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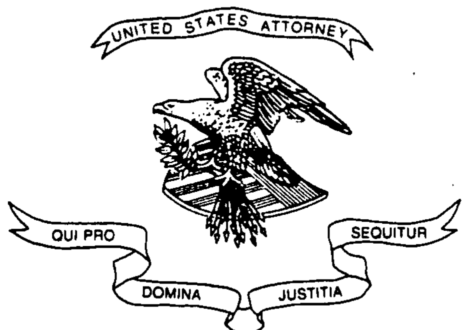

United States Attorneys' Bulletin

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COMMENDATIONS

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

Nancy L. Abell (Texas, Southern District), by E. Najla Tanous, District Counsel, Small Business Administration, Houston, for her high degree of professionalism and legal skill in obtaining the maximum settlement of a complex SBA case pending since 1987.

Terry I. Adelman (Missouri, Eastern District), by James L. Vermeersch, Principal Legal Advisor, FBI, St. Louis, for his excellent lecture on the role of the United States Attorney's office and his contribution to the success of a recent legal training session for FBI agents.

Harold O. Atkinson (Texas, Western District), by Charles S. Saphos, General Counsel, National Central Bureau-INTERPOL, Department of Justice, Washington, D.C., for his valuable assistance and cooperation in representing the Bureau in a recent expungement matter.

A. George Best (Michigan, Eastern District), by Carrie N. Davis, Assistant Corporation Counsel, County of Wayne, Detroit, for his professional skill and prompt action in obtaining dismissal of a case involving seizure of property by DEA agents at the Detroit Metropolitan Wayne County Airport.

A. George Best, Robert Cares, and ***James King*** (Michigan, Eastern District), by William R. Coonce, Special Agent in Charge, Drug Enforcement Administration, Detroit, for their demonstration of excellence while serving as instructors for criminal investigation courses, and their valuable support of DEA's state/ local law enforcement training programs.

Christine C. Bland and ***Nancy Cook*** (Texas, Southern District), by William S. Sessions, Director, FBI, Washington, D.C., for their successful prosecution of three individuals involved in the misapplication of $11.4 million in retirement funds deposited in a trust company. ***Ms. Bland*** was also commended by Kenneth W. Littlefield, Commissioner, Texas Department of Banking, Austin, for her outstanding efforts in this case.

Carolyn J. Bloch (Pennsylvania, Western District), by Det./Lt. Louis Smith, Criminal Investigations, Police Department, Monroeville, for her outstanding success in the prosecution of a narcotics trafficker, resulting in the seizure of over $100,000 in property assets.

Peter A. Caplan (Michigan, Eastern District), by Teresa J. Watmore, Attorney-Advisor, U.S. Army Tank Automotive Command, Department of the Army, Warren, for his excellent representation and successful efforts in obtaining dismissal of an employment discrimination case filed against the government.

Debra Carlson and ***Eric Tolen*** (Missouri, Eastern District), by Cheryell L. Hart, Maintenance Management Analyst, Process Control Division, U.S. Postal Service, Landover, Maryland, for their valuable assistance and professional skills in the successful prosecution of a U.S. Postal Service case.

Daniel J. Cassidy (District of Colorado), by George W. Proctor, Director, Asset Forfeiture Office, Criminal Division, Department of Justice, Washington, D.C. for his excellent presentation at the Intermediate Asset Forfeiture Support Staff Conference recently held in Albuquerque, New Mexico.

Anne Chain (Pennsylvania, Eastern District), by Stephen N. Marica, Assistant Inspector General for Investigations, Small Business Administration, Washington, D.C., for successfully prosecuting a corporate executive who pled guilty to five false bank statement counts and an aiding and abetting charge.

Melanie C. Conour and ***C. Joseph Russell*** (Indiana, Southern District) were presented plaques by the Drug Enforcement Administration for their outstanding success in the trial of eight individuals for conspiracy to manufacture marijuana, distribution of marijuana, perjury to a grand jury, and income tax evasion, for which five defendants were convicted. Sentences ranged up to 20 years for two of the principal defendants and the forfeiture of an 80-acre farm owned by another defendant.

Robert Crowe (California, Northern District), by William E. Smith, Supervisory Special Agent, FBI, San Francisco, for his exceptional legal skills in the successful prosecution of a complicated securities and mail fraud case.

Robert C. Dopf (Iowa, Southern District), by William R. Barton, Inspector General, General Services Administration, Washington, D.C., for his valuable assistance and support in obtaining a settlement of $4 million in a complex case involving multiple parties and simultaneous civil and administrative actions.

Michael DuBose (District of Maine) by Barry M. Hartman, Acting Assistant Attorney General, Environment and Natural Resources Division, Department of Justice, Washington, D.C., Julie Belaga, Regional Administrator, Environmental Protection Agency, Boston, and Thomas A. Hughes, Special Agent in Charge, FBI, Boston, for his professional leadership and outstanding legal skills in successfully prosecuting one of the largest environmental prosecutions in the country, resulting in guilty pleas to five felonies and payment of $2.2 million in fines.

Robert H. Edmunds, Jr., United States Attorney, and ***David B. Smith, Senior Litigation Counsel***, (Middle District of North Carolina) were presented Certificates of Appreciation from Garfield Hammonds, Special Agent in Charge, Drug Enforcement Administration, Southeast Region, for their dedication to the aggressive prosecution of major complex drug cases.

Edward F. Gallagher, III (Texas, Southern District), by Andrew J. Duffin, Special Agent in Charge, FBI, Houston, for his outstanding success in the prosecution of a $16 million embezzlement case.

Barbara Goodman and ***Dori Arter*** (District of Arizona), by Joel H. Knowles, Warden, Federal Correctional Institution, Tucson, for their excellent presentations on the collection of fines, assessments, and restitution funds for the Victim/Witness Crime Fund, and the Victim/Witness Protection Program.

Glenda G. Gordon (District of Maryland), by George J. Terwilliger, III, Principal Associate Deputy Attorney General, Department of Justice, Washington, D.C., for her outstanding service as Asset Forfeiture Unit Chief in the District of Maryland, and for sharing her forfeiture expertise with her colleagues across the country.

Gregory C. Graf and ***William R. Lucero*** (District of Colorado), by Colonel Jeffrey L. Lightner, Office of Special Investigations, Lowry Air Force Base, for their valuable assistance and support in the development of a case against a number of contractor employees, and an indictment of the corporation and the corporation president for defrauding the government of $94,000.00.

Geneva Halliday (Michigan, Eastern District), by Colonel Richard Kanda, District Engineer, Army Corps of Engineers, Detroit, for her special litigation efforts in a case involving violations of the Clean Water and Rivers and Harbors Act, resulting in a settlement of $125,000.00.

Richard L. Hathaway (District of Kansas), by William S. Sessions, Director, FBI, Washington, D.C., for his outstanding success in the prosecution of a bank fraud and embezzlement case in which two indictments were returned, and seven individuals pled guilty.

Stephen B. Higgins, United States Attorney, Raymond Gruender, Assistant United States Attorney, and ***Staff*** (Missouri, Eastern District), by Russell F. Miller, Inspector General, Federal Emergency Management Agency, Washington, D.C., for their legal and professional skill in litigating a number of fraudulent National Flood Insurance Program claims, both criminal and civil, following catastrophic flooding in St. Louis in 1987.

William B. Howard (Texas, Southern District), by John P. Kennedy, Associate General Counsel, Department of Housing and Urban Development (HUD), Washington, D.C., and Gloria Aldridge, Chief Attorney, Department of Housing and Urban Development, Houston, for obtaining a favorable decision on behalf of HUD in a case involving irregularities in the processing of HUD/FHA insured mortgage loans.

Jane H. Jolly (North Carolina, Eastern District), by Kermit Perkins, District Director, Office of Labor-Management Standards, Department of Labor, Nashville, for her valuable assistance in the successful prosecution of a case involving violations of the Labor-Management Reporting and Disclosure Act.

Sue Kempner (Texas, Southern District), by Logan A. Slaughter, District Counsel, Veterans Administration, Houston, for her outstanding representation in settlement negotiations of two complex cases for and on behalf of the Veterans Administration.

Denise Langford-Morris (Michigan, Eastern District), by Teresa J. Watmore, Attorney-Advisor, U.S. Army Tank Automotive Command, Department of the Army, Warren, for her special assistance in obtaining the swift disposal of an employment discrimination suit against the government.

Art Leach (Georgia, Southern District), by Robert W. Genzman, United States Attorney for the Middle District of Florida, for his excellent presentation at the Asset Forfeiture Training Conference in Palm Coast, Florida. Also by Donald F. Bell, Chief, Bureau of Alcohol, Tobacco and Firearms National Academy, Federal Law Enforcement Training Center, Glynco, for serving as an asset forfeiture instructor at several Advanced Agent Safety and Survival classes.

John Leader (District of Arizona), by Bryan J. Swift, Chief Ranger, Saguaro National Monument, National Park Service, Department of the Interior, Tucson, for his legal and professional skill in obtaining guilty pleas from two individuals for possessing and discharging firearms in the Monument.

Lillian Lockary (Georgia, Middle District), by Donnie D. Thomas, District Director, Farmers Home Administration (FmHA), Department of Agriculture, Macon, for her special assistance and continued cooperation with FmHA County Supervisors on various issues and matters of mutual concern.

Sam Longoria and ***Janet Craig*** (Texas, Southern District), by Logan A. Slaughter, District Counsel, Veterans Administration, Houston, for their excellent representation and high degree of legal skill in bringing a complex case with multiple issues to a successful conclusion.

Daniel F. Lopez-Romo, United States Attorney, Jose Quiles and ***Jeanette Mercado-Rios, Assistant United States Attorneys,*** (District of Puerto Rico), by Donald Mancuso, Assistant Inspector General for Investigations, Department of Defense, Arlington, for their successful prosecution and spirit of cooperation in a Department of Defense fraud case, the first such prosecution in the District of Puerto Rico.

David T. Maguire (Virginia, Eastern District), by William S. Sessions, Director, FBI, Washington, D.C., for his successful prosecution of a complex case in which the president of a second mortgage lender was convicted on 79 counts of conspiracy and fraud on financial institutions and savings and loans.

Jim Martin (Missouri, Eastern District), by Edward L. Federico, Jr., Chief, Criminal Investigation Division, IRS, St. Louis, for his valuable assistance in the development of a Financial Investigation Unit in the Western District of Missouri.

Raymond Meyer (Missouri, Eastern District), by Edward L. Federico, Jr., Chief, Criminal Investigation Division, Internal Revenue Service, St. Louis, for his participation in the FY-91 Continuing Professional Education training program.

Joe Mirsky (Texas, Southern District), by Robert N. Ford, Deputy Assistant Attorney General, Debt Collection Management, Justice Management Division, Department of Justice, Washington, D.C., for his valuable instruction on the new Federal Debt Collection Procedures Act at a seminar held recently in Silver Spring, Maryland.

Luis A. Plaza (District of Puerto Rico), by Paul A. Adams, Inspector General, Department of Housing and Urban Development, Washington, D.C., for his outstanding success in the prosecution of a mortgage corporation and its President.

David Portelli (Michigan, Eastern District), by Hal N. Helterhoff, Special Agent in Charge, FBI, Troy, for his prompt and decisive action in a case involving the arrest of an individual that fled the State of Wyoming to avoid federal prosecution.

Ed Rogers (Missouri, Eastern District), by Ted Smith, Executive Director, Missouri Office of Prosecution Services, Jefferson City, for his valuable contribution to the success of the Trial Advocacy School program.

Ronald B. (Barry) Robinson (Texas, Western District), by Michael D. Hood, Regional Counsel, Federal Bureau of Prisons (BOP), Dallas, for obtaining a significant court decision concerning BOP's policy of transferring only alien inmates to community detention facilities.

David Rosen (Missouri, Eastern District), by Gustave A. Schick, Assistant Inspector General, Office of Labor Racketeering, Department of Labor, Washington, D.C., for his excellent presentation on prosecutorial concerns in RICO cases at a recent in-service training program.

Albert W. Schollaert (Pennsylvania, Western District), by Col. Harold F. Alvord, Army Corps of Engineers, Pittsburgh, for his professionalism and successful efforts in settlement negotiations on behalf of the Pittsburgh Branch of the Corps.

Linda K. Teal (North Carolina, Eastern District), by Leonard E. Adams, Regional Audit Management, Bureau of Alcohol, Tobacco and Firearms, Atlanta, for her special prosecutive efforts in a complex and circumstantial arson case.

Andrew A. Vogt (District of Colorado), by Joseph R. Greene, District Director, Immigration and Naturalization Service, Denver, for his excellent representation and valuable assistance in processing a number of immigration cases through the judicial system.

Lanny Welch and ***David Lind*** (District of Kansas), by James C. Esposito, Special Agent in Charge, FBI, Kansas City, for their outstanding success in the prosecution of a financial institution fraud/check kiting case.

William Yahner (Texas, Southern District), by James F. Hoobler, Inspector General, Small Business Administration, Washington, D.C., for his demonstration of initiative, diligence and professionalism in a difficult legal matter, resulting in a recovery for the government of $400,000.00.

SPECIAL COMMENDATION FOR THE DISTRICT OF MARYLAND

Richard C. Kay, Assistant United States Attorney for the District of Maryland, was presented the runner-up award as "Prosecutor of the Year" by the International Association of Credit Card Investigators for his professionalism and legal skill in prosecuting three separate fraud cases brought by the United States Secret Service, resulting in losses to the industry in excess of $1 million. One scheme involved fraudulent replacement cards and subsequent usage at ATMs from New York to Georgia leading to industry losses in excess of $500,000.00. A second case involved individuals responsible for using valid but unissued account numbers to commit telephone order fraud with industry losses in excess of $300,000.00. Another case involved at least three different Ghannian Nationals who kited accounts with industry losses exceeding $200,000.00. The same participants in this scheme also staged auto accidents for the purposes of defrauding insurance companies.

Joseph R. Coppola, Special Agent in Charge, United States Secret Service, Baltimore, said, "His ability to work closely and successfully with my agents should serve as an example to our entire enforcement community of how communication and cooperation can have impact. My sincere appreciation and congratulations to AUSA Kay for a job well done."

* * * * *

SPECIAL COMMENDATION FOR THE EASTERN DISTRICT OF WISCONSIN

Melvin K. Washington, Assistant United States Attorney for the Eastern District of Wisconsin, was commended by Richard L. Trindle, Acting Special Agent in Charge, U.S. Customs Service, for his outstanding assistance and cooperation in the successful prosecution of an individual for violations of the Export Administration Act. The U.S. Customs Service initiated an investigation following an informant's disclosure of unauthorized aircraft parts being solicited for export to Europe. It was learned that the undisclosed destination of the parts was Libya, via Belgium and the Netherlands. For foreign policy and national security reasons, Libya has been a United States embargoed country since 1986, at which time it also became subject to United States economic sanctions.

With the assistance of the Office of International Affairs of the Department of Justice, as well as the Department of State, judicial authorities in the United States and Belgium, and the U.S. Customs attache' in Paris, one Libyan aircraft that was being overhauled in Belgium and on which illegally exported parts had been installed, was seized and the parts removed. The defendant pled guilty and faces up to 15 years imprisonment and a $500,000 fine.

* * * * *

SPECIAL COMMENDATION FOR THE WESTERN DISTRICT OF OKLAHOMA

Connie Symmonds, a Legal Secretary in the United States Attorney's Office for the Western District of Oklahoma, was commended by Laurence A. Urgenson, Chief, Fraud Section, Criminal Division, Department of Justice, Washington, D.C., for her demonstration of initiative, skill, and spirit of cooperation extended to several Fraud Section attorneys during various litigation proceedings in the Western District of Oklahoma.

* * * * *

PERSONNEL

Michael W. Carey, United States Attorney for the Southern District of West Virginia, is on assignment in the Office of the Deputy Attorney General of the Department of Justice. ***First Assistant Charles T. Miller*** is serving as Acting United States Attorney.

On August 30, 1991, ***Frederick Black*** became the Interim United States Attorney for the Districts of Guam and the Northern Mariana Islands.

On September 6, 1991, ***Don V. Svet*** became the Interim United States Attorney for the District of New Mexico.

On September 9, 1991, ***George L. O'Connell*** became the Interim United States Attorney for the Eastern District of California.

On September 16, 1991, ***Karen K. Caldwell*** was Presidentially appointed United States Attorney for the Eastern District of Kentucky.

On September 16, 1991, ***Thomas B. Heffelfinger*** was Presidentially appointed United States Attorney for the District of Minnesota.

On September 16, 1991, ***John F. Hoehner*** was Presidentially appointed United States Attorney for the Northern District of Indiana.

* * * * *

ACTING ATTORNEY GENERAL HIGHLIGHTS

Acting Attorney General Barr Urges Passage Of The Crime Bill

On September 26, 1991 the House Judiciary Committee passed a proposed version of the comprehensive crime bill. This bill will be taken up by the full House for consideration in October. The final House version will then be sent to a conference committee for reconciliation with the Senate version.

The President has urged that a strong anti-crime bill be enacted covering, among other items, reform of the rules affecting habeas corpus, the exclusionary rule and the establishment of an effective federal death penalty. It is anticipated that the President and the law enforcement community will urge the adoption of a number of critical amendments on the House floor to accomplish these purposes.

Acting Attorney General William P. Barr spoke strongly for such changes in the September 24, 1991 issue of The New York Times. His observations follow:

Bush's Crime Bill: This Time, Pass It

Now that the House Judiciary Committee began deliberating on a Federal crime bill yesterday, it should be mindful that the nation and the law-enforcement community deserve better than the legislative sleight-of-hand that foiled President Bush's approach to criminal law reform last year. In 1990, both houses of Congress passed major elements of the President's anticrime proposal, but then a conference committee jettisoned substantial portions of it.

For more than two years, the Administration has sought legislation providing for an effective Federal death penalty, for reform of a habeas corpus system that encourages abuse and delay of the legal process and for revision of the exclusionary rule on evidence. Every major law-enforcement group supports this package.

Critics of President Bush's bill say it cannot solve the problem of violent crime. Yes, no single legislative initiative -- a waiting period for gun purchases, Federal aid to local law enforcement or the Administration's legal reforms -- offers a pat solution to the complex problem of criminal violence. Only an approach combining tough law enforcement with physical, moral and educational revitalization of high-crime areas offers the prospect of a safer America.

While reform of our criminal justice system does not offer a complete solution, it is an essential part of any solution. The system is riddled with loopholes and technicalities that render punishment neither swift nor certain. The three reforms President Bush proposes will help build a more just, more efficient system.

First, we need a death penalty to deter and punish the most heinous Federal crimes such as terrorist killings. That penalty would send a message to drug dealers and gangs.

The need for a death penalty was highlighted by the recent hostage crisis at the Federal prison at Talladega, Ala. Detainees, faced with deportation to Cuba, seized control of the prison and held 10 Federal officers hostage. The prisoners threatened to kill them unless the Justice Department granted their demands to remain in the U.S. Fortunately, no one was killed, and the prisoners were deported. If the crime bill had been law, the prisoners would have faced the death penalty for killing a hostage, increasing the chances our personnel would be recovered safely.

Second, we need to reform a Federal habeas corpus system that encourages endless challenges to state criminal convictions. After trial and appeals, state prisoners may file repeated challenges to their convictions and sentences in Federal court, opening issues decided in state courts years, even decades, ago.

This lack of finality devastates the criminal justice system. It diminishes the deterrent effect of state criminal laws, saps state prosecutorial resources and continually reopens the wounds of victims and survivors.

Death-row inmates use repetitive habeas corpus filings to effectively nullify their sentences through delays that now average more than eight years. The bill limits these inmates to one round of Federal review and requires that due deference be paid to decisions by state judges and juries: the petitioner would have to show that a clearly established Federal right had been violated.

Finally, we must reform the exclusionary rule. Too often, it results in violent criminals returning to the streets because information about weapons used in their crimes and drugs seized are kept from juries deciding their cases. Police officers must act quickly to seize wrongdoers and obtain evidence while protecting themselves and bystanders. It is easy to second-guess their search-and-seizure decisions in a secure courtroom.

The Bush bill follows the lead of several Federal courts of appeal by providing that where the police act in good faith -- trying to follow the law of search and seizure as understood at the time -- evidence should not be suppressed if it turns out that a technical error was committed.

Congress should avoid political shell games and send these reforms to President Bush's desk this fall.

* * * * *

Acting Attorney General Barr Resolves Hostage Crisis

On August 21, 1991, five days after William P. Barr became Acting Attorney General, he was engaged in a harrowing experience with a group of Cuban inmates holding and threatening to kill eleven hostages at Talladega Correctional Institution, an Alabama federal prison. The Cuban inmates had been convicted of crimes in this country, served their sentences, and were awaiting deportation to their homeland when, on August 21, 1991, they took over a maximum security wing of the Institution. This represented a terrorist incident where the lives of innocent persons were put at risk in an attempt to force actions by the government. Mr. Barr moved quickly to assemble a team of aides and law enforcement officials from the FBI and the Bureau of Prisons to monitor the situation. On the scene in Talladega were FBI agents and other federal officials with authority to send in commandos if there was an immediate threat to the lives of the hostages.

After the inmates indicated they were going to kill the hostages, Attorney General Barr decided to storm the prison. At 2:00 a.m. on August 30, he and his advisers met in the FBI's command center. To buy time and to create a false sense of security for the hostage takers, he authorized Talladaga officials to send in meals. At 4:40 a.m., Mr. Barr gave the order to strike. The FBI's Hostage Rescue Team, supported by FBI SWAT teams and the Bureau of Prisons' Special Operations Response Teams, moved in. They set off explosions to confuse and frighten the inmates. Stun grenades were used to create shock waves, smoke, and flashes of light. In three minutes, the ordeal was over, and all hostages were rescued unharmed. One inmate suffered minor injuries. Mr. Barr then left for Talladaga to visit the hostages and their families and to express his appreciation to the law enforcement personnel who took part in the operation. He said, "We are grateful beyond words and proud beyond measure of their professionalism, dedication to duty, and willingness to put their lives on the line to save the hostages. I also want to recognize the tremendous resolve of the hostages and their families. They have been put through the most difficult situation imaginable and conducted themselves with courage, honor, and professionalism."

An editorial which appeared in the Washington Post stated: "This ordeal was Acting Attorney General William Barr's initiation in office. He made the right calls. Concessions to inmates under conditions of terrorism and hostage-taking would have jeopardized prison employees everywhere. An immediate and perhaps poorly planned assault might have caused many casualties. In Alabama, a frightening situation was handled well."

* * * * *

DEPARTMENT OF JUSTICE HIGHLIGHTS

Exxon Valdez Oil Spill

On September 30, 1991, the Department of Justice announced the filing of a criminal plea agreement and a civil consent decree in which Exxon Corporation and Exxon Shipping Company will pay a record $1.125 billion in fines, restitution and civil damages. Exxon has already spent $2.5 billion to address the consequences and causes of the 1989 Exxon Valdez oil spill. Both agreements were filed in the District of Alaska and are subject to court approval.

The companies agreed to an assessed fine of a record $150 million, plus $100 million in restitution. In recognition of the companies' voluntary expenditures of $2.5 billion, $125 million of the criminal fine is remitted. The companies will also plead guilty to four violations of federal environmental law. The $150 million assessed fine represents the proper punitive sanction based on the conduct giving rise to the spill, and the $100 million in restitution immediately addresses the consequences to the environment. The $100 million in restitution is twice the amount agreed to in a previous criminal settlement on March 13, 1991.

According to the civil consent decree, Exxon will pay $900 million to reimburse the federal and state government's past clean up costs and fund the restoration of Prince William Sound and the Gulf of Alaska. The first payment of $90 million will be made ten days after the decree is entered as final. Under the consent decree, after the initial $90 million payment, Exxon will then pay approximately $110 million dollars on September 1, 1992. Thereafter, Exxon will pay $100 million on September 1, 1993 and $70 million each September 1 through the year 2001. The agreement also has a reopener clause stating that Exxon may incur an additional $100 million for natural resource damages not currently foreseen.

The agreement also recognizes Exxon's substantial efforts to make the environment whole after the spill, including spending $42.5 billion to clean up the environment and compensate for losses due to the spill. Although Exxon must immediately pay $25 million into the U.S. Treasury and an additional $100 million in restitution for the Sound, the agreement allows for remission, or forgiveness, for a portion of the fine. Remission is based on post-spill activities and reduces the fine by one dollar for every twenty dollars voluntarily spent by Exxon to address the consequences of the spill.

Barry M. Hartman, Acting Assistant Attorney General for the Environment and Natural Resources Division, praised the outstanding efforts of the Federal Bureau of Investigation and the U.S. Fish and Wildlife Service, Division of Enforcement. Special Agents from both agencies conducted an extensive criminal investigation over the last two-and-a-half years that culminated in the successful resolution of this criminal case. He also singled out for special praise Alaska Attorney General Charles Cole and Assistant Attorney General for the Civil Division, Stuart M. Gerson, whom he said worked with him closely and with remarkable cohesion in producing the final civil settlement. Mr. Hartman said, "This has been a team effort in the highest sense."

* * * * *

Antitrust Cooperation Agreement Between The United States And The European Community

On September 23, 1991, the United States and the Commission of European Communities signed an agreement on antitrust enforcement to promote cooperation and coordination between the United States and the European Community in the enforcement of their respective antitrust laws. Acting Attorney General William P. Barr and Federal Trade Commission Chairman Janet D. Steiger signed the agreement on behalf of the United States in a ceremony at the Department of Justice. Sir Leon Brittan, Vice President of the European Commission and the Commissioner responsible for competition policy, signed for the Commission. Also participating in the ceremony were James F. Rill, Assistant Attorney General for the Antitrust Division, and Claus Dieter Ehlermann, head of the European Community's Directorate-General for Competition.

Commenting on the accord, Sir Leon said, "This agreement comes at a time when our economies are becoming increasingly interrelated and we both pursue active competition policies to ensure fair play. The systematic cooperation provided for in it will help each side to take the other's interests into account in a timely way, in cases with an international dimension. Thus, the agreement provides a means of avoiding conflict. Where we agree that it is in our common interest to do so, the agreement will provide for the European Community and the United States to coordinate their enforcement of competition laws. This coordination may lead to agreement on who should take the lead in investigating a particular matter. This agreement is an important first step in placing our relations with the U.S. authorities in the antitrust field on a formal footing."

Assistant Attorney General James Rill, who played a role in the negotiation of the agreement, said the new agreement has more extensive provisions for enforcement cooperation than earlier agreements. Under one of these provisions, our government can ask the European Community authorities to proceed against anticompetitive conduct occurring in Europe that harms U.S. interests, and vice-versa. He said, "This will be an important step toward minimizing disputes over the extraterritorial application of the antitrust laws."

The agreement is the fourth antitrust cooperative agreement to which the United States is a party. Earlier agreements are in force with Australia, Canada, and the Federal Republic of Germany. The provisions under the terms of the agreement are as follows:

-- Each party shall notify the other of antitrust enforcement activities that may affect the other's important interests.

-- Each party will seek to take account of the other's important interests at all stages of their antitrust enforcement activities.

-- The parties may coordinate their enforcement activities involving related conduct if doing so would be efficient and mutually advantageous.

-- The parties will consult with one another to resolve any issues that may arise.

-- The parties will meet twice each year to exchange information and perspectives on matters of antitrust policy and enforcement.

* * * * *

Memorandum Of Understanding Between The Department Of Housing And Urban Development And The Department Of Justice

Attached at the Appendix of this Bulletin as Exhibit A is a copy of a Memorandum of Understanding (MOU) between the Department of Housing and Urban Development (HUD) and the Department of Justice (DOJ) regarding the litigation of judicial foreclosures of single-family home mortgage loans. The MOU was instituted to provide for the litigation of HUD foreclosure cases in what is a return by HUD from private counsel representation to representation by the United States Attorneys. HUD has provided a force of its attorneys to the United States Attorneys to litigate these foreclosures in the judicial-foreclosure-state districts. The MOU was fashioned to address the litigation authority of the HUD Special Assistant United States Attorneys (SAUSAs) who will be representing the United States under the authority of the United States Attorneys.

A major goal of the Executive Office for United States Attorneys (EOUSA) in drafting the provisions of the MOU was to assure that the United States Attorneys would be in control of the litigation activities of the SAUSAs. In that pursuit, the MOU provides for the authority of the United States Attorneys to extend to supervision of the conduct of the SAUSAs and review of all documents to be utilized by the SAUSAs in the foreclosure actions. It assures that the United States Attorneys will have every opportunity to assume complete control of the litigation from the SAUSAs in instances where, for any reason, the litigation proceeds into areas where the particular interest of the United States Attorney arises or concerns of the United States Attorney arises.

