interest that may be enforced as a right. A defendant who wishes to ensure a right should negotiate a plea agreement agreeing to provide valuable cooperation in return for the government's commitment to file a motion for a downward departure. The defendant then has a contractual right to require the government to fulfill its promise. *U.S. v. Wade*, __ F.2d __ (4th Cir. June 12, 1991) No. 90-5805.

10th Circuit rules government motion is a jurisdictional prerequisite to section 5K1.1 downward departure. (710) The government provided the court with a confidential memorandum detailing defendant's cooperation. However, it did not move for a downward departure from the mini-

mum guideline range under guideline section 5K1.1. The 10th Circuit rejected defendant's argument that the district court had misapplied the guidelines by holding that it lacked jurisdiction to depart in the absence of a government motion. "We have repeatedly held that a government motion is a jurisdictional prerequisite to a section 5K1.1 downward departure from the guidelines." The fact that defendant was requesting a departure below the guidelines, rather than a statutorily imposed minimum sentence, did not change the analysis. *U.S. v. Long*, __ F.2d __ (10th Cir. June 17, 1991) No. 90-6288.

11th Circuit refuses to consider whether government acted in bad faith in refusing to move for downward departure. (710)(780) Defendant contended that the government acted in bad faith in refusing to bring a motion for a downward departure based on her cooperation with authorities. The 11th Circuit refused to consider the claim since defendant did not raise this issue at the district court level. The fact that the district court stated that it was "powerless" to consider a request for a downward departure in the absence of a government motion did not mean that defense counsel did not need to raise this issue to preserve it for appeal. Similarly, the appellate court declined to hear defendant's claim that the government breached her plea agreement. While the plea agreement did state that if defendant rendered substantial assistance the government would move for a downward departure, defendant failed to complain of any breach of the plea agreement to the district court at the sentencing hearing. *U.S. v. Jones*, __ F.2d __ (11th Cir. June 19, 1991) No. 90-8338.

1st Circuit refuses to review failure to depart downward based on defendant's military service. (720)(800) Defendant contended that he was entitled to a downward departure on the basis of his military service record in the Marine Corps. The district court had chosen a sentence at the lower end of the guideline range based on his military service, but found that it was not a mitigating circumstance sufficient to justify a departure. The 1st Circuit found that it was without jurisdiction to review the failure to depart under these circumstances. *U.S. v. Marino*, __ F.2d __ (1st Cir. June 18, 1991) No. 90-1920.

2nd Circuit orders reconsideration of downward departure based on defendant being "misled" by her boyfriend. (720) The district court departed downward because it found that defendant had been "misled" by her boyfriend, a co-defendant. The 2nd Circuit remanded, because the record was unclear as to the reasons for the departure. The court may have been influenced by a memorandum submitted on defendant's behalf which contended that defendant was unaware of the money laundering scheme until her boyfriend, on the night of the arrest, explained why they were watching out for police. If the district court intended to adopt this assertion as a factual finding, departure might be justified. However, the judge may not have accepted this version of the facts since he declined to grant defendant the reduction for minimal role that was given to other defendants. On remand, the district court was directed to reconsider the factual and legal basis for the departure. *U.S. v. Restrepo*, slip copy (2nd Cir. June 12, 1991), No. 89-1596.

1st Circuit rejects downward departure based upon family ties, employment record and drug dependency. (722) Although the district court departed downward based upon defendant's substantial assistance, defendant urged the court to depart further based upon his stable employment record, strong family ties, and rehabilitation from a drug addiction. The court refused, stating that it could not consider those reasons. On appeal, defendant argued that the judge mistakenly thought himself without power to depart. The government, however, argued that the judge exercised his discretion not to depart on those grounds. The 1st Circuit found the district court acted properly, even assuming defendant was right and the district court thought it was without power to depart. The facts in the record did not show any unusual circumstances to justify a departure. *U.S. v. Rushby*, __ F.2d __ (1st Cir. June 20, 1991) No. 91-1112.

D.C. Circuit rules district court knew it had discretion to depart. (722)(800) Defendant claimed that the district court erroneously believed it could not depart from the guidelines based on his long history of steady employment. The D.C. Circuit rejected this claim, finding that the district court knew it had discretion to depart in extraordinary circumstances, but that defendant's case was not extraordinary. The judge remarked that he had "seen nothing" that permitted him to depart from the guidelines. Defendant conceded that offender characteristics such as stable employment are not ordinarily relevant, but argued that the court should find the facts sufficient to warrant an exception. The judge responded, "I've had very great difficulty finding it, and that's the problem." Thus it was clear the judge knew he could depart, but exercised his discretion not to do so. Such a decision is unreviewable. *U.S. v. Dukes*, __ F.2d __ (D.C. Cir. June 14, 1991) No. 90-3081.

D.C. Circuit rejects plea bargain as grounds for downward departure. (722)(780) Defendant was indicted on drug charges carrying a mandatory minimum five-year sentence. Pursuant to a plea agreement, he pled guilty to a less serious charge, but ultimately received a 63-month guideline sentence. He argued that the district court failed to "give effect" to his plea bargain. The D.C. Circuit rejected this argument. His offense level was properly based upon his actual conduct, rather than on the crime to which he pled guilty. The court also rejected his contention that his acceptance of the plea agreement constituted a mitigating circumstance justifying a downward departure. The policy statements in guidelines section 6B1.1 to 6B1.4 show that the commission took plea bargaining into consideration when it devised the guidelines.

Moreover, plea bargains are commonplace. "Aside from 'acceptance of responsibility,' a plea bargain discloses nothing about the defendant's character or condition and it does not add or detract from the seriousness of the offense." *U.S. v. Dukes*, __ F.2d __ (D.C. Cir. June 14, 1991) No. 90-3081.

D.C. Circuit reverses upward departure based upon prior juvenile convictions which were excluded from criminal history calculation. (734) Defendant had five juvenile convictions which were excluded from the calculation of his criminal history score under guideline section 4A1.2. The D.C. Circuit agreed with defendant that the sentencing commission had adequately considered the significance of prior juvenile sentences. Therefore, juvenile sentences which are *not* included in the criminal history calculation under section 4A1.2(d) may not be the basis for a departure under section 4A1.3. The only two exceptions are in Application Note 8: if the juvenile sentence is evidence of similar misconduct or the defendant receives a substantial portion of his income from criminal livelihood. The district court properly considered the apparent leniency of the sentence defendant received for his prior adult conviction for sexual abuse. But the leniency of prior juvenile sentences which were excluded from his criminal history score was not a proper ground for departure. *U.S. v. Samuels*, __ F.2d __ (D.C. Cir. June 21, 1991) No. 90-3069.

2nd Circuit upholds upward departure despite reliance on an improper ground. (740)(745) Defendant attempted to bribe an undercover police officer to assist in the escape of several federal prisoners. The district court departed upward by six months to 24 months based upon the fact that the prisoners defendant was assisting were "major" money launderers involved in "major" narcotics offenses, and that defendant attempted to bribe a law enforcement officer. The 2nd Circuit found some merit in defendant's claim that guideline section 2P1.1(a) took into account the seriousness of the offense by providing for a five-level increase if the escapee committed a felony. Nonetheless, it upheld the departure because it found that the bribery element was an adequate ground for the small departure. The court refused to adopt a rule requiring remand when a district court relies on proper and improper grounds for a departure. A case-by-case approach should be taken and a court may uphold a departure despite a district court's specification of an inappropriate ground if the departure is reasonable in light of the other grounds cited. *U.S. v. Ahuja*, slip copy (2nd Cir. June 12, 1991), No. 90-1044.

11th Circuit affirms upward departure based upon defendant's membership in violent gang. (745) The 11th Circuit rejected defendant's argument that the district court departed upward without giving an adequate basis for the departure. Defendant had been convicted of possession of a firearm by a felon. At sentencing, the government offered evidence that defendant was a member of a violent street gang responsible for "drive-by" shootings connected to their business of trafficking in illegal narcotics. The aggravating circumstances found by the district court included (a) the purpose for possessing the firearms was to carry on the activities of the narcotics trafficking gang, and (b) the dangerousness of the firearms possessed. The district court stated that the offense was part of a criminal livelihood which survived through terrorizing and intimidating witnesses so that the full extent of the criminal behavior never translated into prosecution. The guidelines do not contemplate a scenario such as this. *U.S. v. Sweeting*, __ F.2d __ (11th Cir. June 18, 1991) No. 89-5563.

Sentencing Hearing Generally (§ 6A)

Supreme Court holds that victim's survivors may testify during capital sentencing proceedings. (750)(860) Overruling *Booth v. Maryland*, 107 S.Ct. 2529 (1987), the Supreme Court, in a 6-3 decision written by Chief Justice Rehnquist held that the survivors of the victim may testify during the sentencing phase of a capital punishment case. The court said that allowing a convicted killer to have family and friends testify on his behalf to a sentencing jury while silencing the victim's family "unfairly weighted the scales" of justice. Justices Marshall, White, Blackmun and Stevens vigorously dissented. *Payne v. Tennessee*, __ U.S. __, 111 S.Ct. __ (June 27, 1991) No. 90-5721.

4th Circuit upholds right to appeal despite waiver of appeal in defendant's plea agreement. (780)(800) The government contended that the waiver of the right to appeal the sentence set forth in defendant's plea agreement precluded defendant's appeal. The 4th Circuit upheld defendant's right to appeal. The court found that a defendant may, in a valid plea agreement, waive the right of appeal under 18 U.S.C. section 3742 if the waiver "is the result of a knowing and intelligent decision to forego the right to appeal." The transcript of defendant's Rule 11 hearing revealed that the district court did not question defendant specifically concerning the waiver provision of the plea agreement. Defendant gave no indication that he understood the waiver. Defense counsel told the court that he had advised defendant that the waiver would not prevent defendant from appealing an improper application of the guidelines. The district court corroborated the attorney's understanding of the scope of the waiver provision. Thus, defendant did not "knowingly agree to an absolute waiver of all rights to appeal his sentence." *U.S. v. Wessells*, __ F.2d __ (4th Cir. June 11, 1991) No. 90-5196.

