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

United States Attorneys' Bulletin

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

Editor-in-Chief: *Judith A. Beeman* *FTS/241-6098*
Editor: *Audrey J. Williams* *FTS/241-6098*

VOLUME 39, NO. 12 **THIRTY-EIGHTH YEAR** **DECEMBER 15, 1991**

TABLE OF CONTENTS **Page**

COMMENDATIONS 339
Special Commendation For The Eastern District Of North Carolina 342

FEDERAL EXECUTIVE OF THE YEAR AWARD 342

PERSONNEL 342

ATTORNEY GENERAL HIGHLIGHTS
Attorney General Of The United States 343
Acting Deputy Attorney General 343

DEPARTMENT OF JUSTICE HIGHLIGHTS
Civil Justice Reform 343
Civil Rights Act Of 1991 344
BCCI 344
Operation Polar Cap 345
New Initiatives To Enforce Housing And Credit Rights Of Minorities 346
Pan Am Flight 103 346

INTERNATIONAL AFFAIRS
Taiwan Guidelines 347

SENTENCING GUIDELINES
Organizational Sentencing Guidelines 348
1991 Sentencing Guideline Manuals 348
Sentencing Guidelines Software 348
Guideline Sentencing Updates 349
Federal Sentencing And Forfeiture Guide 349

TABLE OF CONTENTS

	Page
FINANCIAL INSTITUTION FRAUD	
Financial Fraud Report	349
Financial Institution Prosecution Updates	350
Savings And Loan Prosecution Update	
Bank Prosecution Update	
Credit Union Prosecution Update	
OTHER STATISTICS	
Prisoners, Probation, And Parole	351
1990 Bomb Summary	352
Project Triggerlock - Summary Report	352
POINTS TO REMEMBER	
Department Of Justice Symposium	353
Operation Garbage Out	353
United States Attorneys' Manual Bluesheet	353
Sexual Harassment	354
LEGISLATION	
Crime Bill	354
FDIC	355
RTC	355
Immigration	355
CASE NOTES	
Civil Division	355
Environment And Natural Resources Division	359
Tax Division	361
ADMINISTRATIVE ISSUES	
Office Of Legal Counsel, Executive Office For United States Attorneys	363
Career Opportunities	364
Office Of The Pardon Attorney	
Bureau Of Prisons	
Environment And Natural Resources Division	
Office Of The U.S. Trustee, Harrisburg, Pennsylvania; Phoenix, Arizona; San Francisco, California; and New York City	
APPENDIX	
Cumulative List Of Changing Federal Civil Postjudgment Interest Rates	367
List Of United States Attorneys	368
Exhibit A: Civil Justice Reform Fact Sheets	
Exhibit B: Taiwan Guidelines	
Exhibit C: Organizational Sentencing Guidelines	
Exhibit D: Guideline Sentencing Update	
Exhibit E: Federal Sentencing And Forfeiture Guide	

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

COMMENDATIONS

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

Janet Bauerle Anderson (Texas, Western District), by D.J. Raffetto, Commanding Officer, Naval Air Engineering Center, Department of the Navy, Lakehurst, New Jersey, for her excellent representation in a bankruptcy dispute involving complex government contractual issues, and for recovering $5 million from an about-to-expire contract.

Thomas J. Bondurant, Jr. (Virginia, Western District), by John R. Dunne, Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C., for his successful prosecution of a complex circumstantial evidence civil rights case involving the murder of a federal witness.

Reese V. Bostwick (District of Arizona), by David C. Arnell, Chief, Criminal Investigation Division, Internal Revenue Service, Phoenix, for his valuable assistance in a number of grand jury investigations, indictments, and trials, in cooperation with the Tucson office of the Criminal Investigation Division.

George Breitsameter (District of Idaho), by Curtis G. Guiles, Acting District Director, Internal Revenue Service, Boise, for his outstanding prosecutive efforts in a complex case involving non-compliance in the defense contractor industry.

Paul G. Byron and ***Daniel N. Brodersen*** (Florida, Middle District), by Kenneth R. Crone, Project Director, Visa Bankruptcy Reduction Program, San Francisco, for their demonstration of professionalism and legal skill in a bankruptcy fraud and abuse case.

Susan Dickerson and ***Ted Richardson*** (Oklahoma, Western District), by Stephen F. Jeroutek, Area Administrator, Office of Labor-Management Standards, Department of Labor, Dallas, for their cooperative efforts in the successful prosecution of illegal financial activities of labor unions in Oklahoma.

Nathan A. Fishbach (Wisconsin, Eastern District), by Barry M. Hartman, Acting Assistant Attorney General, Environment and Natural Resources Division, Department of Justice, Washington, D.C., for his professional legal skills in obtaining criminal convictions of a corporation and its president for submitting false laboratory reports to environmental regulators and various clients who retained the corporation for environmental testing.

David M. Gaouette (District of Colorado), by Philip W. Perry, Special Agent in Charge, Drug Enforcement Administration, Denver, for his outstanding support, dedication and guidance during several Organized Crime Drug Enforcement Task Force (OCDETF) cases conducted by the DEA Denver Divisional Office during 1990 and 1991.

Joyce J. George, United States Attorney, and ***Staff*** (Ohio, Northern District), by Gene McNary, Commissioner, Immigration and Naturalization Service (INS), Department of Justice, Washington, D.C., for their valuable support of the enforcement activities of INS, and their excellent legal representation in a number of immigration-related criminal prosecutions.

David E. Godwin (West Virginia, Northern District), by William S. Sessions, Director, FBI, Washington, D.C., for his outstanding prosecutive skills in convicting two individuals for arson activities involving an estimated $5 million worth of fraudulent insurance claims and the death of a child.

Jay Golden and ***Joseph M. Hollomon*** (Mississippi, Southern District), by Stephen F. Jeroutek, Area Administrator, Office of Labor-Management Standards, Department of Labor, Dallas, for their outstanding professional assistance in completing over 70 successful criminal actions in FY 1991.

Jennifer Gorland (Michigan, Eastern District), by Cary L. Katznelson, Senior Attorney, U.S. Postal Service, Chicago, for her valuable assistance in obtaining a favorable decision in a slip and fall case filed against the U.S. Postal Service.

Pamela J. Grimm (Pennsylvania, Western District), by Anthony R. Conte, Regional Solicitor, Department of the Interior, Newton Corner, Massachusetts, for her professional legal skill in drafting a Motion for Summary Judgment and brief in a complex civil action.

Marc S. Gromis (New York, Western District), by the Bureau of Alcohol, Tobacco and Firearms, Buffalo, for his successful prosecutive efforts in a complex firearms case involving theft and the illegal sale of firearms by National Guard personnel.

Allen Hoffman (Texas, Southern District), by Stephen F. Jeroutek, Area Administrator, Office of Labor-Management Standards, Department of Labor, Dallas, for his outstanding cooperative efforts and assistance in completing over 70 successful criminal actions during FY 1991.

Joseph M. Hollomon (Mississippi, Southern District), by William P. Tompkins, District Director, Office of Labor-Management Standards, Department of Labor, New Orleans, for his successful prosecution of a corrupt labor union official, and for "assisting in keeping the labor movement clean in the State of Mississippi."

Matthew Jacobs and ***Stephen Liccione*** (Wisconsin, Eastern District), by William S. Sessions, Director, FBI, Washington, D.C., for their outstanding success in the prosecution of the second largest bank robbery case in the history of the State of Wisconsin.

Agnes Kempker-Cloyd (Michigan, Western District), by Christine M. Dowhan, District Counsel, Army Corps of Engineers, Detroit, for her legal skill and expertise in obtaining dismissal of an action, thereby saving valuable agency resources.

Kim R. Lindquist (District of Idaho) by Craig Peterson, Special Agent in Charge, Idaho Bureau of Narcotics, Idaho Falls, for successfully prosecuting the first Triggerlock case in Idaho involving possession of a sawed-off shotgun and a .41 magnum pistol while committing a drug felony.

William H. McAbee (Georgia, Southern District), by Douglas C. Crouch, Assistant Chief Inspector, Internal Security, Internal Revenue Service, Washington, D.C., for his valuable contribution to the Internal Security LEAD Functional School held at the Federal Law Enforcement Training Center in Glynco.

Joseph Mackey (District of Colorado), by Leon Snead, Inspector General, Department of Agriculture, Washington, D.C., for his valuable assistance and guidance in the successful prosecution of a chief law enforcement officer for the Forest Service.

George Martin (Alabama, Southern District), by Stephen F. Jeroutek, Area Administrator, Office of Labor-Management Standards, Department of Labor, Dallas, for his special assistance and cooperative efforts in the successful completion of 70 criminal actions during FY 1991.

Abe Martinez, Mike Shelby, and ***Terry Clark,*** (Texas, Southern District), by John L. Martin, Chief, Internal Security Section, Criminal Division, Department of Justice, Washington, D.C., for their successful prosecution of an individual for transmitting classified information to unofficial representatives of the Taiwan regime in the United States, and for their valuable assistance in protecting classified information from unauthorized disclosure.

James V. Morony and ***Christian H. Stickan*** (Ohio, Northern District), by William D. Branon, Special Agent in Charge, FBI, Cleveland, for their excellent presentations on bankruptcy fraud and the coordination of investigative, prosecutive and forfeiture efforts at a conference for FBI agents involved in white collar crime matters.

Florence Nakakuni (District of Hawaii), by Joseph Parra, Resident Agent in Charge, Drug Enforcement Administration, Honolulu, for her excellent legal and professional skill in resolving a major forfeiture action of international proportions and resulting in approximately $2.5 million forfeited to the Government.

David Nissman and ***Alphonso Andrews*** (District of Virgin Islands) received the Chief Postal Inspector's Special Award from C.R. Clauson, Chief Postal Inspector, U.S. Postal Service, Washington, D.C., for their successful prosecution of a narcotics trafficker who conspired with others to ship teddy bears containing cocaine via the Express mail system.

Ted Richardson (Oklahoma, Western District), by James Cavanaugh, Acting Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Oklahoma City, for his outstanding success in the prosecution of two circumstantial arson-for-profit cases.

Mary Rigdon (Michigan, Eastern District), by Colonel Richard Kanda, District Engineer, Army Corps of Engineers, Detroit, for her legal skill and professionalism in arguing a complex wetlands case through the courts, and bringing about a successful conclusion in favor of the Detroit District Corps of Engineers.

James Robinson (Oklahoma, Western District), by James Cavanaugh, Acting Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Oklahoma City, for his outstanding prosecutive efforts in an arson-for-profit case and a bombing case, leading to the conviction of all defendants involved.

Whitney Schmidt (Florida, Middle District), was presented a Certificate of Appreciation by James J. Mansion, Officer in Charge, Immigration and Naturalization Service, Tampa, for his extraordinary assistance to the investigative staff in several cases dating back to 1987.

Gary L. Spartis (Ohio, Southern District), by Detective Jennifer Y. Benson, Narcotics Bureau, Public Safety Department, Police Division, Columbus, for his valuable assistance and cooperation in the successful prosecution of several criminal cases in the City of Columbus.

James L. Sutherland (District of Oregon), by Michael P. McCarthy, District Counsel, and Karen Berry, Senior Attorney, Department of Veterans Affairs, Portland, for his excellent legal skill in negotiating a favorable settlement of a complicated medical malpractice suit.

Julie F. Tingwall (Florida, Middle District), by Karen E. Spangenberg, Supervisory Senior Resident Agent, FBI, Tampa, for her outstanding success in obtaining guilty pleas of three subjects for interstate transportation of stolen property, wire fraud, conspiracy and possession of fraudulent securities.

Anne VanGraafeiland (New York, Western District), by the Criminal Justice Program staff of the State University of New York, Brockport, for her excellent presentation on white collar crime and various methods of investigation.

Kenneth E. Vines (Alabama, Middle District), by Sherree L. Sturgis, Regional Counsel, Federal Bureau of Prisons, Atlanta, for obtaining a favorable decision in a sentence computation dispute, thereby keeping the prison term of an inmate intact.

James R. Wooley (Ohio, Northern District), by William S. Sessions, Director, FBI, Washington, D.C., for his outstanding efforts in presenting the government's case for the admission of DNA test results and for his success in obtaining trial convictions of all three defendants.

* * * * *

SPECIAL COMMENDATION FOR THE EASTERN DISTRICT OF NORTH CAROLINA

Robert D. Potter, Jr., Assistant United States Attorney for the Eastern District of North Carolina, was commended by Commander E.A. Razzetti, Military Sealift Command, U.S. Navy, Bayonne, New Jersey, for his demonstration of professionalism and legal skill in obtaining a guilty plea from Anangel Shipping Enterprises, S.A. of Panama. The defendant is an affiliate of the Angelicoussis Shipholding Group, Ltd., Hamilton, Bermuda, which owns a fleet of merchant ships. The U.S. Military Sealift Command chartered the M/V Anangel Leader, a 539-foot dry cargo vessel, during Operation Desert Storm to haul ammunition from Southport, North Carolina to Saudi Arabia and return. During the charter, the ship's crew, in order to earn bonus money, submitted false reports at the direction of the company to defraud the United States of money and ship fuel. The cargo ship was seized by the U.S. Marshals Service on August 21, 1991 in Ketchikan, Alaska, at which time documents revealed dual records and reports. The company pled guilty to a criminal information charging a violation of Title 18, U.S.C. §1001, and agreed to forfeit $1,000,000 to the United States, to pay $85,000 in restitution, and are subject to an additional fine of up to $500,000. In a related case, a federal grand jury indicted the ship's Captain from Athens, Greece, and the Chief Engineer from Paros, Greece on various conspiracy charges, all in connection with the scheme to steal money and ship fuel from the United States.

* * * * *

FEDERAL EXECUTIVE OF THE YEAR AWARD

On November 20, 1991, Laurence S. McWhorter, Director, Executive Office for United States Attorneys, announced that the Attorney General's Advisory Committee of United States Attorneys, through Joseph M. Whittle, Chairman, has nominated him on behalf of the United States Attorneys for the 1991 Federal Executive of the Year Award. Mr. McWhorter said, "Please accept my heartfelt appreciation. I am honored. I thank each of you and your staffs for your support and cooperation with this office."

* * * * *

PERSONNEL

On November 7, 1991, ***Ira H. Raphaelson*** was appointed Special Counsel to the Deputy Attorney General for Financial Institution Fraud.

On November 18, 1991, ***Richard Cullen*** was Presidentially appointed United States Attorney for the Eastern District of Virginia.

On November 18, 1991, ***Jerry G. Cunningham*** was Presidentially appointed United States Attorney for the Eastern District of Tennessee.

On December 5, 1991, ***Ernest W. Williams*** was Presidentially appointed United States Attorney for the Middle District of Tennessee.

On December 2, 1991, ***David J. Jordan*** became the Interim United States Attorney for the District of Utah.

On December 2, 1991, ***Kevin V. Schieffer*** became the Interim United States Attorney for the District of South Dakota.

* * * * *

ATTORNEY GENERAL HIGHLIGHTS

Attorney General Of The United States

On November 26, 1991, ***William P. Barr*** was sworn in as the 77th Attorney General of the United States. The ceremony was held in the Great Hall of the Department of Justice, and was attended by the President of the United States. The President said, "I am confident that Bill Barr possesses an abundance of every quality that makes a great Attorney General. He is tough. He is fairminded. He is a man of integrity and of intense dedication. For fifteen years I've been honored to know this good man and I've been deeply impressed by his ability, by his love of country, and by his profession."

* * * * *

Acting Deputy Attorney General

On November 26, 1991, ***George J. Terwilliger III*** became Acting Deputy Attorney General for the Department of Justice. ***Mr. Terwilliger*** formerly served as Principal Associate Deputy Attorney General and United States Attorney for the District of Vermont.

* * * * *

DEPARTMENT OF JUSTICE HIGHLIGHTS

Civil Justice Reform

On November 25, 1991, the Civil Division sponsored a seminar for federal litigators on the implementation of the Executive Order on Civil Justice Reform recently signed by President George Bush. The order requires federal litigators to implement civil litigation reforms. The order also requires agencies to attempt to settle disputes prior to litigation, and to employ settlement and Alternative Dispute Resolution techniques in order to avoid prolonged litigation. (See, United States Attorneys' Bulletin, Vol. 39, No. 11, dated November 15, 1991, at p. 313, for a copy of the Executive Order.)

With Stuart M. Gerson, Assistant Attorney General for the Civil Division serving as moderator, the seminar presented an overview on the development of the Executive Order by Solicitor General Kenneth W. Starr, and a discussion of the Executive Order and policy concerns by John L. Howard, Counsel to the Vice President. Participating in two panel discussions on the implementation and competitiveness of the Order were: Jay P. Lefkowitz, Associate Director, Domestic Policy Council; William G. Myers III, Assistant to the Attorney General; J. Mark Gidley, Associate Deputy Attorney General; Barbara S. Bruin, Special Counsel for the Office of Liaison Services; Stephen Bransdorfer, Deputy Assistant Attorney General for the Civil Division; and Jeffrey Axelrad, Director, Torts Branch, Civil Division.

A Fact Sheet issued by the White House, and Fact Sheets issued by the Civil Division are attached at the Appendix of this Bulletin as Exhibit A. If you have any questions or require further information, please call Larry Lange, Torts Branch, Civil Division, at (FTS) 241-6096 or (202) 501-6096.

* * * * *

Civil Rights Act Of 1991

On November 21, 1991, President Bush signed into law the Civil Rights Act of 1991. Stuart M. Gerson, Assistant Attorney General for the Civil Division, has advised that the Act contains numerous provisions which affect the defense of federal employment discrimination suits. A copy of the Act, 137 Cong. Rec. H9517 (daily ed. Nov. 7, 1991), as well as a copy of the President's signing statement and portions of the legislative history, 137 Cong. Rec. S15,952 (daily ed. Nov. 5, 1991), see also, 137 Cong. Rec. S15,445 (daily ed. Oct. 30, 1991), have been forwarded separately to all United States Attorneys.

One of the more obvious issues stemming from the new legislation is the extent to which it will apply to pending cases. For example, Section 102 of the Act provides for compensatory damages in cases of intentional discrimination under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, and the Rehabilitation Act of 1973. That Section also provides for a jury trial in cases where compensatory damages are sought. The Civil Division has prepared a prototype brief which it has forwarded to all United States Attorneys arguing that these provisions should not be applied retroactively to currently pending cases. The Civil Division is also preparing detailed guidance on other aspects of retroactivity issues which may arise and is prepared to offer guidance on other provisions of the Act relevant to federal employment claims.

If you have any questions on the application of the Act, please call one of the following Federal Programs attorneys: Brook Hedge - (FTS) 368-3501 or (202) 514-3501; Anne M. Gulyassy - (FTS) 368-3527 or (202) 514-3527; Richard Brown - (FTS) 368-5751 or (202) 514-5751; Sarah Wilson - (FTS) 368-3486 or (202) 514-3486; or Lisa Olson - (FTS) 368-5633 or (202) 514-5633.

* * * * *

BCCI

On November 15, 1991, the Department of Justice announced that a federal grand jury has charged the Bank of Credit and Commerce International (BCCI), and three banking officials with racketeering conspiracy for secretly taking over a California bank and for fraudulently dealing in the stock of a Florida bank. According to the indictment, the conspiracy was conducted by arms of the world-wide BCCI network; the founder and president of the BCCI group, Agha Hasan Abedi, of Karachi, Pakistan; the Acting President of the BCCI group, Swaleh Naqvi, believed to be in Abu Dhabi; and a Saudi national with long ties to BCCI, Ghaith Pharaon. This is the third time the Department of Justice has indicted BCCI or its officials in major cases.

The three-count indictment, returned in U.S. District Court in Washington, D.C., said the defendants, as part of the long-term conspiracy, illegally gained control of the Independence Bank of Encino, California. Pharaon masqueraded as the sole purchaser of Independence Bank in 1985 but in fact he owned only 15 percent of the bank and BCCI was the covert financier of the acquisition and owned the controlling 85 per cent of Independence. As a result, false statements were made to federal bank regulatory agencies, a scheme was executed to defraud a federally-insured financial institution, and a plan was devised to obtain by fraud the federal insurance protection for Independence Bank. All of this was done "through deceptive stock purchases by way of hidden stock pledges, nominee agreements, nonrecourse loans, loan releases, beneficial interest agreements, and outright falsehoods, fabrications, and omissions in applications and reports filed with state and federal regulatory agencies," the indictment said.

The indictment also stated that the stock fraud involved the CenTrust Savings Bank in Miami. Pharaon owned about 25 percent of CenTrust's stock and under the scheme he would "arrange for a branch of the BCCI Group to purchase approximately $25 million of the total $150 million CenTrust subordinated debentures in order to mislead and deceive regulators and investors as to the true market for the CenTrust subordinated debentures." Pharaon, as part of the conspiracy, "would cause CenTrust Trust to repurchase said subordinated debentures from BCCI (Overseas) Paris, after approximately six weeks, thus making the BCCI defendants whole and completing the deception of other investors as to the true market for the CenTrust subordinated debentures." Both the purchase and sale of the debentures were carried out, according to the indictment.

The indictment is the result of a Justice Department Task Force consisting of prosecutors from the Criminal Division and the office of Jay Stephens, United States Attorney for the District of Columbia, as well as agents from the Federal Bureau of Investigation.

* * * * *

Operation Polar Cap

On November 25, 1991, the Department of Justice and the Department of the Treasury announced that charges have been filed against 50 persons in five states in the operation of a coast-to-coast ring that laundered millions of dollars obtained from the sale of Columbian cocaine. Federal grand juries in Providence, Manhattan, Atlanta, and Miami returned indictments and a criminal complaint was filed in Los Angeles in the latest phase of Operation Polar Cap, which targets U.S. nationals and Colombians who launder cocaine funds and send the money out of the country. Since 1988, Operation Polar Cap has targeted multi-national narcotics money laundering enterprises for nationally-coordinated multi-agency investigations and prosecutions.

The government alleged that the money was laundered through companies dealing in precious metals on the East and West Coasts. The Rhode Island indictment alleged that one major figure in the money laundering operation is Stephen A. Saccoccia of Cranston, Rhode Island, the owner of precious metals companies in New York City, Los Angeles, and Rhode Island. Saccoccia and his wife, also charged in the money laundering scheme, were arrested in Geneva, Switzerland. Another prominent figure, the Manhattan indictment alleges, is Duvan Arboleda, a native of Colombia who moved to Miami in the mid-1970's and owns precious metals and jewelry companies. The government alleges that Saccoccia and others used their own companies to launder proceeds of cocaine trafficking for Arboleda and others.

According to the indictment, Saccoccia received large amounts of cash at his business offices in New York City, obtained instructions by facsimile machine on how to handle the money, and then sent the funds to his out-of-town companies. Saccoccia's employees would then take the money to banks, convert the funds into checks, and make the checks payable to his various precious metals companies. There would be a complex array of deposits and fund transfers, and then the final wire transfers would be made to bank accounts in Colombia and Miami. In a 12-month period ending last March, more than $130 million was transferred in this manner from one account alone.

Seizure warrants and restraining orders were authorized by federal judges in thirteen districts to seize or restrain the drug proceeds and laundered monies transferred by the various defendants. The Departments of Justice and the Treasury praised the coordinated investigative efforts of the FBI, U.S. Customs Service, IRS, DEA, the Financial Crimes Enforcement Network, and the state and local law enforcement authorities with whom they worked. They also thanked the Office of National Drug Control Policy, and, in particular, the High Intensity Drug Trafficking Areas Program for their contributions.

* * * * *

New Initiatives to Enforce Housing And Credit Rights Of Minorities

On November 4, 1991, Attorney General William P. Barr and Assistant Attorney General for Civil Rights John R. Dunne announced new efforts to address unlawful discrimination in housing. The Department of Justice will establish its own tester program to uncover and identify unlawful housing discrimination. While the Department has used "testing" evidence provided by private parties in the past, this will be the first time ever that the Department of Justice has hired its own force of testers to attack discrimination. Funds will be reprogrammed from other areas of the Department of Justice to support this stepped-up enforcement effort.

In addition, the Department is convening a group composed of federal agencies with regulatory authority over the mortgage lending industry to develop a coordinated program to address possible discrimination by mortgage lenders. The agencies include the Federal Reserve Board, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and the Federal Trade Commission. The Department of Housing and Urban Development has also been asked to participate in this effort.

Assistant Attorney General Dunne developed this enforcement effort in the housing area at the direction of Attorney General Barr in the wake of studies by the Department of Housing and Urban Development and the Federal Reserve Board. The studies were based on tests conducted in 25 major cities and concluded that blacks and Hispanics have a greater than 50 percent chance of encountering discrimination when they seek housing. According to Mr. Dunne, new nationwide data reveals that black and Hispanic mortgage applicants are rejected at a much higher rate than white persons who seek home mortgages. Mr. Dunne said, "Those who violate fair housing laws rarely advertise their discriminatory policies. Testing is the most effective method of identifying housing discriminators and bringing them to justice. The recent HUD study reaffirms the continuing need to enhance our enforcement program."

* * * * *

Pan Am Flight 103

On November 14, 1991, the Department of Justice announced a criminal indictment against two Libyan officers and operatives of the Libyan Intelligence Agency in the 1988 mid-air bombing of Pan American World Airways Flight 103 over Lockerbie, Scotland. The 193-count indictment, returned in Federal District Court in Washington, D.C., is a culmination of one of the most exhaustive and complex investigations in history that covered more than 50 countries, thousands of witnesses, possible suspects and relatives of the 270 people who were killed.

William P. Barr, then Acting Attorney General, explained the charges in the indictment as follows:

> The defendants and co-conspirators made a bomb of plastic explosive and a sophisticated timing device and placed it inside a Toshiba portable radio cassette player. The radio and clothing were put into a Samsonite suitcase.
>
> On December 20, 1988, the defendants flew from Libya to Malta, where one of them had recently worked for Libyan Arab Airlines and had access to the baggage tags of another airline, Air Malta. By using stolen Air Malta baggage tags, the defendants and their co-conspirators were able to route the bomb-rigged suitcase as unaccompanied luggage. The suitcase was put aboard an Air Malta flight that went to Frankfurt Airport in Germany. At Frankfurt, the suitcase was transferred to Pan Am Flight 103-A, which carried it to Heathrow Airport in London. At Heathrow, the suitcase containing the bomb was placed aboard Pan Am 103. It exploded about 38 minutes after the airliner departed for New York.
>
> Pan Am 103 was at an altitude of six miles when the bomb detonated. Pieces of the jetliner were scattered over an area of 845 square miles. In the most extensive crime scene investigation ever carried out, Scottish authorities searched the entire area inch by inch, and found bits of evidence that proved to be critical to the investigators and forensic scientists in solving the case. After laborious analysis and reconstruction, it was determined that the bomb had been in a suitcase in a large aluminum baggage container in the aircraft's forward cargo hold. It was found that the bomb was composed of 10 to 14 ounces of plastic explosive.
>
> The investigation yielded a tiny fragment, smaller than a fingernail, that had been driven by the blast into the large cargo container. Forensic experts determined that this was part of a circuit board of a Toshiba radio. A fragment of a green circuit board -- also smaller than a fingernail -- was found in a piece of a shirt that had been in the suitcase containing the bomb. Scientists determined it was part of the bomb's timing device, and traced it to its manufacturer -- a Swiss company that had sold it to a high-level Libyan intelligence official. The path of the deadly suitcase was reconstructed. With the help of many countries, investigators were able to develop the remainder of the evidence leading to the indictment.

* * * * *

INTERNATIONAL AFFAIRS

Taiwan Guidelines

In establishing diplomatic relations with the People's Republic of China (PRC), the U.S. Government recognized the PRC Government as the sole legal government of China. Both sides agreed that, within this context, the people of the United States would maintain cultural, commercial and other unofficial relations with the people on Taiwan. The President has reaffirmed this policy.

Accordingly, a memorandum has been prepared by the Executive Secretary of the Department of State reviewing the existing guidelines for the conduct of our unofficial relations with the people of Taiwan. Acting Deputy Attorney General George J. Terwilliger, III has requested that the memorandum be circulated to all Department of Justice components. A copy is attached at the Appendix of this Bulletin as Exhibit B to be disseminated within your offices to ensure compliance with the guidelines.

* * * * *

SENTENCING GUIDELINES

Organizational Sentencing Guidelines

On November 7, 1991, Robert S. Mueller, III, Assistant Attorney General for the Criminal Division, issued a memorandum to all Federal Prosecutors advising that the United States Sentencing Commission has promulgated Guidelines for Sentencing of Organizations which became effective on November 1, 1991. (See, Guidelines Manual, Ch. 8 (Nov. 1991). The Department takes the position that these new guidelines apply only to offenses committed on or after the guidelines' November 1, 1991 effective date, but not to offenses committed before that date, irrespective of whether application of the guidelines would have a potentially advantageous or an adverse effect on the defendant.

A copy of the memorandum is attached at the Appendix of this Bulletin as Exhibit C. If you have any questions, please call Paul Maloney, Deputy Assistant Attorney General, Criminal Division, at (FTS) 368-2636 or (202) 514-2636.

* * * * *

1991 Sentencing Guideline Manuals

On November 13, 1991, Laurence S. McWhorter, Director, Executive Office for United States Attorneys, advised that the 1991 Sentencing Guideline Manuals, consisting of two volumes, have been distributed. Please direct any questions or inquiries to Deborah C. Westbrook, Legal Counsel, Executive Office for United States Attorneys, at (FTS) 368-4024 or (202) 514-4024.

* * * * *

Sentencing Guidelines Software

On November 1, 1991, the United States Sentencing Commission released the latest update to their computer software program which aids in the application of the sentencing guidelines. The program ASSYST (Applied Sentencing SYSTem) has been developed utilizing the November 1, 1991 edition of the Guidelines Manual but will continue to allow calculations from both the 1990 and 1989 manuals. The program will not permit mixing provisions from different years (manual editions).

A copy of the November 1 version ASSYST has been provided to each district. Copies may be made for other PCs residing within your district offices but the program may not be distributed to non-Department of Justice personnel. All requests for copies of ASSYST from private sources must be directed to the Sentencing Commission at (202) 626-8500.

For further information, please call Harvey Press, Assistant Director, Information Management, EOUSA, at (FTS) 241-8615 or (202) 501-8615.

* * * * *

Guideline Sentencing Update

A copy of the Guideline Sentencing Update, Volume 4, No. 11, dated October 31, 1991 is attached as Exhibit D at the Appendix of this Bulletin.

* * * * *

Federal Sentencing Guide

Attached at the Appendix of this Bulletin as Exhibit E is a copy of the Federal Sentencing Guide, Volume 3, No. 1, dated November 4, 1991, and Volume 3, No. 2, dated November 18, 1991, which is published and copyrighted by Del Mar Legal Publications, Inc., Del Mar, California.

* * * * *

FINANCIAL INSTITUTION FRAUD

Financial Fraud Report

On November 7, 1991, the Department of Justice submitted a report to Congress entitled "Attacking Financial Institution Fraud." The information in the report, which is required under the 1990 Crime Control Act, came from the 94 United States Attorneys' offices and the Dallas Bank Fraud Task Force. Some of the highlights of the report are as follows:

-- In FY 1991, 1,085 persons were charged in major cases involving financial institution fraud, while 855 defendants were convicted. This compares with 791 persons charged in FY 1990 and 649 convicted.

-- Since October 1, 1988, 2,295 persons have been charged in financial fraud cases involving almost $10 billion in losses to federally insured institutions and 1,770 persons have been convicted, a 96.7 percent conviction rate.

-- Of the 1,770 defendants convicted from FY 1988 through FY 1991, about 1,470, or 77 percent, were imprisoned.

-- From FY 1989 through FY 1991, 871 major savings and loan defendants were charged, with 661 convicted, a 93 percent conviction rate.

-- Of the major savings and loan prosecutions, 106, or 12 percent, were chief executive officers or presidents and 150, or 17 percent, were directors or officers.