One of the provisions of the MOU requires that all of the foreclosure cases which are to be litigated by the United States Attorneys, with or without the use of the HUD SAUSAs, be sent through the DOJ Central Intake Facility (CIF) in Silver Spring, Maryland. The Department has emphasized the need for accurate reporting of all debts owed to the United States. By the referral process going through the CIF, our statistics on debt collection can be accurately maintained.

The MOU allows the United States Attorneys to control the number of cases proceeding through their districts' courts where an increased caseload would place undue burdens on the dockets of the courts in their districts. It leaves unaffected the authority of the Solicitor General to authorize or decline to authorize appeals and over other procedures related to appeals. And it provides for a system through which disputes regarding the litigation process can be resolved, should they arise.

In summary, the MOU is designed to give assistance to the United States Attorneys without diminishing any control or authority that they have over the process of the litigation of these mortgage foreclosures and to provide for the best service to our client, the Department of Housing and Urban Development.

If you have any questions, please call the Financial Litigation Staff of the Executive Office for United States Attorneys, at (202) 501-7017 or (FTS) 241-7017.

* * * * *

CRIMINAL DIVISION ISSUES

Assistance From The Federal Republic Of Germany In Criminal Matters

An increasing number of United States prosecutors handling criminal matters have sought witness interviews, evidence, and other assistance in the Federal Republic of Germany without regard to the official procedures set forth in the U.S. Attorney's Manual. See USAM 9-13.500, et seq. United States prosecutors seeking evidence or other assistance in the Federal Republic of Germany in connection with a criminal investigation or prosecution must obtain the approval and cooperation of the German government. The normal method of securing approval and cooperation is by letters rogatory. All letters rogatory in criminal matters must be submitted to the Office of International Affairs (OIA). OIA will review them for sufficiency of facts and of justification for the assistance requested. Once a letter rogatory is approved by OIA and signed by a district court judge, OIA will transmit the request directly to the German Federal Ministry of Justice. A U.S. prosecutor contemplating any activity in Germany is not authorized to proceed unless and until the German Federal Ministry of Justice notifies OIA that the activity is approved.

German authorities are extremely sensitive to any attempts by prosecutors (and agents) to circumvent the letter rogatory process by planning law enforcement activities in Germany prior to conferring with OIA. Any activity in Germany without formal German government approval is an encroachment upon German sovereignty which may jeopardize that government's willingness to execute future requests, especially those where inappropriate methods are attempted before the accepted procedure is followed.

In order to ensure that United States requests to the Federal Republic of Germany continue to be honored, please advise your staff of the following:

1. Contact the Office of International Affairs (OIA), Criminal Division, before taking any action to secure evidence from Germany. See USAM 9-13.500, et seq. This includes (1) initiating telephone contact with potential witnesses, (2) mailing inquiries to potential witnesses or custodians of evidence, (3) making travel arrangements to interview witnesses, or (4) taking any other investigative steps within German territory. See USAM 9-13.510.

2. Anticipate the need to draft letters rogatory well in advance of the date the desired activity is to take place in Germany, especially if one or more of the following is involved: (1) travel of U.S. personnel, (2) depositions, or (3) time limitations due to trial dates or other constraints. Contact OIA for an exemplar to be used in preparing a letter rogatory to Germany. USAM 9-13.521A.

3. Submit all draft letters rogatory in criminal matters to OIA before presenting them to a judicial officer for signature. USAM 9-13.521B. OIA will review the draft to ensure that it complies with German requirements.

4. Submit all signed letters rogatory in criminal matters to OIA for transmittal to the German Federal Ministry of Justice. This route, developed by agreement between OIA and its counterpart in the Ministry of Justice, is much faster than the diplomatic route generally used for letters rogatory.

5. Contact OIA before planning any travel to Germany. OIA must approve all travel by Assistant United States Attorneys (and by Criminal Division attorneys) who contemplate travel to Germany in relation to a criminal matter. Refer to USAM 3-3.210, and specifically 9-13.534, which states in pertinent part that:

> Prosecutors should contact OIA and EOUSA well in advance of their intended departure date. OIA ensures that the prosecutors' plans are consistent with foreign law. EOUSA notifies the proper American diplomatic or consular post through the Department of State and verifies that the host country has consented. The Department of State requests host country clearances through its overseas missions. The process can be time-consuming, but failure to comply may cause a wasted trip, or worse, e.g., refusal of permission to enter country, expulsion from the country or even arrest.

If you have any questions, please call Richard Owens, Associate Director, Office of International Affairs, Criminal Division, at (FTS) 368-0041 or (202) 514-0041.

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CRIME ISSUES

Funds Are Awarded To Improve Criminal Records

The Department of Justice has announced awards to a number of states to help improve the quality of state criminal history recordkeeping. The project, supported by the Bureau of Justice Statistics in the Office of Justice Programs (OJP), is part of a three-year, $27 million program designed to assist states in upgrading current systems used to maintain records of arrests, prosecutions, convictions and sentences.

The major objective is to improve the overall quality of the states' criminal history record information by improving disposition reporting. The project emphasizes the recording of arrest, conviction and sentencing information in a form that will make felony history information more reliable and complete. This is a crucial component of the overall objective of insuring that state criminal history records are up-to-date and available to all criminal justice agencies.

The following is a complete summary of criminal history record improvement grants to participating states:

Alabama - $204,185: Will contract with state courts to obtain missing disposition data from 1988, and will also determine procedures and implement changes designed to improve disposition reporting in the future.

Alaska - $242,350: Will identify felony convictions, create a uniquely numbered multi-part form that would replace the current fingerprint card, the District Attorney's SID form, and supplement court disposition documents, meet minimum standards for FBI Interstate Identification Index (III) participation, and process backlog of 60,000 criminal histories.

American Samoa - $112,842: Will automate criminal history record information currently maintained manually within the Department of Public Safety. Funds will be used to perform a baseline audit, to procure and install computer hardware, to convert data and to evaluate the project.

Arizona - $264,660: Will conduct a baseline audit, as well as a needs assessment, to identify the system enhancements needed to identify convicted felons and modifications to the system to allow access to the information. A backlog of 95,000 dispositions will be cleared up, and a multi-agency task force will be created to assist in planning.

Arkansas - $497,320: Will process backlog of over 70,000 arrests made within the last five years which do not contain disposition information.

California - $144,196: Will establish internal and external advisory committees and develop an implementation plan for improving the quality of the California Automated Criminal History System.

Colorado - $220,443: Will develop procedures designed to accurately identify persons convicted of at least one felony, meet the FBI voluntary reporting standards, and identify impediments and improve final charge disposition reporting.

Delaware - $375,976: Will complete their statewide Master Name Index, eliminate backlog of disposition data, and develop a real-time state system which will ensure future data quality and timeliness of criminal justice information.

District of Columbia - $474,600: Will design and implement an electronic interface with existing automated metropolitan and regional criminal justice agency databases to create a comprehensive computerized criminal history record system.

Florida - $325,759: Will eliminate backlog of disposition data, fingerprint arrest records, and implement a felon "flag" indicator in their automated files. Also, the Office of State Courts Administrator plans to implement a model integrated criminal justice information system for a judicial circuit.

Georgia - $401,900: A major 12-month effort is planned to eliminate a 348,000 backlog of fingerprint cards and disposition reports.

Hawaii - $500,000: Will conduct a data quality audit, develop a 2-way interface with Judiciary's Circuit Court felony system, reduce backlog of delinquent dispositions, and flag convicted felons.

Idaho - $235,341: Will implement an automated court disposition reporting system, reduce a backlog of arrest and disposition documents, conduct a baseline audit, and flag convicted felons.

Iowa - $415,922: Develop systems to electronically extract and interface corrections and court data to improve computerized criminal history records.

Kentucky - $499,800: Will install computer interfaces from the local circuit courts to permit the immediate reporting of felony dispositions to the Administrative Office of the Courts. Each court will receive a file server (for multi-terminal access within the court), printer, backup system, and communications modem.

Louisiana - $120,711: Will undertake a 9-month analysis of what needs to be made to existing criminal history files.

Maine - $374,566: Will design, develop and implement an automated criminal history system within the state which will replace the existing manual records structure.

Maryland - $83,832: Will develop and implement a "live scan" booking system that will eventually be placed in every agency with responsibility for arrest processing. Automated systems will be developed to electronically interface such systems with state criminal history information.

Massachusetts - $431,672: Will complete the necessary work to tie the state's automated fingerprint identification system to offender disposition data to create a computerized criminal history system that meets state and FBI needs and requirements.

Michigan - $230,970: Will improve the quality and completeness of disposition reporting. Will identify and enter missing disposition data from county courts and developing an electronic system to enter dispositions directly from the courts into the police criminal history files.

Minnesota - $276,284: Plans a multi-phase approach to improving their criminal history system. Will conduct a baseline audit and make improvements in the current criminal records system, develop systems and procedures to identify felons, improve law enforcement reporting, and increase the degree of automated interface with courts and corrections agencies.

Missouri - $478,685: Will make improvements in the current criminal records system to identify convicted felons, and will develop an automated interface to receive disposition data.

Montana - $92,664: Will implement statewide numbering system, establish a requirement that judges use state ID arrest numbers, achieve 90% compliance with fingerprint card submission, achieve 85% disposition reporting, begin auditing submission rates, and flag convicted felons.

Nebraska - $160,000: Will conduct a criminal history records audit and a detailed requirements analysis. Will also develop procedures to identify and flag convicted felons in existing and new databases.

New Jersey - $442,171: Will rewrite its computerized criminal history system to allow an automated interface with a new system to be developed by the courts. This program will enable reporting of dispositions and other criminal justice actions to the state repository.

New Mexico - $549,593: Will establish computerized criminal history system to interface with existing Master Name Index, increase the number of case dispositions, create a felony flag, and establish a database.

New York - $382,529: Will conduct an analysis of basic causes of under-reporting of disposition and other data to the central repository and establish a collection unit to increase disposition reporting from known delinquent agencies.

North Dakota - $351,049: Will identify felons, link final dispositions to charges, and implement systems to increase arrest and disposition reporting.

Ohio - $458,249: Will improve the quality and completeness of criminal history records, eliminate a backlog of dispositions, and increase the accuracy and timeliness of reporting throughout the system.

Oregon - $444,453: Will develop a linkage between the Oregon Judicial Information Network and the State Law Enforcement Data System, reduce disposition backlog of 32,000, flag convicted felons, and monitor status of rejected fingerprint cards.

Pennsylvania - $502,690: Will improve criminal history records by adding a felon identifier, increase the number of arrests in the computerized database, improve court dispositions, and conduct an audit to identify additional problems.

Rhode Island - $272,025: Will improve the quality and completeness of criminal history records, enter a felony flag for convicted felons, improve the inquiry methodology for criminal history records, and audit disposition data.

South Carolina - $496,677: Will reduce the 12-month backlog of dispositions being held at the repository, improve the automated link between the state courts and the repository, and establish a special identification system for felony records.

Texas - $469,608: Will develop software and hardware designed to interface computerized criminal history records with court automated systems to electronically capture disposition reports.

Utah - $350,000: Will implement procedures to eliminate loss of data, routinely obtain prosecution declinations, install systems to improve court data reporting, identify convicted felons, and improve flow of information from the State Department of Corrections.

Virginia - $499,991: Will improve the existing automated disposition reporting system, establish an optical scanner link between local courts and the central repository, reduce backlog, modify computer software to create a special felony case identification system, and extract offender-based transaction statistics.

Washington - $423,799: Will identify felony convictions, eliminate disposition backlog, increase training in state and federal reporting, and develop a detailed implementation plan.

West Virginia - $155,051: Will conduct a needs analysis and system design which will lead to development of a computerized criminal history system. (West Virginia has no existing automated system.)

Wisconsin - $196,785: Will reduce backlog of disposition reports and FBI identification data, develop a "tickler" system to monitor the submission of dispositions, and provide an interface between two automated files to identify convicted felons.

Wyoming - $134,234: Will enhance criminal history repository by automating 7,800 manual arrest records, modify programs to identify felons, and install 13 network controllers state-wide.

Applications are being processed for the following states: Connecticut - $500,000; Georgia - $499,699; Illinois - $409,747; Vermont - $365,322; and Washington - $498,968.

Additional information about this program is available from the Bureau of Justice Statistics, at (202) 307-0784 or (FTS) 367-0784.

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Project Triggerlock
Summary Report

Significant Activity - April 10, 1991 through August 30, 1991
(In Cases Indicted Since April 10, 1991)

Description	*Count*	*Description*	*Count*
Indictments/Informations.......	1,684	Prison Sentences..................	277 years 8 months
Defendants Charged............	2,107	Sentenced to prison.............	41
Defendants Convicted.........	349	Sentenced w/o prison or suspended....................	3
Defendants Acquitted..........	16		

"Significant Activity" is defined as an indictment/information, conviction, acquittal or sentencing which occurs during the time period. Numbers are adjusted due to monthly activity, improved reporting and the refinement of the data base. These statistics are based on reports from 94 offices of the United States Attorneys, excluding District of Columbia's Superior Court. [NOTE: All numbers are approximate.]

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DRUG ISSUES

Juvenile Boot Camps

The Department of Justice has awarded grants totaling more than $2.7 million to Mobile, Alabama, Denver, Colorado, and Cleveland, Ohio to demonstrate juvenile boot camp programs. Mobile will receive $996,179, Denver $992,942, and Cleveland $779,001.

Some highly disciplined "wilderness" and "paramilitary" training programs now exist for juveniles. However, these three test sites represent the first federally funded comprehensive boot camp programs. Each boot camp site will provide juvenile, non-violent offenders with discipline through a military-style regiment of physical conditioning and programs that require teamwork. They also will incorporate education, literacy training, job training, work and life skills, and drug treatment programs. Many youth, for the first time in their lives, will be in an environment where they have positive role models and mentors who are providing leadership and guidance and in whom they can place their trust. At least 100 males, under the age of 18, who have committed non-violent offenses, will be referred to each of the boot camp programs. This program is a collaborative effort among three bureaus of the Department of Justice's Office of Justice Programs (OJP) -- the Office of Juvenile Justice and Delinquency Prevention (OJJDP); the Bureau of Justice Assistance (BJA); and the National Institute of Justice (NIJ). BJA will provide $1.7 million and OJJDP $1 million to fund the program, and NIJ will evaluate the effectiveness of these demonstration sites to serve as a prototype for replication throughout the country. OJJDP will administer the program.

The Boys and Girls Clubs of Greater Mobile, the Strickland Youth Center, and the University of South Alabama will manage the Mobile boot camp. The Colorado Division of Youth Services and New Pride, Inc. will administer the Denver boot camp. The Cuyahoga County Court of Common Pleas and the Northeastern Family Institute of Boston will oversee the Cleveland boot camp. For more information, please call the Boys and Girls Club of Greater Mobile at (205) 432-1235; the Colorado Division of Youth Services at (303) 762-4503; and the Cuyahoga County Court of Common Pleas at (216) 443-8431.

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POINTS TO REMEMBER

Adverse Final District Court Decisions In Civil Division Cases

Section 2-2.110 of the United States Attorneys' Manual requires United States Attorneys' offices immediately to forward to the Appellate Staff of the Civil Division copies of all adverse final district court decisions in Civil Division cases. Receipt of these decisions causes the Appellate Staff to begin the formal process of soliciting and preparing memoranda to the Solicitor General for a determination as to whether or not to appeal. With the exception of certain factual Social Security cases, it is the responsibility of the United States Attorney to file a protective notice of appeal in every case where there has not yet been a Solicitor General determination. United States Attorneys' Manual §§ 2-2.130(B), 2-3.300. Delays in notifying the Appellate Staff of adverse decisions are the most common reason that United States Attorneys' offices are required to file, but later withdraw, a protective notice of appeal in "no appeal" cases. Such delays mean that the determination regarding appeal cannot be made within the time for filing an appeal.

Problems of delayed notification occur most often in cases where the United States Attorney's office has delegated some or all of the responsibility for handling the case to an agency, such as the Department of Health and Human Services. However, even in these cases, it is the responsibility of the United States Attorney's office immediately to notify the Appellate Staff of the adverse decision.

Adverse decisions should be sent to: Robert E. Kopp, Director, Appellate Staff, Civil Division, Room 3617, Department of Justice, Washington, D. C. 20530.

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Technical Assistance Grants Awarded Under The Americans With Disabilities Act

On September 30, 1991, the Department of Justice announced that fifteen organizations will receive grants totaling more than $2.6 million to provide technical assistance under the Americans with Disabilities Act (ADA). John R. Dunne, Assistant Attorney General for the Civil Rights Division, said the grant recipients, which include the public sector, business and disability rights community, will undertake a wide variety of projects to inform the private sector, state and local governments and individuals with disabilities about their rights and responsibilities under the ADA, which becomes effective January 26, 1992.

Funded projects will target priority areas for ADA compliance, such as hotels and motels, restaurants and the food service industry, health care providers, state and local court systems and police departments, and day care centers. They also will address specific issues relating to individuals who are deaf and have hearing impairments, individuals who are blind or who have sight impairments, individuals with mobility impairments, and individuals with epilepsy or mental retardation. The grants will support such activities as telephone information lines; explanatory manuals, pamphlets, and video tapes; training courses in ADA compliance and model programs that can be used to encourage voluntary compliance with the ADA; and programs aimed at resolving disputes while avoiding litigation.

Grants have been awarded to the National Restaurant Association, Food Marketing Institute, Council of Better Business Bureaus Foundation, Institute for Law and Policy Planning, Building Owners and Managers Association, the Association for Retarded Citizens of the United States, Eastern Washington University, American Hotel and Motel Association, Disability Rights Education and Defense Fund, American Foundation for the Blind/Gallaudet University (National Center for Law and the Deaf), Police Executive Research Forum, Foundation on Employment and Disability, the National Federation of the Blind, the Association of Handicapped Student Service Programs, and the National Association of Protection and Advocacy Services.

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Additional Office Space In The Washington, D.C. Metropolitan Area

On August 27, 1991, William P. Barr, Acting Attorney General, advised the Offices, Boards, and Divisions that since 1982 the emphasis on such high priority programs as drug interdiction, environmental crime, immigration reform, prison construction, and the savings and loan crisis has led to Department growth of nearly 60 percent nationwide. Staff growth in the Washington metropolitan area alone approached 15 percent in 1990, and over 11 percent in 1991. The magnitude of this growth in Washington, D.C. has forced the Department to accept numerous small blocks of space provided by the General Services Administration, which has contributed considerably to the increasing fragmentation of our components.

Immediate relief for some components is in sight. Leases have been signed for space at 1001 G Street, N.W. and 901 E Street, N.W., and the Department has acquired smaller blocks of space at 1110 Vermont Avenue, 1620 L Street, N.W., and Market Square, across from the Main Justice Building on Pennsylvania Avenue. In addition, acquisition of space at 1425 New York Avenue is receiving Congressional attention. These numerous space acquisition activities are enabling the Department to address its most urgent and critical space needs and accommodate a majority of the Department's FY 1990 and 1991 personnel increases. The Department will continue to pursue the acquisition of major amounts of space to satisfy the Department's long-term requirements in the Washington metropolitan area.

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SENTENCING REFORM

Guideline Sentencing Updates

Copies of the Guideline Sentencing Update, Volume 4, No. 7, dated September 3, 1991, and Volume 4, No. 8, dated September 20, 1991, is attached as Exhibit B at the Appendix of this Bulletin.

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Federal Sentencing And Forfeiture Guide

Attached at the Appendix of this Bulletin as Exhibit C is a copy of the Federal Sentencing and Forfeiture Guide, Volume 2, No. 31, dated August 26, 1991, and Volume 2, No. 32, dated September 9, 1991, which is published and copyrighted by Del Mar Legal Publications, Inc., Del Mar, California.

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SAVINGS AND LOAN ISSUES

Savings And Loan Prosecution Update

On September 6, 1990, the Department of Justice issued the following information describing activity in "major" savings and loan prosecutions from October 1, 1988 through August 29, 1990. "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	501
Estimated S&L Losses	$7.652 billion
Defendants Charged	820
Defendants Convicted	628 (93%)
Defendants Acquitted	48 *
Prison Sentences	1,258 years
Sentenced to prison	368 (78%)
Awaiting sentence	166
Sentenced w/o prison or suspended	104
Fines Imposed	$ 12.714 million
Restitution Ordered	$313.880 million

CEOs, Board Chairmen, and Presidents:	
Charged by indictment/ information	100
Convicted	76
Acquitted	7
Directors and Other Officers:	
Charged by indictment/ information	145
Convicted	125
Acquitted	5

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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CASE NOTES

CIVIL DIVISION

Ninth Circuit Upholds INS Practice Of Requesting Naturalization Applicants To List Their Memberships In Organizations

Price, a lawfully admitted United States permanent resident, applied for naturalization. He answered all questions on the application, except for the question that required him to list all his present or past memberships in organizations. The Ninth Circuit held in a split decision that INS had statutory authority to ask the question and stressed the need for courts to defer to INS in this sensitive area, noting the broad authority that Congress has given the Attorney General in investigating naturalization applicants. Addressing the argument that the question violated plaintiff's rights under the First Amendment, the majority applied the "facially legitimate and bona fide reason" test and held that INS's question about organizational memberships passed that test for the same reasons that it falls within the INS's statutory authority. Judge Noonan dissented because he thinks the government has no business trying to judge the character of individuals who apply for U.S. citizenship.

Price v. INS, No. 89-16457 (Aug. 7, 1991). DJ # 38-11-1441.

Attorneys: Douglas N. Letter - (202) 514-3602 or (FTS) 368-3602
Lowell V. Sturgill Jr. - (202) 514-3427 or (FTS) 368-3427

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Ninth Circuit Holds That There Is An Implied Right Of Action For Money Damages Against The Federal Government Under Section 504 Of The Rehabilitation Act And Holds FBI Agent Has Qualified Immunity

This case involves a challenge to the FBI's decision to suspend sending its agents and job applicants to a health care facility for compulsory annual physicals upon obtaining information that the physician performing the physicals might have AIDS. The FBI, after being denied information about the physician's medical condition, eventually decided to allow its agents to choose any one of three health care facilities, including the original facility, for their annual physicals. Plaintiff, the physician, brought an action for injunctive relief and money damages against the United States under section 504 of the Rehabilitation Act, and a Bivens claim for damages against the Special Agent in charge of the San Francisco FBI Office, alleging that the FBI's actions invaded his privacy and impaired his practice of medicine.

The Ninth Circuit held that plaintiff's injunctive claims were moot, but held that Congress made an unequivocal waiver of sovereign immunity for money damages under section 504 at least when the government is acting in its proprietary, as opposed to regulatory, capacity. The court of appeals also held that the Special Agent's actions in seeking current medical information about plaintiff were reasonable and did not violate any clearly established Fifth Amendment or Rehabilitation Act rights of which a reasonable person would have known.

Doe v. Attorney General of the United States, Nos. 89-15933 & 89-16134 (August 1, 1991). DJ # 35-11-673.

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Deborah Kant - (202) 514-1838 FTS/368-1838

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Tenth Circuit Rules That Bankruptcy Courts Are "Courts" That May Award Equal Access To Justice Act (EAJA) Fees

The Department of Energy (DOE) was a creditor of the O'Connor's bankruptcy estate. When DOE thought it was not being paid fast enough under the reorganization plan, it filed a motion to liquidate the estate. The debtor defeated DOE's motion and filed in the bankruptcy court for EAJA fees. The bankruptcy court found DOE's position was not substantially justified and awarded the debtor fees.

The Tenth Circuit has now held that bankruptcy courts are "courts" within the meaning of 28 U.S.C. 2412(d) and therefore have jurisdiction to enter EAJA awards. The court reasoned that if Congress meant to limit 2412(d) to "Courts of the United States," it could have expressly said so.

O'Connor v. United States Department of Energy, No. 91-6085 (Aug. 20, 1991). DJ # 77-60-389

Attorneys: William Kanter - (202) 514-4575 or (FTS) 368-4575
Robert M. Loeb - (202) 514-4027 or (FTS) 368-4027

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False Claims Act Cases

The 1986 Amendments To The False Claims Act Held Not Retroactive

In the only appellate decision on the issue to date, the Sixth Circuit has held that the 1986 amendments to the False Claims Act do not apply retroactively to pre-1986 conduct. The court held that the Bradley presumption of retroactivity is to be read narrowly. In addition, given the pre-1986 case law in the Sixth Circuit, the court held that the 1986 amendments affected substantive rights and liabilities because the amendments changed the standard of knowledge and burden of proof and increased the damages and penalties.

United States v. Paul B. Murphy, No. 90-5648 (6th Cir., June 19, 1991)

Attorneys: Carolyn Mark - (FTS) 367-0256 or (202) 307-0256
AUSA William Sonnenberg - (FTS) 856-5140 or (615) 752-5140

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Ninth Circuit Holds That There Is No Right To Contribution Or Indemnification In False Claims Act Suit

Qui tam plaintiffs sought a writ of mandamus directing the district court to dismiss third party complaints filed against them by defendants in this action brought under the qui tam provisions of the False Claims Act. The Ninth Circuit granted the petition, holding that there was no right to contribution or indemnity in a False Claims Act action.

Mortgages, Inc. v. United States District Court for the District of Nevada, 934 F.2d 209 (9th Cir. 1991)

Attorney: Michael Theis - (FTS) 367-0497 or (202) 307-0497

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Ninth Circuit Allows Former Government Attorney To Proceed With A False Claims Act Qui Tam Suit Based On Information He Learned While He Was Drafting A Government Contract, And Holds That Knowledge By A Government Official Is Not In Itself A Defense To A False Claims Act Suit

The court ruled that the False Claims Act qui tam jurisdictional bar applicable to actions that are based on public disclosures does not apply because the relator's work was not "in" an administrative investigation. Neither does a public disclosure occur when the person as a government employee "discloses" the pertinent information to himself as a member of the public. Furthermore, the court ruled that while the government has some good policy arguments against allowing its employees to be relators, because the statute broadly enfranchises "any person" to bring a qui tam suit, the arguments should be made to Congress and not the courts.

The court also ruled that knowledge by a government official is not in itself a defense, but may be relevant to show that the defendant did not submit its claim in deliberate ignorance or reckless disregard of the truth. Also, the government is not estopped by the knowledge of its officers where the detrimental reliance necessary to establish the defense is based on the defendant's unjust retention of the money he should not have received in the first place. Nonetheless, the facts may show that the government suffered no damage when it knowingly decided to proceed with the contract. The court reaffirmed that no damage need be shown to recover False Claims Act civil penalties.

United States ex rel. Hagood v. Sonoma County Water Agency, No. 89-1629O & No. 89-16360 (April 2, 1991), D.J. # 46-11-2669

Attorney: Joan Hartman - (FTS) 367-6697 or (202) 307-6697

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Eleventh Circuit Holds That False Claims Act Does Not Prohibit Government Employees From Filing Qui Tam Action Based Upon Information Acquired While Working For The Government

In the second appellate decision regarding government employees as qui tam relators, the Eleventh Circuit has held that a former government employee is a proper relator when he files suit based on information learned in the course of drafting a government contract. The court held that when the relator filed suit, there was no "public disclosure" within the meaning of 31 U.S.C. §3730(e)(4)(A). The court also noted that §3730(e)(4)(A) only requires that the relator be an original source if the suit was based upon information that was publicly disclosed. The Eleventh Circuit expressly rejected the reasoning of the First Circuit in United States ex rel. LeBlanc v. Raytheon Co., 913 F.2d 17 (1st Cir. 1990), contending that the First Circuit appeared to find that there had been no public disclosure and then improperly proceeded to determine whether the relator was an original source. The court also rejected the government's arguments that the pre-1943 comprehensive bar against qui tam suits by government employees was never repealed and that there are public policy reasons for finding that Congress intended to bar such suits.

U.S. ex rel. Williams v. NEC Corp., No. 89-3973 (11th Cir. May 29, 1991)

Attorney: Joan Hartman - (FTS) 367-6697 or (202) 307-6697

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In An Action Under False Claims Act And Common Law, Central District Of California Holds That It Has No Subject Matter Jurisdiction Over Government Claims For Mistake and Unjust Enrichment Because They Are Governed By The Contract Disputes Act

In two separate cases in the Central District of California, the government filed civil complaints alleging violations by Hughes Aircraft Company of the False Claims Act and common law. In United States v. Hughes Aircraft Company, Civ. No. 89-6842-WJR (C.D.Cal. April 5, 1991), Judge Rea granted Hughes' motion to dismiss the government's allegations of payment by mistake and unjust enrichment, holding that these allegations were governed by the Contract Disputes Act (CDA), 41 U.S.C. §601 et seq., and did not fall within the fraud exception to the CDA. On April 16, 1991, Judge Rea granted Hughes' motion for summary judgment on various grounds, including (1) that the government did not raise a genuine issue of material fact including that Hughes failed to comply with the disclosure obligations of the Truth in Negotiations Act; and (2) that disclosure to the Defense Contract Audit Agency cured the nondisclosure.