9th Circuit holds that government may appeal sentence imposed as a result of an incorrect application of the guidelines. (800) The 9th Circuit held that the government could appeal the district court's sentence under 18 U.S.C. section 3742(b) because it was imposed in violation of 21 U.S.C.

section 841(b) and because it was imposed as a result of an incorrect application of the guidelines. The court noted that the interpretation of the term "cocaine base" in 21 U.S.C. section 841(b) and U.S.S.G. section 2D1.1 "is a legal question which we review *de novo*." *U.S. v. Shaw*, __ F.2d __ (9th Cir. June 11, 1991) No. 90-50242.

Death Penalty Cases

Supreme Court upholds first degree murder conviction even though jury was not required to unanimously agree on theory of premeditated murder or felony murder. (868) In this capital case, the defendant was convicted under an Arizona statute that characterized first degree murder as a single crime as to which a jury need not agree on one of the alternative statutory theories of premeditated or felony murder. Justice Souter, joined by Chief Justice Rehnquist, and Justices O'Connor and Kennedy held that it did not violate the unanimous verdict rule to permit the jury to reach one verdict based on a combination of the alternative findings. The plurality found a useful analogy in the rule that a jury need not agree on which overt act, among several, was the means by which a crime was committed. Nevertheless, the plurality found it impossible to lay down any single test for determining when two means are so "disparate" as to exemplify "two inherently separate offenses." Looking to history and widely shared state practices, the court held that the Arizona statute did not violate due process. Justice Scalia concurred, stating that such a traditional crime as first degree murder, and a "traditional mode of submitting it to the jury" did not need to pass the court's "fundamental fairness" analysis. Justices White, Blackmun, Marshall and Stevens dissented. *Schad v. Arizona*, __ U.S. __, 111 S.Ct. __ (June 21, 1991) No. 90-5551.

Forfeiture Cases

5th Circuit affirms single jury instruction concerning forfeiture of property possibly containing multiple tracts. (900) Claimants were the owner of a strip shopping center containing seven separate businesses, a vacant building and a common parking lot. The jury rejected claimants' contention that they were innocent owners, and the property was forfeited. Claimants contended that the property covered eight separate tracts of land. Therefore, they argued that the district court should have divided the jury charge and verdict form into eight separate questions, so that the jury could consider their innocent owner defense as to each tract. The 5th Circuit rejected the argument on the facts of this case. Although the testimony about specific drug transactions on the property was particular as to location, most of the evidence relating the claimants' consent was quite general. "In sum, the jury was faced with a credibility choice, and it would be unreasonable to conclude that the jury might have credited [claimants] over the government's witnesses as to one of the tracts, but made an opposite credibility choice as to the other tracts, had the requested instruction been given." *U.S. v. Sonny Mitchell Center*, __ F.2d __ (5th Cir. June 21, 1991) No. 90-5612.

3rd Circuit refuses to dismiss forfeiture action despite fact that seizure without notice and hearing may have been unconstitutional. (920) Claimant asserted that the government's seizure of her home without a pre-seizure notice and hearing was unconstitutional. The 3rd Circuit agreed that the government's seizure may have been unlawful, but held that it did not require dismissal of the forfeiture proceedings since probable cause to seize the premises could be supported by untainted evidence. The indictment of claimant's boyfriend, who had provided the funds for defendant to purchase her home, established probable cause to believe that he was involved in a drug importation scheme. Other evidence obtained independently of the illegal seizure gave the district court reasonable cause to believe that the property probably was derived from drug transactions. *U.S. v. A Parcel of Land, Buildings, Appurtenances and Improvements*, __ F.2d __ (3rd Cir. June 17, 1991) No. 90-5823.

3rd Circuit rules forfeiture action not barred by statute of limitations. (930) The 3rd Circuit rejected defendant's argument that the government's forfeiture action was barred by the statute of limitations and undue delay. The applicable statute of limitations, 19 U.S.C. section 1621 of the customs laws, required the government to commence its forfeiture action within five years after the time when the alleged offense was discovered. Because the government became aware of the transactions giving rise to the forfeiture action in 1986, and brought the action in 1989, the action was not time-barred. The only caselaw involving undue delay involved undue delay between the time of seizure of the property and the post-seizure filing of the forfeiture action. Because this forfeiture proceeding was brought prior to the property's seizure, that caselaw was inapplicable. *U.S. v. A Parcel of Land, Buildings, Appurtenances and Improvements*, __ F.2d __ (3rd Cir. June 17, 1991) No. 90-5823.

3rd Circuit refuses to dismiss forfeiture complaint despite reliance upon immunized testimony. (950) A DEA agent admitted that the claimant's immunized testimony was relied upon, in part, in preparing a forfeiture complaint against the claimant's residence. However, since the government established probable cause to forfeit the property from other independent sources, the 3rd Circuit upheld the district court's refusal to dismiss the forfeiture complaint. First, claimant's boyfriend, who provided claimant with the money to purchase the residence, was indicted for various drug offenses. The probable cause to indict the boyfriend was derived independently of claimant, since she disclaimed any knowledge of his involvement with drugs. An accountant testified that the boyfriend delivered to him about $220,000 in cash in a bag to

be wired to claimant's counsel for the purchase of the residence. The boyfriend did not explain where he obtained the cash. *U.S. v. A Parcel of Land, Buildings, Appurtenances and Improvements*, __ F.2d __ (3rd Cir. June 17, 1991) No. 90-5823.

3rd Circuit holds that donee of drug proceeds may establish innocent owner defense. (960) Claimant purchased a house with $216,000 which she received as a gift from her boyfriend. The money was proceeds from a drug transaction. In a civil forfeiture action against the house, the district court held that defendant could not assert the innocent owner defense because she was not a bona fide purchaser for value. The 3rd Circuit reversed, finding that an innocent owner under the civil forfeiture statute need not be a bona fide purchaser for value. First, the plain language of the innocent owner provision speaks only in terms of an "owner" and in no way limits the term to a bona fide purchaser for value. Moreover, the innocent owner provision in the criminal forfeiture statute is expressly limited to bona fide purchasers for value, while the civil statute omits such language, using the broad term "owner." The relation-back doctrine did not prevent defendant from acquiring an ownership interest in the property. This doctrine does not apply to property that has been exempted from forfeiture under the innocent owner doctrine. *U.S. v. A Parcel of Land, Buildings, Appurtenances and Improvements*, __ F.2d __ (3rd Cir. June 17, 1991) No. 90-5823.

11th Circuit holds that owner who knew co-owner used drug proceeds to purchase and improve property was not innocent owner. (960) Claimant used legitimate funds to jointly purchase and improve with his brother a parcel of real estate. The brother used drug proceeds to finance his portion of the expenses. The 11th Circuit found that claimant was not entitled to the innocent owner defense. The legislative history evinces an intent to forfeit the investments of those who knowingly do business with drug dealers. "Innocent owners are those who have no knowledge of the illegal activities and who have not consented to the illegal activities. As to a wrongdoer, any amount of the invested proceeds traceable to drug activities forfeits the entire property," not merely the funds traceable to the illegal activities. However, a claimant who has actual knowledge of the commingling of legitimate and drug funds may avoid forfeiture as an innocent owner if the claimant can prove he did everything reasonably possible to withdraw the commingled funds or to the dispose of the property. *U.S. v. One Single Family Residence Located at 15603 85th Avenue North, Lake Park, Palm Beach County, Florida*, __ F.2d __ (11th Cir. June 18, 1991) No. 90-5387.

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

Vol. 2, No. 26 | FEDERAL SENTENCING GUIDELINES AND FORFEITURE CASES FROM ALL CIRCUITS. | June 17, 1991

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Guideline Sentences, Generally

9th Circuit notes that new version of Rule 35 does not permit correction of illegal sentences. (110) Although Rule 35(a) Fed. R. Crim. P. formerly allowed the court to correct an illegal sentence, "that version of Rule 35(a) is not applicable to individuals sentenced under the Sentence Reform Act of 1984." Nevertheless, the same relief is available in a petition under 28 U.S.C. section 2255. Since petitioner was in propria persona, the 9th Circuit construed his motion as a petition under 28 U.S.C. section 2255. *U.S. v. Young*, __ F.2d __ (9th Cir. June 13, 1991) No. 90-30257.

9th Circuit holds that prior violent felonies are sentence enhancements and need not be included in indictment. (110) (330) The sentence for being a prior felon in possession of a firearm can be enhanced under 18 U.S.C. section 924(e) if the defendant has three previous convictions for violent felonies. The 9th Circuit held that section 924(e), and its predecessor, 18 U.S.C. section 1202(a), are sentence enhancements, not separate federal offenses. Accordingly, the three prior violent felonies required as a predicate for sentence enhancement "need not be included in the indictment and proved at trial." The court noted that the defendant had ample notice of the government's intent to seek the penalty in this case because the prosecution filed a notice of that intent on the day of his arraignment. *U.S. v. Dunn*, __ F.2d __ (9th Cir. June 10, 1991) No. 89-50185.

9th Circuit rules that "weapon" clause was merely a sentence enhancement and need not be alleged in indictment. (110)(210) Petitioner argued that the district court erred in sentencing him for using a "deadly or dangerous weapon" while assaulting a federal officer in violation of 18 U.S.C. section 111, because the indictment failed to allege the elements of the "weapon" clause. The 9th Circuit rejected the argument, holding that the language and structure of section 111 suggests that the "deadly or dangerous weapon" clause is strictly a sentencing provision. Thus it was not required to be alleged in the indictment, nor proven beyond a reasonable doubt. The court also upheld the constitutionality of this

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sentencing provision. *U.S. v. Young*, __ F.2d __ (9th Cir. June 13, 1991) No. 90-30257.