The Department has developed a case reporting system in FY 1991 for major savings and loan cases, established a Senior Interagency Group to enhance the Department's efforts in this area, and allocated additional resources to 75 of the 94 United States Attorneys' offices where prosecutions of financial fraud cases increased. The Department also reported the establishment of the New England Bank Fraud Task Force in six New England states in FY 1991. The Dallas Bank Fraud Task Force currently is investigating bank and savings and loan fraud in the Southwest.

William P. Barr, then Acting Attorney General, said, "I am proud of the record of our accomplishments outlined in this report and the dedicated efforts of the many professionals within this Department, as well as those in the Treasury Department and the law enforcement and regulatory agencies who helped bring this about. We are committed to consistently improving that effort in the coming year."

* * * * *

Financial Institution Prosecution Updates

On November 8, 1991, the Department of Justice issued the following information describing activity in "major" bank fraud prosecutions, savings and loan prosecutions, and credit union fraud prosecutions from October 1, 1988 through October 31, 1991. "Major" is defined as (a) the amount of fraud or loss was $100,000 or more, or (b) the defendant was an officer, director, or owner (including shareholder), or (c) the schemes involved convictions of multiple borrowers in the same institution, or (d) involves other major factors. All numbers are approximate, and are based on reports from the 94 United States Attorneys' offices and from the Dallas Bank Fraud Task Force.

Savings And Loan Prosecution Update

Informations/Indictments.....	545	Sentenced to prison.....	431
Estimated S&L Losses.....	$7,633,125,095	Awaiting sentence.....	161
Defendants Charged.....	915	Sentenced w/o prison or suspended.....	108
Defendants Convicted.....	688	Fines Imposed.....	$ 13,091,936
Defendants Acquitted.....	55 *	Restitution Ordered.....	$ 384,030,718
Prison Sentences.....	1,410 years		

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

* * * * *

Bank Prosecution Update

Informations/Indictments.....	1,051	Sentenced to prison.....	707
Estimated Bank Losses.....	$2,426,265,872	Awaiting sentence.....	211
Defendants Charged.....	1,461	Sentenced w/o prison or suspended.....	228
Defendants Convicted.....	1,132	Fines Imposed.....	$ 4,770,081
Defendants Acquitted.....	13	Restitution Ordered.....	$ 300,729,988
Prison Sentences.....	1,456 years		

* * * * *

Credit Union Prosecution Update

Informations/Indictments.....	60	Sentenced to prison.....	47
Estimated Credit Losses.....$66,237,530		Awaiting sentence.....	6
Defendants Charged.....	79	Sentenced w/o prison or suspended.....	7
Defendants Convicted.....	60	Fines Imposed.....	$ 3,550
Defendants Acquitted.....	1	Restitution Ordered.....	$ 7,623,436
Prison Sentences.....	81 years		

* * * * *

OTHER STATISTICS

Prisoners, Probation, And Parole

The Bureau of Justice Statistics, a component of the Department of Justice's Office of Justice Programs, has published a Bulletin entitled "Probation and Parole 1990," which reports that there were 2,670,234 adults on probation and 531,407 on parole in state and federal jurisdictions last year--a new record high. The Bureau estimated that the number of men on probation or parole was more than 3 percent of the nation's adult male population. The number of adults in the United States under some form of correctional supervision, including those in local jails and state and federal prisons, also reached a new high. There were more than 4.3 million such people last year, which was a 7 percent increase over 1989 and a 44 percent increase since 1985. Steven D. Dillingham, Bureau Director, said that on any given day last year an estimated one in every 43 adults was under the care, custody or control of a corrections agency -- that is, one in every 162 adult women and one in every 24 adult men. He also stated that the growth in the size of the offender population that is supervised in the community has paralleled the increases in the prison and jail populations during the last decade. Since 1980, prison and jail populations have grown by 128 percent, while probation and parole counts have increased by 139 percent. Among the probationers, jurisdictions reported that more than 55,000 were under intensive supervision, with higher levels of contact and monitoring by the probation officer. The supervision of an estimated 7,000 probationers included the use of electronic monitoring. Among the parolees, 17,000 were under intensive supervision, of which more than 1,300 were under electronic supervision.

Texas had the largest number of adults on probation -- more than 308,000 -- and also the largest number on parole -- more than 109,000. At the end of last year, six states reported more than 100,000 people on probation -- New York, Michigan, Florida, Georgia, Texas, and California. The South had the highest ratio of adults on probation to adult residents -- 1,643 per 100,000 residents. The states in the Northeast had the lowest such ratio -- 1,198 per 100,000 inhabitants. Five states reported increases of at least 30 percent in their parole populations during the year -- Oklahoma (62.4 percent), Oregon (38.5), Vermont (36.4), Arizona (32.4) and North Carolina (30.7 percent). On the other hand, Rhode Island, North Dakota, and Florida each reduced their parole populations by more than 10 percent. The South had the highest ratio of parolees to adult residents -- 340 per 100,000 residents. The Midwest had the lowest such ratio -- 149 per 100,000 residents.

Single copies of the BJS Bulletin may be obtained from the National Criminal Justice Reference Service, Box 6000, Rockville, Maryland 20850.

* * * * *

1990 Bomb Summary

On November 15, 1991, the FBI Bomb Data Center released the 1990 Bomb Summary, an annual statistical digest devoted to the presentation of information concerning actual and attempted explosive and incendiary bombings reported by public safety agencies and analyzed by the Bomb Data Center staff. The Summary consists of information on hoax devices, accidental or experimental bombings, and recoveries of certain types of items.

Bombing incidents reported to the FBI increased 31 percent nationwide in 1990, as compared to the previous year (1,208), which may be due in part to improved reporting practices by public safety agencies. Of the 1,582 incidents reported last year, 384 were either prevented or did not actually detonate or ignite. The use of explosives in bombings account for 73 percent of the incidents, incendiary bombings 25 percent, and combination devices, which both explode and burn, accounted for 2 percent of the bombing incidents.

Regionally, the Western States recorded 555 bombings. A 27 percent increase occurred in the North Central States with 433 incidents. The Southern States had an increase from 251 to 409 incidents. The least number of incidents occurred in the Eastern States with 185 reported. Puerto Rico reported a decrease with 29 incidents. The most frequent bombing targets in 1990 can be attributed to residential property, accounting for 43 percent of the total attacks. Sixteen percent of the incidents were directed at vehicles while nine percent were aimed at commercial operations. The remainder were distributed among various targets. Up from 11 fatalities in 1989, 27 victims died in 1990 from injuries sustained from actual bombings. Personal injuries resulting from bombings in 1990 totaled 222, up from 202 in 1989.

These statistics are based on information of incidents reported in the continental United States and its territories, by public safety organizations at all levels of government and the military. Many other trends and breakdowns are contained in this publication. You may order a copy by writing to: FBI Bomb Data Center, Forensic Science Research and Training Center, FBI Academy, Quantico, Virginia 22135.

* * * * *

Project Triggerlock Summary Report

April 10, 1991 through October 31, 1991

Description	*Count*	*Description*	*Count*
Indictments/Informations.....	2,636	Prison Sentences.....	1,554 years
Defendants Charged.....	3,323	Sentenced to prison.....	279
Defendants Convicted.....	850	Sentenced w/o prison or suspended.....	15
Defendants Acquitted.....	23		

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.]

* * * * *

POINTS TO REMEMBER

Department Of Justice Symposium

The fourth in a series of Department of Justice symposia was held on November 26, 1991, in Washington, D.C. The topic of discussion was the Bill of Rights with Dr. Steven R. Schlesinger, Director of the Office of Policy Development, serving as moderator. Featured speakers were Kenneth W. Starr, Solicitor General; Benjamin R. Civiletti, former Attorney General of the United States; and Dr. Ralph A. Rossum, President of Hampden-Sydney College, Hampden, Virginia.

Previous symposia have focused on the Role of the Attorney General, led by Professor Daniel J. Meador of the University of Virginia Law School; the Voting Rights Act of 1965, led by Attorney General Dick Thornburgh and John R. Dunne, Assistant Attorney General for the Civil Rights Division; and Environmental Law, led by Richard Stewart, Assistant Attorney General for the Environment and Natural Resources Division.

* * * * *

Operation Garbage Out

At Attorney General Dick Thornburgh's direction, Laurence S. McWhorter, Director, Executive Office for United States Attorneys, launched "Operation Garbage Out," a program to improve the quality of the data contained in the United States Attorneys' caseload management systems, to report more accurately to the Office of Management and Budget and to the Congress, and to better inform the public of what each United States Attorney's office is doing.

To date, Operation Garbage Out has had a significant impact on the workload of the United States Attorneys. The number of cases and matters pending was reduced by more than ten percent -- from 244,208 to 215,365. At the same time, the number of new referrals (pending less than one year) increased by 7,003. While the number of civil cases and matters less than one year old increased by 4,059, the overall civil workload was reduced by 21,096 cases and matters. The number of criminal cases and matters less than one year old increased by 2,944, while the overall criminal caseload was reduced by 7,747. Director McWhorter has advised Attorney General William P. Barr of the United States Attorneys' outstanding success in this effort.

Mr. McWhorter informed the United States Attorneys that their efforts to date and continued emphasis on the integrity of newly entered data will ensure that we are able to tell the public about the outstanding work the United States Attorneys are doing. He stated, "I know that Operation Garbage Out required a significant effort. Thank you, and congratulations on a job well done."

* * * * *

United States Attorneys' Manual Bluesheet

On October 25, 1991, the Financial Litigation Unit of the Executive Office for United States Attorneys issued a United States Attorneys' Manual bluesheet (USAM 3-11.500) to all United States Attorneys setting forth procedures for a separation of duties in the receipt, deposit and posting of payments received by the Financial Litigation Unit within the United States Attorney's office.

If you would like additional copies, please call the United States Attorneys' Manual staff, Executive Office for United States Attorneys, at (FTS) 241-6098 or (202) 502-6098.

* * * * *

Sexual Harassment

On November 20, 1991, Laurence S. McWhorter, Director, Executive Office for United States Attorneys, issued a memorandum advising that it is the policy of the Executive Office for United States Attorneys (EOUSA) and the Office of the United States Attorneys (OUSA) that sexual harassment is unacceptable conduct in the workplace and will not be condoned. Personnel management within EOUSA and OUSA shall be implemented free from prohibited personnel practices, as outlined in the provisions of the Civil Service Reform Act of 1978. All employees should avoid conduct which undermines these merit principles.

Sexual harassment is a complex and sensitive issue. It is a form of employee misconduct which undermines the integrity of the employment relationship. Harassment on the basis of sex is a violation of Section 703 of Title VII of the Civil Rights Act of 1964, as amended. In accordance with the Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, (29 CFR 1604.11), unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

All employees must be allowed to work in an environment free from unsolicited and unwelcome sexual overtures. Sexual harassment debilitates morale and interferes in the work productivity of its victims and co-workers. Behavior of this nature will not be tolerated. At the same time, it is not the intent of EOUSA or OUSA to regulate the social interaction or relationships freely entered into by its employees.

* * * * *

LEGISLATION

Crime Bill

The anti-crime measure (H.R. 3371) stalled in the final minutes of the congressional session, and on November 27, 1991, at 7:05 p.m., Congress adjourned before completing action on the bill. The Department of Justice will continue to pursue the President's crime package in the second session of the 102nd Congress.

* * * * *

FDIC

On the last day of the Congressional session, Congress cleared for the President the "Federal Deposit Insurance Corporation Improvement Act of 1991." As passed, this legislation: 1) authorizes the FDIC to borrow up to $70 billion from the Treasury to bail out the Bank Insurance Fund; 2) provides additional authority for the regulators to intervene early in weak banks; 3) restricts the authority of the Federal Reserve to provide extended credit to failing banks through its discount window; 4) trims the availability of deposit insurance in connection with certain brokered deposits; and 5) restricts the ability of state-chartered banks to underwrite and sell insurance.

The bill does not contain any of the key reforms sought by the President, such as interstate branching or comprehensive deposit insurance reform. Nor does it contain money laundering provisions -- they were dropped in conference -- that had been sought by the Department.

* * * * *

RTC

The Resolution Trust Corporation (RTC) Refinancing, Restructuring and Improvement Act was also cleared for the President on the last day of the session. Among other things, it provides the RTC with $25 billion through April 1, 1992, to assist in the resolution of failed thrift institutions. The bill also restructures and reforms the RTC in various ways and includes provisions (currently being reviewed by the Office of Legislative Affairs and the Civil Rights Division, among others) intended to increase the participation of women and minorities in the RTC's contracting and other activities.

* * * * *

Immigration

In the final hours of the Congressional session, the House and Senate approved a bill that will 1) make technical corrections to the Immigration Act of 1990; 2) revise temporary immigrant provisions of that Act which adversely affected foreign artists, entertainers and athletes; and 3) restore the role of judges in the ceremonial aspects of naturalizing U.S. citizens.

* * * * *

CASE NOTES

CIVIL DIVISION

First Circuit Reverses Contempt Order Against Secretary Of Housing And Urban Development

In 1989, Project B.A.S.I.C., an organization of public housing tenants in Providence, Rhode Island, brought an action against HUD and the Providence Housing Authority (PHA) to block the demolition of certain public housing. The district court held that PHA had a duty to construct replacement housing units.

Following an appeal, the parties entered into a settlement that extended PHA's time for completing replacement units but did not question its obligation to do so. Subsequently, a dispute arose over whether a contractor on the project was complying with federal prevailing wage laws. At the request of the Department of Labor, HUD withheld $500,000 of project funds pending completion of the prevailing wage investigation. The contractor brought suit against HUD, and sought a preliminary injunction. In the course of a hearing on that matter, the district court sua sponte held that the Secretary of HUD would be in contempt unless it released the money, and imposed large daily fines to coerce compliance with its order.

The court of appeals has now reversed the contempt order. Emphasizing the drastic nature of the contempt power and the resulting "unflagging need for clarity" in the underlying order on which a contempt finding is based, the court held that the 1989 order imposed no clear duties on HUD. The court also rejected the notion that HUD could be held responsible for PHA's alleged contempt on the theory that it acted in concert with PHA.

Project B.A.S.I.C. v. Kemp, No. 91-1612 (October 17, 1991).
DJ # 145-17-4469.

Attorneys: Michael Jay Singer - (202) 514-5432 or (FTS) 368-5432
John F. Daly - (202) 514-2496 or (FTS) 368-2496

* * * * *

Eighth Circuit Rules That Government May Seek Recovery On Bonds With Expired Terms

The Commodity Credit Corporation ("CCC") contracts with bonded warehouses for storage of grain. In this case, the agency received an anonymous tip, in the form of a financial statement, showing that a warehouse had sold grain it was supposedly storing for CCC. The agency investigated, confirmed the tip and revoked the warehouse's license. Thereafter CCC sought to recover its losses from the warehouse bonds. The terms of all but one of the bonds had expired when CCC received the tip. The agency sued the bondholders on all the bonds six years and three days after the anonymous tip.

The court of appeals ruled that the agency has a cause of action against all the bonds and that the statute of limitations presents no bar. The court held that the claims against the bonds could not have accrued on the day CCC received the tip because it was unknowable at that time whether the tip was accurate. Finally the court declined to set the exact accrual date for the agency claims, finding that all the possible accrual dates were within six years of filing the action.

United States of America v. Tri-State Insurance Co., No. 90-5569MN (October 7, 1991). DJ # 120-39-1014.

Attorneys: Barbara C. Biddle - (202) 514-2541 or (FTS) 368-2541
Susan Sleater - (202) 514-5534 or (FTS) 368-5534

* * * * *

Ninth Circuit Rules That Interest Accrues On FTCA Award Only During An Appeal, Not During A Remand

In 1988, the United States lost a medical malpractice case to a plaintiff who was awarded $3.4 million. The government appealed and the plaintiff cross-appealed. While the United States was successful on one of its damages issues, the plaintiff also won on one of his damages issues. The case was then remanded for a new calculation of damages in March 1990. On remand, the district court increased plaintiff's award to $5.6 million and ordered that interest would run on the amended judgment, i.e., the $5.6 million, from the date when the original district court decision was filed with the GAO until the government paid the judgment.

The Ninth Circuit has now held that, under 31 U.S.C. § 1304(b)(1)(A), interest runs on judgments against the government only from the date that the district court judgment is filed with the GAO until the day before the court of appeals issues its mandate of affirmance. This means, according to the Ninth Circuit, that interest could run only on the $3.4 million judgment, not on the increased judgment, and that interest ran only until March 1990, when the court of appeals filed its mandate, thus excluding interest for the period when the case was on remand to the district court.

Desart v. U.S., No. 91-15064 (October 8, 1991). DJ # 157-11-247.

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

* * * * *

Ninth Circuit Holds That Due Process Does Not Require Advance Notice Of Statutory Reduction In Welfare Benefits

In the Deficit Reduction Act of 1984, Congress amended the Aid to Families with Dependent Children (AFDC) program to require that household income must include the income of any siblings or grandparents living in the household. California's Department of Social Services did not implement the change until between two and seven months after the statutory reductions took effect. The state agency then notified the affected claimants that their next AFDC checks would be reduced (1) to reflect the newly-"deemed" sibling and grandparental income and (2) to recover the previous overpayments. Plaintiffs argued that HHS regulations required notice in advance of the statutory change in eligibility. The Ninth Circuit held that the regulations require notice in advance of the date the agency's reduced payment takes effect, not when the eligibility is reduced by statute. The panel further ruled that the claimants' property interest in benefits established in Goldberg v. Kelly creates no Due Process right to continued benefits, even for a "grace period" to adjust to the change.

Rosas v. McMahon, No. 89-15525 (October 4, 1991). DJ # 137-11-1116.

Attorneys: Robert S. Greenspan - (202) 514-5428 or (FTS) 368-5428
Bruce G. Forrest - (202) 514-4549 or (FTS) 368-4549

* * * * *

Ninth Circuit (In Banc) Rules That The Pain Standard Announced In Its Cotton-Varney-Gamer Cases Is The Standard To Be Applied In Social Security Disability Cases Involving Subjective Allegations Of Pain

The Ninth Circuit granted the plaintiffs' petitions for rehearing in banc in these cases after the panels in both cases determined that the pain standard to be applied in Social Security disability cases was the standard announced in Bates v. Sullivan, 894 F.2d 1059 (9th Cir. 1990), rather than the standard set forth in the Circuit's earlier Cotton-Varney-Gamer line of cases. In Bates, the court ruled that the Social Security Act and implementing regulations required objective medical evidence to prove the existence of both a potentially disabling impairment and the severity of the pain caused by the impairment.

In the Cotton-Varney-Gamer cases, the court ruled that, while the Act and regulations required objective medical evidence of an impairment, the severity of pain could be proved by subjective testimony even if not supported by objective medical evidence. We argued that the Secretary's Social Security Ruling 88-13, which was similar to the Cotton-Varney-Gamer standard, was the standard to be applied in pain cases. In a 7-4 decision, the court overruled Bates and determined that the Cotton-Varney-Gamer standard applies. The court noted that SSR 88-13 adheres to the Cotton-Varney-Gamer standard but did not accept our argument that the Secretary gets to set the standard, not the court, unless the Secretary's standard is inconsistent with the Constitution, the statute, or regulations, which was not alleged here.

Bunnell v. Sullivan, No. 88-4179; Rice v. Sullivan, No. 88-4225 (October 1, 1991). DJ # 137-82-599.

Attorneys: William Kanter - (202) 514-4575 or (FTS) 368-4575
Howard S. Scher - (202) 514-3180 or (FTS) 368-3180

* * * * *

False Claims Act Cases

Board Of Contract Appeals Dismisses Contractor's Appeal Until The Conclusion Of The False Claims Act Action

The government moved to suspend Board proceedings relating to a claim that the General Services Administration (GSA) had improperly terminated a contract for default, on the grounds that the issues before the Board overlapped those that were the subject of ongoing civil and criminal fraud investigations. The Board denied the motion, reasoning that it could decide whether there was a breach of contract without necessarily deciding whether there was fraud. Shortly thereafter, the Department of Justice filed a complaint under the False Claims Act and argued before the Board that it could not determine whether the contractor's work conformed to the contract without resolving whether, as we alleged in our complaint, the contractor conspired with the quality control contractor hired by GSA to monitor the contract. Based upon the filing of a complaint and the allegations involving conspiracy, the Board held that the issues of contract and fraud were intertwined, and it suspended the Board proceedings until the conclusion of the False Claims Act action.

San-Val Engineering, Inc., GSBCA No. 10371 (Oct. 29, 1991)

Attorney: Joel Hesch - (FTS) 367-0275 or (202) 307-0275

* * * * *

District Court Holds School Has Obligation To Verify Student Eligibility For Pell Grants

The Northern District of Illinois has held that a school must verify student eligibility to receive Pell Grants and cannot rely on representations of students concerning their eligibility. The court granted the government's motion for summary judgment as to the contractor's liability for payment by mistake of fact.

United States v. St. Augustine College, Civ. No. 88 C 4773 (E.D. Ill. Oct. 17, 1991)

Attorney: Paul Scott - (FTS) 367-0237 or (202) 307-0237

* * * * *

Recent Decisions In Qui Tam Cases

United States ex rel. Sylvester v. Covington Technologies, Co., No. CV 88-5807-JMI (C.D. Cal. October 21, 1991) (maximum statutory award for relator is not appropriate where there has been a pretrial settlement, but "is reserved for those cases in which the relators actively and uniquely aid the government" in discovery and trial; relator's success in companion qui tam case in which government declined to intervene, did not merit maximum award; payments to relator shall be made after each payment is received from the settling defendant).

Attorney: Russ Kinner - (FTS) 367-0189 or (202) 307-0189

* * * * *

ENVIRONMENT AND NATURAL RESOURCES DIVISION

Group Hunting Regulations Under Migratory Bird Treaty Act Sustained

This is the first court of appeals decision regarding group hunting -- a common activity. A U.S. Fish and Wildlife Service agent apprehended eight duck hunters, each with his bag limit of three ducks in hand, for violating regulations promulgated under the Migratory Bird Treaty Act. Sixteen ducks over-the-limit lay strewn around their hunting site in plain view. The magistrate convicted all eight hunters of aiding and abetting in violating the regulations imposing a bag limit and prohibiting wanton waste of waterfowl. The district court upheld the convictions of two of the hunters (the property owner, who also owned the hunting decoys and boat, and the guide) but overturned the convictions of the other six, concluding that there was not sufficient evidence to establish that they aided and abetted in the commission of the violation. On our appeal, the Eighth Circuit ordered the reinstatement of the conviction of all eight hunters.

The Eighth Circuit concluded that the district court failed to apply the requisite deferential standard of review and instead drew its own inferences from the evidence. The Court determined that the Magistrate could have found that each of the elements of the violation was established beyond a reasonable doubt. As to exceeding the bag limit regulation, the Court found that "[o]nce the legal limit was exceeded, each defendant was associated with an unlawful venture. Moreover,

the magistrate judge could reasonably have determined that the defendants divided up the ducks the group had killed to satisfy each defendant's legal limit. By dividing up the ducks and thereby representing to [the USFWS Agent] the legal limit of ducks per hunter, with knowledge that the group had killed more than the daily limit, each defendant participated in, and sought to bring about, the violation of 50 C.F.R. 20.24."

As to violating the requirement that a hunter make a reasonable effort to retrieve ducks he had injured or killed (the "wanton waste" provision), the Court determined that "[a] rational trier of fact could have concluded that each defendant was unaware of which ducks, or how many, he had killed. Indeed, [the guide told the USFWS Agent] that they had no idea how many ducks had been killed. We conclude that by failing to retrieve the ducks the group had shot, each defendant aided in the wanton waste of migratory waterfowl."

United States v. Lyon, 8th Cir. Nos. 91-1360, 91-1316, 91-1362 (Nov. 8, 1991) (Fagg, Wollman, Gibson)

Attorneys: Katherine Hazard - (FTS) 368-2110 or (202) 514-2110
John A. Bryson - (FTS) 368-2740 or (202) 514-2740

* * * * *

Regulations Barring Trapping And Hunting At Sleeping Bear National Seashore Sustained

The Conservation Club and several trappers filed this action asking that the district court declare unlawful and enjoin the enforcement of a regulation of the National Park Service as it applied to Sleeping Bear Dunes National Lakeshore and Pictured Rocks National Lakeshore. The regulation prohibits trapping in the National Park except where specifically authorized by Congress. Although the enabling acts creating Sleeping Bear Dunes and Pictured Rocks permit "hunting and fishing," the acts do not mention trapping and the Park Service has prohibited trapping in these two areas.

The district court held that the Park Service regulations were a permissible construction of the Park Service Organic Act and its amendments and entered summary judgment in favor of the government. In a published opinion the Sixth Circuit affirmed the district court's judgment. As an initial matter, the Court reviewed Chevron jurisprudence in the Sixth Circuit and noted that the Park Service interpretations of its Organic Act were entitled to great deference. The trappers argued that hunting and fishing included trapping and in support of this contention cited an affidavit from a Congressman who had sponsored the enabling legislation creating the Parks. The Court explained in considerable detail why this affidavit as "subsequent legislative history" was entitled to little if any weight. The Court, however, accepted our argument that Congress was aware of the Park Service interpretation and did not change it. The Court remarked that although "inaction by Congress is not often a useful guide, the inaction here was significant."

Michigan United Conservation Clubs, et al. v. Lujan, et al., 6th Cir. No. 90-2013 (Nov. 13, 1991) (Guy, Boggs, Circuit Judges and McRae, Senior District Judge)

Attorneys: Andrew Mergen - (FTS) 368-2813 or (202) 514-2813
Robert L. Klarquist - (FTS) 368-2731 or (202) 514-2731

* * * * *

TAX DIVISION

Fifth Circuit Sustains Tax Court's Allowance Of $8 Million Loss On Iranian Expropriation Of Assets

On November 5, 1991, the Fifth Circuit affirmed the adverse decision of the Tax Court in Halliburton Company v. Commissioner, holding that the Commissioner incorrectly disallowed the taxpayer's claim of a $955,000 long-term capital loss and a $7 million bad debt deduction. At issue in this case was whether there was a reasonable prospect that the taxpayer would receive compensation for its expropriation claims against Iran at the close of 1979. At that time, $12 billion in "frozen" Iranian assets were being held in suspense accounts pursuant to a Presidential order. If there had been a reasonable prospect for recovery at the close of 1979, the taxpayer could not deduct these claims as losses for that year. The Tax Court concluded that no reasonable prospect of recovery existed at the end of 1979, and thus permitted the loss deductions claimed by the taxpayer, and the Fifth Circuit determined that this finding was not clearly erroneous.

* * * * *

Sixth Circuit Goes Into Conflict With Ninth Circuit On Whether Taxpayer Is At Risk In A Sale-Leaseback Transaction

On November 11, 1991, the Sixth Circuit affirmed an adverse Tax Court decision in Emmershaw v. Commissioner, holding that a series of transactions involving the sale and leaseback of computer equipment had economic substance and that the taxpayers, who had invested in the transaction, were entitled to deduct "losses" they had incurred, notwithstanding the "at risk" rules of the Internal Revenue Code. The case involved a circular financing arrangement in which computers were sold by a company which, after several intervening transactions, ultimately leased the equipment back; the payments on the sales and leases perfectly offset one another, so that no cash exchanged hands. The Sixth Circuit held that this circular, offsetting group of obligations did not constitute a "loss-limiting arrangement" as defined in the statute. In so holding, it rejected the analysis employed in Baldwin v. Commissioner, 904 F.2d 477 (9th Cir. 1990), where the court held that a similarly situated taxpayer was precluded from taking losses.

* * * * *

Sixth Circuit Reverses Tax Court's Adverse Decision On The Computation Of Bad Debt Reserves Of Financial Institution

On November 6, 1991, the Sixth Circuit reversed the adverse decision of the Tax Court in Peoples Federal Savings & Loan Ass'n. v. Commissioner. This case presented the question whether a savings institution must reduce its taxable income to reflect net operating loss carrybacks (NOL) before calculating its bad debt reserve deduction where the deduction is a percentage of the taxpayer's taxable income. The Tax Court determined that the deduction should be calculated by reference to the taxpayer's taxable income before reduction by NOLs thus resulting in a larger bad debt deduction. The Sixth Circuit concluded that the Internal Revenue Code did not directly address the question at issue. Relying on Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, 467 U.S. 837 (1984), it held that a court could not substitute its own construction for a reasonable interpretation made by an agency in a regulation, and that, as the challenged regulation was a reasonable interpretation of the statutory scheme, it was valid.

This issue is also being considered by the Ninth Circuit in Pacific First Federal Savings Bank v. Commissioner, (9th Cir. No. 91-70116).

* * * * *

Eleventh Circuit Reverses Favorable Decision In Case Involving Venue For Expedited Review Of A Jeopardy Assessment Against A Nonresident Alien

On October 30, 1991, the Eleventh Circuit reversed the favorable decision of the District Court in Alegria v. United States. The question presented by this case was the appropriate venue for expedited review of a jeopardy assessment pursuant to Section 7429 of the Internal Revenue Code when the assessment is made against a nonresident alien. Section 7429 provides that venue for an individual seeking expedited review of a jeopardy assessment lies only in the judicial district in which the individual resides. The District Court held that a nonresident alien does not reside in any judicial district and, therefore, review under Section 7429 is not available to a nonresident alien as venue is lacking in any judicial district. The Eleventh Circuit reversed, stating that it saw no reason for distinguishing between nonresident aliens on the one hand and citizens and resident aliens on the other. However, in reaching this result, the Court did not specify where venue would be proper.

* * * * *

Federal Circuit Reverses Adverse Claims Court Decision On $5.8 Million Bad Debt Deduction

On October 31, 1991, the Federal Circuit reversed the adverse decision of the Claims Court in The Credit Life Ins. Co. v. United States. This case involved the presumption of worthlessness found in Treasury Regulation §1.166-2(d) for debts required to be charged off by a regulatory agency. In 1981, the Ohio Insurance Department required taxpayer to charge off a $5.8 million receivable. In its return for that year, taxpayer excluded this amount from income but did not claim it as a deduction. Upon audit, the IRS included the amount in income and rejected taxpayer's contention that it was entitled to a bad debt deduction because, inter alia, taxpayer did not satisfy the regulation's requirement that it claim the deduction when the return is filed for the year in which the regulatory agency requires the charge-off. The Claims Court ruled that the taxpayer substantially complied with the regulation and permitted the deduction. The Federal Circuit, however, held that the doctrine of substantial compliance has "very limited scope" and that it did not apply in this case.

* * * * *

District Court Rules On The Constitutionality Of Statutory Provision Requiring The Unearned Income Of A Child To Be Taxed At Parent's Marginal Rate

On October 29, 1991, the United States District Court for the Northern District of Mississippi dismissed the taxpayer's suit for refund in William Collier Carlton v. United States. This case presented the issue of the constitutionality of taxing the unearned income of children under the age of fourteen at their parents' marginal tax rate. Congress provided for this result as part of the Tax Reform Act of 1986. In one of the first opinions on this issue, the District Court ruled that the statutory provision is constitutional.

* * * * *

Guilty Plea By Tax Evader Whose Previous Convictions Overturned By Supreme Court Decision In Cheek

On November 8, 1991, tax protester Ronald A. Pabisz pled guilty in the United States District Court for the Eastern District of New York to income tax evasion for 1985. Pabisz's earlier convictions for evading income taxes for the years 1984 through 1986 had been overturned by the Second Circuit, in light of Cheek v. United States, 111 S.Ct. 604 (1991), after the district court in the earlier prosecution instructed the jury on an "objective reasonableness" standard.

* * * * *

Favorable Decision In PTL Bankruptcy Case

The Bankruptcy Court for the District of South Carolina recently held in Heritage Village Church and Missionary Fellowship, Inc., a/k/a "PTL,", that claims for federal and state taxes have priority over the claims of the PTL lifetime partners. If this decision is not overturned on appeal, the United States will shre over $1 million with the State of South Carolina.