On April 29, 1991, Judge Gadbois, Jr. granted Hughes' motion to dismiss in United States ex rel. John N. Perron, Jr. v. Hughes Aircraft Company, Civ. No. 89-3312 Rg (Sx) (C.D.Cal. April 29, 1991), holding that the government's allegation of payment by mistake fell within the jurisdiction of the CDA, and this allegation therefore was not properly before the District Court.

United States v. Hughes Aircraft Company, No. 89-6842-WJR (C.D. Cal. April 5, 1991), DJ # 46-12C-2942

Attorneys: Vincent B. Terlep, Jr. - (FTS) 367-0474 or (202) 307-0474
AUSA Frank D. Kortum - (FTS) 798-2434 or (213) 894-2434

United States ex. rel. John N. Perron, Jr. v. Hughes Aircraft Company, No. 89-3312 Rg (Sx) (C.D. Cal. April 29, 1991), DJ # 46-12C-3348

Attorney: Vincent B. Terlep, Jr. - (FTS) 367-0474 or (202) 307-0474

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List Of Recent Unpublished Opinions/Decisions In Qui Tam Cases

Government Employees:

United States v. McDonnell Douglas Corp., 755 F.Supp. 1038 (M.D. Georgia 1991); DJ # 46-19M-464

Attorney: Joan Hartman - (FTS) 367-6697 or (202) 307-6697

See United States ex. rel. Givler v. Gary Smith, Civ. No. 89-0647 (E.D. Pa. April 9, 1991) (municipal employee), DJ # 46-62-1856

Contact: Linda Jones - (FTS) 367-0472 or (202) 307-0472

Original Source:

United States ex rel. Cheh-Cheng Wang v. FMC Corporation, (N.D. Cal. April 23, 1991), DJ # 46-11-2657

Contact: Linda Jones - (FTS) 367-0472 or (202) 307-0472

United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life And Accident Insurance Company, Civ. No. 1-89-331 (D. Tenn. September 1991)

Attorney: Stanley Alderson - (FTS) 367-6696 or (202) 307-6696

Public Disclosure:

United States ex rel. Stinson, Lyons, Gelrin & Bustamante, P.A. v. Provident Life and Accident Insurance Company, Civ. No. 1-89-331 (D. Tenn. September 1991).

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ENVIRONMENT AND NATURAL RESOURCES DIVISION

Havasupai Tribe's Attempt To Block Mining In National Forest Based On Their Aboriginal Right Of Access, Inadequate Environmental Impact Statement, And Inadequate Administrative Record Rejected

The Havasupai Tribe and others filed suit to review a final decision of the Chief of the Forest Service, made after a four-year administrative process, to approve a modified plan of operations submitted by Energy Fuels Nuclear, Inc. to mine uranium on three unpatented mining claims in the Kaibab National Forest in Arizona. The Tribe complained that (1) the approval of the plan violates their First Amendment rights to freely exercise their religion; (2) mine operations violate the Tribe's aboriginal right of access to the area; (3) the Forest Service breach fiduciary duties it owes the Tribe; and (4) the environmental impact statement (EIS) fails to comply with the National Environmental Policy Act. The district court issued a 75-page decision in favor of defendants on every issue.

On appeal, the Tribe contended that (1) the district court erred by barring discovery and limiting review to the administrative record; (2) the plan interfered with the Tribe's aboriginal right of access; and (3) the EIS was inadequate. The court of appeals affirmed. The court rejected the Tribe's claim that the agency considered evidence outside the administrative record, holding that the Tribe had pointed to nothing to support its contention. As for the Tribe's contention that there was inadequate consideration of the effects of mining on groundwater which supplies the Tribe's water, the court faulted the Tribe for failing to raise this issue during the comment process after its views were solicited and, at any rate, the agency did adequately consider this claim as the district court found. Finally, with respect to the Tribe's aboriginal rights of access to the mine site, the government had extinguished and paid for tribal title in a 1969 Indian Claims Commission judgment.

Havasupai Tribe, et al. v. F. Dale Robertson, 9th Cir. No. 90-15956
(August 26, 1991) (Per Curiam: Hug, Schroeder and Wiggins)
DJ # 90-1-4-3347

Attorneys: Jacques B. Gelin - (FTS) 368-2762 or (202) 514-2761
Dirk D. Snel - (FTS) 368-4400 or (202) 514-4400

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Corps' Decision To Issue Permit To Pump Water From Lake Gaston To Virginia Beach Sustained

The court of appeals upheld a decision by the Corps of Engineers to issue to Virginia Beach a permit to construct a water intake structure and pipeline which would divert 60 million gallons of water a day from Lake Gaston, a lake on the North Carolina-Virginia border. The State of North Carolina and the Roanoke River Basin alleged that the Corps was arbitrary and capricious in issuing the permit because it failed (1) to adequately consider the environmental effect of the water withdrawal on striped bass and on water quality; (2) to consider the cumulative impact of the withdrawal; and (3) to explain its modeling assumptions. The appellants also contended that the Corps failed to consider the public interest impact of the pipeline. In a detailed reference to the record, the court found all the appellants' contentions without merit.

In sum, the court observed that the project was highly controversial because it will remove a substantial amount of water from one river basin to a distant area. However, the court held, there is no longer any controversy regarding the environmental effects of the project or the need of Virginia Beach for water, and the Corps considered all the factors that it was required to consider before issuing the permit.

Roanoke River Basin v. North Carolina, 4th Cir. No. 90-3049 (July 3, 1991) (Cir. Judges Hall, Neimeyer and District Court Judge Kiser) DJ # 90-1-42682

Attorneys: J. Carol Williams briefed - (FTS) 368-5313 or (202) 514-5313
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* * * * *

Forfeiture Discretionary With Court For Harassing Big Horn Sheep In Violation Of Airborne Hunting Act

After unsuccessfully prosecuting the owner and pilot of a helicopter for harassing Big Horn sheep in violation of the Airborne Hunting Act, 16 U.S.C. 742j-1, the government pursued civil forfeiture proceedings against the helicopter. The district court denied the forfeiture, holding that the statute requires a showing of specific intent for a forfeiture, that the Fish and Wildlife Services' definition of "harass" was arbitrary and capricious, and that the owner and pilot had not harassed the sheep contrary to the law. The district court also held that in any event, the court retained the discretion to refuse forfeiture and that it was appropriate to do so in this case because of the conduct of the undercover investigation.

On our appeal, the court of appeals held that the Fish and Wildlife Service had correctly defined the term "harass," and that the district court's findings of no harassment were clearly erroneous under the correct test as well as under the more restrictive standard erroneously adopted by the district court. The panel also found the evidence of intent overwhelming, and therefore found it unnecessary to decide what level of intent is required for a forfeiture.

The court concluded, however, that Congress intended to make forfeiture discretionary with the district courts, relying on the Interior Department's own characterization of its purpose in proposing amendments to the legislation. The court could find no abuse of discretion here, resting on its view that the conduct of the investigation and the arrest of the owner and pilot had been overzealous. Judge Farris concurred only in the result.

United States v. One Bell Jet Ranger II Helicopter, 9th Cir. No. 89-35551 (September 3, 1991) DJ # 9-8-5-296 (Fletcher, Farris, Boochever)

Attorneys: John A. Bryson - (FTS) 368-2740 or (202) 514-2740
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* * * * *

Environmental Impact Statement (EIS) Required Where Proposed Project Would Cause No Significant Impacts; Absent Finding Of Significant New Information A Supplementary EIS Not Required

This case concerns a decision by the Corps of Engineers that construction of the levee portion of Item 3A-2 of the Yazoo Basin Flood Control Project, consisting of approximately five miles of levee, would not have significant environmental impacts and, accordingly, the National Environmental Policy Act (NEPA) does not require preparation of a supplemental EIS for construction of that levee. Coker, a landowner whose property would be crossed by the levee, challenged that administrative decision, claiming in his complaint that the Corps violated NEPA both (1) by segmenting the NEPA consideration of the levee portion of Item 3A-2 from NEPA consideration of the channelization portion of that item, and (2) by issuing a finding of no significant impact and a determination that preparation of an EIS was thus not required.

The district court agreed with the Corps both that there was no improper segmentation of the levee portion of Item 3A-2 and that the levee would cause no significant environmental impacts. But the court nonetheless enjoined the Corps both from construction of the levee and from condemnation of associated lands pending preparation of a supplemental programmatic EIS, based on a supposed "admission" by the Corps at trial that portions of the underlying programmatic EIS for the entire Yazoo Basin Flood Control Project was "outdated."

The Fifth Circuit reversed on appeal. In a published per curiam decision issued the day following oral argument, the court vacated the district court's order enjoining construction of the levee and condemnation of associated lands, holding that there was no basis under NEPA for requiring preparation of an EIS where the district court itself had found that the proposed project would cause no significant impacts, and citing Fritiofson v. Alexander, 772 F.2d 1225 (5th Cir. 1985). The court further recognized that, absent a finding of significant new information, "an EIS need not be supplemented whenever new information concerning a project comes to light," citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989).

Coker v. Skidmore, 5th Cir. No. 90-1928 (September 6, 1991)
DJ # 90-1-4-3590 (King, Johnson, Emilio Garza) (per curiam)

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Cherokees' Claim That Oklahoma River Improvement Project Constituted Unfair And Dishonorable Dealings Under Indian Claims Commission Act Rejected

In December, 1982, Congress granted special jurisdiction to the U.S. District Court for the Eastern District of Oklahoma to adjudicate "any claim which the Cherokee Nation of Oklahoma may have against the United States for any and all damages to Cherokee tribal assets related to and arising from construction of the Arkansas River Navigation System." (See, Public Law 97-385, 96 Stat. 1944.) The Army Corps of Engineers had made considerable improvements to the Arkansas River.

During an interlocutory phase of the case, the Supreme Court held that the government's exercise of its navigational servitude under the Commerce Clause, as manifested by its river improvements, was not a taking of property under the Fifth Amendment. United States v. Cherokee Nation, 480 U.S. 700 (1987). After remand, the district court denied the Tribe's remaining claim by summary judgment. That claim had alleged that the government's river improvements constituted unfair and dishonorable dealings under the Indian Claims Commission Act of 1946.

On appeal by the Tribe, the Tenth Circuit unanimously affirmed. It held that the Tribe had failed to demonstrate that the government -- by treaty, statute, representation, or any other means -- "undertook a special relationship" with the Tribe such that the government "would forego or restrict its historic rights under the Commerce Clause so that the government was inhibited in the exercise of its navigational servitude, or bound to make compensation for the results of its exercise." The court of appeals further held that nothing in the 1982 special jurisdictional act or its history showed that Congress intended that the tribal claims should automatically be allowed. That act merely charged the federal court "with determining, not only what compensation (if any) was appropriate, but whether the claims should prevail at all."

Cherokee Nation of Oklahoma v. United States, 10th Cir.
No. 88-1112 DJ # 90-2-4-949 (Brown, Halloway, Seymour) (July 9, 1991)

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* * * * *

TAX DIVISION

Third Circuit Rules For The Government In Important Case Involving Amortization Of Intangibles

On September 12, 1991, the Third Circuit reversed an adverse judgment of the district court, and provided the Government with an important victory in Newark Morning Ledger Co., as Successor to the Herald Co. v. United States. This case involved the question whether the purchaser of a newspaper could amortize the value of subscription lists, i.e., existing paying subscribers. An intangible asset is only amortizable, for tax purposes, if it has a value separate and distinct from goodwill and a reasonably determinable finite useful life. Based on this standard, the District Court held that the subscription lists were amortizable. The Third Circuit reversed, holding that even if the subscription lists had limited useful lives and an ascertainable value, the taxpayer failed to demonstrate that the lists were different from goodwill. The Court reasoned that the income stream expected from the continued patronage of existing customers was the essence of goodwill.

The Third Circuit's decision appears to be inconsistent with other recent decisions, including the Eighth Circuit's in Donrey, Inc. v. United States, 809 F.2d 534 (1987). Thus, this case may warrant Supreme Court review if the taxpayer petitions for certiorari. In the meantime, the case provides strong authority for the Government's position that expected revenue by the repeat business of existing customers is at the core of goodwill, and therefore not amortizable. The IRS estimates that billions of dollars in taxes rides on the resolution of cases and audits involving the question whether various intangible assets may be amortized.

* * * * *

Divided Fourth Circuit, Sitting En Banc, Reverses Favorable Tax Court Decision in Federal Estate Tax Marital Deduction Case

On September 13, 1991, the Fourth Circuit, by a margin of 6-5, reversed the favorable decision of the Tax Court in Estate of Reno v. Commissioner. This case presented the question whether a marital deduction claimed with respect to Virginia real property should be reduced by federal and state death taxes. The Virginia property was held by decedent and his wife as tenants by the entirety. Decedent's will provided that death taxes would be payable from property of his estate other than specified Kentucky real property. The only other property sufficient to satisfy the tax obligations was the Virginia property.

The Tax Court ruled that, under Virginia's apportionment statute, the terms of decedent's will would be honored and thus the taxes would be paid from the Virginia property rather than the Kentucky property. A panel of the Fourth Circuit initially affirmed, but upon rehearing en banc, the Fourth Circuit reversed.

The Virginia State Bar Association joined the estate's request for rehearing arguing that the Virginia apportionment statute does not permit a decedent to direct that taxes be paid out of property held in a tenancy by the entireties unless the surviving spouse formally consents to such action.

* * * * *

Fifth Circuit Holds A Corporation May Avoid Depreciation And Depletion Allowance Recapture By Distributing Recapture Property As Partnership Interests

On August 26, 1991, the Fifth Circuit reversed the favorable decision of the lower court in Petroleum Corp. of Texas and Sub. v. United States, a tax refund suit involving excess of $3.7 million. Petroleum Corporation was the parent of an affiliated group of corporations engaged in oil and gas production and certain real estate activities. Having decided to liquidate the corporation, Petco transferred its holdings, including "recapture" property (i.e., property for which previously deducted depreciation or depletion was subject to recapture under Sections 1245, 1250 or 1254 of the Code), into three partnerships and then distributed partnership interests to its shareholders. We argued that since recapture property was distributed albeit in the form of partnership interests, tax was due on the recapture amounts. The District Court agreed, relying on the Federal Circuit's decision on the same issue in Holiday Village Shopping Center v. United States, 773 F.2d 276 (1985).

The Fifth Circuit reversed. It reasoned that, since partnership interests are not properly described in the language of the statutes defining recapture property, the distribution of partnership interests does not give rise to a tax on recapture amounts. The court purported to distinguish Holiday Village on the ground that, here, the Government agreed that taxpayer had a valid purpose in structuring the distribution in the manner it did. In a concurring opinion, Judge Brown questioned the validity of that distinction, and described the case as "a determination that by the stroke of the scrivener's pen, a substantial ($9 million) profit subject to a $3 million income tax is turned into a recoverable (and distributable) profit ($3 million).

The Internal Revenue Code was amended, after the period here in issue, to require that the appropriate recapture be made on a corporation's distribution of an interest in a partnership holding recapture property. The Court noted that the fact that Congress did not require this change to be applied retroactively indicated that it was not merely restating existing law but was changing that law.

* * * * *

Sixth Circuit Holds Pension Underfunding Tax Is Not A Penalty And Is Entitled To Priority In Bankruptcy

On August 28, 1991, the Sixth Circuit, in United States v. Mansfield Tire & Rubber Co., held that the excise tax imposed under I.R.C. Section 4971(a) for underfunding pension plans is entitled to priority as an excise tax and may not be treated as a general unsecured penalty claim. The court also held that, as a tax, this excise tax was not subject to equitable subordination in the absence of inequitable conduct on the part of the Government.

The court disagreed with and criticized a number of district court and bankruptcy court decisions which have looked behind the label of a federal exaction to reclassify as a penalty what is statutorily termed a "tax." In broad language, the court of appeals stated that "[i]f Congress has decided that a particular levy is a 'tax' rather than a 'penalty,' for purposes of priority in bankruptcy the matter is settled." The ruling represents a major victory for the Government with the potential of improving our ability to collect hundreds of millions of dollars of pension taxes owed in pending bankruptcies.

* * * * *

Seventh Circuit Sustains Disallowance Of Deduction For Legal Costs For Successful Defense Of Criminal RICO Charges

On August 21, 1991, the Seventh Circuit affirmed the Tax Court's favorable decision in Anthony J. Accardo and Clarice Accardo v. Commissioner, which presented the question whether the taxpayer was entitled to deduct approximately $225,000 in costs incurred in successfully defending criminal racketeering charges. The taxpayer contended that the cost of his legal defense was deductible under Section 212 of the Internal Revenue Code as an expense incurred for the conservation of income-producing property.

The court of appeals acknowledged the paradox created by such a case where the taxpayer could have deducted his legal fees as a business expense under Section 162 of the Code if he had been convicted (i.e., had been shown to be in the racketeering business), but could not deduct the fees where his defense was successful and he obtained an acquittal. Nevertheless, the court denied the claimed deductions under the well-established rule that an expense incurred in defending a liability is not made deductible by the fact that the liability might have to be satisfied out of income-producing property. The court also rejected the taxpayer's argument that the government should be required under estoppel principles to treat him as a racketeer for tax purposes. The court of appeals upheld the imposition of penalties, noting that the taxpayer failed to introduce any evidence whatsoever to show that he had a reasonable basis for claiming the deductions in question.

* * * * *

Eighth Circuit Reverses Tax Court On Controversial Partnership Ruling

On August 27, 1991, the Eighth Circuit reversed the favorable decision of the Tax Court in William G. Campbell, et al. v. Commissioner. The taxpayer received profits interests in certain partnerships in return for services rendered to the organizer of those partnerships. At issue was whether the value of the profits interests was includible in the taxpayer's income. Taxpayer argued that the receipt by a partner of an interest in partnership profits as compensation for services rendered to the partnership does not result in taxable income. Nevertheless, following its earlier decision in Sol Diamond v. Commissioner, 56 T.C. 530 (1971), aff'd. 492 F.2d 286 (7th Cir. 1974), the Tax Court held that the value of the partnership interests was includible in the taxpayer's income.

While we defended the decision of the Tax Court in this case, we did not endorse the broad interpretation that had been given to the Tax Court's opinion. Rather, we argued that the taxpayer received the partnership interests from his employer as compensation for services rendered to that entity and that such compensation was unquestionably taxable. The Eighth Circuit declined to address this argument because it was raised for the first time on appeal and, in the court's view, required additional factual findings. The Court then concluded that the partnership interests did not have any fair market value at the time of receipt and that the taxpayer thus did not realize income when he received these interests.

* * * * *

Yamaha Seeks To Invoke Income Tax Treaty Between The United States and Japan

The Internal Revenue Service issued a statutory notice of deficiency to Yamaha Motor Corporation, U.S.A. and Yamaha Parts Distributors, Inc. asserting adjustments to income for 1985 and 1986 under Section 482 of the Internal Revenue Code. (Section 482 permits an allocation of income and deductions between related taxpayers in order to clearly reflect income.) In response, Yamaha sought review of its tax situation pursuant to the income tax treaty between the United States and Japan by the Commissioner of Internal Revenue, the competent authority under the treaty. Yamaha also filed a petition in the Tax Court in order to avoid the assessment of the tax deficiency set forth in the notice of deficiency.

In reply to Yamaha's competent authority request, the Internal Revenue Service responded that jurisdiction for this matter would remain with its Chief Counsel until the close of the Tax Court litigation. It further stated that, at the time the litigation concluded, the Commissioner would entertain a resubmission of the competent authority request. Yamaha has now filed suit in the United States District Court for the District of Columbia against the United States, the Internal Revenue Service and the Secretary of the Treasury seeking a declaration that the Commissioner's refusal to act on its request was an abuse of discretion, and also seeking to enjoin the Tax Court litigation and an order compelling the defendants to consider the merits of its request for competent authority assistance.

* * * * *

Motion To Transfer Granted In Church of Scientology Litigation

On September 4, 1991, the Judicial Panel on Multidistrict Litigation granted our motion to consolidate 30 cases brought by the Church of Scientology under the Freedom of Information Act (FOIA) in the Middle District of Florida. All 30 plaintiffs opposed the motion. Each of the FOIA suits in the now-consolidated action sought documents involving various IRS examinations and investigations into the Scientology organization. The Panel found that centralization of these cases was necessary to eliminate duplicative discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary.

* * * * *

Scientology Entity Seeks To Supplement Administrative Record And Strike Government's Brief In Proceeding to Determine Entity's Tax-Exempt Status

On September 6, 1991, the plaintiff in Church of Spiritual Technology v. United States, an action seeking declaratory judgment regarding the plaintiff's tax-exempt status, filed a motion in the Claims Court to supplement the administrative record in this case and to strike the Government's brief on the merits. The motion repeats the assertion previously made in the plaintiff's petition that the denial of plaintiff's application for tax-exempt status was a sham motivated by bias and prejudice. The Claims Court already addressed and rejected this contention in this case. 20 Cl. Ct. 762 (1990). The motion, however, alleges that new information developed in Church of Scientology Celebrity Center International v. IRS, No. 90-3506 DWW(Ex.) (C.D. Cal.), supports its claim. The plaintiff also alleges that the IRS National Office, in collaboration with Los Angeles Criminal Investigation Division (CID), used the plaintiff's exemption application process to develop information for use in a CID criminal investigation of Scientology matters.

* * * * *

Church of Scientology Held In Contempt of District Court Order

On February 11, 1991, the United States District Court for the Central District of California entered orders partially enforcing summonses served on the Church of Scientology Western U.S. and the Church of Scientology International as part of the Internal Revenue Service's examination of these entities under the church audit provisions of Section 7611 of the Internal Revenue Code. After obtaining a temporary stay of this order from the District Court, the churches moved for a stay of the order from the Ninth Circuit and ultimately the Supreme Court. On May 21, 1991, Justice O'Connor denied the churches' motion. Thereafter, the churches failed to produce the documents that the District Court directed them to produce and we filed a petition to hold them in contempt of the District Court's order.

On September 16, 1991, the District Court held the churches in contempt of the District Court's order. Although the Court did not yet impose sanctions on the churches, it required them to extend the statute of limitations on all open years (not just the years before the Court) for eighteen months. This period would begin to run on the later of the day the case is decided on appeal or the day the documents are produced. The Court also set a deadline for the churches to comply with the document production or face jail and fines.

* * * * *

ADMINISTRATIVE ISSUES

CAREER OPPORTUNITIES

Middle District Of North Carolina

The United States Attorney for the Middle District of North Carolina has an opening for an experienced attorney to work in the asset forfeiture/general civil litigation area. Any attorney with familiarity in these areas, who is interested in moving to Greensboro, North Carolina, should send a resume directly to:

Bob Edmunds
United States Attorney for the
Middle District of North Carolina
P.O. Box 1858
Greensboro, North Carolina 27402

* * * * *

Office Of The United States Trustee
Los Angeles, California and Louisville, Kentucky

The Office of Attorney Personnel Management, Department of Justice, is seeking an experienced attorney for the United States Trustee's Office in Los Angeles and Louisville, Kentucky. Responsibilities include assisting with the administration of cases filed under Chapters 7, 11, 12, or 13 of the Bankruptcy Code; drafting motions, pleadings, and briefs; and litigating cases in the Bankruptcy Court and the United States District Court.

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. Applicants must submit a resume and law school transcript to:

Office of the U.S. Trustee
300 N. Los Angeles St.
Suite 3101
Los Angeles, California 90012
Attn: Anna Covington

\- or -

Office of the U.S. Trustee
602 West Broadway
Suite 512
Louisville, Kentucky 40202
Attn: Joseph Golden

Current salary and years of experience will determine the appropriate grade and salary level. The possible range for Los Angeles is GS-11 ($33,605 - $43,684) to GS-14 ($56,598 - $73,579). The possible range for Louisville is GS-11 (31,116 - $40,449) to GS-14 ($52,406 - $68,129). These positions are open until filled. No telephone calls, please.

* * * * *

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%	07-26-91	6.26%
03-10-89	9.43%	06-01-90	8.24%	08-23-91	5.68%
04-07-89	9.51%	06-29-90	8.09%	09-20-91	5.57%
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 l, 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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* * * * *

EXHIBIT
A

MEMORANDUM OF UNDERSTANDING
BETWEEN THE
UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
AND THE
UNITED STATES DEPARTMENT OF JUSTICE

This Memorandum of Understanding between the United States Department of Housing and Urban Development (HUD) and the United States Department of Justice (DOJ) sets forth the terms and conditions for conducting litigation designed to collect debts and enforce judgments owed the United States as a result of non-payment of past due debts arising out of single family home mortgage loans held by the HUD and formerly insured under the Federal Housing Administration (FHA) mortgage insurance programs.

1. The DOJ will litigate or oversee the litigation of all future HUD single family mortgage foreclosures, and related actions, involving judicial proceedings.

2. HUD will make available a number of its attorneys to act as Special Assistant United States Attorneys (SAUSAs), by virtue of 28 U.S.C. §§ 515 and 543, to assist the DOJ in its efforts to collect debts and enforce judgments arising out of these loans. Pursuant to the provisions of this Memorandum of Understanding, and under the direction and control of the United States Attorneys, each SAUSA so designated shall be authorized to represent the United States in litigation involving judicial proceedings in federal and state courts in all matters pursuant to the litigation of the said FHA-held single family mortgage loan foreclosures, and related actions, including bankruptcy proceedings, involving the collection of debts and the enforcement of judg-

ments arising out of FHA-held single family mortgage loans. These SAUSAs shall remain employees of, and will likewise be subject to direction and supervision of, HUD. HUD shall consult with the appropriate United States Attorneys as to the personnel to be designated SAUSAs, and HUD and the DOJ shall cooperate in the provision of oversight, support and clerical assistance for each SAUSA.

3. Pursuant to instructions from the DOJ, all cases covered by the Memorandum of Understanding shall be sent to the Department of Justice, Central Intake Facility, 1110 Bonifant Street, Suite 220, Silver Spring, Maryland 20910. Each case will have as an attachment a completed Claims Collection Litigation Report (CCLR). Cases received by the Central Intake Facility will be distributed to the appropriate U.S. Attorney's Office within one week of receipt of the referral.

4. Each SAUSA will be subject to the direction and control of the United States Attorney in the conduct of cases assigned for litigation. Each SAUSA shall furnish the United States Attorney, or his subordinates, copies of all pleadings, motions, legal memoranda, orders and opinions to be filed in the United States Attorney's district prior to the time for filing, unless the United States Attorney expressly indicates his or her desire not to receive such documents or implements another method of supervision.

5. In any case in which substantial legal issues are raised such as the construction or constitutionality of federal statut-

es, or issues which might affect enforcement policies or have significance for the government as a whole, where counterclaims are raised involving claims arising under other federal programs, or attempts are made to file class actions, the SAUSA shall promptly notify the United States Attorney who is responsible for the district in which the action is pending. In such cases, the United States Attorney shall have the right to remove the case from the SAUSA and assume primary responsibility for the litigation. HUD also may request that the United States Attorney or the Department of Justice assume primary responsibility for the handling of any case involving complex or unusual defenses, counterclaims, or procedures.

6. The United States Attorney in any district may, after consultation with HUD, place reasonable restrictions on the number of cases filed within that district and the time within which they may be filed in order to avoid imposing undue burdens on the dockets of the courts within that district.

7. Nothing in this Memorandum of Understanding shall affect the authority of the Solicitor General to authorize or decline to authorize appeals or petitions by the Government to any appellate court. A copy of any order or judgment adverse to the Government shall be sent promptly by the SAUSA to the Civil Division, the appropriate United States Attorney, and the appropriate HUD office pursuant to HUD procedures. The conduct of appeals in federal and state courts remains under the control of the Department of Justice. However, with the permission of the Civil

Division, the United States Attorney, and HUD, a SAUSA may prosecute or defend an appeal.

8. The Debt Collection Management Unit of the United States Department of Justice has the authority to hire private attorneys pursuant to a private counsel pilot project. Under this project, the private attorneys may litigate HUD single family mortgage foreclosures and will provide all necessary support services and supplies to HUD in connection with litigation involving single family mortgage foreclosures. The DOJ has agreed to provide attorney services when permitted by contract. Each of the private attorneys covered by this Memorandum of Understanding shall be authorized to represent the United States in litigation in federal and state courts in foreclosure matters, including bankruptcy proceedings. The private attorneys will be under the direct supervision of either the United States Attorney or an Assistant United States Attorney in the jurisdiction where the foreclosure actions, and any related actions, will be taken.

9. At the request of the United States Attorney's Office, HUD will arrange for the service of any and all papers and/or documents which are required in connection with the litigation of HUD's single family mortgage foreclosures by contracting with independent contractors or through the use of HUD resources.