5th Circuit upholds constitutionality of guidelines. (115) Noting that the argument has been consistently rejected, the 5th Circuit rejected defendant's "tired argument" that the guidelines are unconstitutional because they permit the district court to resolve factual disputes without a jury. *U.S. v. Harris*, __ F.2d __ (5th Cir. June 3, 1991) No. 90-8415.

9th Circuit applies "relevant conduct" ruling retroactively. (130)(170)(790) Defendant argued that in pleading guilty, he relied on *U.S. v. Restrepo*, 883 F.2d 781 (9th Cir. 1989), which prohibited aggregation of amounts of cocaine from charges that were dropped. After he pled guilty, but before he was sentenced, *Restrepo* was withdrawn and a new opinion was filed, 896 F.2d 1228 (9th Cir. 1990) which allowed him to be sentenced for the 2 kilograms in the dropped count. Analyzing his claim under the due process clause, the 9th Circuit distinguished *U.S. v. Albertini*, 830 F.2d 985 (9th Cir. 1987), on the ground that the defendant here was not convicted of any additional crime, he only had his sentence enhanced because of the withdrawing of an opinion. The court found that defendant had no legitimate expectation of finality in the *Restrepo* opinion because the government's petition for rehearing had not yet been denied and therefore the opinion "was not fixed as settled 9th Circuit law." Judge Reinhardt concurred in the judgment because defendant was given the opportunity to withdraw his plea, and refused to do so. *U.S. v. Ruiz*, __ F.2d __ 91 D.A.R. 6628 (9th Cir. June 6, 1991) No. 90-50165.

General Application Principles (Chapter 1)

4th Circuit says adjustment for both managerial role and more than minimal planning was not "double counting." (160)(430)(680) Defendant used a fraudulently obtained government identification badge to persuade a store owner that the government would pay for the furniture, and had two friends pose as government agents. The 4th Circuit rejected defendant's argument that there were no other participants and thus he was not a manager or organizer of the crime. Defendant's friends actively participated in the crime by posing as government agents, and defendant exercised authority over them. Moreover, it was not double counting to enhance defendant's sentence for more than minimal planning. Defendant's use of his friends was just one of the elements relied upon by the court to find more than minimal planning. On his own, defendant also set up a corporation used in committing the crime, obtained the identification badge, and visited the store on more than one occasion. These actions alone, without the involvement of his friends, would have constituted more than minimal planning. *U.S. v. Curtis*, __ F.2d __ (4th Cir. June 4, 1991) No. 90-5317.

5th Circuit rules that "relevant conduct" must be considered in deciding whether crime was committed while on parole. (170)(500) Defendant contended that the district court improperly considered pre-indictment activities in determining that he committed the "instant offense" while on parole and less than two years after his release from prison, under guideline sections 4A1.1(d) and (e). The 5th Circuit rejected the argument, holding that the "instant offense" includes any relevant conduct. In defendant's case, although not specifically charged in the indictment, the government produced evidence that defendant was involved in methamphetamine production in 1987 while he was on parole and less than two years after his release from prison. These activities were nearly identical to the ones for which he was charged and convicted, and were temporally related as well. Because they were part of a continuing course of conduct, the district court could properly increase defendant's criminal history score for committing the offense while on parole and less than two years after release from prison. *U.S. v. Harris*, __ F.2d __ (5th Cir. June 3, 1991) No. 90-8415.

6th Circuit rules false statement which enabled defendant to commit similar offense six years later was not relevant conduct. (170)(300) In 1983, defendant obtained a job with the U.S. Postal Service by lying about his previous back injury. He later reinjured his back, became disabled, and began to receive federal employee disability payments. In 1989,

he stated on a Labor Department that he had not been employed during the previous 15 months, which was a lie. Defendant was convicted of making false statements to a U.S. agency in connection with his 1989 statements to the Labor Department. The 6th Circuit reversed the district court's determination that the 1983 false statement concerning his back was relevant conduct for the instant offense. The two offenses were unrelated acts separated by the passage of six years. Although defendant may not have been in a position to commit the second offense if he had not committed the first offense, this did not, by itself, make the second offense part of the same course of conduct or common scheme or plan as the first offense. *U.S. v. Kappes*, __ F.2d __ (6th Cir. May 29, 1991) No. 90-6276.

Offense Conduct, Generally (Chapter 2)

1st Circuit affirms upward departure based on extreme psychological harm suffered by child sexual abuse victim. (210)(745) Defendant repeatedly molested his live-in girlfriend's young daughter over a period of three years. The district court departed upward 65 months from the 235 months maximum guideline sentence and imposed three successive 100-month sentences. The departure was based on guideline section 5K2.3, extreme psychological injury to the victim, and guideline section 5K2.8, extreme conduct of the defendant. The 1st Circuit affirmed, finding that the factors mentioned by the district court warranted departure as a matter of law. The court rejected defendant's contention that the four-level increase he received for abusing a victim under the age of 12 took into account the inherent psychological injury resulting to a young victim of sexual abuse. The departure was not based simply on age, but on the extreme harm inflicted on the victim. Not only did defendant continuously assault the girl, his abuse took particularly degrading and insulting forms. The victim suffered extreme stress, fear of physical harm to herself and her family, and guilt over these traumatic experiences. *U.S. v. Ellis*, __ F.2d __ (1st Cir. May 31, 1991) No. 90-1698.

8th Circuit holds that young age of sexual abuse victim may justify upward departure. (210)(745) Defendant pled guilty to two counts of abusive sexual contact with a seven-year old victim. The court departed upward from 8 to 12 months under section 5K2.2 (physical injury) and 5K2.3 (psychological injury), because the victim was "a very young child of seven years," and "suffered extensively as a result of the abusive sexual contact." The 8th Circuit held that departure was not justified under the two sections cited by the district court, but ruled that under the version of the guidelines in effect prior to November 1, 1990, it would be proper to base a departure on the very young age of the victim. Effective November 1, 1990, guideline section 2A3.4 was amended to require a four or six level increase if the victim was under the age of 12. This is an indication that the prior version of the guidelines did not adequately address this aspect of defendant's crime. Noting that a four-month departure would be justified by the victim's young age, the court nevertheless remanded the case for the district court to consider a departure based only upon the victim's age. *U.S. v. Morin*, __ F.2d __ (8th Cir. June 4, 1991) No. 90-5358.

5th Circuit affirms enhancing sentence for firearms offense where weapon was used to commit murder. (210)(330)(380) The court properly enhanced defendant's firearms sentence under section 2K2.1, finding that defendant committed murder during the course of a drug conspiracy. Section 2K2.1(c)(2) directs a court to apply section 2X1.1 if the firearm was used or possessed in connection with another offense, and to use the guideline for the other offense if it is more specific. Murder is covered by section 2A1.1. The 5th Circuit found that defendant's offense was not a justifiable homicide. He sought his victim, laid in wait, and with the help of his brother, provoked the argument that resulted in the victim's death. Defendant received adequate notice of the government's intent to seek enhancement of his sentence under section 2K2.1. Evidence relating to the homicide was presented at the sentencing hearing, and defendant had an opportunity to cross-examine the government's witness or introduce his own evidence, but failed to do so. *U.S. v. Harris*, __ F.2d __ (5th Cir. June 3, 1991) No. 90-8415.

6th Circuit affirms upward departure for defendant who kidnapped child so that he could eventually marry her. (210)(745) Defendant developed a strange obsessive relationship with a young child that he babysat. When the parents attempted to end the relationship by moving, defendant kidnapped the three-year-old girl, intending to marry her when she turned 13. The district court departed upward because (a) the kidnapping was of a specific victim for a specific purpose, and (b) defendant intended to complete the crime, and no matter what the period of incarceration might be, he intended to find the child so that she could help her fulfill her "destiny." The 6th Circuit affirmed the upward departure. Federal kidnapping generally encompasses three types of kidnapping, none of which described defendant's crime. Defendant's admitted purpose in kidnapping the child was to possess her and keep her from her parents, which is indisputably rare and sufficiently aggravating to warrant a departure. *U.S. v. Patrick*, __ F.2d __ (6th Cir. June 5, 1991) No. 90-3602.

9th Circuit holds that "give me all your money of I'll shoot" was "express threat of death." (220)(680) Guideline section 2B3.1(b)(2)(D) provides for a two level increase in the robbery offense level "if an express threat of death was made." Application Note 8 lists one example: "Give me the money or I will shoot you." In this case the defendant presented demand notes which stated "Give me all your money or I'll shoot." Defendant pointed out that the demand notes did

not include a specific threat of "death." Nevertheless, the 9th Circuit followed the Application Note, and held that the demand notes here were sufficient to constitute express threats of death. The court rejected defendant's argument that this was "double counting," noting that the offense of robbery can be committed without such threats. *U.S. v. Eaton*, __ F.2d __ (9th Cir. May 31, 1991) No. 90-50499.

1st Circuit affirms mandatory minimum sentence against due process challenge. (245) The 1st Circuit rejected defendant's contention that the penalty provisions of 21 U.S.C. section 841(b)(1)(B) violated due process because the statute ambiguously mandates imprisonment, fine or "both." First, despite the ambiguous language in the statute, the circuits are unanimous in holding that legislative intent requires a prison sentence for an offender who possesses a certain amount of a controlled substance. Second, no specific quantity of a controlled drug is required to convict under section 841. Only in sentencing does quantity become a factor. Hence, section 841 does not violate the constitutional rights of an innocent person. Finally, under the sentencing guidelines, defendant already faced a prison sentence, so defendant was given due process notice before he received a prison term. *U.S. v. McMahon*, __ F.2d __ (1st Cir. June 3, 1991) No. 90-2086.