* * * * *

ADMINISTRATIVE ISSUES

Office Of Legal Counsel, Executive Office For United States Attorneys

Effective September 1, 1991, the Attorney Hiring Staff, the Support Security Staff, and certain responsibilities of the Labor and Employee Relations Branch of the Executive Office for United States Attorneys, were transferred to the Office of Legal Counsel and placed under the direction of the new Deputy Legal Counsel, ***Mary Anne Hoopes.***

Labor and Employee Relations Branch

The grievance administration, adverse action, and labor management relations programs, formerly performed by the Labor and Employee Relations Branch (LERB) of the Personnel Staff, are now being performed within Legal Counsel. ***Paul V. Ross*** and ***Saundra Callier-Tyndle*** have been transferred to the Office of Legal Counsel to perform these functions. In order to minimize confusion, this staff will retain the LERB name.

Attorney Hiring/Security Staff

Also transferred to Legal Counsel were the Attorney Hiring and Support Security Staff. The Attorney Hiring staff, under the direction of ***D. Glen Stafford***, will continue to perform functions relating to attorney background investigations, attorney pay, the Senior Litigation Counsel program, changes to authorized supervisory attorney pay positions, and Special Assistant United States Attorney/Special Attorney appointments. [Note: The initial approval of new supervisory appointments in a United States Attorney's office will be the responsibility of the Evaluation and Review Staff.] In addition, ***Kathy Byrnes*** will continue to adjudicate non-attorney background investigations and handle national security clearances for non-attorneys, with the assistance of Antoinette Prejean.

Special Assistant United States Attorneys and Special Attorneys

As of July 8, 1991, Laurence S. McWhorter, Director, Executive Office for United States Attorneys, was delegated the authority to appoint Special Assistant United States Attorneys (28 U.S.C. §543) and Special Attorneys (28 U.S.C. §515). (See, United States Attorneys' Bulletin, Vol. 39, No. 9, dated September 15, 1991, at p. 255.) Special Attorneys will only be utilized in narrow circumstances. If you believe a Special Attorney appointment is appropriate, please contact ***Deborah Westbrook,*** Legal Counsel, or ***Robert Marcovici***, Attorney-Advisor, at (FTS) 368-4024 or (202) 514-4024. Requests for Special Assistant United States Attorney appointments should continue to be directed to the Attorney Hiring Staff through ***Mary Anne Hoopes.***

Mary Anne Hoopes, formerly with the Corporation Counsel's Office of the District of Columbia where she managed the Personnel and Labor Relations Section, is working closely with the Personnel Staff and other components of the Executive Office for United States Attorneys in order to speed service and advice to the Districts.

The Deputy Legal Counsel's office is located in Room 6026, Patrick Henry Building. Please feel free to stop by or call. The telephone number is: (FTS) 241-6930 or (202) 501-6930.

* * * * *

CAREER OPPORTUNITIES

Office Of The Pardon Attorney

The Office of Attorney Personnel Management, Department of Justice, is seeking an experienced attorney on a part-time basis for the Office of the Pardon Attorney, Washington, D.C. Responsibilities include the direction of investigations for executive clemency; the drafting of reports for the consideration and disposition of petitions for executive clemency; handling Congressional, case-related and miscellaneous correspondence of a legal or complex nature; and a variety of research and writing assignments.

Applicants must possess a J.D. degree and be an active member of the bar in good standing (any jurisdiction). Prior experience in the criminal justice system is desirable. Applicants must submit a resume and writing sample to: Office of the Pardon Attorney, Department of Justice, 500 First Street, N.W., Seventh Floor, Washington, D.C. 20530, Attn: Raymond P. Theim. (Please note that applicants with less than one year of post-JD experience are ineligible to apply, and in any event more extensive legal experience is desired for this position.)

Current salary and years of experience will determine the appropriate grade and salary levels. The possible range is GS-11 ($31,116-$40,449) to GS-15 ($61,643-$80,138). No telephone calls, please.

* * * * *

Bureau Of Prisons

The Office of Attorney Personnel Management, Department of Justice, is recruiting a labor relations attorney for the Human Resources Management Division of the Federal Bureau of Prisons in Washington, D.C. Responsibilities will include providing legal advice and assistance to central office and field managers with regard to disciplinary and adverse personnel actions and other matters covered by the Federal Service Labor-Management Relations Statute (Chapter 71 of Title 5, U.S. Code); and acting as principal attorney in preparing and presenting the government's case before Administrative Judges of the Merit Systems Protection Board, Administrative Law Judges of the EEOC and Federal Labor Relations Authority and independent arbitrators appointed by the Federal Mediation and Conciliation Service. The selectee will be responsible for all phases of case processing from pre-action inquiries through preparation of post-hearing briefs and appeals to administrative authorities. Other significant duties include participation in the negotiation and administration of a nationwide collective bargaining agreement and with ongoing labor relations with the union; and serving as an instructor on labor relations matters in management training programs. Frequent travel to field stations (up to 50 percent of the time) will be required. Individuals without a federal and/or private sector labor relations background need not apply.

Applicants must possess a J.D. degree, be an active member of the bar in good standing, and have at least two years of post-J.D. experience. Applicants should submit a resume and writing sample to: Bureau of Prisons, 320 First Street, N.W., Suite 301-NALC, Washington, D.C. 20534, Attn: Ron Bates, Deputy Chief, LMR, (202) 724-3134.

Current salary and years of experience will determine the appropriate grade and salary levels. The possible grade/salary range is GS-12 ($37,294 - $48,481) to GS-13 ($44,348 - $57,650). This advertisement will be open until filled.

* * * * *

Environment And Natural Resources Division

The Office of Attorney Personnel Management, Department of Justice, is seeking an experienced civil trial attorney for the Environment and Natural Resources Division in Washington, D.C. Work encompasses the acquisition of land for the federal government by eminent domain (condemnation) proceedings.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction); and have five years of experience in civil litigation. Litigation experience in real estate valuation issues (e.g., eminent domain and tax assessment) is desirable. Applicants must submit a resume to: Environment and Natural Resources Division, Department of Justice, P.O. Box 7754, Washington, D.C. 20044-7754.

Current salary and years of experience will determine the appropriate grade and salary levels. The possible grade/salary is GS-13 ($44,348 - $57,650) to GS-15 ($61,643 - $80,138). This position is open until filled.

* * * * *

Office Of The U.S. Trustee, Harrisburg, Pennsylvania

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

Applicants must possess a J.D. degree for at least one year and be an active member of the bar in good standing (any jurisdiction). Outstanding academic credentials are essential and familiarity with bankruptcy law and the principles of accounting is helpful. Applicants must submit a resume and law school transcript to: Office of the U.S. Trustee, Department of Justice, 1000 Liberty Avenue, Room 319, Pittsburgh, Pennsylvania 15222 - Attn: Stephen Goldring.

Current salary and years of experience will determine the appropriate grade and salary levels. The possible range is GS-11 ($31,116 - $40,449) to GS-14 ($52,406 - $68,129). This position is open until filled. No telephone calls, please.

* * * * *

Office Of The U.S. Trustee
Phoenix, San Francisco, and New York City

The Office of Attorney Personnel Management, Department of Justice, is seeking an experienced attorney to manage the legal activities of the U.S. Trustee's Office in Phoenix, Arizona, San Francisco, California, and New York, New York. Responsibilities include assisting with the administration of cases filed under Chapters 7, 11, 12, or 13 of the Bankruptcy Code; maintaining and supervising a panel of private trustees; supervising the conduct of debtors in possession and other trustees; and ensuring that violations of civil and criminal law are detected and referred to the United States Attorney's office for possible prosecution, as well as participating in the administrative aspects of the office.

Applicants must possess a J.D. degree for at least one year and be an active member of the bar in good standing (any jurisdiction); possess extensive management experience and at least five years of bankruptcy law experience. Applicants must submit a resume, salary history or SF-171 (Application for Federal Employment), to:

Office of the U.S. Trustee
Department of Justice
320 North Cantral Avenue, Room 100
Phoenix, Arizona 85004 -
Attn: Adrianne Kalyna

Office of U.S. Trustee
Department of Justice
601 Van Ness Avenue, Suite 2008
San Francisco, California 94102
Attn: Anthony G. Sousa

Office of U.S. Trustee
Department of Justice
One Bowling Green, Room 534
New York, New York 10004
Attn: Neal S. Mann

Current salary and years of experience will determine the appropriate grade and salary levels. The possible range is $52,000 to $91,200. This position is 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%	10-18-91	5.42%
06-02-89	8.85%	08-24-90	7.95%	11-15-91	4.98%
06-30-89	8.16%	09-21-90	7.78%		
07-28-89	7.75%	10-27-90	7.51%		
08-25-89	8.27%	11-16-90	7.28%		
09-22-89	8.19%	12-14-90	7.02%		
10-20-89	7.90%	01-11-91	6.62%		
11-16-89	7.69%	02-13-91	6.21%		
12-14-89	7.66%	03-08-91	6.46%		

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

* * * * *

UNITED STATES ATTORNEYS

DISTRICT	U.S. ATTORNEY
Alabama, N	Frank W. Donaldson
Alabama, M	James Eldon Wilson
Alabama, S	J. B. Sessions, III
Alaska	Wevley William Shea
Arizona	Linda A. Akers
Arkansas, E	Charles A. Banks
Arkansas, W	J. Michael Fitzhugh
California, N	William T. McGivern
California, E	George L. O'Connell
California, C	Lourdes G. Baird
California, S	William Braniff
Colorado	Michael J. Norton
Connecticut	Albert S. Dabrowski
Delaware	William C. Carpenter, Jr.
District of Columbia	Jay B. Stephens
Florida, N	Kenneth W. Sukhia
Florida, M	Robert W. Genzman
Florida, S	Dexter W. Lehtinen
Georgia, N	Joe D. Whitley
Georgia, M	Edgar Wm. Ennis, Jr.
Georgia, S	Hinton R. Pierce
Guam	Frederick Black
Hawaii	Daniel A. Bent
Idaho	Maurice O. Ellsworth
Illinois, N	Fred L. Foreman
Illinois, S	Frederick J. Hess
Illinois, C	J. William Roberts
Indiana, N	John F. Hoehner
Indiana, S	Deborah J. Daniels
Iowa, N	Charles W. Larson
Iowa, S	Gene W. Shepard
Kansas	Lee Thompson
Kentucky, E	Karen K. Caldwell
Kentucky, W	Joseph M. Whittle
Louisiana, E	Harry A. Rosenberg
Louisiana, M	P. Raymond Lamonica
Louisiana, W	Joseph S. Cage, Jr.
Maine	Richard S. Cohen
Maryland	Richard D. Bennett
Massachusetts	Wayne A. Budd
Michigan, E	Stephen J. Markman
Michigan, W	John A. Smietanka
Minnesota	Thomas B. Heffelfinger
Mississippi, N	Robert Q. Whitwell
Mississippi, S	George L. Phillips
Missouri, E	Stephen B. Higgins
Missouri, W	Jean Paul Bradshaw

DISTRICT	U.S. ATTORNEY
Montana	Doris Swords Poppler
Nebraska	Ronald D. Lahners
Nevada	Leland E. Lutfy
New Hampshire	Jeffrey R. Howard
New Jersey	Michael Chertoff
New Mexico	Don V. Svet
New York, N	Frederick J. Scullin, Jr.
New York, S	Otto G. Obermaier
New York, E	Andrew J. Maloney
New York, W	Dennis C. Vacco
North Carolina, E	Margaret P. Currin
North Carolina, M	Robert H. Edmunds, Jr.
North Carolina, W	Thomas J. Ashcraft
North Dakota	Stephen D. Easton
Ohio, N	Joyce J. George
Ohio, S	D. Michael Crites
Oklahoma, N	Tony Michael Graham
Oklahoma, E	John W. Raley, Jr.
Oklahoma, W	Timothy D. Leonard
Oregon	Charles H. Turner
Pennsylvania, E	Michael Baylson
Pennsylvania, M	James J. West
Pennsylvania, W	Thomas W. Corbett, Jr.
Puerto Rico	Daniel F. Lopez-Romo
Rhode Island	Lincoln C. Almond
South Carolina	E. Bart Daniel
South Dakota	Kevin V. Schieffer
Tennessee, E	Jerry G. Cunningham
Tennessee, M	Ernest W. Williams
Tennessee, W	Edward G. Bryant
Texas, N	Marvin Collins
Texas, S	Ronald G. Woods
Texas, E	Robert J. Wortham
Texas, W	Ronald F. Ederer
Utah	David J. Jordan
Vermont	Charles A. Caruso
Virgin Islands	Terry M. Halpern
Virginia, E	Richard Cullen
Virginia, W	E. Montgomery Tucker
Washington, E	William D. Hyslop
Washington, W	Michael D. McKay
West Virginia, N	William A. Kolibash
West Virginia, S	Michael W. Carey
Wisconsin, E	John E. Fryatt
Wisconsin, W	Kevin C. Potter
Wyoming	Richard A. Stacy
North Mariana Islands	Frederick Black

* * * * *

EXHIBIT
A

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release October 23, 1991

FACT SHEET

EXECUTIVE ORDER ON CIVIL JUSTICE REFORM

The President today signed an Executive order to apply immediately the reforms proposed in the Council on Competitiveness report "Agenda for Civil Justice Reform in America" to civil litigation involving the United States Government. The Executive order requires agencies to implement discovery and expert witness reforms and to adopt the Fairness Rule (also known as the English Rule), whenever feasible. The Executive order also requires agencies to attempt to settle disputes prior to litigation, and to employ settlement and Alternative Dispute Resolution (ADR) techniques in order to avoid prolonged litigation.

In August 1991, the President's Council on Competitiveness recommended 50 specific changes to our current civil litigation system. These recommendations were aimed at achieving swifter justice and reducing the costs of litigation. The proposals facilitate more timely and efficient handling of civil cases.

This Executive Order on Civil Justice Reform seeks to produce a more fair American legal system by making Federal litigators a model for parties in the private sector involved in dispute resolution. Although the Executive order requires the Federal Government to implement many of these legal reforms unilaterally, the Administration expects this Executive order to be a catalyst for civil justice reform in the Congress, State legislatures, and the courts.

Background

The tremendous growth of civil litigation in the past 30 years, including litigation involving the United States Government, has overburdened the American court system. Excessive litigation imposes high costs on American individuals, small businesses, industry, professionals, and government at all levels. With 70 percent of the world's lawyers, it is not surprising that the number of lawsuits filed in the Federal courts each year has more than tripled in the last 30 years -- from approximately 80,000 in 1960 to more than 250,000 in 1988.

Excessive litigation puts America at a competitive disadvantage internationally and results in higher prices for American consumers for everything from household goods to medical treatment. Every year our legal system costs Americans, directly and indirectly, an estimated $300 billion -- including wasted legal fees, court costs, and individual time and effort devoted to litigation.

Several current litigation practices add to these burdens and costs by prolonging the resolution of disputes, thus delaying just compensation and encouraging wasteful litigation. Although procedural changes alone cannot solve all of these problems, the excessive costs and long delays that have plagued our legal system may be reduced by encouraging voluntary dispute resolution, limiting unnecessary discovery, promoting judicious use of expert testimony and prudent use of sanctions, and where appropriate, modifying current fee arrangements.

Promoting Just and Efficient Civil Litigation

In order to promote more efficient litigation in actions involving the United States Government, the Executive order directs all Federal agencies with litigation authority to implement the following reforms:

- The Fairness Rule. Subject to appropriate legal authority, offer to adopt the Fairness Rule in contract disputes with the United States Government and in actions initiated by the United States, whereby the loser of the lawsuit pays an appropriate portion of the costs and fees incurred by the winner.

- Discovery Reform. Streamline and expedite discovery by offering to exchange core information with opposing parties, by eliminating needless discovery, and by discussing all discovery disputes with opposing counsel before seeking resolution in the courts.

- Expert Evidence Reform. Use expert testimony only if it is based on "widely accepted theories" and refrain from using contingency fees to compensate expert witnesses.

- Notice of Complaint. Where appropriate, notify parties whom the United States intends to sue, informing them of the nature of the dispute, before filing suit.

- Settlement Discussions. Attempt to resolve disputes by initiating settlement discussions.

- Alternative Dispute Resolution. Employ ADR techniques whenever appropriate.

Proposing Legislation and Regulations that Do Not Unduly Burden the Courts

The Executive order also contains provisions designed to reduce litigation caused by poorly drafted Federal legislation and regulations. Specifically:

- All legislation and regulations proposed by the Administration will be reviewed to eliminate drafting errors and to use clear and specific standards instead of more ambiguous general standards whenever practicable.

- All legislation and regulations will be reviewed against a "litigation checklist" of 15 specific issues (such as statutes of limitation, preemptive effect, retroactivity, etc.) that historically have led to needless litigation.

- Agencies proposing legislation and regulations must certify compliance with this checklist in their legislative submissions to the Office of Management and Budget.

Promoting Just and Efficient Administrative Adjudication

The Executive order also requires that, whenever reasonable and practicable, all agencies that adjudicate administrative claims employ more efficient case management procedures in administrative law proceedings.

Scope and Effective Date

This Executive order applies to civil matters only and is not intended to affect criminal matters. It shall become effective 90 days from the date of the President's signature, and will not apply to litigation commenced prior to the effective date.

# # #

FACT SHEET
CIVIL JUSTICE REFORM EXECUTIVE ORDER

Pre-filing Notice of a Complaint
[Section 1 (a)]

Objective: The objective of Section 1 (a) is to ensure that a reasonable effort is made to notify persons against whom civil litigation is contemplated of the government's intent to sue and to provide the litigants with an opportunity to settle the dispute without litigation.

Do:

- Notify each putative defendant unless an exception to the application of the notice requirement (set forth in Section 7 (b)) applies.
- Remember that notice can be provided either by the referring agency or by litigation counsel.
- Offer to attempt to resolve the dispute without litigation.

Don't:

- Compromise a dispute on terms that are not in the interest of the government; If the government's position warrants such a position, a pre-litigation settlement may be appropriate only if the adverse parties agree to the relief the government plans to seek in order to save the added cost of litigation.
- Consider the notice requirement merely a formality; litigants may be eager to avoid litigation costs and agree to reasonable government positions without the necessity of litigation.
- Prejudice the government's rights by extending the notice efforts beyond the pale of reason or permitting adverse parties to utilize the pre-filing notice for the purpose of delay.

FACT SHEET
CIVIL JUSTICE REFORM EXECUTIVE ORDER

Settlement Conferences
[Section 1 (b)]

Objective: Litigation counsel has a continuous obligation to evaluate settlement possibilities. Litigation counsel is to offer to participate in a settlement conference or move the court for a conference in order to conclude the litigation.

Do:

- Clearly state the terms upon which litigation counsel is prepared to recommend that the government conclude the litigation without further expenditure of effort.
- Consult appropriately with the affected agency and with litigation counsel's supervisor on appropriate occasions in the course of settlement evaluation.
- When it is reasonable to do so, ask the court to assist in the settlement process.

Don't:

- Settle litigation on terms that are not in the interest of the government; while "reasonable efforts" to settle are required, no unreasonable concession or offer should be extended.
- Evade established agency procedures for development of litigation positions.
- Allow settlement evaluation to hinder your ability as a litigator to take reasonable efforts to bring about a settlement favorable to the United States.

FACT SHEET
CIVIL JUSTICE REFORM EXECUTIVE ORDER

Alternative Methods Of Resolving The Dispute In Litigation
[Section 1 (c)]

Objective: Settlement of disputes promptly and properly is encouraged. It is preferable that claims be resolved through informal negotiations rather than through use of formal or structured alternative dispute resolutions (ADR) mechanisms or court proceedings. Use of ADR mechanisms to resolve disputes should be considered prior to trial.

Do:

- Seek to use the skills of litigation counsel, including skills gained through training provided to the litigator, to bring about a reasonable resolution of disputes.

- Consider utilization of ADR mechanisms to resolve litigation disputes involving the government (not exempted by section 7 (c)) when litigation counsel determines that a particular technique is warranted and has a reasonable likelihood of contributing to resolution of the claim.

- Be familiar with different kinds of ADR mechanisms and the advantages and disadvantages of the different mechanisms, with a view toward utilizing an appropriate mechanism in cases where informal negotiations fail to bring about resolution of the dispute and an ADR mechanism holds out a prospect for success in resolving the dispute.

Don't:

- Bind the government through use of an ADR technique; the Executive Order does not permit counsel to leave the final decision, without exercise of discretion, to the result of an ADR technique.

- Agree to resolve a dispute in any manner or on any terms that is not in the interest of the United States.

- Fail to use skill in negotiation and in the ADR process to benefit the United States reasonably in keeping with the adversarial system of civil justice.

FACT SHEET
CIVIL JUSTICE REFORM EXECUTIVE ORDER

Guidance and Coordination on ADR
[Sections 1 (c) and 7 (c)]

Objective: Alternative dispute resolution techniques should not be used as a substitute for application of attorney expertise. Disputes will be resolved reasonably if an ADR technique is used when the technique holds out a likelihood of success.

The Justice Department has designated Stephen C. Bransdorfer, (202) 514-3309, as the contact to provide guidance on Executive Order implementation issues.

Do:

- Consult with the Department of Justice when a question pertaining to ADR arises, and you are uncertain as to the answer.
- Utilize functioning agency adjudicative procedures for administrative issues warranting a decision by the agency, needing a precedent-setting disposition or when necessary to preserve the integrity of the agency's adjudicative processes.
- Utilize ADR even if there is a factual dispute going to an issue pertaining to liability if use of ADR is otherwise in order under the circumstances.

Don't:

- View ADR as a mandatory technique requiring an agency to undercut its principled position on an issue.
- Evade agency responsibilities by accepting ADR mechanisms to decide legal disputes pertaining to public policy issues.
- Agree to imprudent ADR resolutions of disputes regarding important issues merely because the proposed resolution is the result of use of an ADR technique.

FACT SHEET
CIVIL JUSTICE REFORM EXECUTIVE ORDER

Disclosure Of Core Information
[Section 1 (d) (1)]

Objective: Reasonable efforts shall be made to obtain the agreement of other parties mutually to exchange statements containing core information with the court's approval. Core information means names and addresses of persons with information relevant to claims and defenses and the location of documents most relevant to the case.

Do:

-- Make the offer to participate in a mutual exchange core information at an early stage of the litigation.

-- Emphasize that the government is willing to be bound to exchange core information and statements if, and only if, other parties agree to exchange this same information and the court adopts the agreement as a stipulated order.

-- Prepare appropriate correspondence and proposed agreements making the offer in each case where the offer is practicable.

Don't:

-- Consider core information offers as mandated if a dispositive motion is pending or if the exceptions to the ADR and core disclosure provisions set forth in 7(c) (asset forfeiture proceedings and debt collection cases involving less than $100,000) apply.

-- Permit the offer of reasonable disclosure to require unreasonable or nonmutual efforts on the part of the government.

-- Permit your utilization of the core disclosure requirement offer to delay or postpone the initiation of necessary discovery on behalf of the government when the parties to whom the offer is directed have not accepted it within a reasonable period of time.

FACT SHEET
CIVIL JUSTICE REFORM EXECUTIVE ORDER

Review of Proposed Document Requests
[Section 1 (d) (2)]

Objective: Document discovery should be pursued by government counsel only after review procedures are followed to ensure that the document discovery proposed is reasonable under the circumstances presented by the litigation.

Do:

- Seek to resolve discovery disputes without court intervention.
- Ensure that each agency has procedures to ensure that a senior lawyer reviews each proposed document discovery request prior to filing.
- Ensure that the senior lawyer undertaking review of document discovery proposals determines whether the requests are cumulative or duplicative, unreasonable, oppressive, unduly burdensome or expensive.

Don't:

- Submit document discovery requests to opposing counsel without review of the requests by a senior lawyer within the agency.
- Fail to ensure that the senior lawyer reviewing requests for document discovery determines whether the requirements of the litigation, the amount in controversy, the importance of the issues at stake in the litigation, and whether the documents can be obtained from some other source that is more convenient, less burdensome, or less expensive want pursuit of the documentary discovery as proposed.
- Permit the review system to deter the pursuit of reasonable document discovery conducted in accord with the procedures established in the Executive Order.

FACT SHEET
CIVIL JUSTICE REFORM EXECUTIVE ORDER

Discovery Motions
[Section 1 (d) (3)]

Objective: The court should not be asked to resolve a discovery dispute, including imposition of sanctions as well as the underlying discovery dispute, unless litigation counsel attempts to resolve the dispute first with opposing counsel. If pre-motion efforts at resolution are unsuccessful or impractical, this should be set forth in the government's motion papers.

Do:

-- Seek to resolve discovery disputes without court intervention.

-- Include disputes over the scope of discovery and over the issue of whether sanctions should be imposed as appropriate and necessary subjects for attempts to resolve disputes with opposing counsel.

-- Inform the court of your efforts to resolve discovery disputes without the necessity of court involvement, if such disputes are not successfully resolved, or state why it was impracticable to seek resolution of the dispute prior to judicial involvement.

Don't:

-- File discovery motions, including sanction motions, without making an effort to resolve these matters without court involvement.

-- Consider yourself influenced to compromise a discovery dispute on terms less satisfactory than terms constituting a reasonable resolution of the discovery and/or sanctions dispute.

-- Fail to mention your efforts to resolve the dispute in papers filed with the court if the dispute can not be resolved without the court's intervention.

FACT SHEET
CIVIL JUSTICE REFORM EXECUTIVE ORDER

Expert Witnesses
[Section 1 (e)]

Objective: The function of section 1 (e) is to ensure that litigation counsel only proffer reliable expert testimony in judicial proceedings. This practice, widely utilized by the government already, will enhance the credibility of the government's position in litigation and improve the prospects for a reasonable outcome of disputes warranting utilization of expert witnesses.

Do:

- Utilize experts who have knowledge, background, research or other expertise in the **particular field** of the subject of their testimony.
- Offer to engage in mutual disclosure of information pertaining to experts who a party expects to call at trial.
- Make every reasonable effort to present expert testimony from experts who base their conclusion on explanatory theories that are widely accepted, i.e., are propounded by at least a substantial minority of experts in the relevant field.

Don't:

- Present expert testimony from experts whose explanatory theories are not widely accepted or offer to pay an expert witness based on the success of the litigation.
- Present expert testimony from experts on outside beyond the area of the particular field of their expertise.
- Fail to object to testimony on the part of an expert whose compensation is linked to a successful outcome in the litigation or fail to bring out on cross-examination of the expert the pecuniary incentive for testimony favorable to the party to whom his compensation is linked.

FACT SHEET
CIVIL JUSTICE REFORM EXECUTIVE ORDER

Sanctions Motions
[Section 1 (f) (2)]

Objective: Motions for sanctions predicated upon abusive practices shall not be filed by government counsel unless they have been reviewed by the agency's designated sanctions officer or his or her designee. The sanctions officer shall also review motions for sanctions that are filed against government agencies or counsel.

Do:

- Designate a senior supervising attorney as each agency's sanctions officer. See section 1(f)(2).

- Take steps to seek sanctions against opposing counsel and parties where appropriate, subject to the procedures set forth in section 1(f) regarding agency review of proposed sanction filings.

- Attempt to resolve disputes that might warrant the filing of a motion for sanctions with opposing counsel prior to filing a motion for sanctions.

Don't:

- File a sanctions motion without submitting the proposed motion for review to the sanctions officer or his designee within the litigation counsel's agency. See Section 1(f)(2).

- Fail to submit motions for sanctions that are filed against litigation counsel or the government or its officers to the agency's sanctions officer or his or her designee.

- Permit sanctions motions to be used as a vehicle to coerce government counsel or to coerce counsel adverse to the government when the dispute can be resolved on a reasonable basis.

FACT SHEET
CIVIL JUSTICE REFORM EXECUTIVE ORDER

Improved Use Of Litigation Resources
[Section 1 (g)]

Objective: Litigation counsel are to use efficient case management techniques and make reasonable efforts to expedite civil litigation. These efforts are to include reasonable efforts to negotiate with other parties about, and to stipulate to, facts that are not in dispute; review of filings to insure that they are accurate and reflect a narrowing of issues, if any, resulting from discovery; requests for early trial dates where practicable and moving for summary judgment in every case where the movant would be likely to prevail or where the motion would likely narrow the issues to be tried.

Do:

-- Move for summary judgment to resolve litigation short of trial or narrow the issues to be tried.

-- Seek to stipulate to facts that are not in dispute and move for early trial dates where practicable.

-- Review and revise submission to the court in order to apprise the court and all counsel of any narrowing of issues, resulting from discovery or otherwise, and in to assure accuracy.

Don't:

-- Stipulate to any fact that is reasonably disputed from the perspective of litigation counsel for the government.

-- Use summary judgment practice in a manner which will permit opposing counsel to develop alternative theories and thereby limit the use of summary judgment to narrow issues or resolve controversies.

-- Prejudice the interests of the United States through use of a case management technique which is not reasonably employed to resolve the litigation fairly.

FACT SHEET
CIVIL JUSTICE REFORM EXECUTIVE ORDER

Fees And Expenses
[Section 1 (h)]

Objective: Section 1(h) of the Executive Order provides that litigation counsel should offer to enter into a two-way fee shifting agreement with opposing parties in dispute in cases involving disputes over certain federal contracts or in any civil litigation initiated by the United States, whereby the losing party would pay the prevailing party's fees and costs, subject to reasonable terms and conditions. However, this section is to be implemented only "[t]o the extent permissible by law." The Executive Order requires the Attorney General to review the legal authority for entering into such agreements. The review required by the Executive Order is in progress. Until the review is completed, it is not appropriate to offer to enter into any two-way fee shifting agreement. If the Attorney General determines that legislation is necessary to implement this section, litigation counsel shall not offer to enter into a two-way fee shifting agreement until legislation is enacted.

FACT SHEET
CIVIL JUSTICE REFORM EXECUTIVE ORDER

Principles To Enact Legislation And Promulgate Regulations Which Do Not Unduly Burden The Federal Court System
[Section 2]

Objective: Section 2 of the Executive Order includes provision of a general duty to review legislation and regulations and specific issues for review in order to reduce burdens on the federal court system. The section includes requirements for certification of compliance for agency legislation and regulations (subsection 2(c)) and for performance of a cost benefit analysis on provisions of any legislation which proposes an award of attorney's fees in favor of only one class of parties (subsection 2(d)).

FACT SHEET
CIVIL JUSTICE REFORM EXECUTIVE ORDER

General Information On Implementation Of The Executive Order

- The Attorney General is charged with coordinating efforts by federal agencies to implement the guidelines to promote just and efficient government civil litigation and the principles to promote just and efficient administrative adjudications.

    oo Stephen C. Bransdorfer ((202) 514-3309) has been designated as the contact point for Executive Order Implementation advice and guidance.

- "Agency" includes all departments and establishments as defined in 28 U.S.C. § 451, except it excludes legislative and judicial branch establishments, and "litigation counsel" includes counsel from agencies authorized by law to represent themselves in court without assistance from the Department of Justice as well as private counsel hired by any federal agency to conduct litigation on behalf of the agency of the United States.

- The Executive Order explicitly states that no private rights of any kind are created under the Executive Order (Section 6).

- The Executive Order is inapplicable to criminal matters, proceedings in foreign courts and shall not be construed to require litigation counsel or any agency to act contrary to the applicable rules of court procedure, federal law or any court order.

- The Executive Order does not compel or authorize disclosure of privileged information or any other information prohibited by law.

- The Executive Order becomes effective on January 21, 1992 and applies to litigation commenced after that date.

EXHIBIT B

9117126

United States Department of State

Washington, D.C. 20520

September 25, 1991

MEMORANDUM TO ALL DEPARTMENT AND AGENCY EXECUTIVE SECRETARIES

Subject: Taiwan Guidelines

This memorandum reviews the existing guidelines for the conduct of our unofficial relations with the people on Taiwan. Please ensure that they receive broad circulation within your Department or Agency.

In establishing diplomatic relations with the People's Republic of China (PRC), the U.S. Government recognized the PRC Government as the sole legal government of China. Both sides agreed that, within this context, the people of the United States would maintain cultural, commercial and other unofficial relations with the people on Taiwan. The President has reaffirmed this policy.