10. The DOJ and HUD shall cooperate fully in conducting activities under this Memorandum of Understanding. If a disagreement arises in the implementation of this agreement, the matter shall be referred initially for resolution to the United

States Attorney and the appropriate HUD Regional Attorney. If any disagreement cannot be resolved at that level, it shall be referred for resolution to the HUD General Counsel, the Assistant Attorney General, Civil Division, and the Director of the EOUSA.

11. As required by 28 U.S.C. § 519, the Attorney General retains final authority to determine and conduct the litigation of cases subject to this Memorandum of Understanding.

12. All funds recovered under this debt collection effort by the United States Attorney's Office from third party sales, reinstatement of the mortgage or payoff of the mortgage will be sent to the appropriate United States Attorney's Office for deposit with the U.S. Treasury through DOJ's Lock Box. However, the DOJ agrees to indicate on the deposit transmittals HUD's Agency Code and the FHA Case Number for each case.

13. HUD agrees to pay for all DOJ's costs incurred in connection with the said mortgage foreclosure actions and any other related actions. The DOJ will submit vouchers on a monthly basis to HUD. These vouchers will be sent to the Office of Finance and Accounting, Room 3110, U.S. Department of Housing and Urban Development, 451 Seventh Street, Washington, D.C. 20410 for payment of costs incurred in connection with foreclosures and related matters. The invoices will indicate the following identifying information:

Agency Code:

FHA Case Number:

14. DOJ will provide HUD with a monthly status report for each of the foreclosure actions.

15. The liaison officer for HUD will be:

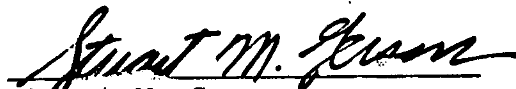
Office of General Counsel
U.S. Department of Housing and Urban Development
451 Seventh Street, S.W.
Washington, D.C.

16. The liaison officer for DOJ will be:

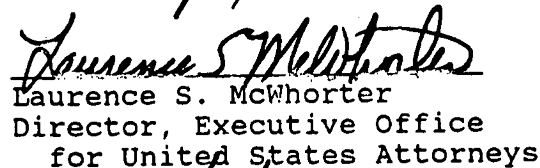
Executive Office for United States Attorneys
Financial Litigation Staff
601 D Street, N.W.
Patrick Henry Building
Room 6404
Washington, D.C. 20530

17. This Memorandum of Understanding is effective when signed by all parties and shall remain in effect indefinitely. This agreement may be terminated by either party on 60 days' written notice to the other, and may be amended at any time by written agreement of the parties.

DEPARTMENT OF JUSTICE



Stuart M. Gerson
Assistant Attorney General
Civil Division
Date: 8/16/91



Laurence S. McWhorter
Director, Executive Office
for United States Attorneys
Date: 8/13/91

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Frank Keating
General Counsel
Date: 8-9-91

EXHIBIT B

Guideline Sentencing Update

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 8 • SEPTEMBER 20, 1991

Relevant Conduct

Eighth Circuit holds sentencing statute does not authorize use of conduct relating to distinct, uncharged property crimes in setting offense level; narrows scope of U.S.S.G. § 1B1.3(a)(2). Defendant, indicted on two counts, pled guilty to one count of theft from an interstate shipment (tires valued at $37,000) and the second count of transporting a stolen vehicle was dropped. The presentence report alleged that defendant was part of an organization that stole over $1 million from interstate commerce, and "listed seven separate interstate property offenses for which the Government had neither charged nor indicted Galloway and included these offenses in the sentencing calculation." Inclusion of the uncharged thefts would have nearly tripled the guideline range, from 21–27 months to 63–78 months. The district court held that use of the uncharged conduct would violate the Fifth and Sixth Amendments by allowing defendant to be punished for conduct that he was neither indicted nor tried on.

The appellate court, following "the familiar rubric that courts do not unnecessarily decide constitutional issues," affirmed on statutory grounds and overturned "subsection (a)(2) of the relevant conduct guideline only insofar as it applies to separate property crimes that, like Galloway's, occurred on separate days, at separate places, targeted separate victims and involved a variety of merchandise. We draw no conclusions about the validity of section 1B1.3(a)(2) with respect to other types of offenses presenting other factual circumstances.... We also make clear that our holding in no way infringes on the traditional authority of sentencing courts to consider unconvicted criminal conduct for an applicable sentence within the guideline range."

The court based its holding on two grounds. First, citing 28 U.S.C. § 994(l)(1), which "authorizes incremental punishment 'in each case where a defendant is convicted of' multiple criminal offenses," the court concluded: "The clear implication is that Congress did not intend the guidelines to punish separate instances of unconvicted conduct incrementally.... Any other interpretation would render the words chosen by Congress meaningless." The legislative history supported this view, the court found, and implied "that Congress intended to afford defendants the full panoply of constitutional, statutory and procedural protections before subjecting them to incremental punishment for multiple offenses."

Second, the court determined that § 991(b)(1)(B), which cites § 994(f), "requires the Commission to establish policies and practices that avoid 'unwarranted sentence disparities among defendants with similar records who have been found guilty of similar criminal conduct.' ... The plain language of this subsection indicates that Congress sought, in large part, to equalize sentences based on convicted criminal conduct ... The legislative history confirms this interpretation."

In sum, then, the court held that § 1B1.3(a)(2) is "unenforceable insofar as it permits offenders to be systematically penalized for factually and temporally distinct property crimes that have neither been charged by indictment nor proven at trial."

U.S. v. Galloway, No. 90-3034 (8th Cir. Sept. 9, 1991) (Bright, Sr. J.).

Criminal History

CAREER OFFENDER

Seventh Circuit holds "simple possession of a weapon, without more," is not a "crime of violence" for career offender purposes. Defendant was sentenced as a career offender under § 4B1.1. One of the prior convictions used to reach career offender status was a state offense for possession of a firearm. Possession of a firearm is not specifically listed as a crime of violence in § 4B1.2, comment. (n.2), nor is force an element of the offense, so the question, pursuant to note 2(B), was whether the actual offense conduct "by its nature, presented a serious potential risk of physical injury to another." *See U.S. v. Terry*, 900 F.2d 1039, 1042–43 (7th Cir. 1990). *Accord U.S. v. John*, 936 F.2d 764, 769–70 (3d Cir. 1991); *U.S. v. Walker*, 930 F.2d 789, 793–94 (10th Cir. 1991); *U.S. v. Goodman*, 914 F.2d 696, 698–99 (5th Cir. 1990); *U.S. v. McVicar*, 907 F.2d 1, 1–2 (1st Cir. 1990).

The appellate court reversed: "While we agree that the potential for a dangerous, violent act is enhanced by the possession of any weapon ... unless the use of the weapon is overtly implied it is not a crime of violence under the Sentencing Guidelines." Defendant was arrested while "riding in a Chicago taxi in daylight hours with a handgun tucked in the waistband of his pants. The gun was not displayed or brandished. There is no evidence that even any touching, gesturing or reference to the gun occurred.... [T]he threat posed by a simple possession of a weapon, without more, does not rise to the level of an act that 'by its nature, presented a serious potential risk of physical injury to another.' [U.S.S.G. § 4B1.2, comment. (n. 2).] It is a very fine line, however.... The facts here present a most passive case. A prior conviction involving any overt action by a defendant pointing a weapon, drawing a weapon, openly displaying a weapon, brandishing a weapon, holding a weapon, gesturing towards a weapon, or any act other than mere passive possession, would ... present a sufficient potential for physical injury to constitute a crime of violence."

One circuit has held that the "offense of being a felon in possession of a firearm by its nature" is a crime of violence. *U.S. v. O'Neal*, 910 F.2d 663, 665–67 (9th Cir. 1990). Other courts have held that possession is a crime of violence when other threatening or violent behavior occurs. *See Walker*, *supra*, 930 F.2d at 794–95 (also fired gun); *U.S. v. Alvarez*,

Not for Citation. *Guideline Sentencing Update* is provided for information only. It should not be cited, either in opinions or otherwise.

914 F.2d 915, 918–19 (7th Cir. 1990) (also struggled with arresting officer); *U.S. v. McNeal*, 900 F.2d 119, 123 (7th Cir. 1990) (also fired gun); *U.S. v. Williams*, 892 F.2d 296, 304 (3d Cir. 1989) (same); *U.S. v. Thompson*, 891 F.2d 507, 509 (4th Cir. 1989) (also pointed firearm at person).

U.S. v. Chapple, No. 90-1544 (7th Cir. Aug. 20, 1991) (Kanne, J.) (Posner, J., dissenting).

Juvenile Sentences

U.S. v. Samuels, 938 F.2d 210 (D.C. Cir. 1991) (with two exceptions, juvenile sentences not counted in criminal history score under § 4A1.2(d) may not be used as basis for departure under § 4A1.3, p.s.—"Given the inconsistencies in record keeping noted by the Commission [in Application Note 7 to § 4A1.2], permitting courts to base departures on the existence of 'reliable' juvenile records would plainly exaggerate the sentencing disparities that section 4A1.2(d) is meant to curb"; the only exceptions to this rule are found in Application Note 8, for sentences that provide evidence of similar misconduct or criminal livelihood; also, court may not consider under § 4A1.3, p.s., whether leniency of juvenile sentences that are not included in criminal history merit upward departure, but may consider leniency of prior adult sentences).

Offense Conduct

Drug Quantity

Eleventh Circuit distinguishes *Chapman*, holds that "mixture" in U.S.S.G. § 2D1.1 does not include "unusable mixtures." Defendant pled guilty to importation of cocaine. She carried sixteen bags filled with cocaine and a liquid. The bags weighed 241.6 grams, of which 7.2 grams was cocaine base and 65 grams a cutting agent, with "liquid waste" the remainder. The district court sentenced defendant on the basis of the total "mixture" pursuant to § 2D1.1, comment. (n.1).

The appellate court reversed: "The inclusion of the weight of unusable mixtures in the determination of sentences under section 2D1.1 leads to widely divergent sentences for conduct of relatively equal severity. . . . [T]he appellant was sentenced based on a total weight of 241.6 grams, despite the fact that only 72 grams of the mixture constituted a usable or consumable drug mixture. This hypertechnical and mechanical application of the statutory language defeats the very purpose behind the Sentencing Guidelines and creates an absurdity in their application: the disparate and irrational sentencing arising out of a 'rational and uniform' scheme of sentencing."

The court distinguished *Chapman v. U.S.*, 111 S. Ct. 1919 (1991): "In *Chapman*, the LSD and other drugs in carrier mediums considered by the Court were usable, consumable, and ready for wholesale or retail distribution when placed on standard carrier mediums, such as blotter paper, gel, and sugar cubes. . . . [T]he cocaine mixture in this case was obviously unusable while mixed with the liquid waste material."

The court further held that "the rule of lenity should be applied to the statute to avoid absurdity and irrationality in the application of the Sentencing Guidelines. We therefore hold that the term 'mixture' in U.S.S.G. § 2D1.1 does not include unusable mixtures." *But cf. U.S. v. Mahecha-Onofre*, 936 F.2d 623, 625–26 (1st Cir. 1991) (suitcase made of cocaine and acrylic material chemically bonded together was "mixture or substance" and total weight of suitcase used) [4 *GSU* #7].

U.S. v. Rolande-Gabriel, 938 F.2d 1231 (11th Cir. 1991).

Departures

Substantial Assistance

U.S. v. Drown, No. 91-1118 (1st Cir. Aug. 14, 1991) (government could not defer filing of § 5K1.1 motion until after sentencing because defendant's cooperation was not yet complete—such strategy would "impermissibly merge" the boundaries of § 5K1.1, p.s., designed to reward cooperation prior to sentencing, and Fed. R. Crim. P. 35(b), which covers cooperation after sentencing; also reiterated that court may not depart under § 5K1.1 in absence of government motion "despite meanspiritedness, or even arbitrariness, on the government's part" (quoting *U.S. v. Romolo*, 937 F.2d 20, 24 (1st Cir. 1991)), but if refusal to file motion "is based on unacceptable standards, such as the infringement of protected statutory or constitutional rights, a federal court is empowered to intervene"). *Cf. U.S. v. Howard*, 902 F.2d 894, 896–97 (11th Cir. 1990) (court must rule on § 5K1.1 motion at sentencing hearing, may not postpone).

Aggravating Circumstances

U.S. v. Faulkner, 934 F.2d 190 (9th Cir. 1991) (may not depart upward, for defendant who pled guilty to five bank robberies, on basis of three robbery counts dismissed in plea bargain and five others government agreed not to charge; following *U.S. v. Castro-Cervantes*, 927 F.2d 1079, 1082 (9th Cir. 1990), which held "sentencing court should reject a plea bargain that does not reflect the seriousness of the defendant's behavior and should not accept a plea bargain and then later count dismissed charges in calculating the defendant's sentence").

Extent of Departure

U.S. v. Faulkner, 934 F.2d 190 (9th Cir. 1991) (courts may not analogize to career offender guideline when departure is warranted because defendant fails to qualify as career offender only by virtue of technicality). *Contra U.S. v. Williams*, 922 F.2d 578, 583 (10th Cir. 1990); *U.S. v. Jones*, 908 F.2d 365, 367 (8th Cir. 1990). *Cf. U.S. v. Delvecchio*, 920 F.2d 810, 814–15 (11th Cir. 1991) (should not automatically depart to career offender levels without analysis of actual criminal history and purpose of the guideline).

Adjustments

Obstruction of Justice

U.S. v. Madera-Gallegos, No. 90-50108 (9th Cir. Sept. 18, 1991) (Pregerson, J.) (reversing enhancement given to defendants who fled to Mexico to avoid arrest when they suspected something went wrong with drug deal and were arrested after they returned nine months later—fact that defendants avoided arrest for nine months does not counteract general rule that flight from arrest, without more, does not warrant obstruction of justice enhancement, *see* § 3C1.1, comment. (n.4(d)); *U.S. v. Garcia*, 909 F.2d 389, 392 (9th Cir. 1990); court distinguished *U.S. v. Mondello*, 927 F.2d 1463, 1465–67 (9th Cir. 1991), because there defendant had been arrested, knew he was expected to turn himself in later, but hid out for two weeks and attempted to avoid capture when authorities found him).

Note to readers: Beginning with this issue, *GSU* will list at the end of case citations or parenthetical summaries the names of judges who dissented, or dissented in part, from the holding or holdings summarized.

Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

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VOLUME 4 • NUMBER 7 • SEPTEMBER 3, 1991

General Application Principles

En banc panel of Ninth Circuit determines weight to give to Commentary; holds that U.S.S.G. § 3B1.1(c) adjustment may not be given if defendant was the only criminally responsible participant. Anderson robbed a bank, escaping in a getaway car driven by a codefendant. Both were charged with bank robbery, but the driver pled guilty to misprision of a felony (for failure to notify authorities after the bank robbery), and he and Anderson both claimed that he did not know Anderson was robbing the bank. Anderson pled guilty to the robbery, and the district court enhanced his offense level by two under § 3B1.1(c) for his leadership role, finding the adjustment appropriate regardless of whether Anderson was the only criminally responsible participant in the robbery. A divided panel of the Ninth Circuit affirmed. *U.S. v. Anderson*, 895 F.2d 641 (9th Cir. 1990) [3 *GSU* #2].

The en banc court reversed. Section 3B1.1(c) "says nothing about any required number of criminally responsible persons. The Introductory Commentary, however, says that '[w]hen an offense is committed by more than one participant, § 3B1.1 or § 3B1.2 (or neither) may apply,' and Application Note 1 explains that '[a] "participant" is a person who is criminally responsible for the commission of the offense.'" The court "consider[ed] the guideline and the commentary together, construing them so as to be consistent with each other and with [Part B of Chapter 3] as a whole," and concluded that "§ 3B1.1 (including subsection (c)) appears to apply only when the offense involves more than one person who is criminally responsible for the commission of the offense." *Accord U.S. v. Fells*, 920 F.2d 1179, 1182 (4th Cir. 1990); *U.S. v. Markovic*, 911 F.2d 613, 616–17 (11th Cir. 1990); *U.S. v. DeCicco*, 899 F.2d 1531, 1535–36 (7th Cir. 1990); *U.S. v. Carroll*, 893 F.2d 1502, 1507–09 (6th Cir. 1990).

To reach this result, the court first had to decide "the appropriate weight to give to the commentary when interpreting the guidelines." This case involved commentary that "may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal." U.S.S.G. § 1B1.7. (The court noted that other types of commentary not at issue here—those suggesting circumstances that may warrant departure and those providing background information—"are to be treated like policy statements, which courts must consider in imposing a sentence, 18 U.S.C. § 3553(a)(5).")

After examining the statements of the Sentencing Commission, which suggested that courts look to commentary "for guidance" and treat it "much like legislative history," and analogizing the commentary to "the advisory committee notes that accompany the federal rules of practice and procedure," the court concluded that "commentary cannot be treated as equivalent to the guidelines themselves but also cannot be treated merely as legislative history .... [I]t must be treated as something in between." The court set forth three principles to "guide courts in steering the middle course": "(1) consider the guideline and commentary together, and (2) construe them so as to be consistent, if possible, with each other and with the Part as a whole, but (3) if it is not possible to construe them consistently, apply the text of the guideline." The court noted that its holding "comports with the approach taken by other circuits." *See, e.g., U.S. v. Bierley*, 922 F.2d 1061, 1066 (3d Cir. 1990); *U.S. v. Smith*, 900 F.2d 1442, 1446–47 (10th Cir. 1990); *U.S. v. DeCicco*, 899 F.2d 1531, 1535–37 (7th Cir. 1990); *U.S. v. Smeathers*, 884 F.2d 363, 364 (8th Cir. 1989).

U.S. v. Anderson, No. 89-10059 (9th Cir. Aug. 6, 1991) (Rymer, J.) (en banc).

Adjustments

Obstruction of Justice

U.S. v. Barry, No. 90-3251 (D.C. Cir. July 12, 1991) (Wald, J.) (alleged false testimony to grand jury in January 1989 regarding defendant's drug use cannot provide basis for § 3C1.1 obstruction of justice enhancement for later drug possession conviction, unless court finds that false testimony was part of willful attempt to impede or obstruct investigation or prosecution of "the instant offense"—obstructive conduct need not actually occur during investigation or prosecution of instant offense; agreeing with other circuits that "the instant offense" in § 3C1.1 means the offense of conviction, *see U.S. v. Perdomo*, 927 F.2d 111, 118 (2d Cir. 1991); *U.S. v. Dortch*, 923 F.2d 629, 632 (8th Cir. 1991); *U.S. v. Roberson*, 872 F.2d 597, 609 (5th Cir.), *cert. denied*, 110 S. Ct. 175 (1989)).

U.S. v. Lato, 934 F.2d 1080 (9th Cir. 1991) (obstruction of state investigation into insurance fraud scheme was properly used for § 3C1.1 enhancement in sentencing on later federal mail fraud conviction based on same scheme—"there is no state-federal distinction for obstruction of justice" and enhancement is not limited to acts aimed at federal authorities; court stated this was an issue of first impression, but noted other cases, cited at 1082, that "have at least implied that section 3C1.1 contains no such federal limitation").

Criminal History

Career Offender Provision

U.S. v. John, 936 F.2d 764 (3d Cir. 1991) (pursuant to § 4B1.2, comment. (n.2), when prior offense is neither specifically listed as crime of violence nor "has as an element the use, attempted use, or threatened use of physical force," the sentencing court is required to examine whether defendant's actual conduct during that offense "pos[ed] a serious potential risk of physical injury to another" and was thus a "crime of violence" for career offender purposes; federal, not state, law

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governs this analysis, *accord U.S. v. Brunson*, 907 F.2d 117, 120–21 (10th Cir. 1990), *see also U.S. v. Nimrod*, No. 90-1389 (8th Cir. Aug. 8, 1991) (whether second degree burglary was "violent felony" under Missouri law does not matter for career offender purposes: "burglary" is defined "independent of the label employed by the various state criminal codes")). Other circuits have also held that underlying conduct in a prior offense may be considered in such circumstances. *See U.S. v. Goodman*, 914 F.2d 696, 699 (5th Cir. 1990); *U.S. v. McVicar*, 907 F.2d 1, 1–2 (1st Cir. 1990); *U.S. v. Terry*, 900 F.2d 1039, 1041–43 (7th Cir. 1990); *U.S. v. Baskin*, 886 F.2d 383, 389 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1831 (1990).

Departures

Criminal History

U.S. v. Bowser, No. 90-3234 (10th Cir. July 19, 1991) (per curiam) (joining Eighth and Ninth Circuits in holding that departure for career offenders is not prohibited by Guidelines, upholding downward departure for career offender based on defendant's youth (age 20) at time of two prior felonies, proximity in time of those offenses (within two months), and fact that concurrent sentences were imposed; reasonable to sentence defendant within guideline range that applied absent career offender enhancement, *accord U.S. v. Senior*, 934 F.2d 149, 151 (8th Cir. 1991); although no factor standing alone may have warranted departure, "this unique combination of factors in defendant's criminal history was not considered sufficiently by the Sentencing Commission to justify rigid application of the career offender criminal history categorization. . . . [W]e emphasize that it is all three factors in conjunction which satisfy the trial court's judgment. We cannot parse the factors, holding each one separately for consideration, without unfairly abusing the trial court's judgment," *see also U.S. v. Takai*, 930 F.2d 1427, 1433–34 (9th Cir. 1991) ("unique combination of factors may constitute" mitigating circumstance) [4 *GSU* #3]; *contra U.S. v. Goff*, 907 F.2d 1441, 1445–47 (4th Cir. 1990); *U.S. v. Pozzy*, 902 F.2d 133, 138–40 (1st Cir.), *cert. denied*, 111 S. Ct. 353 (1990)).

U.S. v. Adkins, 937 F.2d 947 (4th Cir. 1991) ("We join the Eighth and Ninth Circuits and hold that a district court may, in an atypical case, downwardly depart where career offender status overstates the seriousness of the defendant's past conduct. We emphasize that such departures, like all departures, are reserved for the truly unusual case.").

Mitigating Circumstances

U.S. v. Lauzon, No. 90-1661 (1st Cir. July 16, 1991) (Bownes, Sr. J.) (agreeing with *U.S. v. Ruklick*, 919 F.2d 95, 99 (8th Cir. 1990), that under § 5K2.13, p.s., a defendant's "significantly reduced mental capacity" need not be the "but-for" or "sole" cause of the offense before departure may be warranted; however, court also concluded that in general "a person with borderline intelligence or mild retardation who is easily persuaded to follow others" does not present a "mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission," § 5K2.0).

Substantial Assistance

U.S. v. Goroza, No. 90-10142 (9th Cir. Aug. 8, 1991) (per curiam) (Reversed because district court improperly departed under § 5K2.0, p.s., after government refused to move for substantial assistance departure under § 5K1.1, p.s. Defendant cooperated, but government believed he also made false statements. The district court departed because defendant was acquitted of perjury charge based on the alleged false statements, concluding that the Sentencing Commission had not considered this situation. The appellate court disagreed, holding that "cooperation with the government, regardless of whether the government in its discretion moves for a downward departure, is a circumstance that has been adequately taken into account by the Sentencing Commission," and that "so long as the government does not exceed the bounds of its discretion, departure under 5K2.0 for cooperation with the government is inappropriate.").

Extent of Departure

U.S. v. Little, No. 90-6244 (10th Cir. July 22, 1991) (Ebel, J.) (in making upward departure under § 4A1.3(d), p.s., because defendant had committed the instant offense while awaiting trial for an earlier crime, court reasonably added two points to criminal history score by analogizing to § 4A1.1(d), which adds two points for offense committed while under any criminal justice sentence).

Offense Conduct

Drug Quantity

U.S. v. Mahecha-Onofre, 936 F.2d 623 (1st Cir. 1991) (district court properly found weight of cocaine "mixture or substance" to be entire weight of suitcase made of 2.5 kilograms of cocaine chemically bonded to 9.5 kilograms of acrylic material, less weight of metal fittings; appellate court acknowledged that "the suitcase material obviously cannot be consumed; and the cocaine must be separated from the suitcase material before use. . . . Regardless, the suitcase/cocaine 'mixture' or 'substance' fits the statutory and Guideline definitions as the Supreme Court has recently interpreted them in *Chapman* [v. *U.S.*, 111 S. Ct. 1919 (1991)].").

Possession of Weapon During Drug Offense

U.S. v. Garner, No. 90-3361 (6th Cir. July 23, 1991) (Martin, J.) (reversing § 2D1.1(b)(1) finding because "it was clearly improbable that the gun was connected with [defendant's] drug offense": gun was an antique style, single-shot Derringer, unloaded and with no ammunition in defendant's house, it was locked in a safe twelve feet away from the safe where drugs were found, and is "not the type normally associated with drug activity"; court noted that "any one of these factors, standing alone, would not be sufficient to compel this conclusion," but the "cumulative effect of these factors" does).

Supreme Court—Review Granted

U.S. v. R.L.C., 915 F.2d 320 (8th Cir. 1990) [3 *GSU* #14], *cert. granted*, 111 S. Ct. 2850 (1991). Government appeals ruling that for juvenile sentenced pursuant to 18 U.S.C. § 5037(c)(1), which provides that sentence imposed on juvenile may not extend beyond "maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult," the sentence is limited by the "maximum term of imprisonment" authorized under the Guidelines for a similarly situated adult. *See* 49 Crim. Law Rep. 3077 (June 26, 1991).

EXHIBIT C

Federal Sentencing and Forfeiture Guide
NEWSLETTER

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

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Pre-Guideline Sentencing

1st Circuit upholds pre-guidelines sentence despite co-conspirators' lighter sentences. (105)(145) Defendant complained that his pre-guidelines sentence of two concurrent terms of 10 years each on his two drug convictions was disproportionate compared to the sentences of his two other co-conspirators who pled guilty. They each received sentences of four years or less. The 1st Circuit upheld the sentences. The sentence was within the statutory limits for his crimes. Although defendant did go to trial while the other defendants pled guilty, there was no evidence that the harsher sentence was in retaliation for not pleading guilty. Defendant was involved in a major marijuana distribution conspiracy for ten years and he admitted at trial that he distributed thousands of pounds of marijuana. Although his sentence was greater than that of some other co-conspirators, it was not so out of line with defendant's role in the conspiracy as to constitute cruel and unusual punishment. *U.S. v. Richard*, __ F.2d __ (1st Cir. Aug. 27, 1991) No. 90-1997.

Guideline Sentences, Generally

2nd Circuit affirms pre-guidelines sentence for defendant who pled guilty only to conduct occurring prior to guidelines' effective date. (125) At defendant's plea hearing, he stated that he was only pleading guilty to conduct occurring prior to November 1, 1987, the effective date of the guidelines. After determining that the government had no objections, the district court sentenced defendant under pre-guidelines law. Defendant subsequently made a motion under Fed. R. Crim. P. 35 to reduce his sentence, claiming that because he pled guilty to crimes which encompassed acts committed after November 1, 1987, the district court erroneously failed to sentence him under the guidelines. The 2nd Circuit rejected this contention, finding no merit to defendant's claim that by pleading guilty to both counts of the information, he necessarily admitted to conducting illegal activities during the entire period specified in the charge. A district court may conclude that a defendant's participation in

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a charged offense ceased before the time period alleged in the indictment had elapsed. There was no error in the district court's concluding that defendant's illegal conduct occurred prior to November 1, 1987. Defendant stated at the plea allocution that he was only pleading guilty to acts that occurred prior to that date and no evidence was presented which indicated that defendant continued to commit his offenses after that date. *U.S. v. Bloom*, __ F.2d __ (2nd Cir. Aug. 26, 1991) No. 91-1154.

4th Circuit affirms that conspiracy continued past effective date of guidelines. (125)(380) Defendants were involved in a conspiracy to fraudulently obtain HUD-insured mortgages, which they used to purchase property with a very low downpayment. Although the mortgages were obtained in 1984 and 1985, the district court determined that the conspiracy continued past November 1, 1987, the effective date of the guidelines, and thus sentenced defendants under the guidelines. Defendants argued that since the object of the conspiracy was to obtain the HUD-insured mortgages, once the mortgages were obtained this objective was achieved and the conspiracy ended. The 4th Circuit rejected this contention, finding there were other objectives of the conspiracy. First, one of the objects of the conspiracy was to make money by eventually reselling the property. One conspirator proposed that if they held on to the property for three years, they would make a 40 percent return on the resale. This showed that the conspiratorial agreement contemplated that the agreement would last for at least three years. Second, a partnership formed by the conspirators continued to make mortgage payments well past November 1, 1987. This partnership was intimately involved in the fraudulent scheme. *U.S. v. Barsanti*, __ F.2d __ (4th Cir. Aug. 19, 1991) No. 90-5341.