6th Circuit bases mandatory minimum sentence on total drugs involved in conspiracy. (245)(380) Defendant was convicted of a drug conspiracy involving 2 to 3.5 kilograms of cocaine. The 6th Circuit found that the district court erroneously failed to impose the mandatory minimum 10-year sentence. The penalty provisions for substantive drug offenses contained in 21 U.S.C. section 841 apply to related conspiracy convictions under 18 U.S.C. section 846. The penalty for possession with intent to distribute 500 or more grams of cocaine is five to 40 years, with a minimum of 10 years where the defendant has previously been convicted of a drug offense. The trial court incorrectly ruled that the mandatory minimum applied only where the conspiracy dealt in quantities of 500 grams or more *at one time*. The 6th Circuit held that the court should have added up the total amount sold during the lifetime of the conspiracy. *U.S. v. Hodges*, __ F.2d __ (6th Cir. June 7, 1991) No. 90-1124.

5th Circuit refuses to review alleged error in drug calculation where offense level would not change. (250) The 5th Circuit refused to consider defendants' argument that the district court improperly calculated the quantity of phenyl-2-propanol seized during the drug conspiracy. The calculations approved by the district court showed an equivalency to 43.33 grams of cocaine, while those submitted by defendants reflected an equivalency of 20.99 grams. Either calculation placed defendants in offense level 34, which ranges from 15 to 50 kilograms. *U.S. v. Harris*, __ F.2d __ (5th Cir. June 3, 1991) No. 90-8415.

6th Circuit finds no 6th Amendment violation in judge's ability to determine drug quantity and firearm possession. (250)(280) It does not violate the 6th Amendment for the judge, rather than a jury, to determine the quantity of drugs involved in an offense. It also is constitutional for the district court, rather than the jury, to determine whether defendant's sentence should be enhanced for possessing a firearm in the scope of a drug transaction. The district court relied upon testimony from a witness that the court itself deemed "not all that credible." But the 6th Circuit upheld the enhancement since defendant presented no evidence showing that it was "clearly improbable" that the weapon was connected with the offense. Defendant only made the general and insufficient allegation that the judge's determination would have been different under the "beyond a reasonable doubt" standard of proof. *U.S. v. Hodges*, __ F.2d __ (6th Cir. June 7, 1991) No. 90-1124.

6th Circuit rules court made explicit finding concerning quantity of cocaine in conspiracy. (250) The 6th Circuit rejected defendant's claim that the trial court erroneously failed to make a specific finding as to the amount of cocaine involved in the conspiracy. The court made a specific finding that at least 5.25 kilograms and less than 15 kilograms of cocaine were involved in the conspiracy. During sentencing, the court stated that the testimony of one witness established that at least 5.25 kilograms were distributed, and that there was sufficient evidence to determine that additional cocaine was involved. However, to determine that 18 kilograms was involved, the court would have to believe the testimony of a witness that the court did not find credible. *U.S. v. Paulino*, __ F.2d __ (6th Cir. June 3, 1991) No. 90-5090.

9th Circuit, following Chapman, holds that LSD includes weight of blotter paper. (250) Following the Supreme Court's decision in *Chapman v. U.S.*, 111 S.Ct. __ (May 30, 1991), the 9th Circuit held that blotter paper is a "mixture or substance containing a detectable amount" of LSD, and therefore the district court erred in not including its weight when sentencing the defendant under 21 U.S.C. section 841(b)(1)(B)(v). *U.S. v. Mosti*, __ F.2d __ (9th Cir. June 13, 1991) No. 90-50235.

9th Circuit calculates offense level based on amount of drugs for which defendant negotiated. (265) Defendant argued that the district court erred in basing his offense level on the amount of cocaine for which he negotiated (50 kilograms) rather than the amount he actually possessed (49.97 kilograms). The extra .03 kilograms raised his offense level from 151 to 188 months. Relying on application note 1 to section 2D1.4, the 9th Circuit held that the judge properly used the 50 kilogram amount because this was the amount for which the defendant negotiated. *U.S. v. Molina*, __ F.2d __ (9th Cir. June 10, 1991) No. 90-50129.

4th Circuit affirms sentence based on total amount of drugs involved in conspiracy. (275) The 4th Circuit rejected defendant's argument that the district court should have attributed to him only the crack that he personally distributed, rather than the total amount which flowed through the conspiracy and of which he was reasonably aware. Application note 1 of guideline section 2D1.4 indicates that drug conspirators should be punished in a manner commensurate with the scale of the conspiracy, rather than their personal participation in the conspiracy. *U.S. v. Campbell*, __ F.2d __ (4th Cir. June 5, 1991) No. 90-5497.

5th Circuit affirms sentencing co-conspirators on the basis of total quantity of drugs seized from all co-conspirators. (275) The 5th Circuit rejected defendants' argument that it was improper to attribute to each of them the total quantity of drugs seized from all co-conspirators. As co-conspirators engaged in a common enterprise, the defendants could have reasonably foreseen that any member of the conspiracy could have been in possession of that quantity of drugs at any time. *U.S. v. Harris*, __ F.2d __ (5th Cir. June 3, 1991) No. 90-8415.

6th Circuit finds it "reasonably foreseeable" that conspiracy would involve 5 kilograms of cocaine. (275) The 6th Circuit rejected defendant's argument that the district court erred in failing to make a determination as to the amount of cocaine involved in the conspiracy as it related to him. Evidence indicated that he was involved in the conspiracy from the beginning, in several different respects. The district court's finding that he either knew or could have reasonably foreseen that the conspiracy would involve at least five kilograms of cocaine was not clearly erroneous. *U.S. v. Paulino*, __ F.2d __ (6th Cir. June 3, 1991) No. 90-5090.

6th Circuit rules defendant was estopped by argument that prior offense was part of same offense. (275)(500) Defendant contended that because he was incarcerated until September, 1988, he should not be held responsible for any drugs involved in his drug conspiracy until after that date. The 6th Circuit rejected this argument, since it was inconsistent with his position at sentencing that the prior arrest was "all part of the same behavior pattern" as the instant offense. He made this argument in an attempt to convince the court that the prior conviction should be considered as part of the conspiracy and not as a prior offense for criminal history purposes. *U.S. v. Paulino*, __ F.2d __ (6th Cir. June 3, 1991) No. 90-5090.

6th Circuit affirms sentencing defendant on the basis of total drugs involved in conspiracy. (275) Defendant argued that even if he was a member of the alleged conspiracy, his offense level should have been 12 since the only evidence of a transfer involving him was when he handed a vial containing less than 25 grams of cocaine to a government informant. However, the district court found that defendant was aware of quantities of cocaine in the range of 500 grams to 2 kilograms or that such quantities were reasonably foreseeable to him. The 6th Circuit held this conclusion was not clearly erroneous given defendant's relationship with his brothers, the two other co-conspirators, the evidence that he had accompanied one brother on at least three trips to one of their suppliers of cocaine, and his joint occupation of premises with a frequent customer of the business. *U.S. v. Hodges*, __ F.2d __ (6th Cir. June 7, 1991) No. 90-1124.

11th Circuit remands for district court to determine amount of cocaine involved in conspiracy. (275) The district court set defendant's base offense level at 36, which is warranted when 50 or more kilograms of cocaine are involved. Defendant contended that neither his conduct nor the reasonably foreseeable conduct of his co-conspirators justified a conclusion that defendant knew the transaction involved 50 or more kilograms of cocaine. The 11th Circuit remanded for the district court to make an explicit finding of the amount of cocaine in the conspiracy known or reasonably foreseeable to defendant. *U.S. v. Gutierrez*, __ F.2d __ (11th Cir. May 29, 1991) No. 89-3938.

5th Circuit upholds calculation of loss in bank fraud case. (300) Defendant was the vice-president of a credit union. He offered to return to a borrower, for the sum of $150,000, a $1.5 million note to the credit union, marked "Paid." Defendant contended that the amount of loss should only be $150,000, rather than $1.5 million, since under state law the credit union would still have been able to recover the $1.5 from the borrower without the original note. The 5th Circuit rejected this argument, since the potential loss to the credit union was the entire $1.5 million. *U.S. v. Hooten*, __ F.2d __ (5th Cir. May 31, 1991) No. 90-5586.

8th Circuit upholds enhancement for offense committed on bond and denial of credit for acceptance of responsibility. (320)(485)(680) Based on defendant's series of arrests both before and after being arrested on the instant offense, the district court denied defendant a reduction for acceptance of responsibility. Defendant also received a three-level enhancement under guideline section 2J1.7 because the instant offense was committed while he was released on bond. The 8th Circuit affirmed, finding no impermissible double counting. The denial of the reduction for acceptance of responsibility was based on his continued criminal conduct, and not his release status. *U.S. v. Hibbert*, 929 F.2d 434 (8th Cir. 1991).

1st Circuit affirms upward departure for alien smuggling even though one ground was improper. (340)(733)(745) Defendant pled guilty to entering the U.S. after deportation. Six months earlier he had been arrested and deported for a similar illegal entry. On both occasions, he was smuggling illegal aliens. The 1st Circuit affirmed an upward departure, even though it found one of the grounds relied upon was im-

proper. It was proper for the court to base its departure on the uncharged alien smuggling offense, since it was related to the offense of conviction. The court could also properly rely on defendant's previous uncharged alien smuggling activity, which endangered the safety of others. Finally, the recency of the prior offense could be an indicator of recidivism, which can justify a departure. But it was improper for the district court also to rely on defendant's prior uncharged illegal entry, because that was an essential element of the instant offense. Nevertheless, the appellate court did not remand the case, because it was convinced that the district court would impose the same sentence on remand. *U.S. v. Figaro*, __ F.2d __ (1st Cir. June 4, 1991) No. 90-1675.

Adjustments (Chapter 3)

4th Circuit reverses enhancement for physical restraint of victim in stabbing case. (410) Defendant was an accessory after the fact to a murder in which the murderer held the victim while stabbing him. The 4th Circuit reversed an enhancement under guideline section 3A1.3 for physical restraint of the victim. It found that section 3A1.3 requires something beyond acts which are "part and parcel" of a stabbing. "The very act of stabbing will involve some physical restraint." An upward adjustment may be made under this guideline only "in the context of an act which adds to the basic crime." Although defendant's sentence still fell within his new guideline range, the court remanded the case, since it was not clear that the court would have chosen the same sentence. Judge Niemeyer dissented because he found that restraining a victim prior to his murder is not inherent or necessary in accomplishing the murder. *U.S. v. Mikalajunas*, __ F.2d __ (4th Cir. June 4, 1991) No. 90-5684.