The Taiwan Relations Act (TRA) (Public Law 96-8 of April 10, 1979) provides the legal framework for the conduct of these unofficial relations. In the absence of diplomatic ties, the TRA stipulates that programs, transactions, and other relations conducted or carried out by the President or any agency of the U.S. Government with respect to Taiwan shall be conducted and carried out by or through the American Institute in Taiwan (AIT). AIT, a nonprofit corporation headquartered in Rosslyn, Virginia, with offices in Taipei and Kaohsiung on Taiwan, is under contract to the Department of State to perform these functions.

Taiwan has established a counterpart organization to AIT called the Coordination Council for North American Affairs (CCNAA). CCNAA has its U.S. headquarters in Washington, D.C., and other offices in major cities around the United States The unofficial relations between the people of the United States and the people on Taiwan are carried out through these two private organizations.

This framework has proven effective; trade and other unofficial relations with Taiwan have expanded dramatically since 1979.

Guidelines for specific areas of the conduct of unofficial relations with Taiwan are as follows:

Terminology: Consistent with the unofficial nature of U.S.-Taiwan ties, the U.S. Government no longer refers to Taiwan as the "Republic of China" -- a term reflecting Taipei's continuing claim to be the government of China. Nor does the U.S. Government refer to Taiwan as a "country" or a "government." We refer to Taiwan simply as Taiwan, and to its leadership as "the Taiwan authorities."

Correspondence: Executive Branch departments and agencies should not correspond directly with their counterparts on Taiwan or with CCNAA. All such correspondence must take place through, and under the auspices of, AIT. This usually takes the form of a letter from AIT Washington or AIT Taipei, incorporating the view of the concerned U.S. department or agency, to CCNAA in Washington or Taipei.

Unofficial Meetings and Contacts: Guidelines concerning unofficial meetings and contacts between Executive Branch personnel and CCNAA, or visitors from Taiwan, are complex. In general, these should take place at AIT or in other non-official settings -- not in Executive Branch offices. Questions should be directed to the Taiwan Coordination Staff (EAP/RA/TC) at the Department of State (telephone 202-647-7711).

Twin Oaks: Executive Branch personnel may not attend functions at Twin Oaks, the former residence of the "Republic of China" Ambassador. They may, however, accept invitations to social functions held at homes of CCNAA personnel.

"Double Ten" Celebrations: The Taiwan authorities celebrate October 10 as the anniversary of the founding of the "Republic of China." In general, officials at all levels of the foreign affairs agencies (State, NSC/White House, Defense, and CIA), as well as officials above the rank of GS-14 from any other part of the Executive Branch, may not attend the formal CCNAA reception held on that day. Questions regarding attendance by Executive Branch personnel at receptions hosted by CCNAA in honor of this event on other days should be directed to the Taiwan Coordination Staff.

Travel: Executive Branch personnel who contemplate travel to Taiwan for work-related reasons (regardless of leave status) must have prior concurrence from the Taiwan Coordination Staff (fax 202-647-6820 from October 1, 1991, until then at 202-647-7350). Such personnel travel to Taiwan as consultants to AIT. Senior Executive Branch officials at or above the level of assistant secretary, embassy counselor or consul general, and three star flag officer must obtain clearance from the State Department for personal travel as well. All travel must be on a regular (tourist) passport.

Gifts: U.S. law and government guidelines on gifts from foreign sources, including travel expenses, apply to Executive Branch personnel in their relations with Taiwan and CCNAA. Questions should be directed to the concerned recipient's department or agency ethics office.

Questions on policy matters related to these guidelines should be directed to the Taiwan Coordination Staff of the Department of State.

Questions on the actual conduct or procedural implementation of our unofficial relations should be directed to AIT (telephone 703-525-8474).

W. Robert Pearson
Executive Secretary

U.S. Department of Justice

Criminal Division

EXHIBIT C

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

November 7, 1991

MEMORANDUM

TO: All Federal Prosecutors

FROM: Robert S. Mueller, III
Assistant Attorney General

SUBJECT: Organizational Sentencing Guidelines

The United States Sentencing Commission has promulgated *Guidelines for Sentencing of Organizations* which became effective on November 1, 1991. *See, Guidelines Manual,* Ch.8 (Nov. 1991). The Department takes the position that these new guidelines apply only to offenses committed on or after the guidelines' November 1, 1991 effective date, but not to offenses committed before that date, irrespective of whether application of the guidelines would have a potentially advantageous or an adverse effect on the defendant.

However, cases involving a continuing offense such as conspiracy, in which a defendant's illegal conduct began on or before November 1, 1991 and continued after that date, should be sentenced under the new guidelines. Such a sentence does not violate the *ex post facto* clause. *United States v. Campanale*, 518 F.2d 352, 364-65 (9th Cir. 1975)(and cases cited), cert. denied, 423 U.S. 1050 (1976); *United States v. Baresh*, 790 F.2d 392, 404 (5th Cir. 1986); *United States v. Todd*, 735 F.2d 146, 150 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985).

Application of the new guidelines to offenses committed before November 1991 poses constitutional problems under the ex post facto clause where the law is retrospective in application and substantively disadvantages the offender affected by it. *See, e.g., Miller v. Florida*, 482 U.S. 423, 432-33 (1987). The Department has concluded that application of the new guidelines would substantively disadvantage defendants by reducing the possibility that a sentence without any fine would be imposed and by increasing the likelihood of probation as part of the sentence. In addition, the existence of guidelines results in a limitation on the defendant's appeal rights (*see* 18 U.S.C. § 3742).

Prosecutors should oppose defense requests for retroactive application of the guidelines on the ground that they would

arguably produce a more favorable sentence than under the preexisting system. This is contrary to Congressional intent (*see* Criminal Division *Prosecutor's Handbook on Sentencing Guidelines*, pp. 68-69 (1987)) and would raise a number of difficult issues concerning whether the defendant is bound by his election of a guideline sentence. However, the Court may and should be encouraged to refer to the guidelines in fashioning an appropriate sentence as long as the court makes clear that it is only using the guidelines in an advisory manner.

Prosecutors should notify probation officers of the Department's position before the presentence report is prepared in cases involving offenses committed prior to November 1991. Organizational defendants should not first be required to raise *ex post facto* clause objections in these cases.

Guideline Sentencing Update

FED

EXHIBIT D

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 11 • OCTOBER 31, 1991

Adjustments

ACCEPTANCE OF RESPONSIBILITY

Third Circuit holds Fifth Amendment protection against self-incrimination applies to reduction for acceptance of responsibility with respect to related conduct. Defendant pled guilty to robbing a bank by intimidation. As part of the plea agreement, a second count of bank robbery with a dangerous weapon was dismissed. He denied using a gun during the robbery and the count of conviction did not require use of a weapon, but the court increased his offense level for possessing a weapon during a robbery and denied a §3E1.1 decrease because defendant did not accept responsibility for possession of the gun. Defendant was sentenced accordingly and appealed, arguing that § 3E1.1 requires acceptance of responsibility only for conduct in the count of conviction and requiring a defendant to admit conduct beyond the offense of conviction in order to receive the reduction would violate the self-incrimination clause of the Fifth Amendment.

The appellate court rejected the first argument: "We agree with the courts that interpret § 3E1.1's reference to 'criminal conduct' and the application note's reference to 'offense and related conduct' as indicating that the sentencing court may consider whether the defendant has admitted or denied conduct beyond the specific conduct of the offense of conviction in the course of determining whether to grant a two-level reduction for acceptance of responsibility. . . . Accordingly, we here hold that the terms 'criminal conduct' and 'offense and related conduct' in Chapter 3 refer to the same bundle of conduct: all conduct that is 'relevant' under § 1B1.3 of the Guidelines." *Accord U.S. v. Mourning*, 914 F.2d 699, 705–06 (5th Cir. 1990); *U.S. v. Munio*, 909 F.2d 436, 439–40 (11th Cir. 1990) (per curiam); *U.S. v. Gordon*, 895 F.2d 932, 936–37 (4th Cir.), *cert. denied*, 111 S. Ct. 131 (1990). *See also U.S. v. Herrera*, 928 F.2d 769, 774–75 (6th Cir. 1991) (affirming denial of reduction because defendant did not accept responsibility for related conduct). *Contra U.S. v. Piper*, 918 F.2d 839, 840–41 (9th Cir. 1990) (per curiam); *U.S. v. Oliveras*, 905 F.2d 623, 626–27 (2d Cir. 1990) (per curiam); *U.S. v. Perez-Franco*, 873 F.2d 455, 463–64 (1st Cir. 1989).

On the Fifth Amendment issue, defendant had the right to refuse to answer questions in the presentence interview about whether he possessed a weapon during the robbery because he could have faced state weapons charges. Whether a denial of the § 3E1.1 reduction for exercising this right violates the Fifth Amendment turns on whether that denial is a "penalty" or a "denied benefit." The appellate court held it was a penalty: "The characterization of a denied reduction in sentence as a 'denied benefit' as opposed to a 'penalty' cannot be squared with the reality of the sentencing calculation and conflicts with decisions of the Supreme Court and pre-Guidelines decisions of this court. . . . [D]enial of leniency is a penalty which cannot be imposed for the defendant's assertion of his or her Fifth Amendment privilege." *Accord U.S. v. Oliveras*, *supra*, at 627–28; *Perez-Franco*, *supra*, at 463. *See also U.S. v. Watt*, 910 F.2d 587, 590–93 (9th Cir. 1990) ("sentencing court cannot consider *against* a defendant any constitutionally protected conduct"). Several circuits have held that denial of the reduction is not a penalty and thus § 3E1.1 does not implicate the Fifth Amendment. *See Mourning*, *supra*, at 706–07; *U.S. v. Trujillo*, 906 F.2d 1456, 1461 (10th Cir. 1990); *Gordon*, *supra*, at 936–37; *U.S. v. Henry*, 883 F.2d 1010, 1011–12 (11th Cir. 1989).

The Third Circuit noted, however, that "the Fifth Amendment privilege against self-incrimination is not self-executing and thus must be claimed when self-incrimination is threatened." There are "a few limited exceptions to the rule," such as "when the government threatens to penalize the assertion of the privilege, and thereby 'compels' incriminating testimony," but the court concluded that "requiring a defendant to accept responsibility in order to obtain a sentence reduction is not a threat to impose punishment for an assertion of the privilege. . . . [T]he person being questioned may fear that he or she will be more likely to suffer a penalty if the questions go unanswered, but the penalty will not be imposed for the claiming of the privilege. . . . [I]f a defendant does not claim the privilege when asked during the sentencing process about acts beyond the acts of the offense of conviction, any subsequent statements are considered voluntary and may be considered by the sentencing judge in determining whether to grant a reduction for acceptance of responsibility." Here, the court ruled, defendant did not claim the privilege and his statements to the probation officer were not compelled. Thus, his denial that he possessed a gun during the robbery could be considered by the district court in determining he had not accepted responsibility. (Note: One judge dissented on this point.)

The court "emphasize[d] the limited scope of our decision. This case involves a defendant who voluntarily responded to questions and denied a portion of the criminal conduct that the court found to have taken place. This case does not involve a defendant who remained silent when questioned about related conduct beyond the offense of conviction without claiming the Fifth Amendment privilege. Nor does it involve a defendant who consistently relied upon his privilege when questioned about related conduct beyond the offense of conviction. We express no opinion concerning such cases." The court did, however, "venture several words of advice" concerning such cases: "[W]here the defendant has consistently asserted the privilege as to acts beyond those of the offense of conviction, a sentencing judge . . . obviously must not draw any inference from the fact that the privilege has been claimed. . . . [T]he judge cannot rely on the defendant's failure to admit to such acts as a basis for denying the two-level reduction. But that in no way implies an automatic two-level reduction for such a defendant. The sentencing judge must address the acceptance of responsibility issue on the basis of all of the

record evidence relevant to that issue." *See U.S. v. Skillman*, 922 F.2d 1370, 1378–79 (9th Cir. 1990) (assertion of Fifth Amendment rights does not *entitle* defendant to reduction—there must be some affirmative acceptance of responsibility).

The court further observed: "It is at least questionable whether a sentencing judge in a case where the defendant has acknowledged responsibility for the offense of conviction but has claimed the privilege with respect to aggravating related conduct can deny the two point reduction based solely on the defendant's failure to carry his burden of proof with respect to the acceptance of responsibility for his criminal conduct."

U.S. v. Frierson, No. 90-3382 (3d Cir. Oct. 1, 1991) (Stapleton, J.) (Garth, J., dissenting in part).

Abuse of Position of Trust

U.S. v. Kosth, 943 F.2d 798 (7th Cir. 1991) (reversing § 3B1.3 enhancement for abuse of position of trust given to businessman who used his merchant account with bank to commit credit card fraud: "There was no special element of private trust involved.... As with all credit transactions, there was an element of reliance present. However, the relationship described by the facts in this case was a standard commercial relationship. The fraud described here does not differ from any other commercial credit transaction fraud. The defendant was not an 'insider' . . . [but rather] an ordinary merchant customer of the bank who committed fraud by abusing his contractual and commercial relationship with it.").

Multiple Counts

U.S. v. Bruder, No. 90-1931 (7th Cir. Sept. 27, 1991) (en banc) (Ripple, J.) (five judges dissenting on this issue). Court reversed failure to group offenses of convicted felon in possession of firearm and possession of unregistered firearm that involved the same weapon. Because these offenses were not specifically listed in § 3D1.2(d), the main inquiry was whether they "involved substantially the same harm." Court held they did, reasoning that "society" was the victim of both crimes, both statutes that were violated have the same goal, and a convicted felon—who cannot legally register a firearm—will "necessarily violate[] the registration statute as well as the felon in possession statute." The court also determined that this case fit "the guidelines' directive that some counts 'are so closely intertwined with other offenses that conviction for them ordinarily would not warrant increasing the guideline range.' U.S.S.G. Ch. 3, Part D, Introductory Commentary." *See also U.S. v. Riviere*, 924 F.2d 1289, 1306 (3d Cir. 1991) (unlawful delivery of firearms should be grouped with unlawful possession of weapon by felon). The court distinguished *U.S. v. Pope*, 871 F.2d 506, 509–10 (5th Cir. 1989) (unlawful possession of weapon need not be grouped with unlawful possession of silencer for different weapon), and *U.S. v. Bakhtiari*, 913 F.2d 1053, 1062 (2d Cir. 1990) (unlawful possession of weapon need not be grouped with possession of silencer for same weapon).

Relevant Conduct

Stipulation to a More Serious Offense

U.S. v. Day, 943 F.2d 1306 (11th Cir. 1991) (defendant's written stipulation in formal plea agreement to facts that described burning of boat to fraudulently collect insurance proceeds as "the arson job" was "a stipulation that specifically establishe[d the] more serious offense" of arson, and the district court properly used § 1B1.2(a) to sentence defendant under arson rather than fraud guideline; appellate court reasoned that, in light of Supreme Court's analysis of § 1B1.2(a) in *Braxton v. U.S.*, 111 S. Ct. 1854 (1991), a defendant need not expressly agree that the stipulated facts establish the more serious offense, and the relevant inquiry is "whether, as a matter of law, the facts provided the essential elements of the more serious offense").

Departures

Mitigating Circumstances

U.S. v. Glick, No. 91-5505 (4th Cir. Oct. 8, 1991) (Wilkins, J.) (conduct over ten-week period involving number of actions and extensive planning cannot be construed as "single act of aberrant behavior" that warrants downward departure, U.S.S.G. Ch. 1, Pt. A, 4(d), p.s., disagreeing with *U.S. v. Takai*, 930 F.2d 1427, 1433–34 (9th Cir. 1991) (conduct during bribery offense that occurred over eight-day period was "single act of aberrant behavior"); also held that significantly reduced mental capacity, § 5K2.13, p.s., "need not be the sole cause of the offense to justify departure, but should 'comprise[] a contributing factor in the commission of the offense.' *U.S. v. Rucklick*, 919 F.2d 95, 97–98 (8th Cir. 1990)," *accord U.S. v. Lauzon*, 938 F.2d 326, 331 (1st Cir. 1991)).

U.S. v. Bruder, No. 90-1931 (7th Cir. Sept. 27, 1991) (en banc) (Ripple, J.) (defendant's "post-offense rehabilitation" was "'equivalent' to acceptance of responsibility" and sentencing court "properly refused to depart" downward). *Accord U.S. v. Van Dyke*, 895 F.2d 984, 987 (4th Cir.), *cert. denied*, 111 S. Ct. 112 (1990). *See also U.S. v. Williams*, 891 F.2d 962, 966 (1st Cir. 1989) (desire to reform not basis for departure).

Extent of Departure

U.S. v. Baez, 944 F.2d 88 (2d Cir. 1991) (affirming use of analogy to multiple counts guideline, pursuant to *U.S. v. Kim*, 896 F.2d 678, 684–85 (2d Cir. 1990), to impose upward departure on counterfeiting defendant who kidnapped and threatened potential witness—sentencing court concluded obstruction of justice enhancement was inadequate, analogized conduct to offense of witness tampering, and sentenced defendant under guideline range that would have applied under § 3D1.2; appellate court also explained that "the multi-count analysis is to provide only guidance as to the extent of a departure, not a rigid formula. . . . The point of *Kim* is to use the multi-count analysis and the sentencing table as useful guidance . . . , not to precipitate a time-consuming analysis of every possible calculation of arguably relevant circumstances.").

Appellate Review

Departures

U.S. v. Glick, No. 91-5505 (4th Cir. Oct. 8, 1991) (Wilkins, J.) (departure based on proper and improper factors may be upheld if proper factor justifies magnitude of departure, adopting approach set forth in *U.S. v. Diaz-Bastardo*, 929 F.2d 798, 800 (1st Cir. 1991) (*see* 4 GSU #3)). *Accord U.S. v. Alba*, 933 F.2d 1117 (2d Cir. 1991); *U.S. v. Franklin*, 902 F.2d 501 (7th Cir.), *cert. denied*, 111 S. Ct. 274 (1990); *U.S. v. Rodriguez*, 882 F.2d 1059 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1144 (1990). *Contra U.S. v. Zamarippa*, 905 F.2d 337 (10th Cir. 1990); *U.S. v. Hernandez-Vasquez*, 884 F.2d 1314 (9th Cir. 1989) (per curiam).

EXHIBIT E

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

Vol. 3, No. 2 | FEDERAL SENTENCING GUIDELINES AND FORFEITURE CASES FROM ALL CIRCUITS. | November 18, 1991

IN THIS ISSUE:

- 9th Circuit reverses two level increase for threats, where sentence already increased by four levels for use of firearm. Pg. 4
- D.C. Circuit allocates burden of proof for entrapment defense for relevant conduct in the same way as at trial. Pg. 5
- 1st Circuit affirms vulnerable victim enhancement for defendant who falsely told young female drug user he was a DEA agent. Pg. 6
- 9th Circuit suggests departure rather than four-level reduction for "exceptional" acceptance of responsibility. Pg. 8
- 11th Circuit prohibits district court from selectively using prior invalid convictions for criminal history purposes. Pg. 9
- 6th Circuit upholds use of juvenile offense as predicate for career offender status. Pg. 10
- 10th Circuit holds that in revoking supervised release, a court may reimpose supervised release following re-imprisonment. Pg. 13
- 5th Circuit rules no double jeopardy violation in seizure of cash and subsequent prosecution for underlying conduct. Pg. 14
- 3rd Circuit gives innocent spouse right to exclusive use and possession of property during her lifetime. Pg. 15
- 2nd Circuit holds that government waived its right to a substitution of assets by entering letter agreement. Pg. 15

Guideline Sentencing, Generally

9th Circuit holds that term "prepubescent" was not unconstitutionally vague as applied. (120)(310) Defendant was convicted of interstate transportation of material involving the sexual exploitation of minors in violation of 18 U.S.C. section 2252. Guideline section 2G2.2(b)(1) provides for a two level increase in the base offense level "if the material involved a prepubescent minor or a minor under the age of 12 years." Here there was uncontested testimony by a postal inspector that one of the children was "under the age of 12, as well as the fact that puberty has obviously not begun, let alone been completed." There was nothing in the record to indicate that an observer could *not* tell that puberty had not started, "or that there are in fact conflicting definitions that would have led someone like [defendant] to believe that these children had not reached puberty." Accordingly, the 9th Circuit found no basis on which to find the guideline unconstitutionally vague as applied. *U.S. v. Marquardt*, __ F.2d __ (9th Cir. November 13, 1991) No. 90-30461.

5th Circuit reverses separate sentences for being a felon in possession of a firearm. (125)(330)(520) Defendant was sentenced to 22 months for being a felon in possession of a firearm in violation of 18 U.S.C. section 922(g)(1), plus 15 years (180 months) under 18 U.S.C. section 924(e) for having three prior dangerous felony or serious drug offense convictions.. The 5th Circuit ruled that it was error to sentence him under both statutes. Section 924(e)(1) does not create an offense separate from section 922(g), but merely provides a sentence enhancement under section 922(g) for those who have the requisite three felony convictions. Although the defendant failed to raise this issue below, the double sentence was plain error. The court vacated the 22-month sentence and affirmed the 180-month sentence. *U.S. v. Munoz-Romo*, __ F.2d __ (5th Cir. Nov. 5, 1991) No. 89-2345.

5th Circuit upholds separate sentences being a felon and illegal alien in possession of a firearm. (125)(330) Defendant was convicted of two counts of being a felon in possession of a firearm in violation of 18 U.S.C. section 922(g)(1)

SECTION

100 **Pre-Guidelines Sentencing, Generally**

110 **Guidelines Sentencing, Generally**
115 Rule 35 Motion to Correct Sentence
120 Constitutional Issues, Generally
125 Double Counting/Double Jeopardy
130 Ex Post Facto/Retroactivity, Generally
131 Amendments To Guidelines
132 Continuing Offenses/Conspiracy
135 Due Process
140 Cruel and Unusual Punishment
145 Statutory Challenges To Guidelines

150 **Application Principles, Gen. (Chap. 1)**
160 Definitions (More Than Minimal Planning, Etc.) ({1B1.1)
165 Stipulation to More Serious Offense *(See also 795)* ({1B1.2)
170 Relevant Conduct, Generally ({1B1.3) *(For Drug Relevant Conduct, see 260*
175 Acquitted, Dismissed, Uncharged Conduct *(for use in Departures see 718)*
180 Use of Commentary/Policy ({1B1.7)
185 Information Obtained During Cooperation Agreement ({1B1.8)
190 Application to Indians, Assimilated Crimes, Juveniles, Misd. ({1B1.9)

200 **Offense Conduct, Generally (Chapter 2)**
210 Homicide, Assault ({2A1 -2)
215 Sexual Abuse, Kidnapping, Air Piracy, Threatening Comm. ({2A3 -6)
220 Theft, Embezzlement, Burglary ({2B1 -2)
224 Robbery, Extortion ({2B3)
226 Commercial Bribery, Counterfeiting, Forgery, VIN Nos. ({2B4 -6)
230 Public Officials, Offenses ({2C)
240 Drug Offenses, Generally ({2D)
242 Constitutional Issues
245 Mandatory Minimum Sentences
246 Telephone Counts (21 U.S.C. 843(b))
250 Calculating Weight or Equivalency
251 "Mixtures"/Purity
252 Laboratory Capacity/Precursors
253 Marijuana/Plants
254 Estimating Drug Quantity
260 Drug Relevant Conduct, Generally
265 Amounts Under Negotiation
270 Dismissed/Uncharged Conduct
275 Conspiracy/"Foreseeability"
280 Possession of Weapon During Drug Offense, Generally ({2D1.1(b))
284 Cases Upholding Enhancement
286 Cases Rejecting Enhancement
290 RICO, Loan Sharking, Gambling ({2E)
300 Fraud ({2F)
310 Sexual Exploitation of Minors ({2G)
315 Civil Rights, Political Offenses ({2H)
320 Contempt, Obstruction, Perjury, Impersonation, Bail Jumping ({2J)
330 Firearms, Explosives, Arson ({2K)
340 Immigration Offenses ({2L)
345 Espionage, Export Controls ({2M)
348 Food, Drugs, Odometers ({2N)
350 Escape, Prison Offenses ({2P)
355 Environmental Offenses ({2Q)
360 Money Laundering ({2S)
370 Tax, Customs Offenses ({2T)
380 Conspiracy/Aiding/Attempt ({2X)
390 "Analogies" Where No Guideline Exists ({2X5.1)

400 **Adjustments, Generally (Chapter 3)**
410 Victim-Related Adjustments ({3A)
420 Role in Offense, Generally ({3B)
430 Aggravating Role: Organizer, Leader, Manager or Supervisor ({3B1.1)
431 Cases Finding Aggravating Role
432 Cases Rejecting Aggravating Role
440 Mitigating Role: Minimal or Minor Participant ({3B1.2)
443 Cases Finding Mitigating Role
445 Cases Rejecting Mitigating Role
450 Abuse of Trust/Special Skill ({3B1.3)
460 Obstruction of Justice ({3C)
461 Cases Finding Obstruction
462 Cases Rejecting Obstruction
470 Multiple Counts ({3D)
480 Acceptance of Responsibility, Gen. ({3E)
482 As to "Related" Conduct
484 Constitutional Issues
486 Probation Interview/Cooperation
488 Timeliness, Sincerity, Minimizing Role
490 Effect of Guilty Plea
492 Effect of Perjury/Obstruction
494 Other Post-Arrest Misconduct

500 **Criminal History, Generally ({4A1.1)**
504 Prior Convictions ({4A1.2)
508 Departures for Criminal History ({4A1.3)
510 Cases Upholding
514 Cases Rejecting
520 Career Offenders ({4B1.1)
530 Criminal Livelihood ({4B1.3)

550 **Determining the Sentence (Chapter 5)**
560 Probation ({5B) *(for Revocation, see 800)*
570 Pre-Guidelines Probation Cases
580 Supervised Release ({5D) *(Rev. see 800)*
590 Parole
600 Custody Credits
610 Restitution ({5E4.1)
620 Pre-Guidelines Restitution Cases
630 Fines and Assessments ({5E4.2)
640 Community Confinement, Etc. ({5F)
650 Consecutive Sentences ({5G)
660 Specific Offender Characteristics ({5H)
670 Age, Education, Skills ({5H1.1 -.2)
680 Physical and Mental Conditions, Drug and Alcohol Abuse ({5H1.3 -.4)
690 Employment, Family Ties ({5H1.5 -.6)

700 **Departures, Generally ({5K)**
(for Criminal History Departures, see 508, for Refusal to Depart, see 860)
710 Substantial Assistance Departures {5K1)
712 Necessity for Government Motion
715 Specific Grounds for Departure ({5K2)
716 Disparity Between Co-Defendants
718 Acquitted, Dismissed, Uncharged Conduct *(for consideration as "Relevant Conduct," see 175, 270)*
719 "Aberrant" Behavior, Rehabilitation
721 Physical or Psychological Injury, Abduction, Restraint ({5K2.1 -.4)
725 Property Damage, Weapons, Disruption of Gov't. Function, Extreme Conduct, Facilitating Other Offense ({5K2.5 -.9)
730 Self Defense, Necessity, Duress, Diminished Capacity ({5K2.10 -.13)
734 National Security, Public Health and Safety, Terrorism ({5K2.14 -.15)
736 Specific Offender Characteristics ({5H)
738 Drug Cases

750 **Sentencing Hearing, Generally ({6A)**
(for Waiver by Failure to Object, see 855)
755 Burden of Proof
758 Discovery at Sentencing
760 Rule 32, Presentence Report ({6A1.2)
761 Notice/Disclosure of Information
765 Resolution of Disputes ({6A1.3)
770 Information Relied On/Hearsay *(for Dismissed, Uncharged Conduct, see 175, 718)*
772 Pre-Guidelines Cases
775 Statement of Reasons For Sentence Within Range (18 U.S.C. {3553)

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

800 **Violations of Probation and Supervised Release (Chapter 7)**

840 **Sentencing of Organizations (Chapter 8)**

850 **Appeal of Sentence (18 U.S.C. {3742)**
855 Waiver by Failure to Object
860 Refusal to Depart Not Appealable
865 Overlapping Ranges, Appealability of
870 Standard of Review, Generally *(See also substantive topics)*

880 **Habeas Corpus/28 U.S.C. 2255 Motions**

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

and two counts of being an illegal alien in possession of the same two firearms in violation of 18 U.S.C. section 922(g)(5). He contended that this improperly subjected him to double punishment for each firearm. The 5th Circuit upheld the separate sentences, ruling that the plain language of section 922(g) permits multiple punishments, and the legislative history did not suggest a contrary interpretation. In addition, since each provision requires proof of an additional fact which the other does not, the sentences were not duplicative. *U.S. v. Munoz-Romo*, __ F.2d __ (5th Cir. Nov. 5, 1991) No. 89-2345.

6th Circuit finds no double counting in enhancements for bodily injury and for crime against official victim. (125)(224)(410) Defendant assaulted a police officer while fleeing the bank he had just robbed. His sentence was enhanced under section 2B3.1(b)(3) for causing bodily injury, and under section 3A1.2 because the victim was a law enforcement officer. The 6th Circuit rejected defendant's claim that this constituted double counting, ruling that each enhancement requires different conduct and punishes different wrongdoing. *U.S. v. Muhammad*, __ F.2d __ (6th Cir. Oct. 30, 1991) No. 90-5701.

9th Circuit upholds sentencing for aggravating circumstance which had been rejected at first sentencing. (125) Petitioner claimed that he was subject to double jeopardy at his second sentencing hearing when the trial judge found an aggravating circumstance that was found to be nonexistent at his first sentencing hearing. The 9th Circuit rejected this argument noting that in *Poland v. Arizona*, 476 U.S. 147, 152-57 (1986) the Supreme Court had rejected a similar argument. *Carriger v. Lewis*, __ F.2d __ (9th Cir. November 4, 1991) No. 87-1549.

Justice White notes split in circuits over whether double jeopardy applies to sentence enahcements. (125) Dissenting from the denial of the writ of certiorari in this case, Justice White noted that the state court held that the double jeopardy clause did not preclude the state from seeking a second sentence enhancement after it failed to establish the statutory predicate for enhancement in the first proceeding. *State v. Hunt*, 78 N.Y. 2d 932-933 (1991). He also noted that other courts take a contrary view, see e.g. *Durosko v. Lewis*, 882 F.2d 357,359 (9th Cir. 1989) *cert. denied* 110 S.Ct. 1930 (1990) and *Bullard v. Estelle*, 665 F.2d 1347 , 1361 (5th Cir. 1982) *vacated and remanded on other grounds*, 459 U.S. 1139 (1983), both cases holding that double jeopardy analysis applies in sentencing enhancement proceedings. *Hunt v. New York*, __ U.S. __, 112 S.Ct. __ (November 12, 1991) No. 91-5952 (White, J. dissenting from denial of certiorari).

9th Circuit states that the applicable policy statements are those in effect on the date of sentencing. (131) The government argued that the district court was not required to follow section 7B1.4 because the dates of the offense of conviction and each positive urine test predated the effective date of that policy statement, November 1, 1990. The 9th Circuit rejected the argument, stating that "the applicable policy statements are those which are in effect on the date of sentencing." *See* 18 U.S.C. section 3553(a)(5). *U.S. v. Baclaan*, __ F.2d __ (9th Cir. November 6, 1991) No. 91-10043.

5th Circuit upholds sentence for failing to report money from legitimate sources. (140)(360) Defendant was convicted of failing to report $48,000 in currency as he attempted to board a plane to South Korea. He contended that the sentence mandated by the Guidelines violated both the 8th Amendment and Congressional intent because his money was not derived from illegal activities. The 5th Circuit rejected this argument in light of its recent decision in *U.S. v. O'Banion*, 943 F.2d 1422 (1991), which held that the statute applies whether or not the money is derived from legitimate sources and that this does not constitute cruel and unusual punishment. *U.S. v. Park*, __ F.2d __ (5th Cir. Oct. 31, 1991) No. 90-1761.