10th Circuit rules government failed to establish that conspiracy continued past guidelines' effective date. (125)(380) The 10th Circuit found that the government failed to offer any evidence that the conspiracy of which defendant was a member continued past November 1, 1987, the effective date of the guidelines. The only evidence offered by the government to show conspiratorial activity by anyone beyond this date was testimony that a cocaine buyer of a co-defendant sold the cocaine in 1988. The co-defendant had sold the cocaine to the buyer in December 1987. However, this was after the co-defendant terminated his conspiracy with defendant and began a new conspiracy. Thus, defendant was improperly sentenced under the guidelines. *U.S. v. Harrison*, __ F.2d __ (10th Cir. Aug. 19, 1991) No. 89-5156.

6th Circuit reverses district court's failure to sentence defendant for 2500 kilograms he conspired to import. (140)(270)(722) The district court found that defendant had conspired to import and distribute 2500 kilograms of cocaine, but sentenced him on the basis of only 2.5 to 3 kilograms. The court did this because most of defendant's co-conspirators, who were convicted and sentenced nine months earlier, were only sentenced on the basis of the smaller quantity of cocaine. At the time they were sentenced, the government was unable to prove the conspiracy to import and distribute the larger quantity of cocaine. The 6th Circuit reversed, holding that the guidelines do not give a district court discretion to ignore its findings concerning a defendant's relevant conduct. To the extent the district court actually was departing downward in order to equalize the sentences of co-conspirators, the downward departure was unjustified. Under 6th Circuit law, a district court may not engage in "equalization departures." *U.S. v. Gessa*, __ F.2d __ (6th Cir. Aug. 29, 1991) No. 90-5825.

General Application Principles (Chapter 1)

8th Circuit finds more than minimal planning where offense lasted more than two years. (160)(300) Defendant contended that the district court erred in increasing his offense level by two because his fraud involved more than minimal planning under guideline section 2F1.1(b)(2). Defendant argued that he was not involved in the more extensive aspects of the fraud. The 8th Circuit rejected this argument since it went more to defendant's role in the offense than to the nature of the offense itself. Almost any crime that consists of a pattern of activity over a long period of time will qualify as

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an offense involving more than minimal planning. Since it was not disputed that the fraudulent scheme involved more than minimal planning and that defendant was involved in the scheme for almost two years, the application of section 2F1.1(b)(2) was not clearly erroneous. *U.S. v. West*, __ F.2d __ (8th Cir. Aug. 21, 1991) No. 90-1341.

8th Circuit finds more than minimal planning in defendant's concealment of change of circumstances in disability claim. (160)(300) Defendant received disability benefits from the Social Security Administration (SSA) on behalf of her disabled infant granddaughter who lived with her. After the infant was removed from the home because of neglect, defendant never notified the SSA about the change in status or advised the granddaughter's foster mother about the disability payments. Defendant completed and signed a statement with the SSA indicating there were no changes in the number of people in her household. Although the granddaughter was eventually adopted by her foster mother, defendant continued to receive the disability payments and use them for her own benefit. The 8th Circuit affirmed an enhancement under guideline section 2F1.1(b)(2)(A) for more than minimal planning. While defendant's receipt of the checks may have been purely opportune, her concealment of the granddaughter's absence and her continued use of the checks required the necessary repeated acts over a period of time to justify the enhancement. *U.S. v. Callaway*, __ F.2d __ (8th Cir. Aug. 30, 1991) No. 91-1672.

8th Circuit rules guidelines permit use of post-plea information obtained from defendant in criminal history. (185)(500) Defendant contended that it was improper to include his prior misdemeanor conviction in his criminal history because the information would not have been obtained but for defendant's disclosures to the probation officer after the plea agreement was executed. Thus, defendant contended that information obtained solely through his cooperation was being used against him in violation of the plea agreement. The 8th Circuit rejected this argument, holding that guideline section 1B1.8 permits a court to use information obtained, post-plea, from a defendant, in the calculation of the criminal history category. *U.S. v. Hewitt*, __ F.2d __ (8th Cir. Aug. 22, 1991) No. 90-5578.

Offense Conduct, Generally (Chapter 2)

8th Circuit holds that attempt to murder witness through "hit man" involved threatened use of gun. (210) Defendant attempted to hire a government informant to murder a witness. Defendant gave the informant money and an unregistered firearm and ammunition to use for that purpose. The 8th Circuit affirmed a three level enhancement under guideline section 2A2.1(b)(2)(C) because defendant's offense involved the threatened use of a gun. From the point of view of the victim, defendant's offense involved the threatened use of a gun, even if defendant did not intend to use the gun personally. *U.S. v. Sims*, __ F.2d __ (8th Cir. Aug. 23, 1991) No. 90-2701.

8th Circuit enhances sentence for serious bodily injury despite defendant's acquittal. (210) Defendant was charged in Count I with assault with a baseball bat and in Count II with assault resulting in serious bodily injury. He was found guilty of Count I and guilty of the lesser-included offense on Count II of assault by striking, beating or wounding. Defendant's base offense level under guideline section 2A2.2(a) was 15, but the district court enhanced the offense level by four under guideline section 2A2.2(b)(3)(B) for inflicting serious bodily injury on the victim. The 8th Circuit upheld the enhancement despite defendant's acquittal on that charge. Conduct which is the subject of an acquittal may be used to enhance a sentence under the guidelines. Here, the district court properly concluded that the jury's determination under the statutory definition of serious bodily injury did not preclude a finding of serious bodily injury under the guidelines definition. Here, the guidelines' definition of serious bodily injury was met: the victim's skull fracture required hospitalization. *U.S. v. Slow Bear*, __ F.2d __ (8th Cir. Aug. 30, 1991) No. 90-5437.

10th Circuit finds no double counting in consideration of statutory rape victim's age. (210)(660) Defendant was convicted of the statutory rape of a girl under the age of 12. He was sentenced under guideline section 2A3.1, which carries a base offense level of 27. He contended it was impermissible double counting for the district court to then add four points to his offense level under guideline section 2A3.1(b)(2)(A) because the victim was under the age of 12. The 10th Circuit rejected this argument. First, the district court clearly applied the guidelines in the manner contemplated by the Sentencing Commission. Second, it disagreed with defendant's contention that the Sentencing Commission fully incorporated the age of the victim into the base offense level for section 2A3.1. The guideline applies to engaging in a sexual act with any person who is incapable of understanding the nature of the conduct. Although a child under the age of 12 is clearly such a person, the court could not say that the Sentencing Commission necessarily set a base offense level that reflected all of the harm caused by engaging in sexual conduct with a child under 12. *U.S. v. Ranson*, __ F.2d __ (10th Cir. Aug. 21, 1991) No. 90-6403.

9th Circuit reverses enhancement for use of firearm where defendant received consecutive sentence under 924(c). (220)(330(680) The 9th Circuit held that because the defendant "received a consecutive under 18 U.S.C. section 924(c) for use of a firearm during commission of a felony, the base offense level for the bank robbery conviction should not have been enhanced for the use or display of a firearm." The adjusted offense level for the bank robbery should have been

the base offense level of 20, increased by two levels since property of a financial institution was taken. The case was remanded for resentencing. *U.S. v. Brown*, __ F.2d __ (9th Cir. Aug. 27, 1991) No. 90-10084.

5th Circuit rejects argument not raised at trial or sentencing. (240)(800) Defendant argued that the only type of drug he could have produced with his chemicals was Levo-methamphetamine, which carries a lower offense level than the methamphetamine for which he was sentenced. The 5th Circuit refused to consider this argument, since it had not been raised at trial or at sentencing. There was no evidence in the record which the appellate court could review and thus no evidence to establish any error. *U.S. v. Evans*, __ F.2d __ (5th Cir. June 28, 1991) No. 89-6107.

5th Circuit upholds sentencing based on chemicals and glassware supplied by the government. (240) Defendant was arrested after undercover DEA agents assisted defendant in purchasing chemicals and equipment to produce methamphetamine. Defendant contended that government agents improperly predetermined his sentence by supplying the chemicals and glassware. The 5th Circuit rejected this argument. The argument was not raised at trial and therefore had to be rejected absent plain error. Although a previous case had found plain error in the determination of a defendant's sentence when the government had supplied the chemicals used in a drug conspiracy, in that case the defendant did not understand the amount of drugs that could be produced by the chemicals provided by the government. Here, there was evidence that defendant understood the amount of drug to be produced. *U.S. v. Evans*, __ F.2d __ (5th Cir. June 28, 1991) No. 89-6107.

6th Circuit panel expresses belief that drug quantity is an element of offense which should be submitted to the jury. (240)(755) Notwithstanding circuit precedent and the weight of authority to the contrary, a 6th Circuit panel stated that it believed that drug quantity is an element of an offense under 21 U.S.C. section 841 which should be determined by the jury, rather than by the judge at sentencing under the preponderance of the evidence standard. The fact that quantity is listed under the penalty provision of the statute does not require quantity to be considered by the judge at sentencing. Because quantity under section 841 is such an "important and disputable factual issue," it should be determined by the jury. The judicial determination of quantity undermines the function of the jury, limiting it to merely determining that defendant engaged in some illegal activity under section 841. The judge becomes "empowered to make one of the most critical factual determinations regarding the defendant's culpability." Nevertheless, the court ruled that it was bound to follow circuit precedent, and thus affirmed the district court's determination of drug quantity. *U.S. v. Rigsby*, __ F.2d __ (6th Cir. Sept. 4, 1991) No. 90-6127.

1st Circuit considers entire weight of statue made of beeswax and cocaine. (250) Defendant was arrested in possession of 11 statues made of beeswax and cocaine. The 1st Circuit affirmed the district court's decision to include the entire weight of the statue in the weight of the drugs. There was no meaningful difference between this case and *U.S. v. Machecha-Onofre*, __ F.2d __ (1st Cir. 1991) No. 90-1405, which involved a suitcase made of cocaine chemically bonded with acrylic. *U.S. v. Restrepo-Contreras*, __ F.2d __ (1st Cir. Aug. 21, 1991) No. 90- 1660.

6th Circuit affirms inclusion of weight of blotter paper in total weight of LSD. (250) Defendant contended that he was deprived due process of law when the district court calculated his sentence by taking into consideration the weight of the blotter paper medium as well as the pure LSD deposited on it. Following the Supreme Court's decision in *Chapman v. United States*, 111 S.Ct. 1919 (1991), the 6th Circuit rejected this contention. *U.S. v. Andress*, __ F.2d __ (6th Cir. Aug. 30, 1991) No. 90-6427.

6th Circuit upholds sentencing defendant on the basis of entire negotiated quantity of drugs. (265) Defendant contended that there was no evidence that he was capable of purchasing the two five-kilogram amounts of cocaine for which he negotiated, and therefore this amount should have been excluded from his offense level. The 6th Circuit rejected this argument, ruling that the defendant did not meet his burden of proving he was not capable of purchasing the negotiated amount. Defendant's argument was based upon testimony of a co-defendant who asserted that he "coached" defendant to act like a dope dealer in exchange for several hundred dollars. In contrast, the government presented a videotape showing defendant repeatedly boasting of his ability to quickly sell kilogram quantities of cocaine and that his only difficulty was getting a consistent supply. The tape also showed defendant taking and testing the cocaine brought by undercover agents. Based on this "powerful evidence," the district court was justified in rejecting defendant's testimony and including the 10 kilograms in the offense level calculation. *U.S. v. Christian*, __ F.2d __ (6th Cir. Aug. 19, 1991) No. 90-6326.

8th Circuit affirms reliance upon co-defendant's statements in sentencing defendant. (270)(770) Defendant objected to the district court's consideration of 42 grams of cocaine involved in a trip he allegedly made to Aberdeen, South Dakota for the purpose of distributing the cocaine. The government learned of this trip from a co-defendant after defendant had entered into his plea agreement. Defendant contended that it was improper to use this information, claiming that his own guilty plea "forced" his co-defendant to plead guilty. Therefore, defendant argued that the government was using against defendant "indirect information gained by defendant's cooperation." The 8th Circuit found no impropriety in using a co-defendant's statements against a

defendant who has pled guilty. There was no merit in defendant's argument that defendant's guilty plea "forced" the co-defendant to plead guilty and prevented the co-defendant's statements from being used against defendant. *U.S. v. Hewitt*, __ F.2d __ (8th Cir. Aug. 22, 1991) No. 90-5578.

8th Circuit holds "no further prosecution" clause bars considering additional drugs known at time of plea. (270) (770)(780) After defendant's arrest carrying 170 grams of cocaine, he admitted making two prior trips to distribute cocaine. In his plea agreement, the government agreed that unless evidence established otherwise, defendant was involved with 394 grams of cocaine. A police detective then told the probation officer that a co-defendant had said that defendant had made six or eight prior trips to distribute cocaine. The prosecutor was not aware of this information at the time of the plea agreement. Nonetheless, the 8th Circuit found that it was improper to rely on these additional trips. The quantity of drugs involved was unknown, and the other police detective who was present did not recall the co-defendant making such a statement. Furthermore, the "no further prosecution" clause in defendant's plea agreement barred further prosecution based upon information then available to the government. The government, via the police detective, had the information regarding the additional trips at the time the plea agreement was executed. *U.S. v. Hewitt*, __ F.2d __ (8th Cir. Aug. 22, 1991) No. 90-5578.

8th Circuit upholds consideration of sales reflected in defendant's drug records. (270)(770) Defendant challenged the district court's consideration of the amount of methamphetamine sales reflected in her drug records. She contended that the government failed to prove the records were notes of drug sales and that even if some of the records did reflect drug sales, not all of the notes should be found to be drug sales. The 8th Circuit upheld the consideration of all of the drug sales reflected in the records. Evidence at trial supported the government's contention that the records seized from defendant's house were of her drug business. One witness testified that when he purchased methamphetamine from defendant on credit she would write his name down and the amount he owed her. He recognized his name as well as the name of several other individuals in her notes. In addition, a police officer gave his expert opinion that the notes were drug records. It was reasonable for the district court to infer that all of the figures in the notes reflected drug sales. *U.S. v. Carper*, __ F.2d __ (8th Cir. Aug. 27, 1991) No. 90-3077.

8th Circuit affirms that defendant bought one pound of methamphetamine for resale, not personal use. (270)(770) The 8th Circuit rejected defendant's contention that it was error for the district court to determine that he purchased one pound of methamphetamine from his suppliers for resale, rather than personal use. Witnesses testified that he bought methamphetamine in one ounce quantities, that those quantities were too big for personal use, that defendant packaged the drugs in smaller quantities for resale, and that defendant frequently sold the drugs to others. The court also rejected defendant's claim that the finding as to drug quantity should be set aside because he was denied the right to confront the witnesses against him. Although the presentence report and sentencing hearing contained many hearsay reports, the district court primarily relied upon the direct testimony of one witness. This witness testified that she was the bookkeeper of one of defendant's buyers, and that this buyer bought at least one pound of methamphetamine from defendant. This witness's statements were not hearsay and defendant was able to cross-examine her about them. *U.S. v. Apfel*, __ F.2d __ (8th Cir. Aug. 30, 1991) No. 90-2637.

10th Circuit rejects holding defendant responsible for cocaine acquired prior to his entry into conspiracy. (275) The 10th Circuit held that the district court erroneously held defendant responsible for one kilogram of cocaine that his co-conspirators distributed prior to his entry into the conspiracy. As a late-entering co-conspirator, defendant could be sentenced only for past quantities that he knew or should have known the conspiracy distributed. Here, there was no indication that defendant received information on the conspiracy's prior drug dealings. The scope of his agreement was narrow: he came into town to sell two or three ounces of crack, and the co-conspirators agreed to assist him. Nothing in the record showed that the parties contemplated a more extensive relationship. "We think it implausible that person who undertakes a one-time drug deal in concert with others thereby assumes responsibility for the entire past misdeeds of his or her co-conspirators." *U.S. v. Matthews*, __ F.2d __ (10th Cir. Aug. 21, 1991) No. 90-5157.

6th Circuit affirms firearm enhancement based upon gun under co-defendant's car seat. (284) The 6th Circuit upheld a two-level enhancement under guideline section 2D1.1(b)(1) for defendant based upon a gun which was located under his co-defendant's car seat. The co-defendant's ready access to the gun was foreseeable to defendant. *U.S. v. Christian*, __ F.2d __ (6th Cir. Aug. 19, 1991) No. 90-6326.

7th Circuit reverses firearm enhancement because firearms found in home were not connected to offense of conviction. (286) Defendant was arrested after undercover agents observed him conduct a drug transaction in the parking lot of a mall. Neither defendant nor his companion was carrying a weapon, and no weapons were found in defendant's car. A search of defendant's home located 25 miles away uncovered a set of scales, baggies containing cocaine residue, cash and a number of weapons. Defendant pled guilty to distributing cocaine. The 7th Circuit reversed an enhancement under guideline section 2D1.1(b)(1) based upon his possession of a weapon during a drug trafficking crime. Under the guideline, the weapons must be possessed during the commission of the offense of conviction. The crime for which defendant

was charged and convicted did not occur at his home where the guns were discovered nor in the proximity of his home. *U.S. v. Edwards*, __ F.2d __ (7th Cir. Aug. 16, 1991) No. 90-2773.

7th Circuit affirms using insider trading enhancement where defendant used stolen information to trade stocks. (300) Defendant unlawfully entered the finance department of a bank and obtained confidential information which he used to trade on the stock market. Defendant received a base offense level of six under section 2F1.1(6), the guideline for fraud and deceit. The district court then increased the base level by seven points under section 2F1.1 to reflect a total gain of between $201,000 and $500,000, based on section 2F1.2, the insider trading guideline, which directs a court to increase a defendant's offense level based upon the table in section 2F1.1. The 7th Circuit affirmed. Even though defendant was convicted of mail fraud rather than insider trading, the commentary to section 2F1.2 states that other offenses that involve the misuse of inside information for personal gain may also be covered by the guideline. It was also appropriate to use defendant's gain as a measure of the loss he caused the bank and its customers. The whole point of section 2F1.2 is to allow the court to place a monetary value on losses that are hard to identify. It was also proper to use the gains of others to whom defendant recommended trades. *U.S. v. Cherif*, __ F.2d __ (7th Cir. Aug. 30, 1991) No. 90-2118.

8th Circuit affirms that "loss" is not reduced by settlement credit or funds withheld by victim. (300) Defendant was convicted of fraudulently selling adulterated meat to the State of Missouri. The 8th Circuit affirmed the district court's determination that the total amount of the loss to the victim under guideline section 2F1.1(b)(1) was about $285,000, the price of the total amount of meat that the state contracted to buy. The court rejected defendant's claim that the loss should be reduced by the credit given to the state by defendant's company after recalling 62,000 pounds of the meat, or the cost of the amount of meat on which the state withheld payment, or the $20,000 that defendant paid to the state in settlement of a civil suit. The guidelines establish that loss includes "probable or intended loss." The court also rejected defendant's claim that he should receive credit for the proportion of the product sold that was actually good meat, since in this case, the good was mixed with the bad in the form of sausage and ground meat. *U.S. v. West*, __ F.2d __ (8th Cir. Aug. 21, 1991) No. 90-1341.

9th Circuit rules that trustee is not the only victim of bankruptcy fraud. (300) Defendant argued that the only victim of his bankruptcy fraud was the trustee of his estate, not his creditors, and that therefore the district court should not have increased his base offense level for involvement in a scheme to defraud more than one victim under section 2F1.1(b)(2)(B). The 9th Circuit rejected the argument, agreeing with the district court that defendant's secured creditors as well as the bankruptcy trustee were the victims of his fraud. *U.S. v. Nazifpour*, __ F.2d __ (9th Cir. Sept. 3, 1991) No. 90-30399.

9th Circuit rules that loss from bankruptcy fraud included money in account closed prior to filing bankruptcy. (300) The 9th Circuit ruled that the fact that defendant closed his account on November 19, 1987, one day prior to filing his bankruptcy petition on November 20, 1987 "does not change the fact that he did not report its existence when he prepared the Schedules of Assets and Liabilities under penalty of perjury on November 6, 1987." *U.S. v. Nazifpour*, __ F.2d __ (9th Cir. Sept. 3, 1991) No. 90-30399.

1st Circuit reverses vulnerable victim and coercion enhancements in prostitution case. (310)(410) The 1st Circuit reversed a vulnerable victim enhancement under section 3A1.1 based on an interstate prostitution ring's use of single teenage mothers as prostitutes. The Mann Act was designed to protect women and girls who, because of "their innocence, their hard lives and their vulnerability, were particularly susceptible to becoming victims of unscrupulous men and women who would take advantage of their situation for immoral purposes." The victims in this case were not untypical. The court also reversed a four-level enhancement under section 2G1.1 for coercion. The court refused to accept as coercion the economic pressures which existed in this case. First, there was ample evidence that the prostitutes could and did quit at any time. Second, coercion must involve a threat of negative consequences that will affirmatively follow if a person does not succumb to the pressure. The fact that there was money to be made from prostitution was a welcome consequence to the victims, not a negative one. *U.S. v. Sabatino*, __ F.2d __ (1st Cir. Aug. 15, 1991) No. 90-2191.

Adjustments (Chapter 3)

5th Circuit affirms vulnerable victim enhancement despite concern about its overuse in racial crimes. (410) Defendants, all members of a white "skinhead" group, were convicted of various crimes targeted at black, Hispanic and Jewish citizens. The 5th Circuit affirmed a vulnerable victim enhancement under guideline section 3A1.1, agreeing that in this instance, the victims were particularly vulnerable because of their racial and ethnic status. Nevertheless, the court cautioned against the overuse of this section for such purposes. "The sentencing guidelines were not intended to provide harsher penalties for crimes committed against certain racial and ethnic groups, nor were they intended to penalize individuals of one race for crimes committed against members of different racial and ethnic groups. Rather, the section is available for the limited use by the district court for those specific situations in which the racial and ethnic characteristics of a victim or victims play a significant role in

their being targeted by certain individuals for criminal activity." *U.S. v. Greer*, __ F.2d __ (5th Cir. Aug. 13, 1991) No. 90-1348.

8th Circuit reverses vulnerable victim enhancement where defendant misappropriated infant's disability benefits. (410) Defendant received disability benefits from the Social Security Administration (SSA) on behalf of her disabled infant granddaughter who lived with her. After the infant was removed from the home because of neglect, defendant never notified the SSA about the change in status or advised the granddaughter's foster mother about the disability payments. Defendant continued to receive the payments for several years, even after the granddaughter was adopted by her foster mother. The 8th Circuit reversed a vulnerable victim enhancement under guideline section 3A1.1. Although the record showed that the granddaughter was a victim and was both young and handicapped, the record did not support a finding that defendant chose the infant as a "target" for the crime because of her youth and physical handicaps. *U.S. v. Callaway*, __ F.2d __ (8th Cir. Aug. 30, 1991) No. 91-1672.

1st Circuit affirms that interstate prostitution ring involved more than five participants. (430) The 1st Circuit affirmed a four-level enhancement under guideline section 3B1.1 based upon defendants' leadership role in an interstate prostitution ring that involved five or more participants. Defendants were the president and vice-president of the organization. At its peak, the ring had between 15 and 30 employees providing services in three states. Even if all of the employees did not work in the business at the same time and did not all engage in interstate prostitution, this would not change the analysis. The commentary to section 3B1.1 makes it clear that in counting the number of participants, all persons involved during the course of the entire offense are to be considered. *U.S. v. Sabatino*, __ F.2d __ (1st Cir. Aug. 15, 1991) No. 90-2191.

3rd Circuit affirms aggravating role of defendant who organized pension fraud scheme. (430) The 3rd Circuit affirmed a two level enhancement under guideline section 3B1.1 based upon defendant's aggravating role in a pension fraud scheme. Even if the other two defendant's exercised decision-making authority over the scheme, this would not preclude defendant from also being a leader. Defendant did far more than merely suggest the commission of the offense. Defendant first approached the codefendants with the scheme. He demanded that one codefendant obtain a 20 percent commission rate to increase their return, and told the other codefendant that if the codefendant accepted defendant's plan, the codefendant would be "taken care of." Defendant participated in organizing all aspects of the scheme, including the financial transactions. *U.S. v. Cusumano*, __ F.2d __ (3rd Cir. Aug. 28, 1991) No. 90-1931.

4th Circuit affirms that real estate agent had managerial role in fraudulent scheme to obtain HUD-insured loans. (430) Defendant, a real estate agent, assisted two investors in fraudulently obtaining HUD-insured loans by referring individuals to them to purchase certain condominiums. The 4th Circuit affirmed a three-level enhancement based upon his managerial or supervisorial role in the scheme. Without defendant's introduction and encouragement, the individuals would not have met the co-defendants and would not have purchased the property. Defendant "was an essential link in the conspiracy, managing and supervising and arranging for the deals to be struck." *U.S. v. Barsanti*, __ F.2d __ (4th Cir. Aug. 19, 1991) No. 90-5341.

8th Circuit counts innocent employees in finding that defendant's criminal activity was "otherwise extensive." (430)(820) The district court concluded that there were at least eight employees who "knowingly or unknowingly participated in the instant offense of which this defendant was an organizer and leader." Defendant contended that the other employees were not "participants" under guideline section 3B1.1(b) because they were not criminally involved. Reviewing this issue de novo, the 8th Circuit upheld the enhancement. While it is true that the word "participants" refers to persons criminally responsible for their acts, a defendant's aggravating role can also be based upon supervision of an "otherwise extensive" criminal activity. This refers to the number of persons involved in the operation, including outsiders who did not have knowledge of the facts. Judge Heaney dissented from this portion of the opinion, finding that the involvement of eight company employees was not sufficient to make defendant's criminal activity "otherwise extensive." *U.S. v. West*, __ F.2d __ (8th Cir. Aug. 21, 1991) No. 90-1341.

8th Circuit upholds managerial role for methamphetamine dealer (430). The 8th Circuit found no error in the district court's determination that defendant was a manager or supervisor in a criminal activity involving five or more participants. The district court did not make "rote findings by parroting the language" of section 3B1.1(b). The court named three of the participants, noted that defendant was a drug dealer of some size and substance, had many customers coming to him for drugs, and supervised runners. Defendant admitted at his plea hearing that his two suppliers knew he was going to resell the drugs. Evidence presented at the plea hearing indicated that the drug conspiracy included defendant and his two suppliers, and five other people who ran drugs and collected money for defendant. Direct testimony linked five of these seven conspirators to defendant, while two were linked through hearsay testimony. *U.S. v. Apfel*, __ F.2d __ (8th Cir. Aug. 30, 1991) No. 90-2637.

8th Circuit rejects minor role simply because defendant was less culpable than his father. (440) Defendant and his father pled guilty of selling adulterated meat with intent to defraud.

The 8th Circuit rejected defendant's argument that defendant was entitled, as a matter of law, to a minor role reduction under guideline section 3B1.2(b) simply because he was less culpable than his father. In this case, the stipulated facts indicated that defendant was deeply involved in the criminal acts. Therefore, there was no error in refusing to give defendant the requested reduction. *U.S. v. West*, __ F.2d __ (8th Cir. Aug. 21, 1991) No. 90-1341.

9th Circuit upholds departure based on degree of abuse of trust. (450)(745) After upholding a two level adjustment for abuse of trust under 3B1.3, the 9th Circuit also agreed that "the *degree* of trust which [defendant] held coupled with the *degree* of his involvement in this sordid affair warranted a departure in this case." The evidence showed that the defendant, a Deputy U.S. Marshal required a subordinate to perform various sex acts on approximately ten men while watching, participating, or recording the activity. "The Sentencing Commission simply did not contemplate a senior official from the U.S. Marshal Service using his position to promote such activity." The 18-month departure was not unreasonable. *U.S. v. Pascucci*, __ F.2d __ (9th Cir. Aug. 23, 1991) No. 90-10388.

9th Circuit finds Deputy U.S. Marshal abused trust and used special skills in extorting money from victim. (450) The defendant, a Deputy U.S. Marshal, blackmailed the victim after he tape-recorded the victim's "one night affair" with another Deputy U.S. Marshal. The defendant bragged that he had friends who "could get [defendant's] telephone number even though it was unlisted." Defendant was able to track down the victim and send the extortion package to the victim's wife through his contacts as a Deputy U.S. Marshal. He also used his U.S. Marshal Service identification to obtain the victim's address and phone number from the hotel. This was sufficient to support a two-level upward adjustment under 3B1.3 for abuse of trust or special skills. *U.S. v. Pascucci*, __ F.2d __ (9th Cir. Aug. 23, 1991) No. 90-10388.

1st Circuit affirms obstruction enhancement based upon defendant's threats to witnesses. (460) The 1st Circuit affirmed the district court's determination that defendant attempted to obstruct justice based upon his threats to two witnesses prior to their testimony. In the first case, he told a witness, in response to her refusal to talk to him before trial, that she would "end up taking a one-way walk through the woods." In the other case, defendant told a potential witness prior to his testimony before the grand jury that the witness would "get his." The court rejected defendant's contention that this was "suspect" testimony within the meaning of guideline section 3C1.1 which should be evaluated in the light most favorable to the defendant. This language most likely refers to testimony by a suspect, not "suspicious" testimony. *U.S. v. Sabatino*, __ F.2d __ (1st Cir. Aug. 15, 1991) No. 90-2191.