1st Circuit rejects claim that defendant and co-defendant had role parity. (430) Defendant pled guilty of conspiracy to distribute cocaine and other drug related charges. The district court had increased defendant's offense level under guideline section 3B1.1 because defendant (a) arranged the cocaine transaction, (b) caused his co-defendant to deliver the cocaine, and (c) received the purchase money and distributed a portion of it to the government informant who acted as broker. Defendant argued that these factors did not establish that he exercised control over another participant, but merely that his role in the offense was on a par with his co-defendant. The 1st Circuit affirmed, finding the district court's action not unreasonable given the facts before it. Defendant was acting on his own when he agreed to supply the government informant with two kilograms of cocaine, at a fixed price. At the transaction it was defendant who received the payment for the cocaine, decided to pay the $1,000 broker fee, and tendered it to the informant. *U.S. v. Calderon*, __ F.2d __ (1st Cir. June 4, 1991) No. 91-1006.

6th Circuit affirms enhancement for defendant who assumed managerial role in his co-conspirator's absence. (430) The 6th Circuit upheld defendant's managerial role in a drug conspiracy based upon evidence that defendant directed the distribution of cocaine during his brother's absence. There was also testimony that defendant wired proceeds, rented an apartment, automobiles, and a mobile telephone in the name of individuals on behalf of the conspiracy. While his status was not as elevated as his brother's, there was sufficient evidence to conclude that defendant merited a two-point increase in offense level based upon his role in the offense. *U.S. v. Paulino*, __ F.2d __ (6th Cir. June 3, 1991) No. 90-5090.

4th Circuit refuses reduction for mitigating role to drug conspirator. (440) The 4th Circuit upheld the district court's refusal to decrease defendant's offense level based on a mitigating role. Although the trial court adopted the portion of defendant's presentence report which indicated he was "less culpable" than the other defendants, the presentence report also found that his conduct did not qualify him for a mitigating role adjustment. Defendant did not meet the burden of proving he was entitled to the reduction. Moreover, defendant did receive the benefit of a reduced role because his base offense level was lower than the other co-conspirators based on his reduced knowledge of the amount of drugs involved in the conspiracy. *U.S. v. Campbell*, __ F.2d __ (4th Cir. June 5, 1991) No. 90-5497.

5th Circuit rejects minor role for defendant who supplied chemical supplies to drug conspiracy. (440) Defendant was convicted of conspiracy to manufacture methamphetamine. The 5th Circuit rejected defendant's argument that he was an unknowing participant in the scheme, and thus entitled to a reduction based upon his minor status. Defendant played a significant role in the drug conspiracy, providing the drug lab with needed chemical supplies. *U.S. v. Harris*, __ F.2d __ (5th Cir. June 3, 1991) No. 90-8415.

6th Circuit rejects minimal status for co-conspirator who permitted his premises to be used as a base of operations. (440) The 6th Circuit rejected defendant's contention that he was a minimal, rather than a minor, participant in a drug conspiracy with his two brothers. Although he was the least culpable, he was involved in more than a single transaction. He could not conclusively prove that his trips with his brother to one of the conspiracy's suppliers was for his own use. Defendant was present during several of the drug purchases. Moreover, his roommate was a frequent customer of the business who was also intimately involved in the drug transaction. Defendant's conduct contributed to the use of his premises as a base of operations for at least some of the conspiratorial business. *U.S. v. Hodges*, __ F.2d __ (6th Cir. June 7, 1991) No. 90-1124.

9th Circuit denies reduction for minimal participation where defendant played a formative role. (440) Defendant argued that he played only a peripheral role in the transaction and was the least culpable of the other participants. Nevertheless, the 9th Circuit upheld the district court's refusal to reduce his offense level for being a minimal or minor participant under section 3B1.2, noting that he "played a significant, indeed formative role in the criminal activity." *U.S. v. Molina*, __ F.2d __ (9th Cir. June 10, 1991) No. 90-50129.

4th Circuit holds that extraordinary interference with police during arrest may justify obstruction enhancement. (460) Defendant fought with police officers during his arrest, and each side gave differing accounts as to the cause of the fight. The district court enhanced defendant's sentence for obstruction of justice, finding that "there was a struggle beyond the norm in this case." The 4th Circuit held that extraordinary interference with or endangerment to law enforcement officials or bystanders during the course of an arrest can constitute an obstruction of justice. Mere flight, or an unpleasant exchange of words would not be sufficient. This case was remanded because the district court did not make sufficient findings. The court did not determine why the struggle ensued or whether it credited the police officer's testimony that defendant intended to use the gun in his hand. Judge Hall dissented, arguing that the obstruction of justice guideline does not encompass flight or resisting arrest, regardless of the danger posed by such actions. *U.S. v. John*, __ F.2d __ (4th Cir. June 4, 1991) No. 90-5052.

9th Circuit upholds obstruction enhancement even though acts were committed during state, not federal, investigation. (460) The 9th Circuit acknowledged that the use of the language "the instant offense" in guideline section 3C1.1 suggests that there must be some connection between the obstruction and the federal offense for which the defendant is being sentenced. However, the court noted that defendant's actions "were certainly designed to obstruct the investigation of the offense he committed, i.e. defrauding insurance companies, and that fraud "violated federal as well as state law." Therefore, the court held that the obstruction of the state investigation into defendant's fraudulent activities was properly considered in enhancing defendant's federal sentence. *U.S. v. Lato*, __ F.2d __ (9th Cir. June 3, 1991) No. 90-10407.

11th Circuit rules flight from police does not constitute obstruction of justice but upholds enhancement. (460)(820) When DEA agents followed defendant's car into a drive-through lane of a fast food restaurant, the car reversed and headed toward a parking spot. When an agent approached the car on foot, the car did not stop, but drove up over a curb and struck another agent's vehicle. Defendant challenged a two-level enhancement for obstruction of justice. The 11th Circuit, following other Circuits, found "that under the prior version of the guidelines in effect at the time defendant was sentenced, mere flight from police does not justify an enhancement for obstruction of justice. The most recent version of the guidelines expressly states this rule. Nonetheless, the court upheld the enhancement in defendant's case. Since defendant created a substantial risk of death or serious bodily injury to another person in the course of fleeing from police, such conduct did not constitute "mere flight." *U.S. v. Burton*, __ F.2d __ (11th Cir. May 31, 1991) No. 90-3421.

1st Circuit upholds acceptance of responsibility provision against constitutional challenge. (480) Defendant argued that where a convicted defendant claims to be innocent, the acceptance of responsibility provision coerces a defendant into waiving his or her right to assert his or her innocence on appeal. The 1st Circuit found no merit in the argument. *U.S. v. De Jongh*, __ F.2d __ (1st Cir. June 5, 1991) No. 90-2060.

9th Circuit holds that court may not grant more than a single two-level reduction for acceptance of responsibility. (480) Agreeing with *U.S. v. McDowell*, 888 F.2d 285, 293 (3rd Cir. 1989), and *U.S. v. Wright*, 873 F.2d 437, 444 (1st Cir. 1989), the 9th Circuit held that the guidelines do not authorize the granting of more than a single two-level reduction under section 3E1.1. Thus the district court properly refused to grant defendant a six-level reduction by granting two-point reductions for each of his three counts of conviction. *U.S. v. Eaton*, __ F.2d __ (9th Cir. May 31, 1991) No. 90-50499.

4th Circuit rejects reduction for defendant who was late in accepting responsibility. (485) Defendant contended that the district court erred in ruling that his statement accepting responsibility for his crime came too late to grant him a reduction. The 4th Circuit affirmed, since timeliness of a defendant's conduct in accepting responsibility is a proper consideration. Defendant did not attempt to accept responsibility until the sentencing hearing. Moreover, after an earlier aborted sentencing hearing, defendant left the state hospital without authorization, an arrest warrant had to be issued, and defendant was subsequently arrested. *U.S. v. Curtis*, __ F.2d __ (4th Cir. June 4, 1991) No. 90-5317.

5th Circuit refuses to require district court to articulate reasons for denial of acceptance of responsibility. (485) Defendant contended that he was entitled to a two-level reduction for acceptance of responsibility, and that the district court erred in failing to state any reasons for its denial of the reduction. The 5th Circuit affirmed the district court's action, and refused to impose an obligation on the district court to state its reasons for the denial. Although defendant did plead guilty, the record contained sufficient evidence to support the denial. When officers asked defendant where he obtained the cocaine, he said he "found it on the ground." The probation officer who interviewed defendant said defendant exhibited "no remorse." Although defendant did apologize to the court, credibility determinations are "critical to the decision concerning acceptance of responsibility and

protected by the clearly erroneous standard." *U.S. v. Hardeman*, __ F.2d __ (5th Cir. May 31, 1991) No. 90-8342.

5th Circuit affirms denial of acceptance of responsibility reduction to defendant who stood trial. (485) Defendant contended that he was entitled to a reduction for acceptance of responsibility because he abandoned his fraudulent scheme voluntarily and the sentencing court refused the reduction only because he insisted on going to trial. The 5th Circuit upheld the denial of the reduction. The district court concluded that defendant had not abandoned his scheme, and that he was untruthful with authorities. Defendant's decision to stand trial was only one of several factors mentioned in the presentence report. *U.S. v. Hooten*, __ F.2d __ (5th Cir. May 31, 1991) No. 90-5586.

6th Circuit denies acceptance of responsibility reduction based on defendant's letter to probation officer. (485) The 6th Circuit upheld the district court's decision to deny defendant a reduction for acceptance of responsibility. Defendant's letter to the probation officer stated "I myself don't believe I'm guilty of this crime." He further stated that he used cocaine but "was not involved in a plan to buy and sell it." *U.S. v. Hodges*, __ F.2d __ (6th Cir. June 7, 1991) No. 90-1124.