General Application Principles (Chapter 1)

9th Circuit treats defendant as if he had been convicted on separate count of conspiracy for each object offense. (165)(380) Defendant argued that the court erred in sentencing him for two separate conspiracies because the verdict did not specify whether he was guilty of one or both objects of the

The Federal Sentencing and Forfeiture Guide Newsletter *is part of a comprehensive service that includes a main volume, bimonthly supplements and biweekly newsletters. The main volume, (3rd Ed., hardcover, 1100 pp.), covers ALL Sentencing Guidelines and Forfeiture cases published since 1987. Every other month the newsletters are merged into a supplement with full citations and subsequent history.*

Annual Subscription price: $250 (includes main volume, 6 supplements and 26 newsletters a year.) Main volume (3rd Ed. 1991): $80.

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

Publication Manager:
- Beverly Boothroyd

conspiracy. The 9th Circuit found no error, noting that section 1B1.2(d) provides that a conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each separate object offense. Commentary Note 5 provides that the court may sentence if, sitting as a trier of fact, it "would convict the defendant of conspiring to commit that object offense." The 9th Circuit found evidence of separate conspiratorial objectives, and affirmed the sentence for two separate conspiracies. *U.S. v. Tham*, __ F.2d __ (9th Cir. November 5, 1991) No. 90-10573.

Offense Conduct, Generally (Chapter 2)

6th Circuit applies aggravated assault guideline to striker who fired gun at Greyhound bus. (210)(220) Defendant, a striking Greyhound Bus employee, fired a gun at a Greyhound bus travelling on the road, and was convicted of damaging a motor vehicle with reckless disregard for human life, in violation of 18 U.S.C. section 33. Although the Statutory Index in effect in March, 1990, provided that guideline sections 2K1.4 (Arson) and section 2B1.3 (Property Damage) were "ordinarily applicable" to violations of section 33, the court used section 2A2.2, the aggravated assault guideline. The 6th Circuit affirmed. Appendix A to the guidelines states that in an "atypical case" where the guideline is inappropriate, a court may use the guideline "most applicable" to the offense. The district court's choice was confirmed by the current version of the Statutory Index, which lists section 2A2.2 as an appropriate guideline for a violation of section 33. *U.S. v. Daniels*, __ F.2d __ (6th Cir. Nov. 7, 1991) No. 90-4061.

6th Circuit affirms enhancement for bodily injury to police officer attempting to stop fleeing bank robbers. (224) Guideline section 2B1.3(b)(3) provides an enhancement for robbery when a victim sustains bodily injury. Defendant struggled with a police officer while attempting to flee the bank he had just robbed. He argued that the enhancement was improper because the term "victim" referred only to a victim of the robbery. According to defendant, the crime was complete when he left the bank. The 6th Circuit rejected this distinction, holding that the language "any victim" in section 2B3.1(b)(3) was meant to include any employee, bystander, customer, or police officer who is assaulted during the bank robbery or during an attempted getaway. The court also rejected defendant's claim that the police officer was not sufficiently "injured" to invoke the enhancement. The district court found that the officer was beaten and kicked, resulting in numerous abrasions, the hyper-extension of his shoulder, and soreness in his knees and elbow for two weeks. *U.S. v. Muhammad*, __ F.2d __ (6th Cir. Oct. 30, 1991) No. 90-5701.

9th Circuit reverses two level increase for threats, where sentence already increased by four levels for use of firearm. (224) Guideline section 2B3.1(b)(2) provides, in subsection (B), for a four level increase if a dangerous weapon is used in a robbery, and in subsection (D), for a two level increase "if an express threat of death was made." Here, the district court imposed both enhancements. On appeal, the parties agreed that the enhancements are stated in the disjunctive, which precludes an enhancement for both the use of a gun under subsection (B) and for the express threat of death under subsection (D). The 9th circuit agreed and vacated the sentence. *U.S. v. Farrier*, __ F.2d __ (9th Cir. November 12, 1991) No. 90-50533.

11th Circuit bases offense level on drugs sold by dealer from whom agent sought bribe. (230)(254)(380) Defendant, a government agent, pled guilty to soliciting a bribe from a suspected drug dealer. Section 2C1.1(c)(1) provides that if the bribery was for the purpose of concealing or facilitating a crime, the court must use the "accessory after the fact" guideline (section 2X3.1) if that offense level is higher than the bribery guideline. At the sentencing hearing, the government presented "incontrovertible testimony" that the drug dealer was dealing 700 to 800 kilograms of cocaine a month. An Assistant U.S. Attorney said the dealer was believed to be involved in 1500 kilograms of cocaine. The 11th Circuit affirmed an offense level based on 1500 kilograms of cocaine. Since the district court could have supported defendant's base offense level of 30 with only 50 kilograms of cocaine, defendant's contention that he should not have been exposed to the maximum offense level under section 2X3.1 was without merit. *U.S. v. Cruz*, __ F.2d __ (11th Cir. Oct. 30, 1991) No. 90-5871.

2nd Circuit bases offense level on heroin despite defendant's claim that he thought it was cocaine. (242) Defendant swallowed 43 balloons of heroin. He contended that he believed that the balloons contained cocaine, and therefore it was error to sentence him on the basis of heroin. The 2nd Circuit ruled that the district court correctly relied on the offense of conviction, importation of heroin. The mens rea requirement for possession of a controlled substance satisfied due process concerns. Congress, for purposes of deterrence, intended that narcotics violators run the risk of sentencing enhancements when they know they possess controlled substances. *U.S. v. Obi*, __ F.2d __ (2nd Cir. Oct. 30, 1991) No. 91-1200.

10th Circuit holds that felony sentence is "final" under section 841 when period for appeal has expired or reduction to misdemeanor is no longer possible. (245) 21 U.S.C. section 841(b)(1)(A) requires a mandatory minimum sentence of 20 years if the defendant commits a drug violation "after a prior conviction for a felony drug offense has become final." The Utah law under which defendant had been convicted provided for the felony to be converted to a misdemeanor if he

successfully completed probation. He was still on probation when he was arrested on the federal drug charges, and after his federal conviction, the state revoked his probation. The 10th Circuit found that a sentence is final under section 841 when the conviction is no longer subject to examination on direct appeal, *or* when revocation of probation is no longer possible. The Utah sentence was final because the time for appeal had expired, and accordingly, defendant was subject to the mandatory minimum sentence. *U.S. v. Short*, __ F.2d __ (10th Cir. Oct. 31, 1991) No. 90-4077.

10th Circuit says court, not jury, determines drug quantity for mandatory minimum sentencing purposes. (245)(770) Defendant argued that the evidence used in imposing a mandatory minimum sentence under 21 U.S.C. section 841(b)(1)(A) must be presented at trial, and thus it was improper for the district court to determine drug quantity based upon his presentence report. The 10th Circuit found no error. The court noted that the district court had properly relied on the drug quantities in the presentence report in determining the guideline sentence. "We see no meaningful distinction between the [g]uidelines and the drug control statute for purposes of district court findings concerning drug amounts for sentencing purposes." *U.S. v. Short*, __ F.2d __ (10th Cir. Oct. 31, 1991) No. 90-4077.

10th Circuit affirms determination of laboratory capacity based on hearsay in presentence report. (252)(770) To establish the lab's capacity, the presentence report noted that a 22-liter flask and heating mantle were seized from the lab. The report then quoted a DEA chemist, who said that it is "customary" to half-fill a flask with liquid because a heating mantle heats only one-half of the flask. Based on the chemist's statements, the report then concluded that the lab could manufacture 2.3 kilograms of methamphetamine at a time. Defendant offered no evidence that contradicted the presentence report, nor did he present an expert of his own. The figures were supported by the trial testimony of a DEA expert who identified the flask found in defendant's home as a 22-liter, round-bottom cook flask that is used with a heating mantle and other equipment to produce methamphetamine. The 10th Circuit affirmed, ruling that because the presentence report figures were supported by trial testimony, the district court's reliance on those figures did not violate due process. *U.S. v. Short*, __ F.2d __ (10th Cir. Oct. 31, 1991) No. 90-4077.

8th Circuit upholds conversion of cash and assets into crack cocaine. (254) For purposes of determining defendant's base offense level, the district court converted various assets and cash related to drug activity into quantities of crack cocaine. The government used a $100 per gram street value. In *U.S. v. Owens*, 904 F.2d 411 (8th Cir. 1990), the 8th Circuit held that where it is unclear which different drugs are involved, the court should use the drug conversion which yields the most favorable result for defendant. Here the 8th Circuit upheld the conversion of cash and assets into crack cocaine. Although there was evidence that the leader of the conspiracy dealt with other drugs before the co-conspirators joined her, there was no evidence that defendant dealt in anything but crack once the conspiracy began. *U.S. v. Watts*, __ F.2d __ (8th Cir. Oct. 31, 1991) No. 90-2407.

D.C. Circuit allocates burden of proof for entrapment defense for relevant conduct in the same way as at trial. (260)(755) Defendant pled guilty to distributing cocaine. At sentencing, the government attempted to prove, as relevant conduct, defendant's involvement in dealing crack. Defendant did not deny his crack dealing, but alleged that an undercover agent had entrapped him into selling the crack. The D.C. Circuit rejected defendant's claim that the district court improperly placed the entire burden of proving entrapment on him. The court held that the burden of proving an entrapment defense with respect to relevant conduct should be same as at trial. Accordingly, the defendant bears the initial burden of demonstrating inducement; once the defendant meets that burden, the ultimate burden of persuasion shifts to the government to prove predisposition. Here, the district court found no threats, no fraudulent misrepresentations, no solicitation, no improper persuasion that would constitute inducement. Thus, the burden never shifted to the government to prove predisposition. *U.S. v. Salmon*, __ F.2d __ (D.C. Cir. Nov. 12, 1991) No. 91-3073.

1st Circuit upholds application of fraud guideline to defendant who impersonated a DEA agent. (300)(320) Defendant pled guilty to impersonating a DEA agent. The impersonation guideline, section 2J1.4(c)(1), states that if the impersonation was to facilitate another more serious offense, the guideline for an attempt to commit that offense should be applied. The attempt guideline, section 2X1.1(b)(1) instructs a court to apply the guideline for the actual offense (fraud) where all the necessary acts were completed. Accordingly, the district court sentenced defendant under the fraud guideline, section 2F1.1, and the 1st Circuit affirmed. Defendant falsely told two women that he was a DEA agent, that he would help them avoid arrest, and that they must follow his orders or drug "kingpins" would harm them. He convinced one woman's father to invest $8,760 in his business, and obtained his credit card numbers and authority to manage his bank accounts. He convinced the women to quit their jobs and work at his business, paying them with checks that often bounced. Even if obtaining money by fraud was not defendant's primary purpose for the impersonation, the impersonation did facilitate the offense. *U.S. v. Pavao*, __ F.2d __ (1st Cir. Nov. 8, 1991) No. 91-1075.

1st Circuit includes in loss the value of house which fraud victim lost when she could not make mortgage payments. (300) Defendant was convicted of impersonating a DEA agent. During the impersonation, he convinced one woman's father to invest $8,760 in his business, and convinced the

women to quit their jobs and come work at his business, paying them with checks that often bounced. He was sentenced under the fraud guideline. The 1st Circuit affirmed the addition of four points under section 2F1.1(b)(1)(E) because the victims' loss was between $20,000 and $40,000. The father would not have given defendant the $8,760 had he not believed defendant was a DEA agent trying to help his daughter. The record also indicated that one of the women lost her house due to a failure to keep up her mortgage payments. Defendant was responsible for at least some of this loss, for he insisted that she move, that she leave her former job, and that she go to work for him. He often paid her wages with checks that bounced, leaving her without money to make the mortgage payments. The district court's attribution to defendant of $15,000, half of the value of her loss, was reasonable. *U.S. v. Pavao*, __ F.2d __ (1st Cir. Nov. 8, 1991) No. 91-1075.

5th Circuit upholds application of fraud guideline to illegal steroid offense. (300)(348) Defendant pled guilty to conspiring to sell and selling steroids. Defendant's violation was addressed by guideline section 2N2.1, (food and drug violations). Nevertheless, the district court found that the Sentencing Commission had not considered a conviction for trafficking in steroids with the intent to defraud or mislead, and accordingly departed from section 2N2.1 and applied the fraud guideline, section 2F1.1. The 5th Circuit affirmed, although it found that it was unnecessary for the district court to depart. Application note 2 section 2N2.1 provides that if the offense involved theft, fraud, bribery, revealing trade secrets or destruction of property, the court is to apply the guideline applicable to the underlying offense. The district court specifically found that fraud was involved in defendant's offense. *U.S. v. Arlen*, __ F.2d __ (5th Cir. Oct. 31, 1991) No. 90-2746.

5th Circuit affirms that defendant did not meet burden of proving he possessed firearm for sport or recreation. (330) Defendant was convicted of being a felon in possession of a firearm. The 5th Circuit ruled that defendant failed to meet the burden of proving that he possessed the firearm for sport or recreation for purposes of a reduction under the 1987 version of guideline section 2K2.1(b)(2). Defendant offered no evidentiary basis for the application of this reduction; his general objection claiming the reduction did not suffice. Defendant had the burden of proving his entitlement; the district court was not obligated to accept his bald assertion that he was entitled to the reduction. Although defendant did present some evidence that he was a collector, at no time did he claim the sole use of the weapon was for sporting or recreational purposes. *U.S. v. Keller*, __ F.2d __ (5th Cir. Nov. 7, 1991) No. 91-8196.

7th Circuit affirms that defendant participated in conspiracy until after effective date of guidelines. (380) The 7th Circuit upheld the district court's finding that defendant was involved in a conspiracy through August 1989, despite defendant's contention that he terminated his involvement in October, 1987. At defendant's sentencing hearing, defendant's ex-wife, the co-conspirator and the co-conspirator's girlfriend all testified as to defendant's involvement in the conspiracy through 1989. In particular, the co-conspirator testified that he and defendant grew marijuana from 1986 to 1989, and that although defendant told him in 1987 that he wanted nothing further to do with him, defendant continued to supply him with seeds. Defendant presented testimony from a police investigator who searched his apartment, his apartment complex managers and his mother, who all testified that they had not seen any signs of marijuana at his apartment. Defendant's son testified that he saw his father tell the co-conspirator in October 1987 that he wanted nothing further to do with him. Although the district court found defendant's witnesses credible, it nonetheless concluded that the government proved defendant's involvement by a preponderance of the evidence. *U.S. v. Schuster*, __ F.2d __ (7th Cir. Nov. 4, 1991) No. 90-3642.

Adjustments (Chapter 3)

1st Circuit affirms vulnerable victim enhancement for defendant who falsely told young female drug user he was a DEA agent. (410) Defendant falsely told two women that he was a DEA agent, that he knew the DEA was about to arrest them for distributing drugs, that he would held them avoid arrest, and that they must follow his orders or drug "kingpins" would harm them. The district court found that one of the women was especially vulnerable to the offense, under guideline section 3A1.1 because she was a drug user, and defendant knew it and played upon that vulnerability. Although the 1st Circuit found it a close issue, it affirmed the vulnerable victim enhancement. The victim was not a child, and the court was hesitant to suggest that anyone involved with drugs would automatically be a victim of a crime like defendant's. However, the district court had an opportunity to hear the victim testify and observe her in person. The individual facts about the victim (she was young, close to her family, a drug user) combined with those of the crime (suggesting a special degree of fear or naivete on her part) made a finding of unusual vulnerability plausible. *U.S. v. Pavao*, __ F.2d __ (1st Cir. Nov. 8, 1991) No. 91-1075.

6th Circuit affirms official victim enhancement based upon assault on police officer while fleeing robbery. (410) Defendant received an enhancement under guideline section 3A1.2 for assaulting a police officer while fleeing from a bank which he and his co-conspirator had just robbed. He was sentenced under the pre-November, 1989 version of the guidelines, which provided for an enhancement if the victim was a law enforcement officer, and the crime was motivated by that status. Defendant contended that the enhancement was erroneous because the crime for which he was convicted, bank robbery, was not "motivated" by the officer's status as a po-

lice officer. The 6th Circuit affirmed the enhancement, ruling that the pre-November 1989 version of section 3A1.2 was meant to apply to a case where a defendant assaults a police officer while fleeing from the crime. The 1989 amendments, which explicitly provide for an enhancement in such a case, were intended to clarify, rather than change, the original meaning of the guideline. *U.S. v. Muhammad*, __ F.2d __ (6th Cir. Oct. 30, 1991) No. 90- 5701.

11th Circuit remands to district court to clarify standard of proof in supervisor enhancement. (430)(755) Defendant contended that the district court used the wrong standard of proof in determining that he was an organizer, leader, manager or supervisor of the criminal activity. The court concluded that "the evidence [was] sufficient to show that at least two people were possibly working for [defendant]." The 11th Circuit found that it could not tell from the court's language whether it utilized the proper standard, and thus remanded for resentencing to ensure the proper preponderance of the evidence standard was applied. *U.S. v. Cornog*, __ F.2d __ (11th Cir. Oct. 30, 1991) No. 89-8264.

5th Circuit upholds reliance on co-conspirator's hearsay statements to find defendant was an organizer. (431)(770) The district court found that defendant was an organizer under guideline section 3B1.1 based upon statements in the presentence report which a co-conspirator had made to DEA agents. The statements revealed that defendant recruited the co-conspirators, directed the co-conspirators to pick up the drugs at a specific place, and paid the co-conspirator $25,000 in cash. The co-conspirator did not testify at defendant's trial or at his sentencing hearing. The 5th Circuit upheld the enhancement, ruling that the information was not unreliable or materially untrue. Defendant submitted no evidence to rebut the information in the presentence report. His objection to the presentence report consisted only of the unsworn assertion by his attorney. Unsworn assertions do not bear sufficient indicia of reliability to be considered by the trial court in making its factual findings. In addition, the co-conspirator's statements were consistent with facts that the DEA already knew to be true. *U.S. v. Chavez*, __ F.2d __ (5th Cir. Nov. 8, 1991) No. 90-2706.

1st Circuit denies mitigating role adjustment despite conflicting testimony as to defendant's involvement. (445) Three police officers testified that when they entered defendant's house, she and her husband were down in the basement next to a table where the cocaine was located. Defendant denied this. She contended that she was entitled to a mitigating role adjustment, emphasizing the testimony of her son-in-law to the effect that she was not involved in the drug operation. The 1st Circuit affirmed the enhancement, since the refusal to grant the enhancement was supported by the plausible testimony of the police officers. Although defendant was acquitted of conspiracy, this did not automatically entitle her to a reduction under section 3B1.2. The district court took account of the acquittal, reasoning that defendant "was much less than a full participant because she wasn't found guilty of conspiracy, but she was certainly guilty of possession with intent to distribute as the jury found, not just a minimal, or minor participant." *U.S. v. Brum*, __ F.2d __ (1st Cir. Nov. 6, 1991) No. 91-1170.

1st Circuit affirms obstruction enhancement for defendant who presented contradictory stories as to source of money. (461) Defendant received an enhancement for obstruction of justice based upon (a) her conflicting testimony as to the source of the $2,705 found in her husband's jacket, and the existence of a $33,000 "inheritance" that her husband received, and (b) her denial of the fact that at the time police entered her house, she and her husband were down in the basement near a table containing cocaine. The 1st Circuit upheld the enhancement. The district court was not required to view her testimony in a light most favorable to her as set forth in application note 1 to guideline section 3C1.1, since this only applies with respect to conflicts about which the judge has no firm conviction. Here, the trial judge had no doubts about veracity of defendant's testimony. The court did not consider her claim that the enhancement violated her constitutional right to testify since defendant's self-contradictory testimony concerning the source of her family's money provided ample support for the obstruction enhancement. *U.S. v. Brum*, __ F.2d __ (1st Cir. Nov. 6, 1991) No. 91-1170.

10th Circuit upholds obstruction enhancement where defendant instructed co-conspirator to throw cocaine from car. (461) Defendant received an enhancement for obstruction of justice after a co-conspirator testified that as police were attempting to overtake the car, defendant handed a bottle to a coconspirator and ordered her to throw it out the window, which she did. The bottle was later retrieved by police and found to contain cocaine. The 10th Circuit affirmed an enhancement based upon this evidence. The activity "indisputably" amounted to obstruction of justice. Although defendant contended that the co-conspirator's testimony was not credible, the district court was entitled to believe it. *U.S. v. Cook*, __ F.2d __ (10th Cir. Nov. 5, 1991) No. 90-5080.

6th Circuit refuses to find that 1990 amendments changed standard of review for acceptance of responsibility. (480)(870) Defendant claimed that because the 1990 amendments deleted the phrase "should not be disturbed unless it is without foundation" from the application note, an appellate court now has greater leeway in reviewing an acceptance of responsibility determination. The 6th Circuit rejected this argument, finding that this "minor alteration" in the application notes did not change the standard of review. Accordingly the court reviewed the district court's decision to deny defendant an acceptance of responsibility reduction under the clearly erroneous standard. *U.S. v. Osborne*, __ F.2d __ (6th Cir. Nov. 4, 1991) No. 90-6597.

9th Circuit suggests departure rather than four-level reduction for "exceptional" acceptance of responsibility. (480)(715) The defendant sought a downward departure from two to four levels for "exceptional" acceptance of responsibility. The district judge agreed and the government did not challenge the additional two-level reduction on appeal. Nevertheless, in vacating the case on other grounds, the 9th Circuit stated that "the guidelines do not provide for the offense level to be reduced for acceptance of responsibility other than two levels." A review of the record suggested that the district court intended to depart downward under section 5K2.0 "because the defendant's admission of guilt in other crimes was an acceptance of responsibility greater than that contemplated by the guidelines." The court said that if the district court intended this result, "it should make the appropriate finding upon remand." *U.S. v. Farrier*, __ F.2d __ (9th Cir. November 12, 1991) No. 90-50533.

9th Circuit holds that court is not required to state reasons for factual findings on acceptance of responsibility. (480) The defendant objected to the probation officer's recommendation against credit for acceptance of responsibility. In response, the district court stated orally and in writing its conclusion that defendant had not accepted responsibility. On appeal, the 9th Circuit found that these statements were sufficient to resolve defendant's objections, and also constituted a "sufficient finding of fact." The court held that the district court was not required to state reasons for its factual finding. *U.S. v. Marquardt*, __ F.2d __ (9th Cir. November 13, 1991) No. 90-30461.

11th Circuit affirms denial of acceptance of responsibility reduction despite guilty plea and defendant's cooperation. (486) Defendant contended that he was entitled to a reduction for acceptance of responsibility because he pled guilty and cooperated with the government's investigation of persons believed to be stealing seized money. The 11th Circuit held that defendant did not meet his burden. A defendant's cooperation does not automatically entitle him to a reduction for acceptance of responsibility. Even if nothing in the record indicated that defendant was less than truthful with the government or the court, the determination of acceptance of responsibility requires an analysis of both objective facts and subjective considerations of the defendant's demeanor and sincerity. The record indicated that the district court was concerned with defendant's demeanor and sincerity, commenting that defendant seemed to be "taking this in a rather light fashion today." Moreover, the court properly considered defendant's denial of important facts. *U.S. v. Cruz*, __ F.2d __ (11th Cir. Oct. 30, 1991) No. 90-5871.

1st Circuit denies acceptance of responsibility reduction to defendant who claimed he impersonated DEA agent to help drug user. (488) Defendant falsely told two women that he was a DEA agent, that he knew the DEA was about to arrest them for distributing drugs, that he would hold them avoid arrest, and that they must follow his orders or drug "kingpins" would harm them. He convinced the women to quit their jobs and come work at his business, paying them with checks that often bounced. The district court denied defendant a reduction for acceptance of responsibility because he did not accept that he did anything more than try to help one of the women in her drug problems. He stated that although he regretted the impersonation, his intent was good. The 1st Circuit affirmed the denial of the reduction. Although defendant had every right to make this statement, it was not consistent with an acceptance of responsibility. *U.S. v. Pavao*, __ F.2d __ (1st Cir. Nov. 8, 1991) No. 91-1075.

6th Circuit upholds denial of acceptance of responsibility to "con man." (488) Defendant argued that his guilty plea, his oral admission of guilt to a federal agent, and his written statement to a probation officer were grounds for an acceptance of responsibility reduction. The 6th Circuit affirmed the denial of the reduction. The district court based its findings on the fact that (a) defendant's entire criminal history indicated no acceptance of responsibility, (b) the typewritten statement filed with the probation officer was not signed by defendant, (c) defendant did not voluntarily admit his guilt, and (d) defendant did not try to make restitution. Defendant showed no real sign of "changing his ways." His significant criminal history indicated that he was a "con man." Judge Nelson dissented, finding it inappropriate to both depart upward and deny defendant an acceptance of responsibility reduction based upon his criminal history. *U.S. v. Osborne*, __ F.2d __ (6th Cir. Nov. 4, 1991) No. 90-6597.

6th Circuit affirms denial of acceptance of responsibility reduction to defendant who denied culpability. (492) Defendant was convicted of the second-degree murder of his four-year old son and for committing and permitting first-degree criminal child abuse. The 6th Circuit affirmed the denial of a reduction for acceptance of responsibility. While defendant admitted his culpability for beating the child, he never admitted his culpability with respect to the child's death. Moreover, defendant and his wife originally told authorities that the child received the injuries from the child's mother's (fictitious) boyfriend. This deception earned defendant an enhancement for obstruction of justice. Defendant, noting that he did everything possible to save the child's life after he "fell" down the stairs, urged the court to interpret this as a sign of sincere contrition. However, the court found it more likely that defendant took the child to the hospital because "a dead four-year-old is even harder to explain away than a seriously battered four-year old." *U.S. v. Phillip*, __ F.2d __ (6th Cir. Oct. 30, 1991) No. 90-6506.

Criminal History (§4A)

8th Circuit affirms inclusion of juvenile offense despite alleged inequities associated with juvenile sentences.

(504)(514) Defendant received three criminal history points because he had been on parole from a juvenile offense for less than two years at the time of the current offense. Defendant contended that the inequities associated with the juvenile sentence should have caused the district court to exclude these points from his criminal history. In particular, defendant alleged that he was incarcerated for a longer period as a juvenile than he would have been for committing the same offense as an adult. If he had been released sooner, he would not have still been on parole at the time of the instant offense. The 8th Circuit affirmed the inclusion of the juvenile offense, since all it had was defendant's "speculation" as to how long he would have served if he had been convicted as an adult. *U.S. v. Watts*, __ F.2d __ (8th Cir. Oct. 31, 1991) No. 90-2407.

8th Circuit applies clearly erroneous standard of review to determination that prior conviction was not invalid. (504)(870) The 8th Circuit held that a sentencing court's determination of whether a conviction used to enhance a defendant's sentence under guideline section 4A1.2 was constitutionally valid should be reviewed for clear error and application of the proper legal standards. Here, the district court's determination that defendant's waiver of counsel was voluntary and knowing was not clearly erroneous. The transcript showed that state court thoroughly explained the right to have counsel and defendant's prior experience and conduct at the hearing indicated that he was aware of the possible consequences. *U.S. v. LaFrombois*, 943 F.2d 914 (8th Cir. 1991).

11th Circuit upholds district court's power to determine whether prior parole revocation was invalid. (504) Defendant was released on parole more than 15 years prior to the commencement of the instant offense, and therefore, ordinarily, his prior conviction would not have been countable in his criminal history under section 4A1.2(e). However, his parole had been revoked, and the time he served in prison after his parole revocation fell within the 15-year period. Under section 4A1.2(k), this meant that the 1969 conviction could be considered in his criminal history. However, the district court found the parole revocation constitutionally invalid, and refused to consider the prior conviction. The 11th Circuit affirmed the district court's power to determine the validity of the parole revocation. Application note 6 to section 4A1.2 can be read to authorize a collateral inquiry into the validity of a prior conviction even if the prior conviction has not previously been invalidated. A "background note" to this application note contained in the 1990 amendment clarifies that such an inquiry is permissible. *U.S. v. Cornog*, __ F.2d __ (11th Cir. Oct. 30, 1991) No. 89-8264.

11th Circuit calculates 15-year criminal history window from last day of conspiracy. (504) Guideline section 4A1.2(e) directs a court to include in a defendant's criminal history certain prior sentences that (a) were imposed within 15 years of the commencement of the instant offense, or (b) resulted in incarceration during any part of the 15-year period. Here, defendant was charged with drug possession on February 9, 1988 and conspiracy to possess cocaine from January, 1987 to February 13, 1988. The 11th Circuit calculated defendant's 15-year window for the conspiracy charge by counting back from the last day alleged for the conspiracy, February 13, 1988. The jury's guilty verdict on the conspiracy charge meant only that it found that defendant and his coconspirators reached an agreement some time within the period charged. Since the commencement of the conspiracy offense "open[ed] the window" later than the substantive offense, the court actually used the earliest substantive offense date, February 9, 1988, which "open[ed] the window" February 9, 1973. *U.S. v. Cornog*, __ F.2d __ (11th Cir. Oct. 30, 1991) No. 89-8264.

11th Circuit prohibits district court from selectively using prior invalid convictions for criminal history purposes. (504) The district court refused to classify defendant as a career offender, determining that one of his predicate offenses was constitutionally infirm. However, the court placed defendant in criminal history category IV, which would only be applicable if defendant were given criminal history points based upon the unconstitutional conviction. The government contended the district court could properly have counted the conviction for criminal history purposes even though it refused to consider it for career offense purposes. The 11th Circuit rejected this contention, ruling that if the district court held that the prior conviction was invalid, it was also bound to exclude it from all of its criminal history calculations. This was true even though the collateral inquiry undertaken by the district court was discretionary. *U.S. v. Cornog*, __ F.2d __ (11th Cir. Oct. 30, 1991) No. 89-8264.

8th Circuit holds defendant received notice of departure where grounds were stated in presentence report. (508) (700) (761) The 8th Circuit rejected defendant's claim that the district court failed to give adequate notice of its intent to depart from the guidelines range. Under *Burns v. United States*, 111 S.Ct 2182 (1991), formal notice is not required if (1) the presentence report recognizes that certain factors could justify a departure, or (2) the government requests such a departure. Here, the presentence report expressly noted the presence of factors which might warrant departure. Additionally, prior to the sentencing hearing, the government requested that the district court depart upward from the guideline range. *U.S. v. Andrews*, __ F.2d __ (8th Cir. Oct. 29, 1991) No. 90-5571.

6th Circuit affirms upward departure based upon extremely high criminal history score. (510) Defendant had 24 criminal history points. This placed him in criminal history category VI, which is applicable to defendants with 13 or more criminal history points. The district court departed upward based upon defendant's extremely high criminal history score. Noting that each criminal history category after category II contains a spread of three criminal history points, the court determined that defendant should be placed in hypo-

thetical criminal history category IX. This resulted in a range of 46 to 57 months, and therefore the district court sentenced defendant to 57 months, a 24-month increase from his maximum guideline sentence of 33 months. The 6th Circuit affirmed, holding that a criminal history score nearly double the score indicated in category VI was sufficiently unusual to warrant an upward departure. Judge Nelson dissented, finding it inappropriate to both depart upward and deny defendant an acceptance of responsibility reduction based upon his criminal history. *U.S. v. Osborne*, __ F.2d __ (6th Cir. Nov. 4, 1991) No. 90-6597.

8th Circuit upholds upward departure based upon "old" convictions. (510) The district court departed upward from a guideline range of 37 to 46 months and sentenced defendant to 90 months. The 8th Circuit affirmed, finding no abuse of discretion in the conclusion that defendant's criminal history score significantly underrepresented the seriousness of his past criminal conduct. The presentence report listed three prior convictions, for armed robbery, possession of stolen mail, and possession of marijuana, that were excluded from his criminal history because each occurred more than 15 years before the instant offense. These offense would have added six points to defendant's criminal history score, placing him in category III. This would have resulted in a guideline range of 78 to 97 months, and defendant's 90-month sentence fell within that range. *U.S. v. Andrews*, __ F.2d __ (8th Cir. Oct. 29, 1991) No. 90-5571.