2nd Circuit rules that misrepresentation concerning criminal history justified obstruction enhancement. (460)(820) Defendant received an enhancement for obstruction of justice because he made a false statement to his probation officer that he had no prior record, when in fact he had been arrested and convicted six previous times. The 2nd Circuit affirmed the obstruction enhancement, rejecting defendant's contention that the misrepresentation was not material because no one would reasonably rely upon his statement. Reviewing the definition of the term "material" de novo, the court found that a material statement embraced all false statements that would tend to affect a defendant's sentence, whether or not discovery of the falsity of the statement was inevitable. Thus, the question was not whether a defendant's statement was believed, but whether, if believed, it would tend to affect the defendant's sentence. Since the lack of a criminal record would affect defendant's sentence, the misrepresentation was material and the enhancement proper. *U.S. v. Rodriguez*, __ F.2d __ (2nd Cir. Aug. 27, 1991) No. 90-1684.

3rd Circuit upholds obstruction enhancement based on misrepresentation of financial circumstances. (460) Defendant told his probation officer that certain stock he owned was "essentially worthless," when in fact he was negotiating to sell the stock for half a million dollars. The 3rd Circuit upheld an enhancement under guideline section 3C1.1 for obstruction of justice. The fact that he was negotiating for the sale of the stock, apart from the magnitude of the sale, was inconsistent with his statement that the stock was worthless. The misrepresentation was material, since the determination of one's ability to pay is a necessary step in the imposition of a fine. *U.S. v. Cusumano*, __ F.2d __ (3rd Cir. Aug. 28, 1991) No. 90-1931.

4th Circuit reverses obstruction enhancement based upon defendant's denial of guilt at trial. (460) Defendant was convicted of drug charges after several co-conspirators testified as to her involvement in selling crack cocaine. Defendant had taken the stand and denied everything. The 4th Circuit reversed an enhancement for obstruction of justice based upon defendant's untruthful testimony, fearing that the enhancement would become "commonplace punishment for a convicted defendant who has the audacity to deny the charges against him." It disturbed the court that testimony by an accused in his own defense, "so basic to justice," would be deemed to obstruct justice unless the accused convinces the jury. Such an automatic enhancement might persuade even an innocent defendant from testifying. It found that *U.S. v. Grayson*, 438 U.S. 41 (1978), a pre-guidelines case which other circuit have relied upon to support such an enhancement, not to be controlling. "The rigidity of the guidelines makes the section 3C1.1 enhancement for a disbelieved denial of guilt under oath an intolerable burden upon the defendant's right to testify in his own behalf." *U.S. v. Dunnigan*, __ F.2d __ (4th Cir. Aug. 30, 1991) No. 90-5668.

7th Circuit upholds obstruction enhancement based upon defendant's letter to his girlfriend. (460) Immediately after defendant was interviewed by FBI agents concerning his use of stolen information to trade on the stock market, defendant wrote a letter to his girlfriend in which he stated to her that she "could not know anything about deals or stock," and "You know you're innocent and there is no way conceivable that you could have known anything about anything." According to the girlfriend, both of these statements were false, and defendant could not have believed that she was unaware of his criminal activity. The 7th Circuit upheld an enhancement for obstruction of justice based upon defendant's letter. The letter was a "subtle and somewhat clever attempt to tell her, 'Don't spill the beans.'" *U.S. v. Cherif*, __ F.2d __ (7th Cir. Aug. 30, 1991) No. 90-2118.

9th Circuit upholds obstruction adjustment where defendant threatened a witness. (460) Defendant argued that there was no evidence that he was responsible for the threats. However a witness testified that the letter was in defendant's handwriting and the government submitted an affidavit which circumstantially indicated that defendant was the author of the letters as well as the "muffled voice caller" who made similar threats to [the witness] and her relatives. On this record, the 9th Circuit found that the obstruction adjustment was not clearly erroneous. *U.S. v. Pascucci*, __ F.2d __ (9th Cir. Aug. 23, 1991) No. 90-10388.

3rd Circuit reviews "grouping" issue under clearly erroneous standard. (470)(820) Defendant contended that his money laundering counts were ancillary, rather than related, to the other counts in the indictment, and therefore the district court should not have grouped the money laundering offenses with his other offenses. The 3rd Circuit held that this was a factual issue governed by the clearly erroneous standard of review. Although the court previously stated that construction of guideline section 3D1.2 was a legal issue for plenary review, in that case the issue was whether offenses for which society is the victim were properly grouped together. In contrast, the issue in this case was whether defendant's offenses were part of one overall scheme, which the court viewed as essentially a factual issue. *U.S. v. Cusumano*, __ F.2d __ (3rd Cir. Aug. 28, 1991) No. 90-1931.

3rd Circuit upholds grouping money laundering offense with kickback offenses. (470) Defendant contended that his money laundering counts were ancillary, rather than related, to the other counts in the indictment, and therefore the district court should not have grouped the money laundering offenses with his other kickback offenses. He contended that the evidence showed that his codefendant made all the arrangements concerning the handling of money, while defendant played a minor role in the offense. The 3rd Circuit found no merit to this argument, even if defendant's "dubious characterization of the facts" was accurate. The issue under the guidelines is whether the convictions involved the same victim and two or more acts that were part of the same common scheme or plan. Here, the victim of all the offenses was the same pension fund and its beneficiaries. All of the offenses were part of one overall scheme to obtain money from the pension fund and convert it to the use of defendant. The court also rejected defendant's claim that grouping the offenses together was inconsistent with the overall intent of the guidelines to sentence on the basis of a "real offense" system rather than a "charge offense" system. *U.S. v. Cusumano*, __ F.2d __ (3rd Cir. Aug. 28, 1991) No. 90-1931.

8th Circuit rejects acceptance of responsibility reduction for defendant who did not recall committing the offense. (485) Defendant pled guilty to sexual abuse, but told the probation officer that he was intoxicated at the time of the offense, did not recall what actually happened, and had difficulty believing that had committed the offense. Defendant told the court, "[i]f I did anything, I'm sorry . . . [b]ut I can't change the past." The 8th Circuit affirmed the denial of credit for acceptance of responsibility, finding defendant did not meet his burden of proving facts supporting such a reduction. *U.S. v. Drapeau*, __ F.2d __ (8th Cir. Aug. 28, 1991) No. 90-5549.

Criminal History (§ 4A)

7th Circuit rules defendant was not under criminal justice sentence despite five-year-old probation violation warrant. (500) In 1984, a Missouri state court sentenced defendant to five years probation. One year later, he violated probation and a probation violation warrant was issued. The warrant was never executed. Defendant committed the instant federal offense in May 1989, after his term of probation was scheduled to expire in April 1989. The 7th Circuit held that it was error to add two points to defendant's criminal history under section 4A1.1(d) for committing the offense while under a criminal justice sentence. Under state law, the arrest warrant did not extend the period of probation. The state court retained jurisdiction over the probationer only for the period of time that was reasonably necessary. The warrant must be executed within a reasonable time after its issuance. Five years was too long to be considered reasonable absent other circumstances, such as defendant's concealing his identity to escape detection. *U.S. v. Lee*, __ F.2d __ (7th Cir. Aug. 26, 1991) No. 90-2944.

8th Circuit rejects state judge's explanation that prior sentence should have been shorter. (500) Under section 4A1.1, a defendant receives two criminal history points for each prior sentence between 60 days and 13 months, and one point for each prior sentence of less than 60 days. Defendant had previously been convicted of theft in state court. Because he could not post bail, he served 78 days in jail awaiting trial. The state court sentenced defendant to 78

days, with credit for time served. Prior to being sentenced on the instant federal offense, defendant presented an affidavit from the state judge stating that if defendant had been free on bond, he would have sentenced him to only 20 days. The 8th Circuit rejected defendant's argument that he should only have received one criminal history point for the prior state conviction. The most authoritative record of the prior sentence was the state court judgment, not the state court judge's affidavit stating the sentence he would have imposed. *U.S. v. Drake*, __ F.2d __ (8th Cir. Aug. 20, 1991) No. 90-2845.

8th Circuit refuses to consider validity of prior conviction because it was not previously ruled constitutionally invalid. (500) Defendant contended that his prior driving while under the influence conviction should not have been included in his criminal history because it was constitutionally invalid. The 8th Circuit rejected this argument, noting that application note 6 to guideline section 4A1.2 had been amended effective November 1, 1990 to address this situation. It now provided that sentences resulting from convictions that a defendant shows to have been previously ruled constitutionally invalid are not to be included in a defendant's criminal history. Since defendant made no showing that the prior conviction had previously been ruled invalid, it was properly included in defendant's criminal history. *U.S. v. Hewitt*, __ F.2d __ (8th Cir. Aug. 22, 1991) No. 90-5578.

7th Circuit holds a felon's possession of a firearm is not a crime of violence for career offender purposes. (520) The 7th Circuit reversed the district court's determination that defendant's prior conviction for being a felon in possession of a firearm was a crime of violence for career offender purposes. The court held that mere possession of a firearm, without more, "does not rise to the level of an act that 'by its nature, presented a serious potential risk of physical injury to another.'" The facts here presented a "most passive case." Defendant was arrested after his cab driver noticed the loaded weapon tucked in the waistband of his pants. Defendant had not displayed, touched or brandished the weapon. Judge Posner dissented, finding that the act of carrying a weapon in public view in a crowded city while using public transportation was a "provocative act." *U.S. v. Chapple*, __ F.2d __ (7th Cir. Aug. 20, 1991) No. 90-5341.

Determining the Sentence (Chapter 5)

8th Circuit rules district court did not properly consider defendant's ability to pay restitution order. (610) Under 18 U.S.C. section 3664, the court must consider the amount of the loss and the financial resources and needs of defendant and his dependents. The 8th Circuit found that the district court did not give proper consideration to these factors, or articulate any findings. Defendant had a net worth of minus $2700, income of $1200 per month, and total expenditures of $974 per month. He was responsible for the support of a wife and a two-year-old child. The restitution order was one-third of the $285,188 loss he caused the state of Missouri by selling it adulterated meat. This restitution was all to be paid in the first year of defendant's supervised release. Given the discrepancy between the restitution order and defendant's ability to pay, the district court did not properly consider defendant's financial ability. Moreover, defendant should also have received credit for the $20,000 which the state received in settlement of a civil suit, and the amount of payments that the state withheld from defendant. *U.S. v. West*, __ F.2d __ (8th Cir. Aug. 21, 1991) No. 90-1341.

1st Circuit holds plea agreement imposed ceiling on aggregate amount of forfeiture plus fines. (630)(780)(900) Defendants' plea agreement provided that in lieu of a criminal fine, they would forfeit assets worth $2.8 million. In return, the government agreed "not to recommend the imposition of any fines." Nevertheless, the district court ruled that the plea agreement permitted it to impose fines on all four defendants totalling $525,000. The 1st Circuit upheld the district court's discretion to impose the fine. The appellate court rejected the claim that the government breached the plea agreement by failing to recommend against a fine, ruling that agreement permitted the government to remain silent. However, the court agreed that the plea agreement imposed a $2.8 million ceiling on the total amount of fines plus forfeiture. Since the plea agreement specified that the promise to forfeit $2.8 million was "in lieu of a criminal fine," the imposition of a fine relieved the defendants of their promise to forfeit, "dollar for dollar." *U.S. v. Maling*, __ F.2d __ (1st Cir. Aug. 26, 1991) No. 90-1966.

9th Circuit upholds fine where defendant chose to live a more extravagant life style than his means allowed. (630) In denying the defendant's motion to stay the execution of the fine, the district court stated that it had imposed the fine and payment schedule because it found that defendant "had chosen to live a more extravagant lifestyle than his means made practical and that the schedule could be met if [defendant] lived within his means." Among other factors the court noted that defendant earned $31,000 per year, that many of his debts were owed to relatives and could be paid off at any time, that he was paying off a new BMW automobile, and that he was allowing a friend to live rent-free in his apartment. *U.S. v. Nazifpour*, __ F.2d __ (9th Cir. Sept. 3, 1991) No. 90-30399.

1st Circuit prohibits district court from amending sentence to make it consecutive to state sentence. (660) When defendant was convicted of the instant federal offense, he was already serving a prison sentence for state law violations arising out of the same conduct. The district court originally sentenced defendant to 20 years imprisonment to be served concurrently with his state sentence. Five days later, the

court amended the federal sentence to make it run consecutive to the state sentence. The 1st Circuit reversed. When an initial sentence is valid, then once the defendant has begun serving the sentence, a second sentence cannot be imposed which increases the term. Since defendant had already begun to serve his federal sentence when the district court issued the amendment, and the modification from concurrent to consecutive would increase defendant's term of imprisonment, the amended sentence was improper. Moreover, defendant should also have been granted credit for time served in state custody prior to sentencing. Any credit granted by the state court would be rendered meaningless if the federal court did not also grant such credit for the concurrent federal sentence. *U.S. v. Benefield*, __ F.2d __ (1st Cir. Aug. 15, 1991) No. 90-2079.

Departures Generally (§ 5K)

1st Circuit rules government may not defer consideration of departure motion until after defendant's cooperation is "complete." (710) Defendant cooperated extensively with the government. Nevertheless, the government declined to file a motion for a downward departure under guideline section 5K1.1 primarily because the government did not view defendant's cooperation as "complete." The government took the position that a downward departure "was still an open question" which could subsequently be addressed under Fed. R. Crim. P 35(b). Defendant contended that the prosecutor's decision to defer the question of whether to file a departure motion until defendant's cooperation was completed violated due process. The 1st Circuit agreed that section 5K1.1 did not permit the government to defer this decision until after sentencing. This position "improperly merge[d] the temporal boundaries established in section 5K1.1 and Fed. R. Crim. P. 35(b)." Section 5K1.1 was designed to recognize and reward assistance rendered prior to sentencing. In contrast, Rule 35 was designed to recognize and reward cooperation rendered after the defendant had been sentenced. *U.S. v. Drown*, __ F.2d __ (1st Cir. Aug. 14, 1991) No. 91-1118.

7th Circuit finds no breach of plea agreement in government's failure to move for downward departure. (710) Defendant's plea agreement stated that if defendant provided substantial assistance in accordance with guideline section 5K1.1, the government would move for a downward departure. Defendant made a "good faith effort" to cooperate, but the government did not move for a downward departure because it did not learn anything it did not already know. The 7th Circuit rejected defendant's claim that the government breached the plea agreement. "[S]ubstantial assistance in compliance with section 5K1.1" of the guidelines means that the government still has the discretion to determine whether defendant's assistance was substantial. A defendant's assertion of "good faith" is irrelevant. However, the court recommended that the government be more forthcoming with defendants during plea negotiations, making clear its requirements for substantial assistance. The government should not take advantage of a defendant's ignorance of the caselaw surrounding substantial assistance. *U.S. v. Fairchild*, __ F.2d __ (7th Cir. Aug. 15, 1991) No. 90-2637.

8th Circuit rules government's failure to move for downward departure was not arbitrary or in bad faith. (710) The 8th Circuit rejected defendant's claim that the government's failure to move for a downward departure was in bad faith and was arbitrary. The government fully complied with the plea agreement, dismissing five of seven charges and detailing defendant's assistance to the government in a letter to the sentencing court. The court relied upon this letter in sentencing defendant at the bottom of the applicable guideline range. Under the circumstances, the government could not be said to have acted in bad faith or arbitrarily. *U.S. v. Drake*, __ F.2d __ (8th Cir. Aug. 20, 1991) No. 90-2845.

8th Circuit finds judge was aware he had authority to depart downward. (720) The 8th Circuit rejected defendant's claim that the district court mistakenly believed it lacked authority to depart downward. Defendant pointed to the judge's statement that he did not have "a free hand to roam about in the imposition of punishment, but must stay within the guidelines" and that the jail time was "a little heavy," but that he was following the guidelines, and had "no discretion to legitimately exercise beyond that point." The judge's statements at the sentencing hearing, taken as a whole, showed that he understood that there were occasions in which the facts would warrant a departure, but that this case was not one of them. *U.S. v. West*, __ F.2d __ (8th Cir. Aug. 21, 1991) No. 90-1341.

10th Circuit rules it lacks jurisdiction to review discretionary refusal to depart downward. (720)(800) Previously, the 10th Circuit remanded the case to the district court to clarify the reason for its refusal to depart downward. On remand the district court stated that it exercised its discretion in denying a downward departure, despite authority for such departure. The 10th Circuit held that in light of this statement, it lacked jurisdiction to review that discretionary decision. *U.S. v. Fox*, __ F.2d __ (10th Cir. Aug. 29, 1991) No. 90-2048.

11th Circuit rules district court sufficiently articulated reasons for criminal history departure. (733) The 11th Circuit rejected defendant's claim that the district court failed to state sufficiently specific reasons for making an upward criminal history departure. The district court stated that defendant's criminal history did not adequately reflect his criminal history, and indicated that it had reviewed the presentence report. The presentence report concluded that defendant's criminal history score was inadequate because although defendant had 17 criminal history points, which placed him in criminal history category VI, an additional two

points were not counted because some of his prior convictions were consolidated for sentencing. The extent of the departure was also reasonable. Defendant had a guideline range of 41 to 51 months, and received a 60-month sentence. The district court noted that if those additional points had been counted, and the criminal history categories went that high, defendant would fall into criminal history category VIII. With a criminal history of VIII and an offense level of 15, the applicable guideline range would be 61 to 71 months. *U.S. v. Suarez*, __ F.2d __ (11th Cir. Aug. 23, 1991) No. 90-5398.

Sentencing Hearing (§ 6A)

7th Circuit upholds successor judge's ability to make factual determinations. (750) The 7th Circuit rejected defendant's argument that the sentencing judge, as a successor judge, could not make factual determinations. The court had previously approved post-trial reassignment to a successor judge for sentencing under Fed. R. Crim. P. 25(b). Defendant did not object to the reassignment, and the record indicated that the sentencing judge was familiar with the case and exercised informed discretion in imposing sentence. *U.S. v. Slow Bear*, __ F.2d __ (8th Cir. Aug. 30, 1991) No. 90-5437.

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

1st Circuit upholds its jurisdiction to consider whether government improperly decided not to move for downward departure. (800) The 1st Circuit upheld its jurisdiction to consider defendant's claim that the government based its decision not to file a motion for a downward departure under guideline section 5K1.1 on an improper factor. To the extent that the government's reasons for withholding action conflicted with guideline section 5K1.1, due process concerns were raised. Hence the appellate court could review the sentence under 18 U.S.C. section 3742(a)(1) to determine whether it was imposed in violation of law. *U.S. v. Drown*, __ F.2d __ (1st Cir. Aug. 14, 1991) No. 91- 1118.

2nd Circuit warns defendants that in the future it will be less likely to consider issues not raised below. (800) Generally, issues not raised in the trial court are deemed to have been waived, absent "plain errors or defects affecting substantial rights" within the meaning of Fed. R. Crim. P. 52(b). In the past the 2nd Circuit ruled that when a question of law arose which was a matter of first impression for it under the sentencing guidelines, it would reach the merits despite a defendant's failure to raise the issue in the sentencing court, so long as the failure was not a calculated decision. This rule was intended to operate only during the "infancy" of the guidelines. Here, the 2nd Circuit stated that the guidelines had outgrown their infancy, and consequently, the court cautioned defendants that in the future it would be hesitant to consider on appeal sentencing issues not raised in the district court. *U.S. v. Rodriguez*, __ F.2d __ (2nd Cir. Aug. 27, 1991) No. 90-1684.

4th Circuit examines whether conspiracy continued after guidelines' effective date under clearly erroneous standard. (820) Defendants challenged the district court's determination that their conspiracy continued after November 1, 1987, and thus the guidelines applied to the offense. The 4th Circuit held that under 18 U.S.C. section 3742(e), it must accept this finding unless clearly erroneous. *U.S. v. Barsanti*, __ F.2d __ (4th Cir. Aug. 19, 1991) No. 90-5341.

8th Circuit reviews whether offense involved threatened use of a weapon under clearly erroneous standard. (820) Defendant challenged the district court's three-level enhancement under guideline section 2A2.1(b)(2)(C) based upon its determination that defendant's offense involved the threatened use of a gun. The 8th Circuit rejected defendant's invitation to review the matter de novo, finding that the court's determination was a finding of fact to be reviewed under the clearly erroneous standard. *U.S. v. Sims*, __ F.2d __ (8th Cir. Aug. 23, 1991) No. 90-2701.

Forfeiture Cases

6th Circuit reverses award of attorneys' fees and storage fees in forfeiture case. (900) The district court dismissed the government's forfeiture complaint against claimant's airplane, finding that "there simply [was] not enough information set forth in the amended complaint to show that the government can demonstrate probable cause in a forfeiture trial." Thereafter, claimant filed a motion for attorneys' fees under section 2412 of the Equal Access to Justice Act. The district court granted the motion, finding that the government's claim against the airplane had not been substantially justified. The 6th Circuit reversed, finding that the government's position was "substantially justified." The complaint alleged that claimant owned the airplane, was a pilot, supplied cocaine to the residence of a known drug trafficker, and had been involved in past illegal drug transactions. A trained detection dog alerted to an exterior panel and an interior area of the plane. The appellate court also vacated the district court's order awarding claimant storage expenses incurred while the aircraft was in the government's possession, since the district court failed to articulate the legal authority for this. Judge Merritt dissented. *U.S. v. Real Property Located at 2323 Charms Road, Milford Township, Oakland County, Michigan*, __ F.2d __ (6th Cir. Aug. 22, 1991) No. 90-1655.

9th Circuit holds that forfeiture of helicopter under the Airborne Hunting Act was discretionary. (900) The claimants used a helicopter to harass bighorn sheep in vio-

lation of the Airborne Hunting Act, 16 U.S.C. section 742j-1. All aircraft, guns or other equipment used in violation of this statute are subject to forfeiture to the United States. The 9th Circuit held that the wording of the Act and its legislative history made it clear that the forfeiture was discretionary. Here, the district court was "justifiably disturbed by the conduct of the government during the investigation and prosecution of this case." Accordingly the court did not abuse its discretion in denying forfeiture of the helicopter. *U.S. v. One Bell Jet Ranger II Helicopter*, __ F.2d __ 91 D.A.R. 10729 (9th Cir. Sept. 3, 1991) No. 89-35551.

8th Circuit rejects constitutional challenges to seizure of non-obscene materials under RICO forfeiture provisions. (910) Defendant was convicted of selling obscene magazines and videos, tax evasion and RICO violations. Under the forfeiture provisions of RICO, 28 U.S.C. section 1962, the district court ordered the forfeiture of defendant's interest in his wholesale business and thirteen retail businesses (bookstores and video stores) that were used in his criminal enterprise. The 8th Circuit rejected defendant's argument that the RICO forfeiture provisions unconstitutionally criminalized non-obscene expressive material. The forfeiture of the non-obscene books and materials occurred only after he was convicted of racketeering involving the sale of obscene goods. The court also rejected defendant's claim that the forfeiture was an unconstitutional prior restraint, imposed an unconstitutionally chilling effect on protected expression and was overbroad. The forfeiture also did not violate the 8th Amendment's prohibition against cruel and unusual punishment and excessive fines. In the only other RICO obscenity case, the 4th Circuit held that the forfeiture of a business with total annual sales of $2 million as a result of $105.30 worth of obscene material did not constitute cruel and unusual punishment or an excessive fine. *Alexander v. Thornburgh*, __ F.2d __ (8th Cir. Aug. 30, 1991) No. 89-5364.

1st Circuit upholds granting wife's motion to intervene in forfeiture action. (920) The 1st Circuit rejected the government's claim that the wife's motion to intervene was procedurally deficient under Fed. R. Civ. P. 24(a)(2). The district court did not abuse its discretion in extending the time for filing the claim. The wife was not named in nor served with a copy of the summons. Once the wife sought the aid of counsel and learned of the potentially devastating consequences, she actively pursued her claim. In addition, because the time for discovery was not closed, the government had time to prepare its case against the wife and thus was not prejudiced by the extension. The district court also did not abuse its discretion in allowing the case to proceed despite the absence of a verified claim. The documents filed by the wife adequately apprised the government of her claim. The wife's claimed interest was also sufficient to gain access to the courts. Although the wife's claim was originally based on the wrong statute, it did raise questions about the possibility of an equitable interest in the property acquired through some unwritten marital agreement. *U.S. v. One Parcel of Property with Buildings, Appurtenances and Improvements Known as 116 Emerson Street, Located in the City of Providence, Rhode Island*, __ F.2d __ (1st Cir. Aug. 21, 1991) No. 91-1019.

1st Circuit affirms that wife established ownership interest in property through a resulting trust. (960) The government brought a civil forfeiture action against a family's residence whose title was held solely by the husband. The wife intervened, claiming an interest in the property as an innocent owner. The 1st Circuit found no clear error in the district court's determination that the wife had established an ownership interest in the property through a resulting trust, i.e., a verbal agreement between claimant and her husband entered into at the time of the property's purchase in which he agreed to pay the $8,000 down payment, she agreed to pay the mortgage of $8000, and they both agreed that the property would be held jointly. Claimant offered her own testimony, the testimony of her daughters and a stack of cancelled money orders which she had used to pay the mortgage in full. This was ample evidence to support the district court's decision. Judge Campbell dissented, believing that the court did not properly apply state law. *U.S. v. One Parcel of Property with Buildings, Appurtenances and Improvements Known as 116 Emerson Street, Located in the City of Providence, Rhode Island*, __ F.2d __ (1st Cir. Aug. 21, 1991) No. 91-1019.

1st Circuit affirms that wife was unaware of husband's drug activities in their home. (960) Claimant's husband sold drugs to a DEA agent. When agents entered their residence, claimant and her daughter were in the living room. Packages of heroin were discovered hidden in the microwave oven in the kitchen. In a civil forfeiture action against the residence, claimant asserted the innocent owner defense. The government contended that since defendant was in charge of cooking and cleaning, she must have known of the heroin hidden in the microwave. Nonetheless, the 1st Circuit affirmed the district court's determination that claimant was an innocent owner. First, the government's own witness, a DEA agent, testified that claimant was never a suspect in her husband's drug activities. Second, the husband admitted that the drugs and money were his. Third, claimant testified that she would never have permitted drug activity in her home. Fourth, she testified that she had been out all morning on the day of the search and seizure and that she had just returned when the police arrived. Finally, the government had the opportunity to cross-examine claimant extensively on this issue, and still the district court chose to believe claimant. *U.S. v. One Parcel of Property with Buildings, Appurtenances and Improvements Known as 116 Emerson Street, Located in the City of Providence, Rhode Island*, __ F.2d __ (1st Cir. Aug. 21, 1991) No. 91-1019.

Federal Sentencing and Forfeiture Guide
NEWSLETTER

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

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Guideline Sentences, Generally

9th Circuit applies interpretation of career offender guideline retroactively. (125)(520) In *U.S. v. O'Neal*, 910 F.2d 663 (9th Cir. 1990), the 9th Circuit held that the offense of being a felon in possession of a firearm is a crime of violence under the career offender guidelines. Defendant argued that since his offense which was committed before *O'Neal* was decided, the court should not have applied the decision retroactively to him. The 9th Circuit rejected the argument, ruling that the "categorical analysis" in *O'Neal* was identical to the analysis undertaken in a 1988 case, *U.S. v. Sherbondy*, 865 F.2d 996 (9th Cir. 1988). Therefore, under the three-part test for retroactivity applied in *U.S. v. Gonzalez-Sondoval*, 894 F.2d 1043, 1052, 53 (9th Cir. 1990), the *O'Neal* case "does not establish a new rule of law," and therefore was properly applied retroactively. *U.S. v. Oliveros-Orosco*, __ F.2d __ (9th Cir. Aug. 19, 1991) No. 90-50639.

10th Circuit applies 1987 version of guidelines to firearm offense to avoid ex post facto problems. (130)(330) The 10th Circuit upheld the district court's application of the 1987 version of the guidelines to defendant's firearm offense in order to avoid an ex post facto problem. The 1987 version of guideline section 2K2.1(a) provided a base offense level of nine for receipt of firearms by prohibited persons. There was no increase based on the number of firearms involved. In 1989, the section was amended to reduce the base offense level to only six, but section 2K2.2 was added to authorize an increase in offense level based on the number of firearms. If the 1989 guideline could have been applied, it would have resulted in an offense level of nine or 10. Therefore the district court did not err in using a base offense level of nine under the 1987 version. *U.S. v. Elias*, __ F.2d __ (10th Cir. July 2, 1991) No. 90-2230.