7th Circuit denies acceptance of responsibility reduction where defendant was on probation after similar crime. (485) Defendant was convicted of trafficking in counterfeit goods, an offense for which she had also been convicted several years earlier. The 7th Circuit found that it was proper for district court to rely on defendant's probationary status and her knowledge of the illegality of her conduct to deny her a reduction for acceptance of responsibility. These factors showed that she "willfully and knowingly" violated the applicable statute, and therefore were relevant to the determination of whether she accepted responsibility for her offense. *U.S. v. Song*, __ F.2d __ (7th Cir. May 31, 1991) No. 89-2453.

8th Circuit affirms denial of acceptance of responsibility reduction despite defendant's admission of guilt. (485) Defendant argued that he was entitled to a reduction for acceptance of responsibility because he admitted his involvement in the conspiracy, indicated a desire to cooperate with the government, acknowledged his guilt while testifying at trial and disclosed his involvement to his probation officer for use in preparing his presentence report. The 8th Circuit upheld the denial of the reduction. Defendant was caught transporting 70 pounds of marijuana. He was advised to contact the government if he wished to cooperate, and although he later met with agents and gave a full statement of his activities, he subsequently refused to cooperate further. He admitted his acts, but denied that he did anything wrong and expressed no remorse. *U.S. v. Clair*, __ F.2d __ (8th Cir. May 30, 1991) No. 90-2840.

9th Circuit upholds denial of credit for acceptance of responsibility where defendant claimed entrapment. (485) "[O]n almost every key incident concerning both his predisposition to engage in drug trafficking and the government's alleged inducement in getting him to cooperate, the appellant provided a story very different from the one the government offered -- which ultimately was the story the jury believed." Accordingly the 9th Circuit found the record supported the judge's conclusion that defendant failed to satisfy the requirements of section 3E1.1. The court emphasized however, that it was not holding that the defense of entrapment and a reduction for acceptance of responsibility "are necessarily and in all cases incompatible." *U.S. v. Molina*, __ F.2d __ (9th Cir. June 10, 1991) No. 90-50129.

9th Circuit upholds denial of acceptance of responsibility credit where defendant obstructed justice. (485) As of November 1, 1989, a defendant who obstructs justice may nevertheless be given credit for acceptance of responsibility. In this case however, the district court's denial of credit was not clearly erroneous in light of the probation officer's recommendation that any expression of remorse lacked sincerity, and "the very purposeful and methodical way in which [defendant] attempted to suborn perjury." *U.S. v. Lato*, __ F.2d __ (9th Cir. June 3, 1991) No. 90-10407.

Criminal History (§ 4A)

5th Circuit upholds enhancement for escaping while under a criminal justice sentence. (500)(680) Defendant argued that it was impermissible double counting to enhance his criminal history score for his escape while under a criminal justice sentence. The 5th Circuit rejected this argument, finding it was bound by two recent 5th Circuit decisions. *U.S. v. Taylor*, __ F.2d __ (5th Cir. June 3, 1991) No. 89-2634.

5th Circuit excludes driving without insurance misdemeanor from defendant's criminal history. (500) Defendant contended that his prior conviction for driving without insurance, a misdemeanor, should have been excluded from his criminal history because it was "similar" to the offenses excluded under guideline section 4A1.2(c). The 5th Circuit agreed, finding that the offense was similar to the offense of driving with a revoked or suspended license. The court refused to adopt a rigid test for determining when two offenses are similar. It adopted a "common sense approach which relies on all possible factors of similarity, including a comparison of punishments imposed for the listed and unlisted offenses, the perceived seriousness of the offense as indicated by the level of punishment, the elements of the offense, the level of culpability involved, and the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct." *U.S. v. Hardeman*, __ F.2d __ (5th Cir. May 31, 1991) No. 90-8342.

10th Circuit holds that a sentence imposed after the commission of the instant offense is a 'prior sentence.' (500) While out on bond pending trial for counterfeiting charges in Colorado, defendant fled the jurisdiction and committed additional counterfeiting offenses. He was convicted in federal court in Mississippi and served six months. He then returned to face the original charges in Colorado, where two points were added to his criminal history score for the six-month Mississippi sentence. The 10th Circuit affirmed. A sentence imposed after the defendant's commission of the instant offense, but prior to sentencing, is a prior sentence, unless the prior sentence is for conduct that is part of the instant offense. The offenses committed in Mississippi and Colorado occurred months apart and were "severable instances of unlawful conduct." The offenses involved different individuals, different counterfeiting equipment, and the counterfeit bills bore different serial numbers. The Mississippi case was not consolidated with the Colorado case for trial or for sentencing. *U.S. v. Walling*, __ F.2d __ (10th Cir. June 6, 1991) No. 90-1198.

8th Circuit affirms downward departure for career offender where criminal history was overstated. (520)(733) After initially sentencing defendant to 292 months as a career offender, the court reconvened the sentencing hearing and departed downward to the statutory minimum 10 years on the ground that defendant's criminal history was overrepresented. The 8th Circuit affirmed. The three prior robberies had been treated by the state "as more or less one criminal episode," with concurrent sentences. The drug offenses were consolidated and sentenced concurrently, and defendant was paroled after about 18 months. It was proper for the district court to consider the historical facts of defendant's career, including his age when he committed the offenses. Because the district court based its sentence on the guideline range that would have applied absent the overstatement, the sentence was reasonable. *U.S. v. Senior*, __ F.2d __ (8th Cir. June 4, 1991) No. 90-2912.

9th Circuit holds that possession of an unregistered firearm is a violent crime for "career offender" purposes. (520) Although possession of an unregistered firearm does not require the use or threatened use of physical force, it is a crime that "by its nature" involves a substantial risk of physical force against persons or property. Not all firearms must be registered under 26 U.S.C. section 5861(d). Only firearms that Congress has found to be inherently dangerous, such as sawed off shotguns and hand grenades, must be registered. Therefore, the 9th Circuit held that the defendant's possession of an unregistered sawed-off shotgun was a crime of violence for career offender purposes. *U.S. v. Dunn*, __ F.2d __ (9th Cir. June 10, 1991) No. 89-50185.

D.C. Circuit holds that, absent request, court need not review facts underlying prior crimes of violence. (520) Defendant argued that, before finding he was a career offender, the district court should have looked at the facts underlying his prior robberies to determine whether they were actually crimes of violence. The D.C. Circuit rejected the argument. A district court does have discretion to determine that particular prior offenses were *not* crimes of violence even if, in general, those offenses are violent and are listed as such by the commentary. However, there is no obligation to review the underlying facts in the absence of a defendant's request to do so. Here, defense counsel made no such request. *U.S. v. Bradshaw*, __ F.2d __ (D.C. Cir. June 7, 1991) No. 90-3105.

Determining the Sentence (Chapter 5)

D.C. District Court imposes no imprisonment but departs upward in probation term for mentally ill defendant. (560)(745) Defendant was diagnosed as mentally ill but competent to stand trial. The D.C. District Court found that in a supervised environment defendant accepted medication, which regularized his behavior. Without such medication, defendant would quickly revert to his "irresponsible state in which he engaged in criminal conduct and became a danger to his family and to the community." The guidelines left imprisonment to the sentencing court's discretion and mandated a one- to three-year term of probation. The court found that incarceration was not indicated as long as defendant continued to accept his medication, but departed upward and sentenced defendant to five years' probation. It found the departure was justified by concern for the safety of defendant's family and the community if his medication and treatment were not supervised by the probation officer for as long as possible. *U.S. v. Coleman*, __ F.Supp. __ (D.D.C. May 2, 1991) CR. 89-0483- LFO.

7th Circuit upholds prohibition against associating with white supremacists as condition of supervised release. (580) Defendant pled guilty to possessing an unregistered firearm and was sentenced to 14 months imprisonment and a term of supervised release. One of the conditions of the supervised release was that defendant not participate in or associate with members of "skinhead" or other neo-Nazi groups. The 7th Circuit upheld this as a proper condition of supervised release. The condition did not lack certainty, and was sufficiently clear to put defendant on notice regarding the parameters of the court's restriction on his activities. The condition also complied with the specificity requirements of 18 U.S.C. section 3563(b)(7). Moreover, the condition did not involve a greater deprivation of liberty than was necessary, in violation of 18 U.S.C. 3583(d)(2). The district court was correct in concluding that defendant needed to be separated from other members of white supremacist groups in order to stay out of trouble. *U.S. v. Showalter*, __ F.2d __ (7th C May 30, 1991) No. 90-1361.

D.C. Circuit upholds term of supervised release after maximum prison term. (580) The D.C. Circuit rejected defendant's contention that the imposition of a term of supervised release following a maximum term of imprisonment constituted an illegal sentence. Although the statute provided for imprisonment for not more than five years, the language of the supervised release statute allows a court to include such release "as part of the sentence." not "as part of the imprisonment." These phrases suggest that imprisonment and supervised release are discrete portions of a sentence. Moreover, every court to consider this issue has held that 18 U.S.C. section 3583 permits a term of supervised release beyond the maximum term of imprisonment. *U.S. v. Jamison*, __ F.2d __ (D.C. Cir. June 4, 1991) No. 90-3197.

9th Circuit reduces guideline sentence that exceeded the statutory maximum. (660) Defendant was sentenced as a career offender to 150 months in custody. However U.S.S.G. 5G1.1(a) provides that the statutory maximum displaces any higher guideline sentence. Since a sentence for possession of an unregistered firearm cannot exceed ten years, the sentence was reduced to 120 months. *U.S. v. Dunn*, __ F.2d __ 91 D.A.R. 6733 (9th Cir. June 10, 1991) No. 89-50185.