6th Circuit reverses downward departure based on dissatisfaction with harshness of career criminal provisions. (514)(520)(716) As a career offender, defendant had a guideline range of 210 to 262 months. The district court departed downward to 63 months because his two predicate offenses were more than 10 years old, and if sentenced as a career offender, he would receive a much harsher sentence than his more culpable co-conspirators. The 6th Circuit reversed, ruling that a court may not depart downward because it believes a career offender sentence would be excessive. With respect to the age of the prior convictions, the Sentencing Commission has specifically determined that offenses committed within 15 years of the instant offense are to be considered. Finally, the objective of the guidelines is not to eliminate disparity between defendants in the same case who have different criminal records, but to eliminate unwarranted disparities nationwide. To reduce a defendant's sentence because of a perceived disparity with a co-defendant's sentence creates a new and unwarranted disparity between the first defendant and the sentences of other defendants nationwide who are similarly situated. *U.S. v. LaSalle*, __ F.2d __ (6th Cir. Nov. 5, 1991) No. 91-3337.

11th Circuit rules invalid conviction could not be basis for departure because defendant did not receive notice. (514) The district court placed defendant in criminal history category VI, which was only applicable if the court included in defendant's criminal history a prior conviction which the court had determined was constitutionally invalid. The government contended that the district court intended to depart from the criminal history category. The 11th Circuit ruled the court's placement of defendant in category IV could not be justified on departure grounds because defendant did not receive notice of the departure. A court may consider criminal conduct underlying an invalid conviction in making a departure, but the court must, under *Burns v. United States*, 111 S.Ct 2182 (1991), give the defendant notice and an opportunity to comment before it departs upward. Here, the district court gave no indication that it intended to depart nor did it explain its reasons. *U.S. v. Cornog*, __ F.2d __ (11th Cir. Oct. 30, 1991) No. 89-8264.

6th Circuit upholds use of juvenile offense as predicate for career offender status. (520) Defendant contended that he should not have been sentenced as a career offender because he was 17 years old when he committed one of the convictions used to determine his career offender status. He argued that since guideline section 4B1.1 does not treat a juvenile as a career offender, it would "violate the spirit" of the guidelines to include an offense committed by a juvenile in the calculation. The 6th Circuit upheld the use of the juvenile offense as a predicate offense for career offender status. "The fact that Congress did not see fit to treat a juvenile as a career offender, does not mean that this court should ignore a prior adult conviction for bank robbery merely because the defendant was 17 years old at the time of the crime." *U.S. v. Muhammad*, __ F.2d __ (6th Cir. Oct. 30, 1991) No. 90-5701.

11th Circuit considers nature of all related cases for purposes of determining career offender status. (520) Defendant was convicted in 1969 of assault and burglary charges. Because the convictions were related, they were counted as one prior offense for criminal history purposes. Defendant argued that because the burglary conviction carried a longer sentence, the guidelines required the court to consider his burglary conviction, rather than his assault conviction, in determining whether the offense was a crime of violence for career offender purposes. The 11th Circuit rejected defendant's argument that a court could only consider the conviction with the longest sentence, ruling that Congress intended courts to consider the nature of all convictions in related cases for career offender purposes. It would be illogical to ignore a conviction for a violent felony just because it happened to be coupled with a non-violent conviction having a longer sentence. Moreover, the court thought that burglary, even of a commercial establishment, was a crime of violence under the 1988 version of the guidelines. *U.S. v. Cornog*, __ F.2d __ (11th Cir. Oct. 30, 1991) No. 89-8264.

Determining the Sentence (Chapter 5)

5th Circuit upholds guilty plea despite court's failure to advise defendant that he could be imprisoned if he violated terms of supervised release. (580)(780) The 5th Circuit upheld the validity of defendant's guilty plea, even though it found that the district court failed to advise him that if he violated the conditions of supervised release, he would face additional imprisonment. The court did not totally fail to address the subject of supervised release, and thus defendant must demonstrate that he was prejudiced, i.e. that the district court's failure to explain the effects of supervised release caused him to plead guilty when he would not have otherwise so pled. Defendant did not meet this burden. He was willing to plead guilty with the prospect of receiving a substantial jail sentence. He did not explain why the knowledge of all of the requirements of supervised release would have caused him to go to trial rather than enter a plea. *U.S. v. Arlen*, __ F.2d __ (5th Cir. Oct. 31, 1991) No. 90-2746.

9th Circuit states that drug dependence is not ordinarily relevant in determining sentence. (680) In revoking defendant's supervised release and sentencing him to two years in custody, the district court found that the statutory one-year minimum term of imprisonment was inadequate due to his "drug dependence and the danger he presented to society." On appeal, defendant argued that the court erroneously considered his drug dependence in determining the length his sentence. The 9th Circuit found it unnecessary to rule on this issue, but noted that section 5H1.4 provides that drug dependence "is not ordinarily relevant in determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall." *U.S. v. Baclaan*, __ F.2d __ (9th Cir. November 6, 1991) No. 91-10043.

Departures (§5K)

5th Circuit rejects attack on sentence based on lesser sentences received by co-conspirators. (716) Defendant contended that his sentence was disproportionately high when compared to the sentences received by other, more culpable co-conspirators. The 5th Circuit rejected this complaint, since defendant's 12-month sentence was well within his 10 to 16 month guideline range. Defendant could not attack his own guideline range sentence based upon the sentences of his co-conspirators. *U.S. v. Arlen*, __ F.2d __ (5th Cir. Oct. 31, 1991) No. 90-2746.

6th Circuit affirms three level upward departure for defendant who seriously abused son prior to his death. (725) Defendant was convicted of second-degree murder of his four-year old son and for committing and permitting first-degree criminal child abuse. The 6th Circuit affirmed an upward departure from 262 months to 30 years under guideline section 5K2.8 based upon the extreme nature of the child abuse. The defendant's own expert witness testified that it was the worst case of child abuse he had ever seen. The district judge concluded that for a period of six or seven weeks, the child was subjected to "the most savage and brutal abuse I think that anyone within the sound of my voice has ever encountered." The prolonged and brutal nature of the abuse was documented by defendant's wife's testimony and the coroner's report. Although only "highly unusual circumstances" can justify an upward departure equivalent to three offense levels, here the extent of the departure was reasonable. Chief Judge Merritt dissented, believing that the departure was improperly based upon the facts which formed the basis for the child abuse offense. *U.S. v. Phillip*, __ F.2d __ (6th Cir. Oct. 30, 1991) No. 90-6506.

Sentencing Hearing (§6A)

7th Circuit refuses to require higher burden of proof despite large increase in sentence. (755) The district court found, by a preponderance of the evidence, that defendant was involved in a conspiracy through August 1989, even though defendant contended that he terminated his involvement in October, 1987. This resulted in defendant being sentenced under the guidelines and the mandatory minimum sentencing provisions of 21 U.S.C. section 841(b)(1). Under pre-guidelines law and the parole system, defendant would have been subject to a maximum term of imprisonment of five years, with an estimated time in custody of zero to six months. Relying on *U.S. v. Kikumura*, 918 F.2d 1084 (3rd 1990), defendant argued that because of the drastic increase in sentence, the government should have been required to prove his participation in the conspiracy by clear and convincing evidence. The 7th Circuit refused to require a higher burden of proof, and held that the district court correctly employed the preponderance of the evidence standard. The court also said that drug quantity is not a substantive element of the offense, but merely goes to the severity of the sentence. *U.S. v. Schuster*, __ F.2d __ (7th Cir. Nov. 4, 1991) No. 90-3642.

7th Circuit refuses to remand despite failure to attach written findings to presentence report. (765) Defendant argued that the case should be remanded for resentencing because the district judge failed to make written findings regarding the disputed factual information in the presentence report. The 7th Circuit held that the district court appropriately found the disputed portions of the presentence report to be accurate. No remand was necessary even though the judge failed to attach a copy of those findings to the presentence report sent to the Bureau of Prisons. The court directed the United States Attorney to ensure that the judge's findings were attached to presentence report before it was transmitted to the Bureau of Prisons. *U.S. v. Musa*, __ F.2d __ (7th Cir. Nov. 5, 1991) No. 90-3122.

11th Circuit affirms despite failure to give defendant opportunity to object to final factual findings and legal conclusions. (765) In *U.S. v. Jones*, 899 F.2d 1097 (11th Cir.), *cert. denied* 111 S.Ct. 275 (1990), the 11th Circuit held that the district court must give the parties an opportunity not only to resolve the objections contained in the addendum but also to object to the district court's ultimate findings of fact and conclusions of law. In this case, defendant did not raise the "technical violation" of *Jones*, but the 11th Circuit noted that the district court summarily concluded the sentencing hearing without giving defendant the opportunity to object to its ultimate factual findings and legal conclusion. Nevertheless, the record was sufficient for meaningful appellate review, and the court affirmed the sentence. *U.S. v. Cruz*, __ F.2d __ (11th Cir. Oct. 30, 1991) No. 90-5871.

7th Circuit affirms reliance on evidence contradicted only by defendant's uncorroborated testimony. (770) Defendant contended that his due process rights were violated by the district court's reliance upon inaccurate information. The 7th Circuit upheld the district court's determination, noting that defendant offered nothing to show the inaccuracy of the facts, other than his own uncorroborated testimony. Defendant did nothing to disprove the hearsay evidence against him except to deny the allegations. It was "no surprise" that the district court did not find defendant credible after defendant denied at his plea hearing that he had obtained cocaine from one of his co-conspirators and then admitted this fact at his sentencing hearing. The judge stated that he doubted defendant's credibility for other reasons as well, such as not being able to remember the names that corresponded to the initials of his cocaine customers in his calender. *U.S. v. Musa*, __ F.2d __ (7th Cir. Nov. 5, 1991) No. 90-3122.

10th Circuit upholds reliance on co-conspirator's testimony to estimate drug quantity. (770) Defendant contended that it was error for the district court to base its estimation of the amount of cocaine attributable to defendant upon information from a co-conspirator who was not credible. The 10th Circuit affirmed the drug estimate, ruling that information had sufficient indicia of reliability for the district court to rely on it. The probation officer testified at the sentencing hearing that he relied on the information provided by the co-conspirator on three different occasions to determine that defendant sold between $1,000 and $2,000 worth of cocaine daily. The co-conspirator's testimony was consistent throughout the proceedings. Moreover, the co-conspirator had previously relayed the same information in an interview with the Assistant U.S. Attorney, and had attested to the veracity of her presentence report, containing the same figures. *U.S. v. Cook*, __ F.2d __ (10th Cir. Nov. 5, 1991) No. 90-5080.

Plea Agreements, Generally (§6B)

7th Circuit rules misstatement about minimum penalty was harmless error. (790) Defendant contended that his guilty plea was unknowing and involuntary because the district court misstated the statutory minimum penalty as "three years, which would be 60 months" rather than five years. The 7th Circuit held this misstatement to be harmless error. Just before the judge made this statement, he asked the prosecutor on the record what the possible penalties were for defendant's offense, to which the prosecutor responded "five to 40 years." Even if defendant did not hear the prosecutor's response, the court assumed that since defendant was a senior in college, he could do the arithmetic necessary to determine that 60 months equalled five years. *U.S. v. Musa*, __ F.2d __ (7th Cir. Nov. 5, 1991) No. 90-3122.

7th Circuit upholds factual basis for guilty plea despite defendant's claim that he was a buyer rather than seller of cocaine. (790) Defendant contended that there was not an adequate factual basis on the record for his guilty plea, as required by Fed. R. Crim. P. 11(f), because during his plea hearing he contended that he was merely a buyer, and not a seller, of cocaine. He argued that once he contested the evidence, the court was obligated to lay a factual foundation on the record before accepting the plea. The 7th Circuit upheld defendant's plea, ruling that there was an adequate factual basis for the plea. Because defendant was only charged with conspiracy to distribute cocaine, the only facts that needed to be established on the record were the elements of conspiracy. Here defendant admitted that he engaged in drug activities with a drug dealer, and that he helped the dealer facilitate the conspiracy. *U.S. v. Musa*, __ F.2d __ (7th Cir. Nov. 5, 1991) No. 90-3122.

Violations of Probation and Supervised Release (Chapter 7)

5th Circuit upholds sentence on revocation of supervised release despite court's failure expressly to consider policy statements. (800) Defendant's supervised release was revoked and he was sentenced to two years imprisonment, the statutory maximum under 18 U.S.C. section 3583(e)(3). He contended that the court erred in not applying the policy statements in chapter 7 of the guidelines. The 5th Circuit upheld the sentence, even though it was unclear from the record whether the district court considered the policy statements. Defendant did not object or otherwise raise this issue at the revocation hearing. The district court's failure to articulate that it considered the policy statements was not plain error. The district court had discretion to impose the sentence it pronounced. The appellate court presumed that the court imposed the sentence because it was the appropriate sentence under all the circumstances of the case. *U.S. v. Ayers*, __ F.2d __ (5th Cir. Oct. 29, 1991) No. 91-1124.

5th Circuit finds no due process violation in admission of evidence not disclosed prior to revocation hearing. (800) Defendant contended that his due process rights were violated by the admission, at his hearing to revoke his supervised release, of evidence which had not previously been disclosed to him. The 5th Circuit found no due process violation since defendant's substantial rights were not affected. Prior to the hearing, defendant was aware that he was accused of withdrawing funds from his former employer's bank account. He was furnished, in advance of the hearing, with copies of the deposit slips containing the name of the account, the account number, the amount of funds to be withdrawn and his alleged signature. At the hearing, the government offered into evidence the signature card for the bank account. Defendant did not request a continuance to consider the signature card after its disclosure, and was given the opportunity to fully cross-examine each government witness. Under these circumstances, admission of the signature card did not affect defendant's substantial rights. *U.S. v. Ayers*, __ F.2d __ (5th Cir. Oct. 29, 1991) No. 91-1124.

9th Circuit holds that positive urine tests and admission of drug use constituted "possession" under section 3583(g). (800) Application Note 5 to section 7B1.4 leaves to the court "the determination of whether evidence of drug usage established solely by laboratory analysis constitutes 'possession of a controlled substance' as set forth in 18 U.S.C. sections 3565(a) and 3583(g)." Relying on cases from other circuits, the 9th Circuit found that the district court properly determined that the defendant here "possessed" methamphetamine within the meaning of section 3583(g) based on four positive drug tests within three months and the defendant's admission to his probation officer that he had used crystal methamphetamine on two occasions. *U.S. v. Baclaan*, __ F.2d __ (9th Cir. November 6, 1991) No. 91-10043.

9th Circuit reverses sentence where judge failed to consider section 7B1.4(b)(2). (800) Policy statement 7B1.4(b)(2) provides that where "the minimum term of imprisonment required by statute, if any, is greater than the maximum of the applicable range, the minimum term of imprisonment required by the statute shall be substituted for the applicable range." Here, the minimum one year term of imprisonment required by section 3583(g) was greater than the guideline range, so it became the guideline. The district judge failed to consider this subsection, ruling instead that the ten month guideline term conflicted with section 3583(g), and that he was therefore free to impose a two year sentence. The 9th Circuit vacated the sentence and remanded for resentencing with instructions to consider section 7B1.4(b)(2). *U.S. v. Baclaan*, __ F.2d __ (9th Cir. November 6, 1991) No. 91-10043.

10th Circuit holds that in revoking supervised release, a court may reimpose supervised release following re-imprisonment. (800) After defendant violated the conditions of his supervised release, the court sentenced him to 15 months imprisonment and an additional 14 months of supervised release. The 10th Circuit affirmed, disagreeing with the 9th Circuit's opinion in *U.S. v. Behnezhad*, 907 F.2d 896 (9th Cir. 1990). The court held that 18 U.S.C. section 3583(e) permits a court, when revoking a term of supervised release, to impose further imprisonment and to reimpose supervised release following imprisonment. A recent amendment to the statute clarified that this was Congress's original intent. Under section 3583(e), the maximum prison term a court may impose when revoking supervised release is equal to the term of supervised release originally imposed without credit for time previously served under post-release supervision. Section 3583(e)(2) permits the court dealing with a violation of a supervised release to extend the term of supervised release to the maximum allowable for the original offense. Judge Holloway, dissenting, would have followed the 9th Circuit decision in *Behnezhad*. *U.S. v. Boling*, __ F.2d __ (10th Cir. Oct. 31, 1991) No. 90-6407.

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

7th Circuit upholds its jurisdiction despite notice of appeal's incorrect designation of appellate court. (850) The 7th Circuit upheld its jurisdiction to hear defendant's appeal even though his notice of appeal incorrectly designated the 8th Circuit as the court to which appeal was taken. The district court and the prosecutor received fair notice of the appeal; the notice unambiguously notified them that defendant appealed the judgment. Except under limited circumstances not applicable here, the 7th Circuit was the only court to which defendant could appeal. *U.S. v. Musa*, __ F.2d __ (7th Cir. Nov. 5, 1991) No. 90-3122.

5th Circuit rules defendant did not waive right to challenge multiplicity of sentences on appeal. (855) Defendant was convicted of two counts of being a felon in possession of a firearm and two counts of being an illegal alien in possession of the same firearms. Defendant contended for the first time on appeal that he was improperly subjected to multiple punishments for a single offense as to each weapon. The 5th Circuit held that defendant had not waived his right to appeal this issue. A complaint about multiplicity of sentences can be raised for the first time on appeal, unless the sentences are to be served concurrently. Here, defendant's terms of imprisonment on each count were to run concurrently. However, if monetary assessments under 18 U.S.C. section 3013 are imposed on separate counts of conviction, the sentence on those counts are not concurrent, and the concurrent sentence doctrine does not apply. Here, the district court imposed a $50 assessment against defendant on each count of conviction. Thus the sentences were not concurrent, and defendant did not waive his right to challenge the multiplicity of his sentences. *U.S. v. Munoz-Romo*, __ F.2d __ (5th Cir. Nov. 5, 1991) No. 89-2345.

8th Circuit refuses to review refusal to depart based upon diminished capacity and substantial assistance. (855)(860) Defendant contended that the circumstances of his offense constituted mitigating circumstances for which the district court should have departed downward under guideline section 5K2.0. Further, he contended that the district court erred in failing to depart based upon his diminished capacity and for his substantial assistance. The 8th Circuit held that the district court's decision not to depart under section 5K2.0 was not reviewable. Moreover, defendant's failure to raise the substantial assistance and diminished capacity issues before the district court precluded the appellate court's consideration of the issues. *U.S. v. Schneider*, __ F.2d __ (8th Cir. Nov. 5, 1991) No. 91- 1209.

5th Circuit holds district court was aware of its ability to depart for diminished capacity. (860) The 5th Circuit refused to review the district court's refusal to depart based upon defendant's diminished capacity, ruling that the court was aware of its authority to depart. In addressing defendant's request for the downward departure, the court reviewed his psychiatric report and noted that it was inconclusive as to any clinical disorders. The court also referred to the probation officer's report that defendant's repeated reference to his illiteracy was motivated by a desire to avoid accountability for his behavior. The court's comments indicated that it was not inclined to find as a factual matter that defendant was suffering from a significantly reduced mental capacity. *U.S. v. Keller*, __ F.2d __ (5th Cir. Nov. 7, 1991) No. 91-8196.

D.C. Circuit affirms refusal to depart based on "partial entrapment." (860) Although defendant's entrapment defense was not successful, he contended that the district court should have departed downward based upon the "partial entrapment," i.e. his initial hesitation to sell crack cocaine. The D.C. Circuit refused to consider whether this was a valid ground for departure, since the district court ruled that even if such a defense were available, defendant had not displayed sufficient reluctance to warrant a departure. Discretionary judgments of this kind are not subject to appellate review. *U.S. v. Salmon*, __ F.2d __ (D.C. Cir. Nov. 12, 1991) No. 91-3073.

9th Circuit reviews district court's construction and interpretation of the guidelines de novo. (870) The 9th Circuit reviews *de novo* the district court's construction and interpretation of the guidelines. The court noted that after revoking supervised release, the court must provide specific reasons for imposing a particular sentence. *U.S. v. Baclaan*, __ F.2d __ (9th Cir. November 6, 1991) No. 91-10043.

Forfeiture Cases

5th Circuit finds no double jeopardy violation in seizure of cash and later prosecution for underlying conduct. (910) Customs officials seized $48,000 in cash from defendant as he attempted to board a plane to South Korea. He was convicted of failing to declare the currency as required by law. Defendant contended that the civil seizure and retention of the $48,000 was severe enough to constitute criminal punishment so that his subsequent criminal prosecution for the same underlying conduct violated the double jeopardy clause. Although the 5th Circuit found that defendant raised an important question as to whether a prior civil forfeiture could be considered punishment for double jeopardy purposes, it rejected defendant's claim because the customs service never imposed a civil penalty on defendant. Defendant elected to delay civil forfeiture proceedings pending the outcome of his criminal prosecution. Because no final administrative action or other adjudication of civil liability occurred prior to defendant's criminal conviction, defendant was not twice put in jeopardy. *U.S. v. Park*, __ F.2d __ (5th Cir. Oct. 31, 1991) No. 90-1761.

11th Circuit rules genuine issues existed as to whether 11-month delay between seizure and hearing violated due process. (910) The district court granted summary judgment in favor of claimants. holding that the 11-month delay after the seizure of the real property, without an adversarial hearing on probable cause, violated claimants' rights to due process under *U.S. v. $8,850*, 461 U.S. 555 (1983). The 11th Circuit found that genuine issues of material facts existed, and remanded for further proceedings. Under *$8,850*, the factors to consider are (1) the length of the delay, (2) the reasons for the delay, (3) the claimant's assertion of a right to a judicial hearing, and (4) whether the claimant has been prejudiced by the delay. Here, the 11-month delay was related to an ongoing criminal investigation, which is a "weighty justification" for delay. With respect to claimant's right to a judicial hearing, the district court would have allowed claimants to remove the stay by filing a motion, but they did not. Although the district court discussed the unmarketability of the property, this does not constitute prejudice. Prejudice relates to a claimant's ability to present his case at a probable cause hearing. *U.S. v. Land*, __ F.2d __ (11th Cir. Oct. 31, 1991) No. 90-7788.

5th Circuit upholds seizure of property alleged to be in violation of food and drug laws. (920) The government applied to the district court for a warrant to seize property alleged to be in violation of the Federal Food, Drug, and Cosmetic Act. After the warrant was issued, another judge in the same district court rescinded the seizure and ordered the return of the property. Despite claimant's contention that the seizure was based upon inaccurate factual information, the 5th Circuit upheld the seizure, ruling that when a complaint which complies with the provisions of the admiralty rules seeks forfeiture of articles of property alleged to be in violation of the federal food and drug laws, the government is entitled to secure a warrant and maintain its seizure on the property until a court hears the merits of the conflicting claim. To balance a claimant's due process rights with the interests of public

health, a hearing on the merits should be scheduled at the promptest date possible considering the court's emergency calendar and the ability of the parties to prepare and present the controversy to the court. *U.S. v. Proplast II*, __ F.2d __ (5th Cir. Nov. 7, 1991) No. 91-2263.

11th Circuit rules genuine issue of material fact existed as to whether government provided adequate notice of forfeiture. (920) The district court granted summary judgment in favor of claimant on the basis of the government's violation of several statutory procedures, including the failure to provide adequate notice by publication. The 11th Circuit ruled that summary judgment was inappropriate because genuine issues of material fact existed as to the several matters, including whether adequate notice had been made. Contrary to the district court's assumption, the Supplemental Rules for Certain Admiralty and Maritime Claims do not apply to gambling forfeitures. The customs laws apply, and require that the government publish notice of the seizure and the intent to forfeit for at least three weeks. The record showed that the marshals arranged for the appropriate publication, but there was no evidence that the notice was actually published. Thus, there was a genuine issue of material fact as to whether the government published adequate notice. *U.S. v. Land*, __ F.2d __ (11th Cir. Oct. 31, 1991) No. 90-7788.

3rd Circuit gives innocent spouse right to exclusive use and possession of property during her lifetime. (960) Claimant and her husband owned the property as tenants by the entirety. A tenant by the entirety has title to the whole property. In a forfeiture action based on the husband's drug activities, the government conceded that claimant had a valid innocent owner defense. The district court then dismissed the forfeiture complaint, ruling that as an innocent owner, claimant was entitled to retain her title to the entire property. The government then moved to amend the judgment, arguing that it had a right to the husband's interest, but that claimant could retain exclusive use of it during her lifetime, and the right to obtain title in fee simple absolute if her husband predeceased her. The 3rd Circuit reversed the district court's ruling and adopted the government's interpretation. That interpretation best served the dual purposes of 21 U.S.C. section 881(a)(7), permitting the immediate forfeiture of the interest of the guilty spouse, and fully protecting the property rights of the innocent owner under the tenancy by the entireties. *U.S. v. Parcel of Real Property Known as 1500 Lincoln Avenue*, __ F.2d __ (3rd Cir. Nov. 7, 1991) No. 91-3159.

2nd Circuit holds that government waived its right to a substitution of assets by entering letter agreement. (970) In lieu of a formal RICO forfeiture hearing, defendants entered into a letter agreement with the government in which they agreed to forfeit $22 million in cash in full satisfaction of the forfeiture penalties in 18 U.S.C. section 1963. To secure the payments, defendant delivered affidavits confessing judgment in the amount of $22 million. After defendant's default, the government filed the confessions of judgment and moved for an Order of Forfeiture for the $22 million. The district court then granted the government's motion under 18 U.S.C section 1963(m) for a substitution of assets, and entered a forfeiture order vesting in the government title to defendant's interest in various corporations. The 2nd Circuit reversed, holding that by entering the letter agreement rather than submitting the forfeiture issue to the jury, the government waived its rights, including the right to a substitution of assets under section 1963(m). While the agreement contemplated the sale of the properties to raise the $22 million in the event of defendant's default, it did not contemplate the automatic vesting of title to the properties in the government. *U.S. v. Paccione*, __ F.2d __ (2nd Cir. Nov. 4, 1991) No. 91-1325L.

11th Circuit holds that forfeiture provision of gambling statute includes real property. (970) Following the 2nd, 7th and 8th Circuits, the 11th Circuit held that 18 U.S.C. section 1955(d), which provides for the forfeiture of "any property" used for illegal gambling purposes, applies to real property. The plain meaning of the words "any property" necessarily encompasses real property. Moreover, at the time of its enactment, section 1955 was part of the Organized Crime Control Act of 1970, which also included the RICO and CCE statutes. The civil forfeiture provisions of RICO and CCE both have been interpreted to include real property. Although in 1984 the RICO and CCE forfeiture provisions were amended to expressly include real property while section 1955(d) was not, the court refused to find any negative implication from Congress' failure to act. *U.S. v. Land*, __ F.2d __ (11th Cir. Oct. 31, 1991) No. 90-7788.

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

Vol. 3, No. 1 | FEDERAL SENTENCING GUIDELINES AND FORFEITURE CASES FROM ALL CIRCUITS. | November 4, 1991

IN THIS ISSUE:

- 2nd Circuit affirms firearm enhancement even though firearms offense was treated as drug offense. Pg. 3
- 4th Circuit forbids reliance on information from cooperation agreement to deny substantial assistance departure. Pg. 5
- 8th Circuit rejects disparity in charging decision as basis for downward departure. Pg. 6
- 4th Circuit upholds converting cash into drug equivalency to determine offense level. Pg. 6
- 10th Circuit reverses inclusion of uncharged drugs where information not reliable. Pg. 8
- 9th Circuit holds that manager must have managed at least one other criminally responsible person. Pg. 9
- 1st Circuit rejects obstruction enhancement because defendant's statement did not impede investigation. Pg. 11
- D.C. Circuit holds drug rehabilitation does not justify downward departure. Pg. 11
- 7th Circuit rejects criminal history departure based on heinous prior offense. Pg. 14
- 9th Circuit reverses downward departure for lack of prior record, restitution, acceptance of responsibility, and family ties. Pg. 15
- 11th Circuit upholds reliance on hearsay to determine that drug was crack cocaine. Pg. 16

Pre-Guideline Sentencing

11th Circuit remands where unclear whether judge applied guidelines or pre-guidelines law. (100) Both of the offenses alleged against defendant occurred pre-guidelines, but the transcript of the sentencing hearing did not make it clear whether the district court applied the guidelines or pre-guidelines law. Facially, the hearing appeared to have been conducted as one pursuant to the guidelines. The 11th Circuit vacated the sentences and remanded for resentencing with instructions for the district court to resentence defendant under the applicable standard. *U.S. v. Smith*, __ F.2d __ (11th Cir. Oct. 22, 1991) No. 88-5187.

Guideline Sentencing, Generally

9th Circuit refuses to apply "rule of lenity" in interpreting the term "sophisticated." (110)(345) The rule of lenity "applies both to the interpretations of the substantive ambit of criminal prohibitions and to the penalties they impose." "The mere possibility of articulating a more narrow construction of a criminal statute, however, is not sufficient to trigger lenity." In this case, the issue turned on whether the term "sophisticated" had a well-recognized meaning. Although the guidelines do not define the term, the 9th Circuit followed the 5th and 11th Circuits in holding that the term was sufficiently clear to allow the higher base offense level under guideline section 2M5.2 to be applied to defendants who exported intermediate ballistic missile components. *U.S. v. Helmy*, __ F.2d __, (9th Cir. Oct. 28, 1991) No. 89-10659.