8th Circuit judge expresses concern with prosecutor's plea bargaining and charging practices. (140) The 8th Circuit summarily rejected defendant's argument that the district court misapplied the relevant conduct provisions of the guidelines. Senior Judge Heaney wrote a lengthy concur-

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tence in which he expressed his concern about the sentence disparities among defendants with similar degrees of involvement in the drug ring. The sentence disparity resulted "not from decisions made by the district judge, but from charging decisions and plea bargains made by the prosecutor." According to Judge Heaney, the defendants who go to trial pay a "heavy premium" for their choice, and the prosecutor largely determines the sentence of the defendants by deciding who to charge, what to charge, and when to charge. *U.S. v. Hammer*, __ F.2d __ (8th Cir. July 23, 1991) No. 90-5270.

General Application Principles (Chapter 1)

2nd Circuit upholds more than minimal planning enhancement. (160)(300) The 2nd Circuit affirmed that defendant's fraud scheme merited a two-point enhancement for more than minimal planning. Defendant "concoct[ed]" a scheme to move a business that he did not own to a new town and received a $250,000 advance from the town. The money that defendant received was preceded by extensive negotiations and travel by both the town representatives and defendant over many months. It was based upon a false financial statement that was "anything but a simple planning device." The district court did not improperly consider uncharged conduct in making the more than minimal planning determination. Although the district court did refer to other frauds which defendant perpetrated, this was done merely to "illustrate [defendant's] penchant for developing 'elaborate' schemes that are 'drenched in fraud." The court did not suggest that defendant's other fraudulent activities per se played a part in his scheme to defraud the town. *U.S. v. Brach*, __ F.2d __ (2nd Cir. Aug. 15, 1991) No. 90-1742.

5th Circuit affirms that defendant stipulated to more serious drug possession offense. (165)(240) Defendant pled guilty to using a communication device to facilitate a drug transaction. The district court determined that defendant stipulated to a more serious offense, and sentenced him under the guideline applicable to a possession with intent to distribute cocaine offense. The 5th Circuit originally affirmed the decision in an unpublished opinion, but the Supreme Court vacated the case and remanded the for reconsideration in light of *Braxton v. United States*, 111 S.Ct. 1854 (1991). On a second review, the 5th Circuit again affirmed the district court's decision. The court held that a stipulation under guideline section 1B1.2(a) is not limited to stipulations contained in plea agreements, but includes "any statement of facts which the defendant adopts and accepts, either expressly or implicitly." In this case, defendant admitted at his plea hearing that he possessed cocaine and attempted to sell it to an undercover officer. Under Braxton, a defendant must stipulate to each element of the more serious offense. Here, defendant did stipulate to each element of the offense of possession of cocaine with intent to distribute: (a) knowing (b) possession of cocaine (c) with intent to distribute. *U.S. v. Garcia*, __ F.2d __ (5th Cir. Aug. 14, 1991) No. 90-8482.

2nd Circuit affirms finding that defendant used weapon in dealing drugs. (170)(280)(330) Defendant was convicted of being a felon in possession of a firearm. The district court departed upward based upon its conclusion that defendant had used the weapon in dealing drugs. The 2nd Circuit found this conclusion was not clearly erroneous. Defendant admitted he had the gun for protection. In addition to the gun, the police found in his apartment more than $35,000 in cash, a portable telephone, a beeper, and a triple beam scale. This amply supported the conclusion that the gun was used in drug trafficking. *U.S. v. Hernandez*, __ F.2d __ (2nd Cir. Aug. 8, 1991) No. 91-1028.

5th Circuit affirms consideration of laundered money involved in acquitted counts. (170)(755)(770) The 5th Circuit found no error in the district court's consideration of laundered money for which her husband was convicted but for which she was acquitted. The government need only prove facts at sentencing by a preponderance of the evidence. Although the jury was not convinced beyond a reasonable doubt that defendant was criminally responsible for the entire sum laundered, the district court could conclude that a preponderance of the evidence supported

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this conclusion. *U.S. v. Allibhai*, __ F.2d __ (5th Cir. Aug. 6, 1991) No. 90-1354.

9th Circuit upholds considering prior immigration felony dropped as part of plea bargain. (170)(340)(780) Defendants were charged with violating 8 U.S.C. section 1326(b)(1), reentry following deportation after a felony conviction. The maximum sentence for that crime is 5 years. They pled guilty to section 1326(a), simple reentry after deportation, which carries a two year maximum sentence. Nevertheless, the district court considered their prior felony convictions, increasing the base offense level by four points under section 2L1.2(b)(1). On appeal, the 9th Circuit held that a "prior felony conviction is an element of the crime with which appellants were charged, 8 U.S.C. section 1326(a), but is not an element of the crime to which they pleaded guilty, 8 U.S.C. section 1326(b)(1)." The court held that the "relevant conduct" section of the guidelines, 1B1.3(a)(4), required consideration of the prior convictions. The court rejected the argument that this violated the "spirit" of the plea bargains or that the government acted "dishonestly" in bargaining away the more serious offense. The government simply "bargained away the option to pick sentences above section 1326(a)'s two year maximum in exchange for appellant's guilty pleas." *U.S. v. Arias-Granados*, __ F.2d __ (9th Cir. Aug. 13, 1991) No. 90-50507.

Offense Conduct, Generally (Chapter 2)

2nd Circuit rules past conduct cannot be used to show defendant's intent to carry out threat. (210) Defendant was involved in a fraudulent investment scheme in oil wells. After legal proceedings began, he sent a letter to several investors threatening that they would lose their interest in the wells unless they contributed to defendant's legal defense fund. The district court found that defendant committed the offense of sending threatening communications, which carries a base offense level of 12 under guidelines section 2A6.1(a). The district court increased the offense level to 18 under guideline section 2A6.1(b)(1) because it found that defendant had engaged in conduct which evidenced an intent to carry out the threat. The 2nd Circuit reversed the six-level enhancement. The only evidence presented of defendant's double-selling of the wells was related to actions which took place prior to the threatening letters. A person cannot take actions that will constitute proof of his intent to carry out a threat until after the threat has been made. Thus, defendant's past conduct could not be used to show he intended to carry out his threat. *U.S. v. Hornick*, __ F.2d __ (2nd Cir. Aug. 7, 1991) No. 90-1113.

9th Circuit holds that government bears burden of proving possession of firearm in counterfeiting case. (220)(755) In *U.S. v. Howard*, 894 F.2d 1085, 1090 (9th Cir. 1990) the 9th Circuit held that the government bears the burden of proving the facts necessary to establish the base offense level. "Once the base offense level is established, the party seeking to alter the base offense level bears the burden of proving the necessary facts. In this case, the court increased the base offense level by nine points, finding that defendant possessed a firearm in connection with the crime of possession of counterfeit currency. The 9th Circuit held that the government bore the burden of proof on this issue, and that the evidence was sufficient to support the district court's finding. The defendant was holding a loaded handgun when the agent's returned to arrest him after the informant purchased counterfeit currency from him. *U.S. v. Oliveros-Orosco*, __ F.2d __ (9th Cir. Aug. 19, 1991) No. 90-50639.

10th Circuit rules "loss" included value of real estate gained by fraud. (220) Defendant purchased 18 residential properties each carrying a mortgage which was insured against default by the U.S. Department of Housing and Urban Development. Although he collected a total of $16,000 in rent from the properties' tenants, defendant never made a single mortgage payment. The rent money was spent on personal expenses. Defendant was convicted of mail fraud and equity skimming. The 10th Circuit affirmed that the "loss" caused by defendant's activities included the value of the real estate, and not just the loss of the rent money. Defendant was convicted of acquiring the property by fraudulent means and misappropriating the rent checks. The real estate was "taken" within the meaning of guideline section 2B1.1. The government's re-acquisition of the property through foreclosure did not change the fact that defendant took the property in the first place. Under the guidelines, property value is defined by its fair market value. Since the court was unable to determine whether this had been done properly, the case was remanded. *U.S. v. Johnson*, __ F.2d __ (10th Cir. Aug. 15, 1991) No. 90-6235.

3rd Circuit affirms 10-year mandatory minimum sentence for 21-year old drug courier. (245) Defendant pled guilty to possessing with intent to distribute 374 grams of a mixture containing cocaine base. The 3rd Circuit affirmed the 10-year mandatory minimum sentence, noting that the district court correctly determined that it lacked authority to depart below this mandatory minimum. Judge Higginbotham concurred, but wrote separately to express his concern that Congress may not have appreciated the "egregious consequences" which sometimes result from the application of the mandatory minimum sentence. Here, a 10-year sentence was imposed upon a 21-year old first-time offender who served as a courier, and who was not a major participant in the drug transaction. *U.S. v. Tannis*, __ F.2d __ (3rd Cir. Aug. 9, 1991) No. 90-5948.

7th Circuit upholds mandatory minimum sentence above guideline range. (245)(660) Defendant had a guideline range of 21 to 27 months, but because his conduct involved over

100 marijuana plants, received a mandatory minimum sentence of five years. The 7th Circuit upheld the mandatory minimum sentence against defendant's claim that it was in violation of law because it exceeded his guideline range. Guideline section 5G1.1(b) provides that where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the minimum sentence shall become the guideline sentence. *U.S. v. Hayes*, __ F.2d __ (7th Cir. Aug. 12, 1991) No. 90-3191.

9th Circuit holds that mixture containing 100 grams of methamphetamine triggered 10-year minimum sentence. (245) 21 U.S.C. section 841(a)(1)(B)(viii) requires a 10-year minimum sentence for offenses involving 100 grams of methamphetamine or [one kilogram] of a mixture containing methamphetamine. At the time of the offense, the statute said "100 grams," not "one kilogram," but the court agreed that this was a typographical error that Congress has since corrected. Although the total weight of the mixture here did not exceed one kilogram, the district court found that more than 100 grams of "pure" methamphetamine were included in the mixture, and therefore imposed the 10-year mandatory minimum sentence. On appeal, the 9th Circuit affirmed, holding that this interpretation "is consistent with the statute and avoids absurd results." *U.S. v. Alfeche*, __ F.2d __ (9th Cir. Aug. 22, 1991) No. 90-10568.

4th Circuit reverses for insufficient information upon which to approximate drug quantity. (250)(760) Defendant's presentence report concluded that she should be held accountable for more than 500 grams of cocaine base because the conspiracy brought back approximately 500 grams from New York. Defendant objected, contending that she should be sentenced on the basis of her involvement with between 150 and 500 grams of cocaine base. The district court made no findings relating to amount other than to adopt the presentence report. Accordingly, defendant was sentenced on the basis of her involvement with in excess of 500 grams of cocaine base. The 4th Circuit agreed with defendant that the district court's fact-finding procedure was not adequate. Under application note 2 to guideline section 2D1.4, a court may approximate the quantity of a controlled substance where there has been no seizure, but supporting factors that lead to the approximation must be present, and they must be the subject of findings. *U.S. v. Johnson*, __ F.2d __ (4th Cir. Aug. 14, 1991) No. 90-5043.

8th Circuit reverses for reliance on hearsay in lab report to determine presence of cocaine base. (250)(770) Defendant stipulated that he was pleading guilty to three counts involving 364.93 grams of cocaine. However, the presentence report attributed 432.24 grams of cocaine to him based on a lab report which indicated that .68 grams of the drugs were cocaine base. Defendant contended that the .68 grams of cocaine base belonged to his co-defendant. The 8th Circuit ruled that defendant could not challenge possession of the cocaine since he stipulated to 364.93 grams of cocaine in his guilty plea. However, the court found that the district court's finding that the .68 grams were cocaine base was not supported by a preponderance of the evidence. The district court could not rely upon the hearsay in the lab report as a basis for its decision without establishing the reliability of the lab statement or finding an exception to the hearsay rule. *U.S. v. Marshall*, __ F.2d __ (8th Cir. Aug. 5, 1991) No. 90-2512.

11th Circuit holds that weight of unusable liquid should not be included in weight of drugs. (250) Defendant possessed 241.6 grams of a liquid substance from which a chemist extracted 72.2 grams of a powder comprised of 7.2 grams of cocaine base and 65 grams of a cutting agent. The 11th Circuit held that weight of the liquid carrier medium was improperly included in the weight of the drugs under guideline section 2D1.1. Prior Circuit cases seeming to hold to the contrary were inapplicable because they dealt with drug mixtures that were in usable forms, "i.e. usable by or marketable to the consumer." In this case, the drug was in an unusable mixture. The Supreme Court's recent decision in *U.S. v. Chapman*, 111 S.Ct. 1919 (1991) was also not controlling because the LSD/blotter paper mixture considered by the Court was "usable, consumable, and ready for wholesale or retail distribution." The liquid waste in this case was similar to packaging materials. The cocaine mixture was "easily distinguished from, and separated from" its liquid carrier waste medium. *U.S. v. Rolande-Gabriel*, __ F.2d __ (11th Cir. Aug. 14, 1991) No. 90-5500.

7th Circuit rules evidence sufficient to establish additional drugs as part of same course of conduct. (270) A co-conspirator was arrested with 10 kilograms of 91 percent pure cocaine. He said that he worked for defendant, and that he had made previous trips for defendant each involving six to eight kilograms of cocaine. Defendant was arrested after he met with the co-conspirator and requested a kilogram of cocaine. Although defendant was only charged with possessing one kilogram, the court sentenced him on the basis of 50 kilograms. The 7th Circuit affirmed, ruling that the evidence was sufficient to establish that the 50 kilograms were part of the same course of conduct as the one kilogram. In addition to the co-conspirator's testimony, the amount and purity of the seized cocaine indicated that this was not a random transaction. Moreover, defendant had confirmed reservations to Medellin, Colombia, for 15 days, and his girlfriend said that he used her apartment to store and sell drugs, and that he had made wire transfers of thousands of dollars from the girlfriend to various people in Miami. *U.S. v. Rodriguez-Luna*, __ F.2d __ (7th Cir. July 22, 1991) No. 90-1983.

8th Circuit includes gift of cocaine in relevant conduct. (270) The 8th Circuit affirmed including In calculating defendant's base offense level, the district court included

three ounces of methamphetamine defendant purchased, and three-quarters of an ounce of cocaine which defendant gave to one of his customers as a Christmas gift. A witness testified that the witness's methamphetamine supplier was unable to sell to the witness three ounces of methamphetamine which had been promised to him because the supplier sold the drug to defendant. Defendant later sold three-quarters of an ounce of methamphetamine to the witness. This testimony supported the reasonable inference that the supplier sold three ounces to defendant, who then sold part of it to the witness. With respect to the cocaine gift, testimony showed that this gift was intended to foster the relationship between the customer and defendant. The 8th Circuit agreed that the business practice of keeping valued customers happy with Christmas gifts was part of the ongoing drug conspiracy, and was properly included in defendant's base offense level. *U.S. v. Fuller*, __ F.2d __ (8th Cir. Aug. 5, 1991) No. 90-2394.

4th Circuit includes cocaine even though it had been shipped before defendant joined the conspiracy. (275) Defendant objected to including in her offense level 500 grams of cocaine that were transported from New York in late August 1989. She contended that this occurred before she became a member of the conspiracy. The 4th Circuit upheld including the drug shipment in defendant's offense level, since the evidence showed that defendant was involved in the distribution of the cocaine even though it had been obtained from New York before she joined the conspiracy. *U.S. v. Johnson*, __ F.2d __ (4th Cir. Aug. 14, 1991) No. 90-5043.

7th Circuit affirms that larger drug deal was reasonably foreseeable to defendant. (275) Defendant permitted his co-conspirators to use his apartment to sell small amounts of cocaine to an undercover agent. The co-conspirators then negotiated to sell 140 grams of cocaine to the agent. Defendant was asleep when the agent arrived to view the cocaine and arrest the co-conspirators. The 7th Circuit upheld the inclusion of the 140 grams in defendant's base offense level. Defendant knew that his co-conspirator had arranged another cocaine sale to the agent at defendant's apartment. Defendant had met the undercover agent several times. The agent claimed to be buying the cocaine for resale, and thus it was reasonable to foresee that the agent would attempt to arrange a large-quantity purchase. One of the prior transactions involved three or four ounces, which was not significantly less than the 140 grams the co-conspirators attempted to sell to the agent. *U.S. v. Scroggins*, __ F.2d __ (7th Cir. Aug. 2, 1991) No. 90-2580.

9th Circuit holds parties cannot bargain away court's right to consider use of firearm in drug offense. (280)(780) The 9th Circuit said that the government's decision not to seek a superseding indictment charging defendant with possession of a firearm in violation of 18 U.S.C. section 924(c) is an "entirely different matter" from precluding the court from considering the weapon as a specific offense characteristic. Defendant successfully bargained as to the first but not as to the second. "Indeed, the government could not bargain away the district court's duty to consider all relevant facts in applying the sentencing guidelines." Here the district court's consideration of the weapon was entirely appropriate, as defendant knew that one of his codefendant's possessed it. *U.S. v. Flores-Payon*, __ F.2d __, 91 D.A.R. 9808 (9th Cir. Aug. 12, 1991) No. 90-50081.

4th Circuit holds concurrent acts not necessary for firearm enhancement. (284) Defendant was acquitted of carrying or using a firearm in relation to a drug trafficking crime, but the district court enhanced his sentence under section 2D1.1(b) for possession of a firearm during the commission of a drug trafficking offense. The 4th Circuit affirmed, rejecting defendant's contention that proof of possession of weapons during commission of the offense of conviction required proof of concurrent acts, such as defendant holding the gun in his hand while in the act of storing drugs. The phrase, "during the commission of," is not so narrowly construed. Here, four weapons were found in a co-conspirator's home where the defendants stored drugs. The co-conspirator testified that defendant brought weapons to the home. On the day defendant was arrested he left guns at the co-conspirator's home and crack hidden in one of her shoes. This was sufficient to show defendant possessed the weapons during the commission of the offense. *U.S. v. Johnson*, __ F.2d __ (4th Cir. Aug. 14, 1991) No. 90-5043.

4th Circuit affirms firearm enhancement of defendant who buried weapons. (284) Defendant was convicted of various drugs crimes as a result of his involvement in a cocaine and crack conspiracy. The 4th Circuit found no merit to defendant's challenge of the district court's enhancement under guideline section 2D1.1(b) for possession of a firearm during a drug crime. There was testimony that defendant buried the firearms involved in the conspiracy, that two of the guns belonged to him, and that he cleaned the guns. *U.S. v. Johnson*, __ F.2d __ (4th Cir. Aug. 14, 1991) No. 90-5043.

8th Circuit affirms firearm enhancement based upon loaded firearms found in defendant's residence. (284) A search of defendant's residence uncovered drugs and four loaded firearms. Two 12 gauge shotguns were in an upstairs bedroom closet and two pistols were between the mattresses. The 8th Circuit affirmed the enhancement under section 2D1.1(b)(1) based upon defendant's possession of the weapons during a drug offense. The weapons were loaded and found near drug paraphernalia. *U.S. v. Marshall*, __ F.2d __ (8th Cir. Aug. 5, 1991) No. 90-2512.

6th Circuit reverses firearm enhancement for unloaded gun found in locked safe in defendant's house. (286) Police discovered two locked safes in defendant's basement. One

safe contained three kilograms of cocaine, $19,000 in cash and some jewelry. The other safe, located about 12 feet away from the first safe, contained an unloaded .22 caliber single-shot Derringer. The 6th Circuit reversed an enhancement under guideline section 2D1.1 based upon defendant's possession of a firearm during a drug trafficking crime. First, the gun was not the normal type of firearm associated with drug activity, but was an antique-style Derringer. Defendant testified that he purchased the weapon at a flea market as a collector's piece. Second, the gun was not loaded and no ammunition was found in defendant's home. Finally, the gun was located in a safe which did not contain drug paraphernalia and was not located close enough to the drugs to infer a relationship. Thus, it was clearly improbable that the weapon was connected with defendant's drug offenses. *U.S. v. Garner*, __ F.2d __ (6th Cir. July 23, 1991) No. 90-3361.

9th Circuit reverses firearm enhancement for lack of evidence of dominion and control. (286) The firearm was located in the same bag, along with extra ammunition, as the narcotics intended to be distributed. The question was whether the defendant or his codefendant possessed the gun. The district court applied the enhancement for possession of a firearm during a drug trafficking offense under section 2D1.1(b)(1), because the defendant "had access to the weapon and had used weapons in the commission of prior offenses." The 9th Circuit held that this was insufficient evidence of a relationship between the defendant and *this* weapon to establish constructive possession. The sentence was reversed. *U.S. v. Kelso*, __ F.2d __ (9th Cir. Aug. 21, 1991) No. 90-50453.

2nd Circuit holds that defendant's intent to repay fraudulent loan did not require downward departure. (300)(722) Defendant fraudulently obtained a loan by misstating his financial situation. He contended, based on application note 10 of section 2F1.1, that the district court should have departed downward because the amount of the loan overstated the seriousness of his offense. The 2nd Circuit rejected this argument, since a district court's refusal to depart downward is not appealable unless the refusal was based upon the court's mistaken belief that it did not have the discretion to do so. Defendant's assertion that note 10 "requires" a reduction in the amount of the actual loss if the accused intends to repay was a misreading of the note, which provides that in some instances a downward departure may be warranted. *U.S. v. Brach*, __ F.2d __ (2nd Cir. Aug. 15, 1991) No. 90-1742.

2nd Circuit affirms value of loss based upon face value of loan defendant fraudulently obtained. (300) Defendant misrepresented his financial condition in order to obtain a $250,000 loan. When his lender became suspicious and contacted the FBI, defendant repaid the money. The 2nd Circuit affirmed that the amount of "loss" involved under guideline section 2F1.1(a) should be based upon the face value of the loan rather than on the temporary use of the $250,000. Even if defendant intended to repay the loan, this would not change the analysis. Defendant's crime was complete once he transmitted the false financial information and obtained the loan. Under the guideline, "loss" includes the value of all property taken, even if all or part of it was returned. *U.S. v. Brach*, __ F.2d __ (2nd Cir. Aug. 15, 1991) No. 90-1742.

1st Circuit rejects downward adjustment for firearm purchased for self-defense purposes. (330) Defendant pled guilty to unlawfully purchasing a firearm. He contended he was entitled to a four-level reduction under guideline section 2K2.1(b)(2) of the pre-November 1989 version of the guidelines because he obtained or possessed the firearm solely for sport or recreation. Defendant contended that he purchased the Beretta and .25 caliber gun for legitimate "lawful" uses, including hunting and self-defense. The 1st Circuit found that defendant was not entitled to the reduction. With respect to the .25 caliber, defendant conceded that the gun was not obtained for sporting purposes, but for self-defense for his wife. The guidelines do not provide for a reduction because a gun is possessed for potential use in self-defense. *U.S. v. Cousens*, __ F.2d __ (1st Cir. Aug. 2, 1991) No. 90-1615.

2nd Circuit finds no double counting in using prior conviction in offense level and criminal history. (330)(500)(680) Defendant was convicted of unlawfully dealing in firearms. His offense level was increased under section 2K2.2(c) for his prior felony conviction, and his criminal history score was increased under section 4A1.1(b) for the same prior. The 2nd Circuit rejected defendant's contention that this constituted impermissible double counting. Offense level calculations focus principally on the offense of conviction. Section 2K2.1(a)(1) increases the offense level when the unlawful sale of weapons was by a felon, recognizing that the sale of firearms is a more serious offense when committed by a person who in the past has proven dangerous or irresponsible. Calculation of a defendant's criminal history focuses on the deeds and experiences of the particular defendant. A defendant with a past criminal record is generally more culpable than a first offender and deserving of greater punishment. *U.S. v. Blakney*, __ F.2d __ (2nd Cir. Aug. 5, 1991) No. 91-1091.

4th Circuit reverses sentence enhancement based upon defendant's possession of 28 inert grenades. (330) Undercover agents sold defendant 30 grenades. Defendant was unaware that 28 of the grenades lacked powder and were incapable of being detonated. The district court increased defendant's offense level under guideline section 2K2.2(b) for all 30 grenades. The 4th Circuit reversed, holding that the inert grenades were not destructive devices under section 2K2.2(b). The government failed to show as a factual

matter that the powder in the two grenades was sufficient to arm all of the grenades. As a matter of law, the inert grenades were not destructive devices. A person cannot be deemed in possession of a "destructive device" if he does not possess all of the requisite parts or ingredients needed to activate the device. *U.S. v. Blackburn*, _ F.2d _ (4th Cir. Aug. 2, 1991) No. 90-5538.

5th Circuit affirms that defendant knew money was criminally derived. (360) The 5th Circuit found no error in the district court's enhancement of defendant's offense level under guideline section 2S1.3(c) because she "reasonably should have believed that the [laundered] funds were criminally derived property." Defendant's only evidence was polygraph reports and her statements that she thought the money was legitimately procured. The district court was not required to credit defendant's self-serving testimony, and was free to consider other evidence, such as the way defendant handled the funds, to conclude that she was aware of the money's character. *U.S. v. Allibhai*, _ F.2d _ (5th Cir. Aug. 6, 1991) No. 90-1354.

Adjustments (Chapter 3)

4th Circuit affirms organizer role of drug conspirator. (430) The 4th Circuit affirmed a two-level enhancement for defendant's role as an organizer or supervisor of a drug conspiracy. There was testimony that defendant helped to recruit one of the conspirators, arranged for a person to haul cocaine from New York promised payment to him, and asked another conspirator to go to New York with him. *U.S. v. Johnson*, _ F.2d _ (4th Cir. Aug. 14, 1991) No. 90-5043.

5th Circuit affirms that money laundering scheme was extensive. (430) Defendant received an enhancement under guideline section 3B1.1(a) for being the organizer or leader of a criminal activity that involved five more participants or was otherwise extensive. The 5th Circuit affirmed the district court's determination that defendant's money laundering operation was "otherwise extensive." The scheme took defendant to at least two foreign countries, and spanned almost three years. By the time of his arrest, defendant had laundered over one million dollars and had expressed a willingness and capability to handle even larger sums. Defendant used the unknowing services of many outsiders such as bank employees, which is relevant under application note 2 to section 3B1.1. *U.S. v. Allibhai*, _ F.2d _ (5th Cir. Aug. 6, 1991) No. 90-1354.

8th Circuit upholds leadership of drug dealer. (430) A drug distributor need not be the main supplier in a geographical area in order to be considered a leader. Here, defendant directed the distribution of drugs, organized two co-conspirators to manufacture methamphetamine, and coordinated the sale of drugs through another conspirator. The district court's finding that defendant was the center of the scheme and that he organized at least five people was not clearly erroneous. *U.S. v. Fuller*, _ F.2d _ (8th Cir. Aug. 5, 1991) No. 90-2394.

9th Circuit holds there can be more than one leader or organizer. (430) The 9th Circuit ruled that the fact that two other persons played a leadership role in the initial phases of the conspiracy "is not dispositive." Commentary Note 3 to section 3B1.1 says that "there can be more than one leader or organizer." Here the defendant played a "decisive" role in the decision to ship the marijuana through Mexico, rather than directly to the United States." It was he who had connections with Mexican customs officials and underworld figures who would assure transportation in the United States." The district court's finding that defendant was an organizer or leader was not clearly erroneous. *U.S. v. Monroe*, _ F.2d _ (9th Cir. Aug. 21, 1991) No. 89-50597.

5th Circuit rejects minor role of wife of money launderer. (440) The 5th Circuit rejected defendant's contention that she was a minor or minimal participant in her husband's money laundering scheme. Defendant played an important role in the laundering scheme: she relayed messages between the launderers and their clients, counted the money to verify the sums, and on at least one occasion actually transported the money to Belgium. *U.S. v. Allibhai*, _ F.2d _ (5th Cir. Aug. 6, 1991) No. 90-1354.

7th Circuit remands because it was unclear whether district court considered minor participant reduction. (440) Defendant permitted his co-conspirators to use his apartment to sell cocaine. The 7th Circuit found that the district court properly denied defendant a reduction for having a minimal role in the transaction. Defendant had some knowledge of the scope of the enterprise, allowed his residence to be used on several occasions for drug transactions and was present for several of those transaction. He also attested to the high quality of the drugs. However, it was unclear whether the district court considered giving defendant a two-level decrease as a minor participant. This failure to articulate reasons for denying the decrease was "troubling" in light of the prosecutor's acknowledgement that defendant's participation was more minimal than the other participants. The court itself also indicated that defendant might have had a "peripheral role" in the conspiracy. The sentence was vacated so that the district court could give fuller consideration to defendant's eligibility for a two-level reduction as a minor participant. *U.S. v. Scroggins*, _ F.2d _ (7th Cir. Aug. 2, 1991) No. 90-2580.

9th Circuit rules that court need not make findings of relative culpability in rejecting "minor participant" reduction. (440) The 9th Circuit held that the guidelines do not require a district court to make factual findings as to the culpability of a defendant relative to his codefendants. In addition, the

court found it unnecessary to decide whether a "mere courier" was entitled to minor participant status, because "defendant in this case did more than act as a simple courier." *U.S. v. Flores-Payon*, __ F.2d __, 91 D.A.R. 9808 (9th Cir. Aug. 12, 1991) No. 90-50081.