Departures Generally (§ 5K)

Supreme Court holds that Rule 32 requires "reasonable" notice and opportunity to be heard before the court departs from the guidelines. (700)(750) In a 5-4 opinion written by Justice Marshall, the Supreme Court held that "before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence or in a prehearing submission by the government, Rule 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling." This notice must specifically identify the ground on which the district court is contemplating an upward departure. The court did not decide how much notice is "reasonable," leaving it to the lower courts to adopt appropriate rules. Justices Souter, White, O'Connor and Chief Justice Rehnquist dissented. *Burns v. U.S.*, __ U.S. __, 111 S.Ct. __, 91 D.A.R. 6934 (June 13, 1991) No. 80-7260.

D.C. Circuit holds "coercion" does not require downward departure. (720)(800) Defendant argued that the district court improperly refused to depart downward for coercion under guideline section 5K2.12. Although defendant claimed to have presented evidence that he was the victim of physical injuries, property damage and threats of continued harm if he did not participate in the drug distribution ring, the D.C. Circuit refused to consider the claim. The guidelines do not require a downward departure in the case of coercion, and the district court's decision not to depart is unreviewable. *U.S. v. Jamison*, __ F.2d __ (D.C. Cir. June 4, 1991) No. 90-3197.

New York District Court departs downward where deportation would separate defendant from his family. (721) Defendant pled guilty to importation of heroin. Defendant was a permanent resident married to a permanent resident with a one and one-half year old daughter who was an American citizen. He served six years in the U.S. Army and was entitled to citizenship as a result, but made no application out of ignorance of his rights. Upon completion of his term of his imprisonment, defendant was to be deported. He would be separated from his family and friends and probably never be permitted to legally return to the United States. Defendant's guideline range was 41 to 51 months. The Eastern District of New York departed downward and sentenced defendant to time served, which in this case was 15 months, and three years supervised release. The court then turned defendant over to the INS for deportation. *U.S. v. Agu*, __ F.Supp. __ (E.D.N.Y. May 16, 1991) No. 90 CR 210.

1st Circuit affirms upward criminal history departure despite failure to state criminal history was underrepresented. (733) The district court departed upward from criminal history category III to IV because defendant committed another drug offense while awaiting disposition of the instant offense. Defendant conceded that this might warrant an increase in his criminal history category, but argued that the court should first have determined that his criminal history category was underrepresented. The district court stated only that the additional offense warranted a criminal history departure. Acknowledging that the district court's statement might imply a misconception, the 1st Circuit nevertheless affirmed, noting that the district court also stated that "the appropriate criminal history category here is not three but rather category four." *U.S. v. Calderon*, __ F.2d __ (1st Cir. June 4, 1991) No. 91-1006.

Sentencing Hearing (§ 6A)

4th Circuit finds no 6th Amendment violation in ex parte communications between probation officer and the court. (750) Prior to sentencing, the district judge met in chambers with the two probation officers who had prepared defendants' presentence report. The court did not allow questions about the substance of the ex parte conversation, although defense counsel was permitted to examine the probation officers at length about other matters. The 4th Circuit rejected defendants' contention that this violated their 6th Amendment right to counsel. Such an ex parte communication was proper under pre-guidelines law. Under the guidelines, a probation officer continues to be a neutral, information-gathering agent of the court, not an agent of the prosecution. Guidelines sentencing "significantly diminishes the conceivable impact" of such ex parte communication. Moreover, Fed. R. Crim. P. 32 recognizes several circumstances under which a probation officer may communicate ex parte with

the sentencing court without disclosure of the substance of those communications. *U.S. v. Johnson*, __ F.2d __ (4th Cir. June 5, 1991) No. 90-5034.

1st Circuit affirms factual findings where defendant did not object to presentence report. (760) Defendant challenged the district court's findings that he was involved in alien smuggling. The 1st Circuit affirmed. The relevant information concerning alien smuggling was set out in the presentence report and an INS memorandum made available to defendant during discovery. At sentencing, defendant explicitly stated that he agreed with the facts in the presentence report and was only challenging the district court's decision to depart upward. *U.S. v. Figaro*, __ F.2d __ (1st Cir. June 4, 1991) No. 90-1675.

9th Circuit holds that defendant waived two of three objections to presentence report by failing to raise them in the district court. (760) The defendant has the initial burden to proffer evidence to show inaccuracy of the presentence report, and therefore the defendant waived two of his three issues by failing to raise them in the district court. The third issue, regarding the amount of drugs, was properly resolved against him in light of the evidence presented at trial. *U.S. v. Lujan*, __ F.2d __ (9th Cir. June 10, 1991) No. 89-30197.

8th Circuit finds no error in district court's failure to follow government's recommended sentence. (790) Defendant contended that the 46-month sentence he received violated his plea agreement and that the district court improperly exceeded the government's recommended 27-month sentence. The 8th Circuit found no merit to these contentions. The plea agreement specifically stated that the court could sentence defendant anywhere within the statutory maximum. The court also told defendant at the plea hearing that it was not bound by the government's recommendation or the stipulated base offense level. *U.S. v. Hibbert*, 929 F.2d 434 (8th Cir. 1991).

Forfeiture Cases

10th Circuit finds itself bound by 8th Circuit's "erroneous" ruling as to res judicata effect of dismissal of civil forfeiture action. (920) The government filed a civil forfeiture action in Colorado district court against property in which claimant held a lien. The property was sold, and the proceeds were held by the court clerk. The civil forfeiture action was later dismissed, but the owner of the property was then convicted in Missouri, and the Missouri district court ordered the property held in Colorado forfeited. The claimant moved to vacate the Missouri order on the ground that the dismissal of the Colorado civil forfeiture action barred the Missouri criminal forfeiture under res judicata principles. The Missouri district court rejected this claim, even though the Colorado dismissal was with prejudice, and the 8th Circuit affirmed. In the meantime, the Colorado court followed the Missouri court's order, and disbursed the proceeds to the government. On appeal, the 10th Circuit affirmed, but stated that it would have ruled that the dismissal of the civil forfeiture action barred the subsequent criminal forfeiture proceeding. Nonetheless, the Missouri court's ruling had been affirmed and was "itself res judicata as to the res judicata effect of the earlier Colorado judgment." *U.S. v. Lots 43 Through 46, Including Block 32 University Place, Boulder, Colorado*, __ F.2d __ (10th Cir. June 10, 1991) No. 87-1600.

11th Circuit rules transfer of proceeds to Asset Forfeiture Account deprived court of jurisdiction. (920) When the court entered a forfeiture judgment, the claimant filed a notice of appeal, but failed to seek a stay of execution or post a supersedeas bond. The U.S. Marshall transferred the proceeds from the sale of the property into the Asset Forfeiture Fund of the U.S. Treasury. The 11th Circuit ruled that it had no jurisdiction to hear the claimant's appeal, because the transfer of funds into the Asset Forfeiture Fund deprived it of *in rem* jurisdiction. It rejected claimant's argument that 21 U.S.C. section 881(j) provided continuing jurisdiction to hear the appeal. The court also rejected claimant's argument that once the claimant filed a general appearance, the case involved *in personam* jurisdiction. Moreover, the fact that the parties stipulated that the property could be sold and the proceeds maintained by the U.S. Marshal, did not estop the government from utilizing the change to defeat jurisdiction Claimant litigated its claim and pursued all of its remedies. Claimant had the option to move for a stay of execution or post a supersedeas bond and did neither. *U.S. v. One Single Family Residence Located at 6960 Miraflores Avenue*, __ F.2d __ (11th Cir. June 10, 1991) No. 91-5295.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA **Plaintiff** **- vs -** RICHARD PAUL CARROLL **Defendant**	**CASE NO. 1:91-MC-0025** Judge Sam H. Bell **O R D E R**

Currently pending before the court in the above-captioned cause are two motions. On March 26, the petitioner United States of America (hereinafter the Government) filed a motion for respondent Richard Paul Carroll to show cause why he should not be held in contempt of court for his failure to comply with this court's order of March 8, 1991 directing him to appear before Internal Revenue Service (IRS) officer Linda Olen and produce certain documents. Prior to this motion, on March 15, 1991, respondent filed a motion for reconsideration of the this order, which was based upon the recommendation of Magistrate Charles R. Laurie.

This cause was originally instituted on January 11, 1991 by the Government through the filing of a petition to enforce an IRS summons pursuant to 26 U.S.C. §§7402(b) and 7604(a). The summons, issued on September 25, 1990, directed respondent to appear before Olen on October 25, 1990, and to produce documents reflecting income for the tax years 1982, 1984, 1985, 1986, 1987, 1988, and

1989, as follows:

> **These documents and records include, but are not limited to:** Forms W-2, Wage and Tax Statement, Forms 1099 for interest or dividend income, employee earnings statements, and records of deposits with banks or other financial institutions.
>
> **Also include any and all other books, records, documents and receipts for income from, but not limited to, the following sources:** wages, salaries, tips, fees, commissions, interest, rents, royalties, alimony, state or local tax refunds, annuities, life insurance policies, endowment contracts, pensions, estates, trusts, discharge of indebtedness, distributive shares of partnership income, business income, gains from dealings in property, and any other compensation for services (including receipt of property other than money). This includes any and all documents and records pertaining to any income you have assigned to any other person or entity.

IRS Collection Summons, Form 6638. The summons was issued for the purpose of obtaining documents which would enable the Government to prepare respondent's tax returns for the years in question, for which years no returns had been filed by respondent. Id. This court's order of March 8, 1991 also directed respondent to "include any and all additional documents not mentioned hereinabove that will enable the agents of the Internal Revenue Service to prepare complete 1040 forms for each year as well as any necessary schedules to be included therewith."

On May 30, 1991, this court conducted a hearing on the subject motions. Respondent argued that production of the requested documents would violate his Fifth Amendment right against self-

incrimination. The Government submitted, *inter alia*, that the Fifth Amendment is not implicated in this case because it involves neither a criminal proceeding nor an investigation and because the act of producing the subject documents does not rise to the level of "testimonial communication," which lie of the heart of the Fifth Amendment. At the close of the hearing, the court ordered both sides to file supplemental briefs on the issue of the Fifth Amendment's applicability to the facts of this case. It is these briefs, along with an analysis of applicable case law to, which we now turn.