1st Circuit upholds mandatory minimum sentence against constitutional challenge. (120)(245) The 1st Circuit rejected defendant's contention that the five year mandatory sentencing provision of 18 U.S.C. section 924(c)(1) was unconstitutional because it fails to provide for individualized sentencing and precludes discretion on the part of the trial judge. There is no constitutional right, in non-capital cases, to individualized sentencing. Legislatures are free to provide for

SECTION

100 Pre-Guidelines Sentencing, Generally

110 Guidelines Sentencing, Generally
115 Rule 35 Motion to Correct Sentence
120 Constitutional Issues, Generally
125 Double Counting/Double Jeopardy
130 Ex Post Facto/Retroactivity, Generally
131 Amendments To Guidelines
132 Continuing Offenses/Conspiracy
135 Due Process
140 Cruel and Unusual Punishment
145 Statutory Challenges To Guidelines

150 Application Principles, Gen. (Chap. 1)
160 Definitions (More Than Minimal Planning, Etc.) (§1B1.1)
165 Stipulation to More Serious Offense *(See also 795)* (§1B1.2)
170 Relevant Conduct, Generally (§1B1.3) *(For Drug Relevant Conduct, see 260*
175 Acquitted, Dismissed, Uncharged Conduct *(for use in Departures see 718)*
180 Use of Commentary/Policy (§1B1.7)
185 Information Obtained During Cooperation Agreement (§1B1.8)
190 Application to Indians, Assimilated Crimes, Juveniles, Misd. (§1B1.9)

200 Offense Conduct, Generally (Chapter 2)
210 Homicide, Assault (§2A1-2)
215 Sexual Abuse, Kidnapping, Air Piracy, Threatening Comm. (§2A3-6)
220 Theft, Embezzlement, Burglary (§2B1-2)
224 Robbery, Extortion (§2B3)
226 Commercial Bribery, Counterfeiting, Forgery, VIN Nos. (§2B4-6)
230 Public Officials, Offenses (§2C)
240 Drug Offenses, Generally (§2D)
242 Constitutional Issues
245 Mandatory Minimum Sentences
248 Telephone Counts (21 U.S.C. 843(b))
250 Calculating Weight or Equivalency
251 "Mixtures"/Purity
252 Laboratory Capacity/Precursors
253 Marijuana/Plants
254 Estimating Drug Quantity
260 Drug Relevant Conduct, Generally
265 Amounts Under Negotiation
270 Dismissed/Uncharged Conduct
275 Conspiracy/"Foreseeability"
280 Possession of Weapon During Drug Offense, Generally (§2D1.1(b))
284 Cases Upholding Enhancement
286 Cases Rejecting Enhancement
290 RICO, Loan Sharking, Gambling (§2E)
300 Fraud (§2F)
310 Sexual Exploitation of Minors (§2G)
315 Civil Rights, Political Offenses (§2H)
320 Contempt, Obstruction, Perjury, Impersonation, Bail Jumping (§2J)
330 Firearms, Explosives, Arson (§2K)
340 Immigration Offenses (§2L)
345 Espionage, Export Controls (§2M)
348 Food, Drugs, Odometers (§2N)
350 Escape, Prison Offenses (§2P)
355 Environmental Offenses (§2Q)
360 Money Laundering (§2S)
370 Tax, Customs Offenses (§2T)
380 Conspiracy/Aiding/Attempt (§2X)
390 "Analogies" Where No Guideline Exists (§2X5.1)

400 Adjustments, Generally (Chapter 3)
410 Victim-Related Adjustments (§3A)
420 Role in Offense, Generally (§3B)
430 Aggravating Role: Organizer, Leader, Manager or Supervisor (§3B1.1)
431 Cases Finding Aggravating Role
432 Cases Rejecting Aggravating Role
440 Mitigating Role: Minimal or Minor Participant (§3B1.2)
443 Cases Finding Mitigating Role
445 Cases Rejecting Mitigating Role
450 Abuse of Trust/Special Skill (§3B1.3)
460 Obstruction of Justice (§3C)
461 Cases Finding Obstruction
462 Cases Rejecting Obstruction
470 Multiple Counts (§3D)
480 Acceptance of Responsibility, Gen. (§3E)
482 As to "Related" Conduct
484 Constitutional Issues
486 Probation Interview/Cooperation
488 Timeliness, Sincerity, Minimizing Role
490 Effect of Guilty Plea
492 Effect of Perjury/Obstruction
494 Other Post-Arrest Misconduct

500 Criminal History, Generally (§4A1.1)
504 Prior Convictions (§4A1.2)
508 Departures for Criminal History (§4A1.3)
510 Cases Upholding
514 Cases Rejecting
520 Career Offenders (§4B1.1)
530 Criminal Livelihood (§4B1.3)

550 Determining the Sentence (Chapter 5)
560 Probation (§5B) *(for Revocation, see 800)*
570 Pre-Guidelines Probation Cases
580 Supervised Release (§5D) *(Rev. see 800)*
590 Parole
600 Custody Credits
610 Restitution (§5E4.1)
620 Pre-Guidelines Restitution Cases
630 Fines and Assessments (§5E4.2)
640 Community Confinement, Etc. (§5F)
650 Consecutive Sentences (§5G)
660 Specific Offender Characteristics (§5H)
670 Age, Education, Skills (§5H1.1-.2)
680 Physical and Mental Conditions, Drug and Alcohol Abuse (§5H1.3-.4)
690 Employment, Family Ties (§5H1.5-.6)

700 Departures, Generally (§5K)
(for Criminal History Departures, see 508, for Refusal to Depart, see 860)
710 Substantial Assistance Departures §5K1)
712 Necessity for Government Motion
715 Specific Grounds for Departure (§5K2)
716 Disparity Between Co-Defendants
718 Acquitted, Dismissed, Uncharged Conduct *(for consideration as "Relevant Conduct," see 175, 270)*
719 "Aberrant" Behavior, Rehabilitation
721 Physical or Psychological Injury, Abduction, Restraint (§5K2.1-.4)
725 Property Damage, Weapons, Disruption of Gov't. Function, Extreme Conduct, Facilitating Other Offense (§5K2.5-.9)
730 Self Defense, Necessity, Duress, Diminished Capacity (§5K2.10-.13)
734 National Security, Public Health and Safety, Terrorism (§5K2.14-.15)
736 Specific Offender Characteristics (§5H)
738 Drug Cases

750 Sentencing Hearing, Generally (§6A)
(for Waiver by Failure to Object, see 855)
755 Burden of Proof
758 Discovery at Sentencing
760 Rule 32, Presentence Report (§6A1.2)
761 Notice/Disclosure of Information
765 Resolution of Disputes (§6A1.3)
770 Information Relied On/Hearsay *(for Dismissed, Uncharged Conduct, see 175, 718)*
772 Pre-Guidelines Cases
775 Statement of Reasons For Sentence Within Range (18 U.S.C. §3553)

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

800 Violations of Probation and Supervised Release (Chapter 7)

840 Sentencing of Organizations (Chapter 8)

850 Appeal of Sentence (18 U.S.C. §3742)
855 Waiver by Failure to Object
860 Refusal to Depart Not Appealable
865 Overlapping Ranges, Appealability of
870 Standard of Review, Generally *(See also substantive topics)*

880 Habeas Corpus/28 U.S.C. 2255 Motions

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

mandatory sentences for particular offenses. The court also rejected defendant's claim that the mandatory sentencing scheme deprived him of effective assistance of counsel by depriving him of the opportunity to present evidence at sentencing. *U.S. v. Campusano*, __ F.2d __ (1st Cir. Oct. 17, 1991) No. 91-1317.

4th Circuit upholds obstruction enhancement for misrepresenting attorneys' fees to probation officer. (120)(461) During his presentence interview, defendant told his probation officer that he had paid his attorney $6,000 in attorneys' fees, when in fact he had paid him $60,000. The 4th Circuit affirmed this misrepresentation as a ground for an obstruction of justice enhancement. The false statement was material, because it affected the court's ability to impose an appropriate fine. The court rejected defendant's claim that the statement was obtained in violation of his 5th Amendment right against self-incrimination and his 6th Amendment right to counsel. A defendant who pleads guilty waives his right to remain silent. *Miranda* warnings are not required prior to routine presentence interviews. Moreover, there was no 6th Amendment right to counsel because the presentence interview is not a critical stage of the criminal proceedings. *U.S. v. Hicks*, __ F.2d __ (4th Cir. Oct. 23, 1991) No. 90-5627.

5th Circuit remands because court failed to apply rule of lenity to overlapping penalties. (120)(245) Defendants contended that the 1988 version of 21 U.S.C. section 841(b)(1) was unconstitutionally vague because it provided two different penalties for the same offense. Subsection (A)(viii) provided for 10 years to life if the offense involved at least 100 grams of a mixture containing methamphetamine, while subsection (B)(viii) provided for imprisonment of only 5 to 40 years if the offense involved at least 100 grams of a mixture containing methamphetamine. The 5th Circuit ruled that the inconsistent penalties did not invalidate the section, but that the district court erred in failing to apply the rule of lenity. This directly affected one defendant's sentence, raising his offense level as a career offender from 34 to 37. It also may have influenced the decision to sentence the other defendant at the top of his guideline range. On remand the court was also instructed to allow the government to point to evidence in the record that the 269 grams of methamphetamine seized was at least 37 percent pure. If so, there was at least 100 grams of pure methamphetamine, and the stricter penalty scheme would be triggered. *U.S. v. Kinder*, __ F.2d __ (5th Cir. Oct. 21, 1991) No. 90-8579.

9th Circuit holds that phrase "sophisticated weaponry" is not vague. (120)(345) Appellants argued that section 2M5.2 violated due process and was vague on its face because nothing in the guideline defined the term "sophisticated" as it applied to weaponry. The 9th Circuit rejected the argument, based on evidence that the only use of the material exported by the appellants was for the production of ballistic missiles. The material was necessary to construct flexible engine nozzles and the State Department had specifically found that it met the "munitions list" criteria. The court said that because "missiles fall within any common sense definition of 'sophisticated weaponry' and because the government established that the materials exported here were intended for use as missile components, the guideline is not vague with respect to appellants." *U.S. v. Helmy*, __ F.2d __, (9th Cir. Oct. 28, 1991) No. 89-10659.

2nd Circuit affirms firearm enhancement even though firearms offense was treated as drug offense. (125)(284) Defendant was convicted of drug charges and being a felon in possession of a firearm. Section 2K2.1(c)(2) says that where the weapon is possessed in connection with another offense, the guideline for the other offense applies if the offense level is higher. This resulted in treating the weapons offense as a drug offense under section 2D1.1(c). The district court then grouped the weapons offense with the other drug offenses under section 3D1.2(d), and enhanced the sentence under guideline section 2D1.1(b) for possession of a weapon during a drug trafficking crime. The 2nd Circuit affirmed, stating that although the enhancement for gun possession might appear to be double counting, this dual use of the gun was intended by the Sentencing Commission. The cross-reference to the drug guideline includes all adjustments appropriate to drug offenses, including the enhancement for gun possession. Moreover, it was proper to add the gun enhancement to the offense level for the aggregated drug quantity, even though the gun was only possessed in connection with a small part of the drugs. *U.S. v. Patterson*, __ F.2d __ (2nd Cir. Oct. 22,

The **Federal Sentencing and Forfeiture Guide Newsletter** *is part of a comprehensive service that includes a main volume, bimonthly supplements and biweekly newsletters. The main volume, (3rd Ed., hardcover, 1100 pp.), covers ALL Sentencing Guidelines and Forfeiture cases published since 1987. Every other month the newsletters are merged into a supplement with full citations and subsequent history.*

Annual Subscription price: $250 (includes main volume, 6 supplements and 26 newsletters a year.) Main volume (3rd Ed. 1991): $80.

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

Publication Manager:
- Beverly Boothroyd

1991) No. 91-1186.

8th Circuit upholds separate sentences for armed robbery and use of a firearm against double jeopardy claim. (125) Defendant received a 33-month sentence for committing an armed robbery in violation of 18 U.S.C. section 2113(a) & (d) and a consecutive 60-month sentence for use of a firearm in violation of 18 U.S.C. section 924(c). The 8th Circuit upheld both sentences against defendant's claim that they violated double jeopardy by imposing two penalties for the same conduct. Following its decision in *U.S. v. Doffin*, 791 F.2d 118 (8th Cir.) *cert. denied*, 479 U.S. 861 (1986), the court noted that the double jeopardy clause does no more in this context than prevent the sentencing court from prescribing greater punishment than the legislature intended. Since section 924(c) applies even where another criminal statute provides for enhanced punishment for using a weapon, Congress clearly authorized the cumulative punishment. The court found nothing to indicate that Congress did not intend the cumulative punishment to continue to apply after the Sentencing Reform Act. *U.S. v. Halford*, __ F.2d __ (8th Cir. Oct. 25, 1991) No. 91-1246.

7th Circuit upholds application of guidelines to "straddle" conspiracy. (132) Defendant contended that since his conspiracy began prior to the effective date of the guidelines, it violated the ex post facto clause to apply the guidelines to the offense. The 7th Circuit rejected this contention, since the conspiracy continued past the effective date of the guidelines. Moreover, the constitutional prohibition against ex post facto punishment is directed principally toward punishment for acts not illegal at the time of their commission or an unexpected punishment. Defendant's participation in the distribution of cocaine and heroin was at no time legal. *U.S. v. Rosa*, __ F.2d __ (7th Cir. Oct. 11, 1991) No. 89-2704.

7th Circuit holds failed attempt to smuggle drugs was in furtherance of conspiracy. (132)(380) All of the marijuana imported by a drug conspiracy came into the country prior to November 1, 1987, the effective date of the guidelines. However, the drug ring unsuccessfully attempted to smuggle two additional drug shipments into the country after November 1, 1987. The 7th Circuit held that the failed attempts to smuggle drugs were in furtherance of the importation conspiracy. Therefore, the conspiracy was a straddle crime, and the guidelines were applicable to the offense. *U.S. v. Morrison*, __ F.2d __ (7th Cir. Oct. 10, 1991) No. 89-2284.

5th Circuit holds that defendant need not know gun was stolen for enhancement under section 2K2.1(b)(1). (135)(330) Defendant was convicted of being a felon in possession of a firearm and received a one point enhancement under guideline section 2K2.1(b)(1) because the firearm was stolen. Following the 8th, 9th and D.C. Circuits, the 5th Circuit rejected defendant's claim that the guideline requires a defendant to have knowledge that the weapon was stolen. The guidelines are explicit when they wish to impose a mens rea requirement. The rule of lenity was not applicable because the statute was not ambiguous. The court also rejected defendant's claim that the lack of a mens rea requirement violated due process. The enhancement was not an independent crime but was part of the sentencing court's quest to formulate a proper sentence. Intent need not be proven for each element a judge considers at sentencing. *U.S. v. Singleton*, __ F.2d __ (5th Cir. Oct. 16, 1991) No. 90-1962.

8th Circuit rejects claim that guidelines violate due process by failing to provide a standard of proof. (135)(755) Defendant claimed that the guidelines violated his Fifth Amendment due process rights by failing to provide a standard of proof for the district court to apply in finding facts upon which a sentence is based. He also contended that the district court improperly failed to apply any express standard of proof. The 8th Circuit rejected these challenges. No particular standard of proof for fact-finding is required at the sentencing phase. The sentencing judge need only make findings sufficient to provide for a meaningful appeal. Here there was more than sufficient evidence to support the district court's findings. The appellate court summarily rejected defendant's claim that the guidelines unduly limit the sentencing judge's discretion and improperly grant discretion to the prosecutor. *U.S. v. Abdullah*, __ F.2d __ (8th Cir. Oct. 16, 1991) No. 90-1615.

10th Circuit rejects due process challenge to guidelines. (135)(710) Defendant contended that the guidelines violate due process because they fail to provide a departure procedure analogous to 18 U.S.C. section 3553(e) and guideline section 5K1.1 for departing downward from a statutory minimum sentence. Defendant was the least culpable participant in a drug conspiracy, but the district court was unable to depart below the statutory minimum of 120 months. Other more culpable defendants received downward departures based on their substantial assistance, and received sentences of 72 to 84 months. The 10th Circuit found no due process violation. Defendant's argument was "nothing more than a call for a reallocation of power in the sentencing process." Defendants in non-capital cases have no due process right to a discretionary, individualized sentence. The substantial assistance provisions do not deny equal protection because a rational connection exists between obtaining information concerning narcotics and providing the opportunity for a sentence reduction in exchange for such information. *U.S. v. Horn*, __ F.2d __ (10th Cir. Oct. 9, 1991) No. 90-5196.

General Application Principles (Chapter 1)

5th Circuit reviews relevant conduct determination under clearly erroneous standard. (170)(260)(870) The 5th Circuit held that a district court's determination that certain transac-

tions were part of the conspiracy for which a defendant was convicted is subject to review under the "clearly erroneous" standard. The district court is in the best position to determine what constitutes relevant conduct. *U.S. v. Lokey*, __ F.2d __ (5th Cir. Oct. 10, 1991) No. 90-8245.

D.C. Circuit permits criminal history departure for unrelated prior embezzlement. (170)(510) Defendant pled guilty to two counts of fraud arising out of his theft and misuse of a credit card. The district court departed upward, adding three points to defendant's criminal history for his admitted embezzlement of $56,000 from an art gallery where he had been employed. The embezzlement did not result in a criminal conviction. The D.C. Circuit rejected defendant's claim that the embezzlement was "related" to the instant offense and therefore was not a proper basis for a criminal history departure. The art gallery incident occurred over a year before the fraud. Defendant perpetrated the instant fraud by relying on information from an individual he did not meet until after he had left the art gallery. *U.S. v. Jones*, __ F.2d __ (D.C. Cir. Oct. 25, 1991) No. 90-3266.

7th Circuit upholds firearms enhancement despite acquittal on firearms charge. (175)(284)(755) The 7th Circuit affirmed an enhancement under section 2D1.1(b) for possession of a firearm during a drug trafficking crime even though defendant was acquitted of possessing the weapon during a drug trafficking crime. The fact that the jury did not find him guilty beyond a reasonable doubt did not prevent the court from finding the facts under the guidelines by a preponderance of the evidence. The court rejected defendant's contention that his possession was analogous to an unloaded hunting rifle in the closet for which an enhancement is improper under application note 3 to section 2D1.1(b). Although there was testimony that defendant used the gun for private purposes such as shooting pigeons, the district court found that the semi-automatic pistol and loaded clip found in defendant's van were readily accessible and available to defendant during the cocaine transaction which took place in the van. *U.S. v. Welch*, __ F.2d __ (7th Cir. Oct. 15, 1991) No. 90-2676.

10th Circuit upholds firearms enhancement despite acquittal on firearms charge. (175)(284) The 10th Circuit upheld an enhancement under guideline section 2D1.1(b) despite defendant's acquittal of carrying a firearm in connection with a drug trafficking crime. There was evidence that two guns had been located for several days at the arrest scene; that they were handled at will by those persons who lived at the apartment; and that they were kept for the protection of the conspiracy participants and the money and the cocaine. That the jury did not convict the defendant of possessing the weapon during a drug trafficking crime did not bar the sentencing judge from considering this evidence. *U.S. v. Coleman*, __ F.2d __ (10th Cir. Oct. 16, 1991) No. 90-5207.

7th Circuit upholds criminal history departure where defendant could have been classified as a career offender. (180)(510)(520) Defendant fell within criminal history category VI, resulting in a guideline range of 51 to 63 months. The district court departed upward to 15 years because (1) an additional 14 points could have been added to defendant's criminal history score if certain offenses which were not included in defendant's history due to their age were included, and (2) another 12 points could have been added for six bank robberies which were not considered as separate crimes because they had been consolidated for sentencing. The 7th Circuit affirmed, finding that the district court could have designated defendant as a career offender under section 4B1.1 based on the six bank robberies. The court rejected the conclusion in application note 3 to section 4A1.2 that two convictions, even if completely unrelated factually, may be characterized as one conviction for career offender and criminal history purposes if they are consolidated for sentencing. Since the applicable sentence for a career offender was 151 to 188 months, the extent of the departure was reasonable. *U.S. v. Elmendorf*, __ F.2d __ (7th Cir. Oct. 11, 1991) No. 89-3378.

4th Circuit forbids reliance on information from cooperation agreement to deny substantial assistance departure. (185)(710) Defendant's plea agreement provided that he would cooperate with authorities, and that any evidence obtained from defendant would not be used against him in any further criminal proceedings. During defendant's debriefing, he admitting selling about 400 pounds of marijuana per year since 1984. This information was not used to calculate his offense level because it was not known to the government before his cooperation. The government moved for a downward departure for substantial assistance, but the district court refused to depart because of defendant's admission of involvement in heavy marijuana trafficking. The 4th Circuit vacated and remanded for resentencing. Although guideline section 1B1.8(a) only prohibits the use of such information in determining a defendant's guideline range, Application Note 1 explains that it is the policy of the Sentencing Commission that a defendant not receive an increased sentence as a result of such information. Judge Wilkins dissented. *U.S. v. Malvito*, __ F.2d __ (4th Cir. Oct. 16, 1991) No. 90-5822.

Offense Conduct, Generally (Chapter 2)

9th Circuit holds that lack of statutory minimum sentence does not permit guideline to be ignored. (220)(245) In *U.S. v. Sharp*, 883 F.2d 829 (9th Cir. 1989), the 9th Circuit held that a statutory mandatory minimum sentence must be imposed even when the guideline sentence would be lower. Based on *Sharp*, the defendant in this case argued that since

the embezzlement statute does not specify a minimum sentence, the minimum term of "no imprisonment" must control over the guideline sentence. Thus, he argued that it was proper for the district court to impose a sentence of probation even though the guidelines called for 15 to 21 months. The 9th Circuit rejected the argument, stating that Congress could not have intended for the silence of the statute to invalidate guideline sentences. *U.S. v. Berlier*, __ F.2d __ (9th Cir. Oct. 31, 1991) No. 90-10376.

8th Circuit rejects disparity in charging decision as basis for downward departure. (245)(715) Defendant received a 33-month sentence for armed robbery in violation of 18 U.S.C. section 2113(a) and (d), and a consecutive 60-month sentence for use of a firearm in violation of 18 U.S.C. section 924(c). He argued that the district court should have found that it had the authority to depart downward from the 60-month sentence required by section 924(c) because two persons convicted of the same conduct–robbing a bank with a firearm–could be charged and sentenced differently. One charged only with violating section 2113(a) & (d) would receive a much lighter sentence than one charged with violating both section 2113(a) (d) and section 924(c). According to defendant, this would violate the goal of unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct. The 8th Circuit, noting that it had previously rejected this argument in *U.S. v. Foote*, 898 F.2d 659 (8th Cir.), *cert. denied*, 111 S.Ct. 112 (1990), found no error. *U.S. v. Halford*, __ F.2d __ (8th Cir. Oct. 25, 1991) No. 91-1246.

9th Circuit bases methamphetamine offense level on total weight of mixture. (250) A footnote to section 2D1.1(c), added to the guidelines by the 1989 amendments, requires the offense level to be based on the entire weight of any mixture in which a controlled substance is found. However, a footnote treats methamphetamine differently: "in the case of a mixture or substance containing PCP or methamphetamine, use the offense level determined by the entire weight of the mixture or substance or the offense level determined by the weight of the pure PCP or methamphetamine, whichever is greater." The 9th Circuit held that this footnote was "perfectly clear and consistent on its face." Therefore there was no need to interpret it. The presentence report correctly calculated the amount of pure methamphetamine in the mixture. *U.S. v. Bressette*, __ F.2d __ (9th Cir. October 24, 1991) No. 90-50621.

10th Circuit holds defendant waived right to independent weighing of heroin. (250)(855) The 10th Circuit upheld the district court's denial of defendant's motion for an independent weighing of the heroin. The court agreed that Fed. R. Crim. P. 16(a)(1)(C) entitled defendant to an independent weighing because the weight of the heroin could affect the sentence. However, defendant's motion stated that once the government provided a copy of the official laboratory report the motion might become moot. The government did not oppose the weighing and stated that the lab reports had been provided to defendant. The district court then ordered the government to produce representative samples for independent chemical testing and did not mention, except by a general denial of all other requests, the weighing issue. Defendant later pled guilty without raising further objections. Under these circumstances, defendant waived his right to the independent weighing. When defendant failed at sentencing to challenge the weight of the heroin in the charged offense, he waived the right to challenge it on appeal. *U.S. v. Padilla*, __ F.2d __ (10th Cir. Oct. 21, 1991) No. 89-2179.

4th Circuit upholds converting seized cash into drug equivalency to determine base offense level. (254) Various drugs, drug paraphernalia and $279,000 in cash were seized from defendant's home. In determining defendant's base offense level, the district court converted the seized cash into an equivalent cocaine quantity, which was then added to the drugs actually seized from defendant. The equivalent cocaine quantity was determined by dividing $32,000 (the price that defendant had previously agreed to sell a kilogram of cocaine) into $279,000 to arrive at 8.736 kilograms of cocaine. The 4th Circuit held that the conversion of cash into drugs was authorized by application note 4 to section 2D1.4, which states that the judge may approximate quantity when the amount of drugs seized does not reflect the scale of the offense. Here defendant admitted to DEA agents that he had obtained a majority of the money from other previous drug transactions and that if it had not been seized, it would have been picked up by an individual to be used to purchase more cocaine. *U.S. v. Hicks*, __ F.2d __ (4th Cir. Oct. 23, 1991) No. 90-5627.

7th Circuit upholds basing drug quantity on estimation by government witness. (254) A government witness testified that on average, per month, he sold cocaine for the defendant in the amount of "one to two ounces maybe, at the most." The 7th Circuit upheld the district court's determination that defendant was involved in the distribution of one ounce of cocaine per month. The transaction which led to defendant's arrest corroborated the witness' testimony that he was involved with the defendant in a conspiracy to distribute cocaine and gave credence to his estimate of the amount of cocaine distributed. The witness had knowledge of the amount of cocaine that was available for distribution as well as the amount distributed. *U.S. v. Welch*, __ F.2d __ (7th Cir. Oct. 15, 1991) No. 90-2676.

7th Circuit finds inadequate factual findings as to defendant's drug transactions. (254) Defendant was involved in a conspiracy which imported large quantities of marijuana. The district court found that defendant was responsible for importing 6600 pounds of marijuana. The 7th Circuit vacated and remanded for additional findings. The court had failed to detail why 6600 pounds was chosen. It did not say

which importation episodes it considered in arriving at its calculation, nor did it find that defendant participated in the importation activities that were the basis of the substantive charges for which he was acquitted. Such specificity was necessary in light of defendant's argument that he joined the conspiracy months after it had begun and therefore should not have been held liable for its earliest importations. *U.S. v. Morrison*, __ F.2d __ (7th Cir. Oct. 10, 1991) No. 89-2284.

10th Circuit upholds estimating drug quantity based upon testimony of government witness. (254)(770) Defendant argued that the court erred by basing its ruling that he was involved with 500 grams of crack cocaine upon the "speculative and inherently unreliable testimony" of a government witness. The witness testified that defendant and his co-conspirators were awaiting a shipment of approximately five kilograms of crack cocaine and heroin. The 10th Circuit upheld the district court's ruling since it was supported by testimony other than the disputed testimony. The same government witness also testified that he and defendant had transported "about half a kilo or 18 ounces each time" of crack and that they made about four trips. Any half kilogram, or 500 gram amount, could have satisfied the weight requirement for a base offense level of 36. "Though an estimate, this testimony about the shipments in general comprised the type of evidence of historical transactions that is not inherently unreliable." The trial judge specifically found the witness to be credible and reliable. *U.S. v. Coleman*, __ F.2d __ (10th Cir. Oct. 16, 1991) No. 90-5207.

11th Circuit upholds drug quantity despite inconsistency between trial and grand jury testimony. (254)(770) An informant testified that defendants had acquired two kilograms on a trip to Miami in November and three kilograms on a second trip to Miami in December. Defendants contended that the informant's testimony was unreliable because he testified before the grand jury that three kilograms were involved in the first Miami trip and two kilograms were involved in the second Miami trip. The 11th Circuit upheld the district court's determination, finding that the court allowed for the witness' inconsistent testimony. The court found that the December acquisition involved two kilograms, which was added to the two kilograms from the November trip, plus the negotiation involving one kilogram. Thus the cumulative amount was five kilograms. *U.S. v. Griffin*, __ F.2d __ (11th Cir. Oct. 22, 1991) No. 90-8200.

1st Circuit affirms inclusion of cocaine defendant promised to supply undercover agents. (265) Defendant contended that the cocaine involved in his conspiracy was two to three kilograms, rather than the 15 to 50 kilograms used by the district court. The 1st Circuit held that the calculation was supported by evidence that defendant promised to supply undercover agents five to 10 kilograms of cocaine at 15-day intervals. Defendant contended that the court should have excluded the quantities he negotiated to supply because he did not intend to produce and was not reasonably capable of producing those quantities. The district court found, however, that defendant "was not just puffing" and that he was able to produce the promised quantities. *U.S. v. Moreno*, __ F.2d __ (1st Cir. Oct. 17, 1991) No. 90-2185.

1st Circuit upholds consideration of drugs involved in transaction at which defendant was not present. (270) Defendant contended that it was improper for the district court to consider at sentencing 2.014 grams of cocaine that her boyfriend gave to undercover agents without her knowledge or participation. The 1st Circuit affirmed the offense level calculation, ruling that the 2-gram transaction was part of the same course of conduct for which defendant pled guilty. The two different distributions were essentially related stages of the same transaction. The 2 grams was a sample for which the boyfriend did not demand payment, and served as a direct antecedent to the sale of the larger quantity of cocaine for which defendant pled guilty. Moreover, given defendant's extensive participation in the planning of the entire transaction, and in the collection of the proceeds, the district court could have reasonably concluded that defendant knew of the 2-gram transaction. *U.S. v. DiIorio*, __ F.2d __ (1st Cir. Oct. 16, 1991) No. 91-1340.

5th Circuit finds no breach of plea agreement despite government's inclusion of uncharged drugs. (270)(790) Defendants contended that the government violated their plea agreement not to prosecute them for additional offenses by recommending inclusion of 17 ounces of methamphetamine not involved in the count of conviction. The 5th Circuit rejected this contention, ruling that the government kept its promise not to prosecute, because including the additional 17 ounces in sentencing was not equivalent to prosecution. The court also rejected defendants' claim that their guilty pleas were rendered involuntary by the government's alleged misrepresentation that their base offense level would be based on only 269 grams. The guilty pleas were voluntary because the district court informed both defendants of the maximum possible statutory punishment they faced. *U.S. v. Kinder*, __ F.2d __ (5th Cir. Oct. 21, 1991) No. 90-8579.

5th Circuit affirms consideration of drugs that defendant said he had "on the street." (270) Defendant was arrested after purchasing half a pound of methamphetamine from an undercover agent. Prior to his arrest, he told the agent that he had not wanted to buy a large quantity of the drug the week before because he had 17 ounces of methamphetamine "on the street" and had not collected all of the money from the sale of it. The 5th Circuit affirmed the district court's consideration of the 17 ounces in determining defendant's base offense level. Defendant's claim that this statement was mere "puffery" was belied by another undercover agent who testified that he had information concerning "multiple ounces" sold by defendant. Defendant's high sales volume was also supported by an informant who told the undercover

agent that defendant sold from eight to 16 ounces of methamphetamine a week. It was also proper to hold defendant's brother responsible for the 17 ounces, since the evidence supported a conclusion that the brother worked closely with defendant in the conspiracy. *U.S. v. Kinder*, __ F.2d __ (5th Cir. Oct. 21, 1991) No. 90-8579.

10th Circuit reverses inclusion of uncharged drugs where information was not reliable. (270)(770)(855) The district court held defendant responsible for 3.8 grams of heroin outside the offense of conviction. Although the presentence report detailed defendant's involvement in several other drug transactions, they did not amount to 3.8 grams. The 10th Circuit remanded for resentencing, since the source of information for the 3.8 grams did not appear in the record. Although hearsay information may be used, some indicia of reliability is required. The court rejected the government's claim that because defendant did not specifically challenge the reliability of the information, the issue was not preserved for appeal. Defendant did object to the use of the 3.8 grams, and even if defendant did not specifically challenge the reliability of the information, the court should have made an independent determination on the reliability of the evidence. *U.S. v. Padilla*, __ F.2d __ (10th Cir. Oct. 21, 1991) No. 89-2179.

5th Circuit determines that old drug sales were part of same conspiracy despite lapse of time. (275)(380) In determining defendant's sentence, the district court considered defendant's drug transactions from 1984 to 1989. Defendant contended that the 1984 transactions were not part of the later conspiracy for which he was convicted because he moved to another town in 1985, and while he was there, he had no dealings with his co-conspirators. Moreover, he argued that the statute of limitation barred consideration of the 1984 transactions. The 5th Circuit upheld the inclusion of the 1984 transactions in defendant's base offense level. A single conspiracy is not converted into multiple conspiracies simply by lapse of time, change in membership, or a shifting emphasis in the location of the operation. The five-year limitations period for prosecuting the 1984 transactions did not expire until the fall of 1989, after defendant's arrest and indictment. In addition, guideline section 1B1.3(a)(2) does not limit the definition of relevant conduct to acts within the limitations period. *U.S. v. Lokey*, __ F.2d __ (5th Cir. Oct. 10, 1991) No. 90-8245.

7th Circuit holds that conspiracy defendant is responsible only for reasonably foreseeable conduct. (275) The 7th Circuit held that the district court improperly sentenced several conspirators for the total quantity of drugs without determining whether the drugs were reasonably foreseeable to each defendant. The district judge offered a generic explanation for assigning the same offense level to each conspirator. The appellate court then determined, on a defendant-by-defendant basis, whether the defendant offered a meritorious argument for remanding their case for resentencing. The court remanded for resentencing several defendants who entered the conspiracy near its end, since they might not be accountable for the drugs involved in the earlier stages of the conspiracy. The court refused to remand two defendants who offered no reason to believe that they were involved in a narrower conspiracy. The case contains a detailed discussion of the foreseeability requirement in conspiracy cases. *U.S. v. Edwards*, __ F.2d __ (7th Cir. Oct. 15, 1991) No. 89-2880.

7th Circuit affirms that heroin distribution was reasonably foreseeable. (275) Defendant was charged with a conspiracy to distribute cocaine, heroin and marijuana. He eventually pled guilty only to conspiring to possess cocaine. His offense level was calculated on the basis of the full amount of drugs handled by the conspiracy, including three to ten kilograms of heroin. He contended that the heroin distribution was not reasonably foreseeable to him given his limited participation in the conspiracy. The 7th Circuit rejected the argument, ruling that the heroin distribution was reasonably foreseeable to him. He was not a peripheral co-conspirator. He had frequent contact with the central organizer of the drug distribution network. He conceded that he used code words such as "brown cars" and "white cars" in telephone conversations with the organizer in order to discuss heroin and cocaine transactions and that he was aware that the organizer used an area restaurant as the base for operations. *U.S. v. Rosa*, __ F.2d __ (7th Cir. Oct. 11, 1991) No. 89-2704.