2nd Circuit affirms obstruction enhancement based upon defendant's attempt to intimidate fraud victim. (460) Defendant fraudulently obtained a loan from a town by presenting false financial information. The district court enhanced defendant's sentence for obstruction of justice after reviewing taped telephone conversations in which defendant attempted to intimidate the mayor of the town into signing a letter to be used at sentencing which would state that the town's loan to defendant had been approved twice before the town requested any financial information from him. The 2nd Circuit affirmed, finding that the proposed statement violated common sense and was contrary to the district court's finding that the town officers expected financial statements as a matter of course. *U.S. v. Brach*, __ F.2d __ (2nd Cir. Aug. 15, 1991) No. 90-1742.

1st Circuit gives "due deference" to district court's determination of how to group counts. (470)(820) Defendant challenged the district court's grouping of his counts under guideline section 3D1.2. The 1st Circuit found that the determination of whether and how to group counts under the multiple counts provisions of the guidelines more closely resembles an application of the guidelines to the facts than a finding of fact. Accordingly, an appellate court should give "due deference" to the grouping determinations of the district court. *U.S. v. Cousens*, __ F.2d __ (1st Cir. Aug. 2, 1991) No. 90-1615.

1st Circuit upholds separate grouping of firearms counts. (470) Defendant pled guilty to nine separate firearms violations. The district court grouped seven of those counts together under guideline section 3D1.2 because the offenses were committed close together, out of a common fund of money, and for a common scheme or plan. Each of the other two counts were grouped separately. The 1st Circuit upheld the separate grouping of the firearms counts, concluding that the differences between the separate counts and the remaining seven counts were sufficient to justify separate grouping. Defendant purchased the weapon in one of the separate counts almost two years before he purchased the guns identified in the seven grouped counts. The guns involved in the other separate count, though purchased only five weeks after the guns purchased in the grouped counts, included a pistol purchased from a different seller. This weapon was allegedly purchased for self defense purposes, while the remaining firearms were allegedly purchased for hunting and target practice. *U.S. v. Cousens*, __ F.2d __ (1st Cir. Aug. 2, 1991) No. 90-1615.

2nd Circuit remands because error in computing one base offense level caused error in combined offense level. (470) Defendant's offenses were placed into three different groups under section 3D1.4. However, the district court improperly determined that the offense level for one of the groups was 18 rather than 12. If the court had not added six levels to the offense level in that group, the offense level for that group would have been more than eight levels less serious than the group with the highest offense level, and thus would have been disregarded in computing the multiple count adjustment under section 3D1.4(c). Thus, defendant's combined offense level should have been 27, not 28, and his maximum guideline sentence should have been 87 months, which was 10 months less than the 97-month sentence he received under the guidelines. Although the district court could have sentenced defendant for up to two more years on the non-guidelines counts, it was not possible to determine whether the district court would have done so if it had applied the guidelines properly. Accordingly, the 2nd Circuit remanded for resentencing. *U.S. v. Hornick*, __ F.2d __ (2nd Cir. Aug. 7, 1991) No. 90-1113.

11th Circuit holds guidelines bar court from imposing a general sentence on multiple counts. (470) Defendant contended that the district court erred by imposing a general sentence on Count 1 and Count 3, rather than separate and specific sentences for each count. A general sentence is an undivided sentence for more than one count that does not exceed the maximum possible aggregate sentence for all the counts but does exceed the maximum allowable sentence on one of the counts. The 11th Circuit held that guideline section 5G1.2(b) requires distinct sentences on each count of conviction, not undivided general sentences covering two or more counts. *U.S. v. Woodard*, __ F.2d __ (11th Cir. Aug. 14, 1991) No. 89-8339.

4th Circuit rejects acceptance of responsibility reduction for defendant who denied involvement with firearms. (485) The 4th Circuit found no error in the district court's denial of a reduction for acceptance of responsibility. The district court found that defendant had demonstrated no remorse and that, despite evidence to the contrary, he denied having anything to do with firearms involved in the criminal enterprise. *U.S. v. Johnson*, __ F.2d __ (4th Cir. Aug. 14, 1991) No. 90-5043.

5th Circuit denies acceptance of responsibility reduction despite defendant's entrapment defense. (485) Defendants contended that the district court improperly denied them a reduction for acceptance of responsibility based upon their decision to plead the defense of entrapment. The 5th Circuit affirmed, finding defendants misinterpreted *U.S. v. Fleener*, 900 F.2d 914 (6th Cir. 1990). *Fleener* merely held that the district court did not err in granting the defendant a reduction for acceptance of responsibility even though that defendant raised an entrapment defense at trial. Thus, the

decision does not entitle a defendant to the reduction, but merely permits a district court to consider it notwithstanding an entrapment defense. Here, the reduction was properly denied, because the district court noted that defendants' attitudes at trial did not comport with the attitude of one who has accepted responsibility. *U.S. v. Allibhai*, __ F.2d __ (5th Cir. Aug. 6, 1991) No. 90-1354.

Criminal History (§ 4A)

8th Circuit rules that prior conviction for fictitious license was not "similar" to instant drug offense. (500) Defendant had a prior conviction for driving his car with his brother's license plates. His arrest for this offense occurred near a crack house during or shortly after a drug raid. In the instant offense, defendant pled guilty to a drug offense. Section 4A1.2(c) excludes certain misdemeanor and petty offenses from a defendant's criminal history unless the sentence was a term of at least one year's probation or 30 days' imprisonment or the prior offense was "similar to" the instant offense. The district court included the prior fictitious license offense in defendant's criminal history because it was "closely related" to defendant's instant drug activities. The 8th Circuit reversed, ruling that "similar to" was not synonymous with "closely related." The phrase must be given its normal meaning. Even if the fictitious license offense was closely related to defendant's drug dealing, the two offenses of drug dealing and driving with a false license were not remotely similar to each other. *U.S. v. Mitchell*, __ F.2d __ (8th Cir. Aug. 12, 1991) No. 90-3022.

10th Circuit rules deferred sentence was automatically expunged under Oklahoma law. (500) Defendant contended that his deferred sentence under Oklahoma law should not have been counted for criminal history purposes because it had been expunged. The 10th Circuit agreed that Oklahoma law provides for the automatic expungement of such convictions. The statute states that upon completion of the probation term, the defendant shall be discharged without a court judgment of guilt, and the verdict or plea "shall be expunged on the record." The word "shall" is mandatory, rather than permissive. Moreover, the applicable statute contains no mechanism an individual can follow to have a record expunged. *U.S. v. Johnson*, __ F.2d __ (10th Cir. Aug. 15, 1991) No. 90- 6235.

8th Circuit affirms that second-degree burglary is a crime of violence for career offender purposes. (520) Defendant contended that his prior conviction for second-degree burglary was not a "violent felony" as defined by state law, and therefore he should not have been classified as a career offender. The 8th Circuit found this argument foreclosed by the Supreme Court's decision in *Taylor v. United States*, 110 S.Ct. 2143 (1990). *Taylor* ruled that the definition of the word "burglary" for purposes of sentence enhancement under 18 U.S.C. section 924(c) must have a uniform definition independent of the label employed by state law. Thus, the inclusion of a prior conviction for second-degree burglary in an enhanced sentence calculation was proper. *U.S. v. Nimrod*, __ F.2d __ (8th Cir. Aug. 8, 1991) No. 90-1389.

10th Circuit affirms downward departure for career offender. (520)(690)(733) The district court departed downward from the career offender guidelines because defendant's two previous convictions were committed within two months of each other when he was only 20 years old, and were punished by concurrent sentences. The 10th Circuit affirmed, finding that the reasons for the departure, taken together, were adequate. Although the guidelines advise that age is not ordinarily relevant, it was proper to consider age "in the context of the other circumstances of a defendant's criminal history." Similarly, it was proper for the district court to look at the short period of time between defendant's two previous crimes "in the context of defendant's age and the state court's treatment of the two convictions." The court concluded that the guidelines did not sufficiently consider "this unique combination of factors in defendant's criminal history." Judge Baldock dissented from this portion of the opinion. *U.S. v. Bowser*, __ F.2d __ (10th Cir. July 19, 1991) No. 90-3234.

11th Circuit rules government need not give section 851 notice to sentence defendant as a career offender. (520) Following the other Circuit courts, the 11th Circuit rejected defendant's argument that the government was required to comply with the notice requirements in 21 U.S.C. section 851(a)(1) before defendant's prior convictions could be used to classify him as a career offender under the guidelines. The guidelines do not contain a provision like section 851 requiring the government to file an information before relying upon a defendant's prior conviction to enhance his guideline sentence. The government need only follow the notice requirements of section 851 when it intends to enhance a defendant's statutory minimum or maximum sentence. No notice is necessary to classify defendant as a career offender so long as the enhanced sentence is still within the permissible statutory range. *Young v. U.S.*, __ F.2d __ (11th Cir. July 23, 1991) No. 90-7050.

11th Circuit holds that "controlled substance offense" must be drug trafficking crime for career offender purposes. (520) Defendant had two prior convictions for attempting to obtain a controlled substance using a forged prescription. The 11th Circuit reversed the district court's determination that these were "controlled substance offenses" under the career offender guideline section 4B1.1. The guideline defines a controlled substance offense as any offense identified in specific federal statutes, and "similar offenses." The listed offenses are all drug trafficking crimes, while defendant's offenses were not. His prior offenses required proof that he attempted to obtain drugs by using a forged prescription.

The offense did not contain an element that was similar to the trafficking element in the listed offenses, and was therefore not a controlled substance offense. *Young v. U.S.*, __ F.2d __ (11th Cir. July 23, 1991) No. 90-7050.

7th Circuit holds criminal livelihood determination must be based on net income. (540) In this habeas corpus action, defendant claimed ineffective assistance of counsel because counsel failed to present evidence at the sentencing hearing that during defendant's five-month crime spree, he had legitimate gross income of $400 per month, rather than $150 as the court believed. Defendant had received a two-level enhancement under guideline section 4B1.3 for deriving a substantial portion of his income from a pattern of criminal conduct. Defendant fraudulently used a credit card to obtain $8178 worth of merchandise, which he sold for $1000. The 7th Circuit held that under guideline section 4B1.3, the defendant's net income, rather than gross income, is the relevant figure for both legitimate and criminal sources of income. The object of section 4B1.3 is to distinguish the professional from the amateur criminal on the basis of the extent to which a defendant derives his livelihood from his criminal as opposed to his legal activities. "And livelihood is a matter of net rather than gross income." *Lee v. U.S.*, __ F.2d __ (7th Cir. Aug. 12, 1991) No. 90-2513.

Determining the Sentence (Chapter 5)

3rd Circuit affirms sentence after revocation of supervised release despite judge's misstatement. (580) Defendant violated a term of his supervised release and the release was revoked. In sentencing defendant to three years' imprisonment, the district court stated that it was revoking defendant's original sentence "in its entirety" and imposing a new sentence. The 3rd Circuit agreed that the district court should have said that it was revoking defendant's supervised release and was sentencing him for violating a condition of his supervised release. However, the judge's statement was "a verbal slip," and it appeared from the record that the judge properly intended to revoke defendant's supervised release, not his original sentence. Moreover, defendant was unable to identify any prejudice resulting from the district court's putative revocation of his original sentence. *U.S. v. Blackston*, __ F.2d __ (3rd Cir. July 29, 1991) No. 90- 3750.

3rd Circuit finds defendant's drug use sufficient to establish drug possession. (580) Under 18 U.S.C. section 3583(g), if a defendant on supervised release is found in possession of a controlled substance, the court must impose a prison term of at least one-third of the supervised release term. Defendant tested positive for cocaine on three consecutive occasions and admitted using cocaine. The district court ruled that defendant had been "in possession" of a controlled substance as provided in section 3583(g), and sentenced him to three years. The 3rd Circuit, finding the issue to be "exceedingly close," found that section 3583(g) permitted consideration of defendant's drug use as circumstantial evidence of his possession of the drug. However, the court did not state that supervised release must be revoked just because a defendant tests positive for drugs. The probation officer and court have discretion to determine whether defendant "possessed" the controlled substance. In this case, the factual determination that defendant "possessed" a controlled substance was not clearly erroneous. *U.S. v. Blackston*, __ F.2d __ (3rd Cir. July 29, 1991) No. 90-3750.

3rd Circuit affirms sentence on revocation of supervised release that is greater than guideline range. (580) Defendant's supervised release was revoked after he provided to his probation officer three consecutive urine specimens that tested positive for cocaine. Guideline section 7B1.4(a) recommended a four to 10 month sentence. However, because defendant was found to have been in possession of a controlled substance, 18 U.S.C. section 3583(g) mandated a minimum two-year term of imprisonment, which became defendant's guideline range. The district court sentenced defendant to three years' imprisonment, and the 3rd Circuit affirmed. The Chapter Seven policy statements are not "guidelines" binding upon a court. The district court was not required to justify its decision to impose a sentence outside of the prescribed range by finding an aggravating factor that warranted an upward departure. *U.S. v. Blackston*, __ F.2d __ (3rd Cir. July 29, 1991) No. 90-3750.

5th Circuit rules failure to advise about supervised release was not harmless. (580)(790) In *U.S. v. Bachynsky*, 934 F.2d 1349 (5th Cir. 1991), the 5th Circuit overruled prior circuit precedent and held that a district court's total failure during a plea colloquy to mention or explain the effect of supervised release does not automatically constitute a failure to address a core concern of Fed. R. Crim. P. 11 and thus does not automatically mandate reversal. Here, the district court's total failure to mention or explain the effect of supervised release was not harmless error. In contrast to the defendant in *Bachynsky*, defendant faced a possible period of incarceration in excess of the maximum penalty of which he was advised. Moreover, defendant was a foreigner who did not speak English, was only 21 years old, had a sixth grade education, and pled guilty to the indictment without the benefit of a plea bargain. *U.S. v. Garcia-Garcia*, __ F.2d __ (5th Cir. Aug. 5, 1991) No. 90-8668.

10th Circuit rules failure to advise defendant of supervised release was harmless error. (580)(790) The 10th Circuit upheld defendant's sentence despite the district court's failure to advise defendant that his sentence would include a period of supervised release as required by Rule 11. Defendant did not argue that he would not have pled guilty had the court advised him of the supervised release. The court did advise defendant that the maximum penalty for his

offense was five years' imprisonment, plus fines and fees. Defendant received a sentence of 14-months imprisonment and three years supervised release. Thus, the total sentence was a fraction of the maximum stated by the district court, and defendant's substantial rights were not affected. The court rejected the suggestion that a possible future violation of supervised release might affect the harmless error analysis. *U.S. v. Elias*, __ F.2d __ (10th Cir. July 2, 1991) No. 90-2230.

11th Circuit reverses restitution order based upon dismissed counts. (610) Pursuant to a plea agreement, defendant pled guilty to one charge of embezzling a postal money order and three other counts were dismissed. The district court imposed a restitution order of $6,698.18 even though the count of conviction involved only $140. The 11th Circuit vacated the restitution order, based upon the Supreme Court's decision in *Hughey v. United States*, 110 S.Ct. 1979 (1990), which limits restitution awards to the loss caused by the conduct underlying the offense of conviction. *U.S. v. Epperson*, __ F.2d __ (11th Cir. Aug. 14, 1991) No. 90-3344.

Departures Generally (§ 5K)

10th Circuit holds Rule 32 requires notice of contemplated degree of departure. (700)(760) Fed. R. Crim. P. 32(c)(2)(B) requires the presentence report to contain the offense level and criminal history category that the probation officer believes applicable. The 10th Circuit held that these requirements apply equally to departure and non-departure sentences. Thus, Rule 32 requires the presentence report to identify the factors considered relevant to determining the appropriate degree of departure. "However, the presentence report's failure to contain the alternate departure calculations will not destroy the validity of the sentence imposed so long as the sentencing court has given both parties notice of the facts warranting departure and of the method or reasons to be employed in fixing the degree of departure and a reasonable opportunity to be heard concerning these matters." *U.S. v. Kalady*, __ F.2d __ (10th Cir. Aug. 15, 1991) No. 90-8087.

7th Circuit affirms district court's refusal to depart downward despite government motion. (710) The 7th Circuit found no merit to defendant's claim that the district court was required under 18 U.S.C. section 3553(e) to depart downward after the government made a motion for a downward departure based upon defendant's substantial assistance. The language in section 3553(e) does not mandate a downward departure, but mandates that the district court comply with the sentencing guidelines. Section 3553(e) and guideline section 5K1.1 are generally treated as parallels for purposes of analysis. *U.S. v. Hayes*, __ F.2d __ (7th Cir. Aug. 12, 1991) No. 90-3191.

7th Circuit rules it has no jurisdiction to review refusal to depart downward. (710)(800) Defendant claimed that the district court abused its discretion in denying the government's motion for a downward departure. The 7th Circuit held that under 18 U.S.C. section 3742(a), it had no jurisdiction to review the district court's failure to depart because a refusal is not an incorrect application of the guidelines, or without more, a violation of law. *U.S. v. Hayes*, __ F.2d __ (7th Cir. Aug. 12, 1991) No. 90-3191.

10th Circuit upholds criminal history departure because defendant committed instant offense while awaiting trial on similar state charges. (733) While awaiting trial in state court on charges of murdering his five-week old son, defendant committed the instant federal offense, the murder of his five-month old daughter. The district court departed upward because this offense was committed while he awaiting trial for the separate state crime. The 10th Circuit affirmed, agreeing with the district court that the guidelines do not specifically account for this aggravating circumstance. Guideline section 4A1.3(d) lists as an example of an aggravating circumstance whether defendant was pending trial, sentencing, or appeal on another offense. It was proper for the district court to depart upward by two points by analogy to section 4A1.1(d), which provides for a two-point increase if the defendant committed the instant offense while under a criminal justice sentence. *U.S. v. Little*, __ F.2d __ (10th Cir. July 22, 1991) No. 90-6244.

2nd Circuit rejects relevant conduct surrounding instant offense as grounds for criminal history departure. (734) Defendant fell within criminal history category IV. The district court departed upward to criminal history category VI after considering the relevant conduct surrounding the offense of conviction. The district court found that it should sentence defendant as if he were a career offender because he had done everything necessary to qualify as a career offender. The 2nd Circuit reversed, holding that it was improper to consider relevant conduct surrounding the offense of conviction as grounds for a criminal history departure. Relevant conduct may be considered in determining a defendant's criminal history only with respect to defendant's prior convictions. *U.S. v. Hernandez*, __ F.2d __ (2nd Cir. Aug. 8, 1991) No. 91-1028.

8th Circuit rejects downward criminal history departure based upon prior DWI violations. (734)(800) Defendant contended that his criminal history category was overstated because of two 1982 convictions of driving while intoxicated. The 8th Circuit disagreed, since these are not minor traffic infractions under guideline section 4A1.2(c). Moreover, the district court's refusal to depart downward from the guidelines range is nonreviewable. *U.S. v. Fuller*, __ F.2d __ (8th Cir. Aug. 5, 1991) No. 90-2394.

10th Circuit rules district court failed to adequately explain reasons for extent of departure. (734) Defendant was placed in criminal history category VI, which resulted in an applicable guideline range of 24 to 30 months. The district court departed upward and sentenced defendant to 40 months' imprisonment, based upon numerous prior offenses which were not counted in defendant's criminal history. The 10th Circuit affirmed this as a ground for departure, but found that the district court failed to adequately explain why a 10-month departure was appropriate. The judge merely stated that he imposed the additional 10 months to protect society and because criminal history category VI was inadequate. This explanation did not reveal how the district court selected the degree of departure. If possible, the court should have extrapolated from other guideline levels or made an analogy to closely-related circumstances or conduct addressed by the guidelines. *U.S. v. Kalady*, __ F.2d __ (10th Cir. Aug. 15, 1991) No. 90-8087.

2nd Circuit affirms upward departure based upon defendant's use of weapon in dealing drugs. (745) Defendant was convicted of being a felon in possession of a firearm. The court departed upward, finding that defendant had used the weapon in dealing drugs. To determine the extent of the departure, the district court looked to 18 U.S.C. section 924(c)(1), which sets a five-year mandatory minimum for a defendant who uses a weapon in the course of committing a drug offense. This five-year mandatory sentence was then added to defendant's guideline sentence. The 2nd Circuit affirmed the departure. The district court's explanation satisfied the requirements for upward departures set forth in U.S. v. Kim, 896 F.2d 678 (2nd Cir. 1990). The resulting sentence, based on the mandatory minimum set by Congress in section 924(c) for the offense that would apply to defendant's relevant conduct, did not exceed what defendant would have received had he been convicted under section 924(c). The ultimate sentence was also reasonable. *U.S. v. Hernandez*, __ F.2d __ (2nd Cir. Aug. 8, 1991) No. 91-1028.

Sentencing Hearing (§ 6A)

7th Circuit refuses to remand despite failure to ask defendant whether he read the presentence report. (760) Defendant sought resentencing because the district judge failed to comply with Fed. R. Crim. P. 32 which requires the court to determine that defendant and his counsel have had an opportunity to read and discuss the presentence report. The 7th Circuit found remand unnecessary because the judge's failure to make this inquiry did not compromise defendant's rights. Defendant did not identify any fact he was prevented from disputing, nor did he claim that he had not read the report or discussed it with his attorney. Rule 32(c)(3)(D) requires the district judge to write or attach his disposition of factual disputes to the presentence report. The judge's failure to do this did not implicate any due process rights because the district judge clearly made a finding as to the disposition of the sole disputed issue. *U.S. v. Rodriguez-Luna*, __ F.2d __ (7th Cir. July 22, 1991) No. 90-1983.

10th Circuit rules defendant has no constitutional right to see probation officer's sentencing recommendation. (760) Defendant argued that Fed. R. Crim. P. 32(c)(3)(A) was unconstitutional because it does not permit a court to provide a defendant with the probation officer's final recommendation as to sentence. The 10th Circuit rejected this argument, finding no support for this argument in *Gardner v. Florida*, 430 U.S. 349 (1977). In defendant's case the district court did not consider any factual information not contained in the presentence report. *U.S. v. Kalady*, __ F.2d __ (10th Cir. Aug. 15, 1991) No. 90-8087.

1st Circuit remands for district court to clarify whether it relied on information without giving defendant notice. (770) Defendant contended that the district court adjusted his offense level upward based on information which he had no opportunity to rebut. The information consisted of testimony by a DEA agent at the sentencing hearing of a codefendant. The 1st Circuit found that if the district court considered this information in sentencing defendant, defendant should have been provided with notice and an opportunity to comment. Since the record was unclear as to whether the district court considered this information, the case was remanded to the district court with directions to indicate on the record whether the disputed information had been relied upon. If the court did rely on the information, it should vacate the sentence and defendant should be sentenced by a different judge. *U.S. v. Berzon*, __ F.2d __ (1st Cir. Aug. 5, 1991) No. 90-2080.

5th Circuit finds no improper consideration of defendant's religion. (770) The 5th Circuit found no merit to defendant's contention that she was punished [illegible]use of her religious affiliation with the Ismaili Muslim fai[illegible]. Defendant pointed to a statement in her presentence report noting that she should have been aware, "as an Ismaili Muslim," of the frequent practice of exporting cash out of the United States to the Aga Khan. However, the probation officer indicated that the money laundering activities for which she and her codefendants were indicted were not connected to those religious practices. In fact, the court never even mentioned defendant's religious faith at sentencing. *U.S. v. Allibhai*, __ F.2d __ (5th Cir. Aug. 6, 1991) No. 90-1354.

Plea Agreements, Generally (§ 6B)

4th Circuit applies waiver of appeal provision in plea bargain to bar government appeal. (780)(800) The government attempted to appeal, but defendant's plea agreement contained a provision in which she waived the right to appeal her sentence. The 4th Circuit dismissed the govern-

ment's appeal, holding that the p;ea agreement also barred the government's right to appeal. "Such a provision against appeals must also be enforced against the government, which must be held to have implicitly cast its lot with the district court, as the defendant explicitly did." *U.S. v. Guevara*, __ F.2d __ (4th Cir. Aug. 12, 1991) No. 90-5840.

9th Circuit holds that claim of breach of plea agreement was waived by failure to raise issue below. (780)(800) Rejecting cases from the 3rd and 10th Circuits and following the 11th Circuit, the 9th Circuit held that a claim that a plea agreement was violated both by the sentence imposed and statements by the prosecutor "may not be raised for the first time on appeal." The defendant waived the issues, by failing to raise them in the district court. The court said that this "is the sort of claim which a defendant ordinarily will recognize immediately and should be required to raise when the alleged breach can still be repaired." *U.S. v. Flores-Payon*, __ F.2d __ (9th Cir. Aug. 12, 1991) No. 90-50081.

9th Circuit holds that defense counsel's miscalculation of guidelines does not entitle defendant to withdraw plea. (790) Defendant moved to withdraw his plea on the ground that the sentencing law in effect at the time he entered his plea and upon which he and his counsel relied, had been "radically changed." The change to which counsel referred was the decision in *U.S. v. O'Neal*, 910 F.2d 663 (9th Cir. 1990), holding that the offense of being a felon in possession of a firearm is a crime of violence under the career offender provisions of the sentencing guidelines. Relying on *U.S. v. Garcia*, 919 F.2d 1346 (9th Cir. 1990), the 9th Circuit reiterated that an erroneous sentencing prediction or miscalculation of the guideline range "does not entitle a defendant to withdraw his guilty plea." The defendant was informed of the maximum penalties he faced and that his attorney's predictions did not bind the court. *U.S. v. Oliveros-Orosco*, __ F.2d __ (9th Cir. Aug. 19, 1991) No. 90-50639.

Death Penalty

9th Circuit holds that Arizona state courts have sufficiently narrowed the definition of "depraved" that it is not vague. (862) In applying the "depraved" aggravating circumstance to petitioner's case, the Arizona Supreme Court made clear that the term "depraved" referred to "the mental state and attitude of the perpetrator as reflected in his words and actions." The Arizona Supreme Court then recited several discrete facts which supported the finding that defendant committed the murders in a "depraved" manner, as Arizona courts defined that term. The Arizona court found that the aggravating circumstances had been "established," which in context, meant established "beyond a reasonable doubt." Thw 9th Circuit held that this was sufficient to uphold the death sentence. *Clark v. Ricketts*, __ F.2d __, 91 D.A.R. 9749 (9th Cir. Aug. 9, 1991) No. 87-2560.

9th Circuit finds that in imposing death sentence judge need not discuss each mitigating factor and explain its effect. (865) Defendant challenged the adequacy of the mitigation hearing on the ground that the sentencing judge did not discuss each mitigating factor that had been presented, identify it by name and explain its effect, if any, on the sentencing decision. Judges Thompson, Farris and Brunetti rejected the argument, ruling that it was clear from the record that the court "considered all mitigating evidence, both statutory and nonstatutory, before imposing the death sentence." *Clark v. Ricketts*, __ F.2d __, 91 D.A.R. 9749 (9th Cir. Aug. 9, 1991) No. 87-2560.

9th Circuit reaffirms that judge, rather than jury, may find the aggravating circumstances supporting a death sentence. (865) Citing *Walton v. Arizona*, 110 S.Ct. 3047, 3054 (1990), the 9th Circuit ruled that the Constitution does not require that a jury find the aggravating circumstances supporting a death sentence. *Clark v. Ricketts*, __ F.2d __, 91 D.A.R. 9749 (9th Cir. Aug. 9, 1991) No. 87-2560.

Forfeiture Cases

3rd Circuit holds victim of embezzlement cannot be bona fide purchaser for value under section 853(n)(6)(B). (900) The district court entered a forfeiture order encompassing all of defendant's property derived from drug proceeds. Claimant, a corporation, sought to amend the forfeiture order, asserting that defendant embezzled a large sum of money from claimant, and that this gave the company an interest in the forfeited property. However, defendant's drug activity began three years before the embezzlement. Claimant conceded that its interest in defendant's property was superior to the government only if it was a "bona fide purchaser for value" under 21 U.S.C. section 853(n)(6)(B). The 3rd Circuit affirmed the district court's determination that a victim of embezzlement is not a bona fide purchaser for value. In order to be a bona fide purchaser, claimant must acquire its interest in the forfeited assets through an advertent, contractual transaction, rather than an inadvertent, tortious transaction like embezzlement. *U.S. v. Lavin*, __ F.2d __ (3rd Cir. Aug. 6, 1991) No. 90-1743.

3rd Circuit holds appeal in forfeiture proceeding under 21 U.S.C. section 853(n)(6) is civil in nature. (920) The 3rd Circuit held that a forfeiture proceeding under 21 U.S.C. section 853(n)(6) is civil, rather than criminal, in nature. Thus, Fed. R. App. P. 4(a)(1) allows 60 days to appeal if the United States is a party. *U.S. v. Lavin*, __ F.2d __ (3rd Cir. Aug. 6, 1991) No. 90-1743.