In his brief, respondent cites to 63 cases which, according to him, collectively stand for the proposition that the Fifth Amendment protects one against the compelled production of personal papers and documents in a case where, although criminal proceedings have not been instituted, such is reasonably feared by respondent. In its brief, the Government concedes that the Fifth Amendment can be utilized to bar the compelled production of documents, but argues that respondent here has waived any right he may have had to assert a Fifth Amendment privilege as to the testimonial aspects implicated by the production of the documents. In order to resolve the issue presented by these arguments, it is first necessary to examine and analyze the relevant case authority.

In support of his position, respondent relies in large part upon the Supreme Court opinion Boyd v. United States, 116 U.S. 616,

6 S. Ct. 524, 29 L.Ed. 746 (1886), which held that the compulsory production of one's private records in a suit to convict that person of a crime is prohibited by both the Fourth and Fifth Amendments. Id., 116 U.S. at 635. More recent Supreme Court authority has, however, modified this holding to some degree. Of special significance to the case at bar is Fisher v. United States, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976). There, the issue presented was whether enforcement of IRS summonses on taxpayer's attorneys for the production of documents prepared by the taxpayers' accountants violated the taxpayers' Fifth Amendment privilege against self-incrimination. While the Court stated that "[w]hether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here," Id., 425 U.S. at 414, the discussion undertaken by the court in the Fisher opinion nonetheless has substantial relevance to the case at bar.

It must initially be recognized that, where the Government requests the production of documents, the taxpayer is not entitled to the Fifth Amendment's protections on the grounds that the contents of the document may be incriminating; this is so whether the documents are the taxpayer's own private papers or that of someone else, such as his accountant. Id., 425 U.S. at 410; see also Baltimore City Department of Social Services v. Bouknight, 493 U.S. 549, 110 S.Ct. 900, 107 L.Ed.2d 992, 1000 (1990). Further,

the Fifth Amendment does not protect against the disclosure of private information, but only against compelled testimony which is self-incriminatory. Fisher, 425 U.S. at 401.

The Fifth Amendment "applies only when the accused is compelled to make a testimonial communication that is incriminating." Id., 425 U.S. at 408 (emphasis supplied). In the case of a documentary summons, "[p]roduction of documents may be testimonial in any of three ways: by acknowledging that the documents exist, by acknowledging that they are in the control of the person producing them, or by acknowledging that the person producing them believes that they are the documents requested and thereby authenticating them for purposes of Fed. R. Evid. 901." Butcher v. Bailey, 753 F.2d 465, 469 (6th Cir. 1985). See also Bouknight, 107 L.Ed.2d at 1000; Fisher, 425 U.S. at 410.

The question of whether the production of documents involves such "testimonial communication" depends on the facts and circumstances of each case. Fisher, 425 U.S. at 410; United States v. Doe, 465 U.S. 605, 613, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984). The facts and circumstances surrounding the case at bar fail to establish that the production of the documents in question would amount to such testimonial communication. As the Government points out, respondent has already admitted voluntarily that the documents exist and that they are in his control. The transcript of the meeting on March 21, 1991 between respondent and Olen reveals as

follows:

Olen: Mr. Gaumer, friend and witness for Mr. Carroll, and myself, Linda Olen, Revenue Officer. Okay, Mr. Carroll, as I stated the purpose of the meeting is the court order by Judge Bell for you to produce records or returns for tax years 1982, 1984, 1985, 1986, 1987, 1988, and 1989. Do you have those prepared tax returns or do you have the records so that those returns might be prepared?

Carroll: Yes, I do. That is to say I have brought with me all the documents and records that I was in possession of, that satisfied the descriptions of Judge Bell's order, which, which I am here to obey of course.

. . .

Olen: Mr. Carroll, I think that the court order is very clear. You are to produce documents and records and the court order itemizes what they should be limited, should include but not be limited to, and I think its very clear what Judge Bell has asked you to present.

Carroll: Uh-huh.

Olen: And do you have those records?

Carroll: Yes, they're right here. The only thing is that in view of the criminal investigation action which is under way, I want to take advantage of my Fifth Amendment rights under the U.S. Constitution, which exempt me from being a witness against myself in any criminal proceedings and so, in answer to your question, I do have them, but I respectfully decline to, to turn them over to you on the basis of my Fifth Amendment objection.

. . .

Olen: Okay Mr. Carroll, can you provide for me information from your W-2's or 1099's for income that you received in tax year 1982?

> Carroll: Well, well that would all be part of the information that I believe that was requested that I bring and, as I say, all that I, all the information that, that I have that satisfies Judge Bell's description, that I am in control of I brought. But that is all part of what I am declining to pro--, to actually turn over to you, because of my Fifth Amendment protection.

Government Exhibit A to Supplemental Brief. The existence of the pertinent documents and their control by Carroll, thus, is no longer in question, as these factors have been admitted by respondent. Consequently, the production of the documents would not involve a testimonial communication within the meaning of the Fifth Amendment. "Where nothing more is involved than surrendering materials already in existence, fully identified and requiring no authentication by the taxpayer, testimony is not involved." United States v. Schlansky, 709 F.2d 1079, 1082 (6th Cir. 1983), cert. denied 465 U.S. 1099, 104 S.Ct. 1591, 80 L.Ed.2d 123 (1984).

With regard to the third testimonial aspect of the production of documents, authentication by the taxpayer, we believe that the posture of this case indisputably establishes that the Government is not using the act of production as authentication of the documents. Respondent is not under criminal investigation, much less prosecution. The case has been assigned as a "miscellaneous" case in which the Government is merely attempting to prepare respondent's tax returns for him. It is not doubted that the preparation of these returns may lead to criminal investigation and

prosecution in the future. With this in mind, "[i]f the government should attempt to authenticate [the documents and their] contents as evidence in subsequent criminal proceedings with proof that they were produced by the taxpayer, a Fifth Amendment objection could be interposed at that time." Schlansky, 709 F.2d at 1083. Where the Government is not seeking to authenticate the documents, however, the act of production is lacking in "testimonial value." Id.

There also exists an alternative argument in support of the Government's position in this case. Many of the documents requested by the summons are those required by law to be kept and/or disclosed. Where the government seeks production of such documents, the act of producing these documents does not implicate the Fifth Amendment. In other words, even where the act of production may require testimonial self-incrimination under the standards set by Fisher and subsequent cases, the Fifth Amendment nonetheless will not protect the record keeper where the subject documents are required to be kept and disclosed by law. In construing several cases which have held that the Fisher doctrine is inapplicable to required records, the Sixth Circuit reasoned as follows:

> Two rationales are revealed by the above cases. First, because required records must have taken on a "public aspect" and because the law requires that they be kept, an individual admits little of significance by producing them. Second, if an individual chooses to begin or continue to do business in an area in

which the government requires record keeping, he may be deemed to have waived any Fifth Amendment protection which would otherwise be present in the absence of the record keeping regulation. For example, the Fifth Circuit in McCoy, stated:

> The proper designation by the government of certain records to be kept by an individual necessarily implies an obligation to produce them, and limited implied testimonial authentication. These obligations to keep and produce the records are in a sense consented to as a condition of being able to carry on the regulated activity involved.

601 F.2d at 171. The Second Circuit in In re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 observed:

> The governmental requirement that [records] be kept implies an obligation to produce them upon the government's demand, which amounts to a waiver of any Fifth Amendment claim with respect to the act of production. Moreover, since they are required to be kept, production of them can hardly provide the basis for an inference of criminality in possessing them.

772 F.2d at 487 n. 5.

In re Grand Jury Subpoena Duces Tecum Served Upon Underhill, 781 F.2d 64, 70 (6th Cir. 1986), cert. denied 479 U.S. 813, 107 S.Ct. 64, 93 L.Ed.2d 23 (1986).

The Supreme Court case of California v. Byers, 402 U.S. 424, 91 S.Ct. 1535, 29 L.Ed.2d 9 (1971), relied upon in part by the court in Underhill, is also instructive. There, the Court stated

as follows:

> Whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential the judicial scrutiny is invariably a close one. Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly.
>
> An organized society imposes many burdens on its constituents. It commands the filing of tax returns for income; it requires producers and distributors of consumer goods to file informational reports on the manufacturing process and the content of products, on the wages, hours, and working conditions of employees. Those who borrow money on the public market or issue securities for sale to the public must file various information reports; industries must report periodically the volume and content of pollutants discharged into our waters and atmosphere. Comparable examples are legion.
>
> In each of these situations there is some possibility of prosecution - often a very real one - for criminal offenses disclosed by or deriving from the information that the law compels a person to supply. Information revealed by these reports could well be "a link in the chain" of evidence leading to prosecution and conviction. But under our holdings the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here.

Id., 402 U.S. at 427-28. Where an individual is required by statute to keep and disclose financial information regarding income, such as W-2 Forms, Wage and Tax Statements, and 1099 Forms,

the possibility of incrimination resulting from disclosure does not entitle that individual to plead the Fifth Amendment when asked to produce these documents.

Carroll's position apparently is based upon the argument that because the content of the documents in question may incriminate him, he is entitled to Fifth Amendment protection. Alternatively, respondent's argument amounts to the proposition that he is entitled to claim Fifth Amendment protection merely because the documents consist of his own personal, private records. While the Boyd decision may arguable stand as some authority for these propositions, it is abundantly clear from the foregoing analysis that they no longer carry weight under current Supreme Court and Sixth Circuit authority. In sum, respondent is not entitled to Fifth Amendment protection in the case at bar because production of the requested documents herein involves no testimonial communication and, further, because at least some of the documents withheld are required by law to be kept and disclosed.

For the foregoing reasons, respondent's motion for reconsideration (Docket No. 9) is hereby denied, and respondent is hereby ordered to comply with the IRS summons and this court's prior order in full.

IT IS SO ORDERED.

SAM H. BELL
U. S. DISTRICT JUDGE