4th Circuit affirms that defendant caused bodily injury despite victim's testimony. (290) Defendant was convicted of collecting extensions of credit by extortionate means and received a two level enhancement under section 2E2.1(b)(2) for causing bodily injury to his victim. The 4th Circuit affirmed the enhancement, even though the victim testified that defendant struck him because he lied to defendant and that he suffered no physical effects from the injury and there was "no malice involved." The victim's testimony exemplified that of a loan-sharking victim who fears the consequences of non-repayment and of testifying as a complaining witness. The district court found persuasive testimony by four witnesses who observed the victim within a few hours after the battery occurred. One witness heard the victim say "I had the [expletive] slapped out of me," and observed that the victim's face was red. Another noticed that the victim's face looked reddish and that the victim complained that his ear was ringing as a result of defendant's blow. An FBI agent testified that the victim's face looked a little puffy, while the victim's son testified that he observed a red mark on defendant's face. *U.S. v. Isaacs*, __ F.2d __ (4th Cir. Oct. 18, 1991) No. 90-5541.

8th Circuit affirms that defendant who concealed assets from bankruptcy officers violated a judicial "process."

(300) Guideline section 2F1.1(b)(3)(B) provides for a two level enhancement if the underlying offense involved the "violation of any judicial or administrative order, injunction, decree or process." The 8th Circuit affirmed an enhancement under this section, ruling that a defendant who committed bankruptcy fraud did violate a judicial "process" by fraudulently concealing his assets from bankruptcy court officers. *U.S. v. Lloyd*, __ F.2d __ (8th Cir. Oct. 18, 1991) No. 91-1688.

2nd Circuit upholds treating firearm count as drug count. (330)(470) Defendant was convicted of drug charges. Shortly thereafter, he was convicted of being a felon in possession of a firearm based upon his arrest while carrying a weapon en route to purchase drugs. The two indictments were consolidated for sentencing. In connection with the firearms offense, the district judge followed guideline section 2K2.1(c)(2), which provides that where a defendant possesses a weapon in connection with another offense, the guideline for the other offense applies if it results in a higher offense level. Since the drug guideline, section 2D1.1(c), resulted in a higher offense level, the judge treated the weapons offense as a drug offense. The judge then grouped the weapons offense with the other drug offenses under guideline section 3D1.2(d), and determined the base offense level by aggregating the drug quantities involved in the drug counts and the weapons count. The 2nd Circuit affirmed, ruling that the gun count was properly treated as a drug count, and then properly grouped with the other drug counts. *U.S. v. Patterson*, __ F.2d __ (2nd Cir. Oct. 22, 1991) No. 91-1186.

Adjustments (Chapter 3)

9th Circuit holds that manager must have managed at least one other criminally responsible person. (430) The 9th Circuit held that "in order for a defendant to receive an adjustment under 3B1.1(b) for his role as a manager or supervisor, the defendant must have managed or supervised at least one other participant–that is, a person who was criminally responsible for the commission of the offense." A person may be deemed criminally responsible even though that person has not been convicted. In the present case, the district court found that defendant's concealment of the exports required three shipping companies, three storage facilities, at least five knowing participants, and numerous unknowing participants. Since the district court did not find that any of these persons were criminally responsible, the sentence was vacated and remanded to make the required determination. *U.S. v. Helmy*, __ F.2d __, (9th Cir. Oct. 28, 1991) No. 89-10659.

10th Circuit orders court to reconsider role in offense based solely on offense of conviction. (430) Defendant contended that the district court improperly considered conduct outside the offense of conviction to impose a supervisory role enhancement. The government agreed that the adjustment must be based upon defendant's role in the offense of conviction, but contended that there was sufficient evidence in the record based upon defendant's role in the offense of conviction to support the enhancement. Since the case was being remanded on other grounds, the 10th Circuit ordered the district court to reconsider its determination, even though there was sufficient evidence to support the enhancement based solely on the offense of conviction. The district court sentenced defendant without the benefit of *U.S. v. Pettit*, 903 F.2d 1336 (10th Cir. 1990), which held that the factual basis for such an adjustment must come from a defendant's role in the offense of conviction. *U.S. v. Padilla*, __ F.2d __ (10th Cir. Oct. 21, 1991) No. 89-2179.

1st Circuit upholds leadership role where defendant conducted negotiations. (431) The 1st Circuit rejected defendant's claim that he was not an organizer, leader, manager or supervisor of a drug conspiracy under guideline section 3B1.1(c). There was no question that defendant's co-conspirator was distinctly subordinate to defendant. Defendant, not the co-conspirator, conducted the negotiations with the informant and with the undercover agents, and received payment for the cocaine. *U.S. v. Moreno*, __ F.2d __ (1st Cir. Oct. 17, 1991) No. 90-2185.

5th Circuit upholds older brother's leadership role. (431) Defendant contended that his two-point enhancement under guideline section 3B1.1(c) for being a leader of a criminal activity was improper because his role was no different from the other two participants. Any dominance he had over them, defendant contended, resulted from his relationship to them (boyfriend to one, older brother to the other), rather than his role in the criminal activity. The 5th Circuit found the evidence sufficient to uphold the enhancement. A police officer testified that an informant had advised authorities that defendant was in charge of the other two. Further, defendant's girlfriend informed an undercover agent that she took care of defendant's drug business for him. At defendant's meeting with the undercover agent to purchase drugs, defendant negotiated with the undercover agent, instructed his younger brother to test the drugs, give the agent the money and to take the drugs outside and wait for him. *U.S. v. Kinder*, __ F.2d __ (5th Cir. Oct. 21, 1991) No. 90-8579.

7th Circuit affirms leadership role for "prime mover" in setting up cocaine transactions. (431) The 7th Circuit affirmed a two level enhancement under guideline section 3B1.1(c) based upon defendant's leadership role in a drug conspiracy. Testimony at trial demonstrated that defendant was the "prime mover" in setting up the cocaine distribution organization. Defendant had approached a co-conspirator and asked him to become involved in selling cocaine. He then gave money to the co-conspirator in order to buy cocaine for defendant; defendant would in turn provide the co-

caine to others for distribution. *U.S. v. Welch*, __ F.2d __ (7th Cir. Oct. 15, 1991) No. 90-2676.

11th Circuit affirms leadership role of defendant who directed informant's drug distribution. (431) The evidence revealed that defendant, a co-conspirator in a drug ring, financed the apartment from which a co-conspirator-turned-government-informant sold drugs, subsequently arranged for a roommate to help the informant with the drug sales, had drugs delivered to the apartment, collected the proceeds from the drug sales, and planned and executed trips to obtain drugs. The 11th Circuit affirmed that this was sufficient evidence to justify a two level enhancement under guideline section 3B1.1(c) for being a manager or supervisor. That the co-conspirator was a government informant did not make the enhancement inapplicable, since the co-conspirator was an active member in the drug operation before he became a government agent, and thereafter continued to operate in the same capacity as far as defendant was concerned. *U.S. v. Griffin*, __ F.2d __ (11th Cir. Oct. 22, 1991) No. 90-8200.

7th Circuit finds district court failed to adequately explain basis for supervisorial enhancement. (432) Although the presentence report recommended a three level enhancement for each defendant based upon their managerial role in the offense, the district court imposed only a two level enhancement because it did not believe that many of the people involved in the conspiracy had been managed by defendants. The 7th Circuit remanded because the district court failed to adequately explain the factual basis for the enhancement. The district court gave no indication which of the alleged participants each defendant had supervised. It also remarked that at least some of the conspirators could not be characterized as followers of anyone. Although there might have been an adequate basis in the record to support the conclusion that defendants each supervised at least one other participant, the district court should determine this matter in the first instance. *U.S. v. Jewel*, __ F.2d __ (7th Cir. Oct. 21, 1991) No. 90-2001.

1st Circuit rules defendant waived minor participant issue by failing to present it to sentencing court. (440)(855) The 1st Circuit refused to consider defendant's claim that he was a minor participant in a drug smuggling offense because he failed to raise the issue in the district court. Defendant was offered ample opportunity to challenge the computation of his offense level and to raise any question regarding his alleged role as a minor participant. Defendant's failure to assert this claim at his sentencing hearing foreclosed him from raising it here. *U.S. v. Uricoechea-Casallas*, __ F.2d __ (1st Cir. Oct. 11, 1991) No. 90-1717.

1st Circuit rejects four-level reduction for defendant who was "loyal lieutenant" in boyfriend's drug activity. (445) Defendant contended that she should have received a four level, rather than three level, reduction in offense level based upon her minimal role in her boyfriend's drug activities. The 1st Circuit affirmed the denial of the four level reduction. Although defendant was clearly less culpable than her boyfriend, she acted as a "loyal lieutenant" in the drug deals. Defendant was well aware that her boyfriend hoped to arrange additional transactions of cocaine on a weekly basis. She also expressed a fear that the undercover agents might be cops, and suggested that future transactions be moved to an establishment known for cocaine trafficking. She also appeared at a meeting at which the agents paid for the drugs, and she counted the money. All of this belied any claim that she was unaware of the scope and structure of the boyfriend's activities. *U.S. v. DiIorio*, __ F.2d __ (1st Cir. Oct. 16, 1991) No. 91-1340.

5th Circuit rejects minor role for defendants who were involved with substantial quantities of marijuana. (445) The 5th Circuit rejected the contentions of two drug conspirators that they were entitled to a reduction based upon their minor role. One defendant was a regular customer of a drug dealer/conspirator during the period listed in the indictment, purchasing between 150 and 180 pounds of marijuana every three to 12 pounds. The other defendant was involved in transactions totalling at least 2,000 pounds. *U.S. v. Lokey*, __ F.2d __ (5th Cir. Oct. 10, 1991) No. 90-8245.

8th Circuit denies mitigating role adjustment to defendant who initiated transaction with undercover agent. (445) The 8th Circuit affirmed the court's denial of a minor or minimal role adjustment because defendant initiated the drug transaction with the undercover agent, had previously distributed drugs, and had a weapon to protect himself. *U.S. v. Laird*, __ F.2d __ (8th Cir. Oct. 25, 1991) No. 91-1986.

4th Circuit affirms high speed chase and disposal of cocaine as grounds for obstruction enhancement. (461) The district court imposed a two level obstruction of justice enhancement based in part on the fact that when confronted by police, defendant fled, resulting in a high speed chase during which defendant threw two kilograms of cocaine from his car. The 4th Circuit affirmed that both the high speed chase and the disposal of the cocaine were independent and adequate grounds for the enhancement: Defendant's conduct was more than mere flight to evade arrest. He led police on a high speed chase through a rural area for three to four miles. Speeds reached up to 95 miles per hour. The lives of pursuing law enforcement officers were endangered, as were the lives of any unsuspecting motorists who may have been driving that evening. Defendant's disposal of the cocaine while in flight also constituted obstruction of justice, even though defendant later aided police in the cocaine's recovery. *U.S. v. Hicks*, __ F.2d __ (4th Cir. Oct. 23, 1991) No. 90-5627.

7th Circuit affirms obstruction enhancement where threats against witness were corroborated. (461) At defen-

dant's sentencing hearing, a police detective testified that a government informant reported that defendant had called the informant and had threatened him and his attorney. According to the detective, the informant had also advised his attorney about the threats. Less than a week after the alleged threatening phone calls, the informant was shot at by another co-conspirator, who accused the informant of being "a snitch." Neither the informant or the informant's attorney testified at sentencing concerning the alleged threats. Nonetheless, the 7th Circuit affirmed an enhancement for obstruction of justice, rejecting defendant's claim that the enhancement was based upon unreliable and uncorroborated hearsay. The court expressed doubts that the informant's allegations, by themselves, would be sufficiently reliable to justify the enhancement. However, the shooting incident, which took place shortly after defendant was arrested, tended to corroborate the informant's story. *U.S. v. Jewel*, __ F.2d __ (7th Cir. Oct. 21, 1991) No. 90-2001.

7th Circuit affirms obstruction enhancement based upon "incredible" story given by defendant. (461) Defendant contended that the district court improperly used the defendant's decision to testify and the subsequent guilty verdict as evidence that he testified untruthfully. The 7th Circuit affirmed the enhancement for obstruction of justice under section 3C1.1. Defendant testified that he was not involved in a cocaine transaction and stated that he had provided a loan of $4800 to his co-conspirator at approximately 5:50 p.m. to be used for the purchase of a used car. He further stated that he was waiting in a parking lot expecting the co-conspirator to return approximately an hour and a half later after having purchased the car and resold it at a profit. The district court found this testimony to be "incredible" in the face of testimony to the contrary, and the appellate court agreed. *U.S. v. Welch*, __ F.2d __ (7th Cir. Oct. 15, 1991) No. 90-2676.

1st Circuit rejects obstruction enhancement because defendant's statement did not impede investigation. (462) Defendant's full name was "Jairo Andres Valejo Gonzales," although all participants in the drug transaction knew defendant simply as "Andres Gonzales." Although there was some evidence that others knew him as "Jairo Gonzales," there was no evidence that defendant used this name during the offense or that authorities were misled. He did, however, refuse to acknowledge that he also went by the name of "Jairo Valejo." He contended that an enhancement for obstruction of justice was improper since he consistently used and answered to the name "Andres Gonzales." The 1st Circuit found it unnecessary to decide this issue, since the enhancement was improper on other grounds. Application Note 4(b) to section 3C1.1, effective November 1, 1990, makes clear that the obstruction enhancement does not apply to a false statement, not under oath, to law enforcement officers, unless a significant obstruction or impediment of the investigation or prosecution occurs. Here, the investigation or prosecution was not obstructed or impeded. *U.S. v. Moreno*, __ F.2d __ (1st Cir. Oct. 17, 1991) No. 90-2185.

8th Circuit reverses obstruction enhancement where conduct was part of offense. (462) Defendant was convicted of bankruptcy fraud. The district court imposed a two level increase for obstruction of justice based upon defendant's conduct in concealing assets from bankruptcy court officers and committing perjury during the bankruptcy proceedings. The 8th Circuit reversed, since this conduct was the basis for the criminal charges against him. An enhancement under guideline section 3C1.1 is limited to obstructive conduct that occurs during the investigation, prosecution, or sentencing of the charged offense. It does not apply to conduct that is part of the crime itself. *U.S. v. Lloyd*, __ F.2d __ (8th Cir. Oct. 18, 1991) No. 91-1688.

11th Circuit refuses to require obstruction enhancement despite contradictions in defendant's testimony. (462) The government appealed the district court's refusal to impose a two-level enhancement for obstruction of justice based on defendant's perjury at trial. The 11th Circuit refused to require the enhancement, noting that although there were "apparent contradictions" in defendant's trial testimony, it was not clear that the examples justified reversal. *U.S. v. Stubbs*, __ F.2d __ (11th Cir. Oct. 18, 1991) No. 89-6112.

D.C. Circuit holds drug rehabilitation does not justify downward departure. (480)(680)(719) The D.C. Circuit reversed a downward departure based upon defendant's potential for rehabilitation from drug addiction. However, following the 1st Circuit's decision in *U.S. v. Sklar*, 920 F.2d 107 (1st Cir. 1990), the court held that post-arrest but pretrial drug rehabilitation effort might justify a two-level reduction for acceptance of responsibility under section 3E1.1. The court left open the possibility that on a "rare occasion" a further reduction might be in order, but only if the rehabilitation was "so extraordinary as to suggest its presence to a degree not adequately taken into consideration by the acceptance of responsibility reduction." Judge Edwards concurred, but wrote separately to express his "profound concerns" with the guidelines, arguing that they do not promote uniformity, but merely transfer discretion from the judges to the prosecutors and the probation office. Judge Silberman dissented. *U.S. v. Harrington*, __ F.2d __ (D.C. Cir. Oct. 25, 1991) No. 90-3176.

5th Circuit rejects acceptance of responsibility where defendants denied involvement outside charged conduct. (482) Defendants were arrested after purchasing half a pound of methamphetamine from an undercover agent. The 5th Circuit affirmed the district court's denial of a reduction for acceptance of responsibility because defendants denied culpability for any criminal conduct beyond the specific offense charged. One defendant claimed that he was pressured into committing the offense and denied that the purchase money

came from the prior sale of other drugs. The other defendant denied that he knew that his co-defendant planned to purchase methamphetamine and denied testing the drug, insisting that he was simply "using" the drug. Both defendants continued to deny their involvement in the sale of 17 additional ounces of methamphetamine. *U.S. v. Kinder*, __ F.2d __ (5th Cir. Oct. 21, 1991) No. 90-8579.

8th Circuit affirms denial of acceptance of responsibility reduction despite defendant's assistance. (486) Defendant contended that he should have received a reduction for acceptance of responsibility because he voluntarily terminated his criminal activity, provided truthful admissions, assisted authorities in the recovery of the fruits and instrumentalities of the offense, and wore a body wire to a meeting with his drug source. The 8th Circuit found that the denial of the reduction was not clearly erroneous. Defendant's acceptance of responsibility was "equivocal." At one point in the sentencing hearing defendant acknowledged his acceptance of responsibility, but later in the hearing said that he was not responsible because his drug source made him commit the offense. *U.S. v. Laird*, __ F.2d __ (8th Cir. Oct. 25, 1991) No. 91-1986.

1st Circuit denies acceptance of responsibility reduction to defendant who gave three different stories. (488) The 1st Circuit affirmed the district court's decision to deny defendant a reduction for acceptance of responsibility. Defendant provided three different versions of the events leading to his arrest. The district court had the opportunity to observe defendant's demeanor and evaluate his credibility when he testified at trial. Defendant's claim that he was coerced in transporting cocaine was inconsistent with acceptance of responsibility. *U.S. v. Uricoechea-Casallas*, __ F.2d __ (1st Cir. Oct. 11, 1991) No. 90-1717.

11th Circuit affirms reduction for acceptance of responsibility even though defendant's statement was subject to interpretation. (488) The district court granted defendant a reduction for acceptance of responsibility based upon a statement written by defendant but read at sentencing by defense counsel because defendant was "overcome by emotion." The government appealed, claiming that defendant never admitted culpability in the statement. The closest she came was "I am guilty with being involved with the wrong people. I realize how foolish I was. My mistakes resulted in my being here." Nevertheless, the government contended that defendant continued to maintain her innocence and denied ever being involved with drugs. The 11th Circuit refused to reverse the acceptance of responsibility reduction, noting that since defendant's statement was capable of varying interpretations, deference should be granted to the trial judge who can weigh the credibility of such statements.. *U.S. v. Stubbs*, __ F.2d __ (11th Cir. Oct. 18, 1991) No. 89-6112.

Criminal History (§4A)

5th Circuit holds that defendant who was imprisoned pending sentencing was under criminal justice sentence. (500) While in prison pending sentencing on a drug charge, defendant attempted to escape. In sentencing defendant for the escape attempt, defendant received two additional criminal history points under guideline section 4A1.1(d) for committing the attempted escape while under a criminal justice sentence. The 5th Circuit affirmed the enhancement, rejecting defendant's claim that he was not under a criminal justice sentence because he had not yet been sentenced on the drug charge. The court held that if a defendant commences an offense following conviction for an earlier offense, but before sentencing on that earlier offense, he or she nevertheless commits the instant offense "while under a criminal justice sentence," as long as: (1) the conduct involved in the instant offense was not part of the earlier offense, and (2) the defendant is sentenced on the earlier offense before being sentenced on the instant offense. *U.S. v. Arellano-Rocha*, __ F.2d __ (5th Cir. Oct. 25, 1991) No. 91-8047.

2nd Circuit upholds young adult offender offense as predicate for career offender status. (504)(520) The 2nd Circuit upheld the use of an offense for which defendant was sentenced as a young adult offender under 18 U.S.C. section 4216 (now repealed) as a predicate offense for career offender status. The commentary to guideline section 4B1.2 specifies that courts are to apply section 4A1.2 in counting convictions to determine career offender status. That section provides detailed instructions for offenses committed prior to age 18. "The plain implication is that convictions for all offenses committed when the defendant was [18] or older are to be considered adult convictions for purposes of the criminal history category determination." Here, defendant was 25 years old when he committed the predicate offense. Thus, it was an adult conviction for career offender purposes. *U.S. v. Connor*, __ F.2d __ (2nd Cir. Oct. 21, 1991) No. 89-1630.

2nd Circuit rejects contention that prior federal and state convictions were "functionally consolidated." (504) Defendant was sentenced as a career offender based on a federal conviction for armed robbery, and two state court convictions for armed robbery. The 2nd Circuit rejected defendant's claim that he was improperly sentenced as a career offender because his federal and state convictions were "functionally consolidated." The convictions were the product of a single arrest, were investigated jointly by state and federal authorities, and resulted in concurrent sentences of the same length. Defendant claimed that their separate status was simply the accidental result of how prosecution was allocated between state and federal authorities. However, the court had previously ruled that it would not inquire into whether consolidation would have occurred if all the offenses had been prosecuted by the same authority, since this

inquiry is too speculative. The federal and state convictions were not part of a common scheme or plan, since the robberies were committed on different dates, by different participants, using different methods. *U.S. v. Connor*, __ F.2d __ (2nd Cir. Oct. 21, 1991) No. 89-1630.

10th Circuit affirms that witness intimidation charge related to instant offense may be considered in defendant's criminal history. (504) After defendant's first trial on drug conspiracy charges, he assaulted a witness who had testified against him at the trial. He was then convicted of witness retaliation. After a second trial on the drug charges, he was also convicted of the drug charges. In determining defendant's criminal history level for the drug convictions, the district court added points based upon defendant's conviction for witness retaliation. The 10th Circuit upheld the sentence, rejecting defendant's claim that the witness retaliation was part of a single common scheme with the drug offense. The drug charges alleged criminal conduct that ended before the offense charged in the witness retaliation indictment. Thus, the offenses did not occur "on a single occasion." *U.S. v. Coleman*, __ F.2d __ (10th Cir. Oct. 16, 1991) No. 90-5207.

10th Circuit upholds consideration in criminal history of offense for which exact date of sentencing was unknown. (504) Defendant challenged the district court's inclusion in his criminal history of an offense for which the exact date of sentencing was unknown. The 10th Circuit ruled that the district court had sufficient information from which it could reasonably infer that the sentence had been imposed within five years of the beginning of defendant's instant offense. The report listed the date of arrest as "02-15-84" and listed the date of sentencing as unknown. The trial court reasoned that the sentence necessarily was imposed after his arrest, which took place less than five years prior to the date his instant offense began. Defendant's contention that the trial court erred because the arrest date might have been unrelated to the sentence imposed was unconvincing. *U.S. v. Coleman*, __ F.2d __ (10th Cir. Oct. 16, 1991) No. 90-5207.

D.C. Circuit adopts 1st Circuit test for departures based on permissible and impermissible grounds. (508)(700) The D.C. Circuit adopted the test articulated by the 1st Circuit in *U.S. v. Diaz-Bastardo*, 929 F.2d 798 (1st Cir. 1991) for reviewing the validity of a departure based upon permissible and impermissible grounds. Such a departure will be affirmed so long as (1) the direction and degree of the departure are reasonable in relation to the remaining valid ground(s), (2) the excision of the improper ground does not obscure or defeat the expressed reasoning of the district court as a whole, and (3) the reviewing court is left, on the record as a whole, with the definite and firm conviction that removal of the inappropriate ground would not be likely to alter the district court's view of the sentence rightfully to be imposed. Such a test meets the twin goals of insuring that a sentence is imposed for proper reasons and conserving judicial resources. *U.S. v. Jones*, __ F.2d __ (D.C. Cir. Oct. 25, 1991) No. 90-3266.

7th Circuit rules district court adequately identified grounds for criminal history departure. (510) The 7th Circuit rejected defendant's claim that the district court failed to adequately identify its reasons for an upward criminal history departure. It was clear from the judge's comments that he enhanced defendant's sentence because the criminal history in the presentence report failed to take into account defendant's extensive criminal convictions. The fact that the judge did not "recite in categorical sequence each and every prior offense set forth in the presentence report that it relied on in enhancing the defendant's sentence" was immaterial. It was evident that the judge relied upon the presentence report, and that defendant and his counsel had the opportunity to review the presentence report prior to sentencing. *U.S. v. Elmendorf*, __ F.2d __ (7th Cir. Oct. 11, 1991) No. 89-3378.

D.C. Circuit upholds criminal history departure despite reliance on improper grounds. (510) The district court initially departed upward to criminal history category IV based upon two prior offenses for which defendant either was not convicted or received probation. The court then departed to category V because defendant committed the instant offense while on release in three different pending cases, had a flagrant disregard for the law as demonstrated by the crime spree which led to the instant offense, and had engaged in numerous acts of deception in connection with the instant offense. The D.C. Circuit agreed that it was error to depart based on deception related to the instant offense, but nonetheless upheld the departure. First, the district court cited sufficient factors to permit a departure to category V prior to mentioning the inappropriate factor. Second, the departure was based upon defendant's long history of prior criminal activity. Finally, the record left the court with the "firm and definite conviction" that elimination of the improper ground would not have changed the district judge's view of the appropriate sentence. *U.S. v. Jones*, __ F.2d __ (D.C. Cir. Oct. 25, 1991) No. 90-3266.

D.C. Circuit upholds departure for prior offense even though sentence was greater than if prior offense had been part of instant prosecution. (510) The district made an upward criminal history departure based on a prior embezzlement for which defendant was never convicted. The D.C. Circuit upheld the extent of the departure, even though defendant contended that his total sentence exceeded the sentence he would have received had he stipulated to or been convicted of the embezzlement. The embezzlement was not related to the instant offense, and thus defendant could not have been charged with, convicted of, or stipulated to the embezzlement as part of the instant prosecution. Circuit precedent, at most, held that in departing based on prior conduct for which the defendant was not convicted, it would

be unreasonable to increase the sentence beyond what the defendant would have received if he had been convicted at a prior time. Here defendant received the same number of criminal history points he would have received if he had previously been convicted. *U.S. v. Jones*, __ F.2d __ (D.C. Cir. Oct. 25, 1991) No. 90-3266.

7th Circuit rejects criminal history departure based on heinous prior offense. (514) The district court departed upward from criminal history category II to category VI because one of defendant's prior convictions was for a brutal, execution-style murder. The 7th Circuit reversed, ruling that this was an inappropriate ground for departure. Defendant was assigned criminal history points for the prior conviction as mandated by guideline section 4A1.1. The court agreed that the practice of weighing identically all prior sentences of a length greater than one year was "somewhat indiscriminate," but "to allow upward departures on the basis of the nature of a considered offense would render that very choice meaningless." The Sentencing Commission chose to award defendants three criminal history points for every conviction with a sentence of greater than one year, regardless of the nature of the underlying conduct. *U.S. v. Morrison*, __ F.2d __ (7th Cir. Oct. 10, 1991) No. 89-2284.

5th Circuit includes amount of uncashed stolen checks as income from criminal livelihood. (530) There are two criteria that define whether a defendant engaged in a pattern of criminal conduct as a livelihood under guideline section 4B1.3: (1) the defendant must have derived income from his pattern of criminal conduct that in any 12-month period exceeded 2000 times the then-existing minimum wage, and (2) the criminal conduct must be the defendant's primary occupation in that 12-month period. Defendant contended that the income from his criminal conduct was $2394. The 5th Circuit found that defendant neglected to include as income $6587.81 worth of stolen checks which authorities recovered from him. The court rejected defendant's implicit argument that only actual cash amounts received by him could be counted as income. The court also rejected defendant's claim that his criminal conduct was not his primary occupation. Although defendant claimed to have been self-employed as a roofer, he was unable to provide any records of his employment because he was always paid in cash. Others testified that defendant told them that he lived off the proceeds of the stolen mail. *U.S. v. Quertermous*, __ F.2d __ (5th Cir. Oct. 22, 1991) No. 91-1263.

Determining the Sentence (Chapter 5)

10th Circuit reverses supervised release term in excess of three years. (580) Defendant pled guilty to one count of possession with intent to distribute less than 100 grams of heroin. In addition to other penalties, defendant received a five year term of supervised release. On appeal, the government conceded that the offense to which defendant pled guilty was a Class C felony subject to a maximum term of supervised release of three years as provided in 18 U.S.C. section 3583(b)(2). Thus, the 10th Circuit remanded for resentencing on this issue. *U.S. v. Padilla*, __ F.2d __ (10th Cir. Oct. 21, 1991) No. 89-2179.

California District Court holds that more lenient D.C. parole guidelines apply equally to females. (590) In *Cosgrove v. Thornburgh*, 703 F.Supp. 995 (D.D.C. 1988), a class of federally-housed male D.C. Code offenders won a ruling that pursuant to D.C. Code section 24-209, the U.S. Parole Commission must apply the statutes and regulations of the D.C. Board of Parole, including the D.C. parole guidelines. While *Cosgrove* made no distinction between male and female prisoners, the U.S. Parole Commission refused to apply the decision to female prisoners housed outside of the District of Columbia because females have an option under *Garnes v. Taylor*, Civ. No. 159-72 (D.D.C. 1976) to transfer to the District of Columbia in order to have the D.C. guidelines apply to them. California District Judge Henderson held that D.C. Code section 24-209 applies equally to females and males, and therefore required the Parole Commission to apply the D.C. parole guidelines to this prisoner without transferring her to the District of Columbia. *Bryson v. U.S. Parole Commission*, __ F.Supp. __ (N.D. Cal. Sept. 27, 1991) No. C91-0802 TEH.

4th Circuit vacates because court failed to make findings with regard to fine. (630) In *U.S. v. Harvey*, 885 F.2d 181 (4th Cir. 1989), the 4th Circuit vacated and remanded for reconsideration of the fine imposed because the district court failed to make specific findings with regard to the factors listed in the applicable statute concerning fines. Here, the 4th Circuit vacated because the district court failed to comply with *Harvey*. *U.S. v. Arnoldt*, __ F.2d __ (4th Cir. Oct. 11, 1991) No. 89-5043.

5th Circuit reverses downward departure based upon defendant's young age. (670)(736) The district court departed downward from 151 months and sentenced defendant to 120 months because of defendant's young age (18). The 5th Circuit reversed, holding that the guidelines have adequately taken into consideration a defendant's age in section 5H1.1. This section specifies extremely limited circumstances under which age may be the basis for a departure. Being young is not a permissible consideration under the guidelines. *U.S. v. White*, __ F.2d __ (5th Cir. Oct. 21, 1991) No. 91-3145.

8th Circuit refuses to review refusal to depart based upon drug dependency. (680)(860) The 8th Circuit refused to review defendant's claim that the district court erred in denying his motion to depart based on his drug dependency and prospects for rehabilitation. Guideline section 5H1.4 specifically mentions that alcohol and drug dependence are not rea-

sons for downward departures. The appellate court was not empowered to review the district court's refusal to depart. *U.S. v. Laird*, __ F.2d __ (8th Cir. Oct. 25, 1991) No. 91-1986.

Departures Generally (§5K)

7th Circuit rules government did not breach unwritten agreement to move for downward departure. (710)(790) Defendant pled guilty and agreed to aid the government without the benefit of a written plea agreement. He then contended that the government breached an unwritten promise to submit a motion for downward departure based upon his substantial assistance. The 7th Circuit ruled that the government's failure to move for a downward departure was not the breach of any unwritten agreement. The only evidence as to the parties' oral understanding was that the government agreed to "inform" the sentencing court of defendant's cooperation. The government did inform the court, although it was a "cavalier rendition" of defendant's assistance. The information was "almost buried in an avalanche of examples of the lack of assistance" offered by defendant. "Damaging with praise this faint appear[ed] to shirk" the government's duty to act in good faith. *U.S. v. Rosa*, __ F.2d __ (7th Cir. Oct. 11, 1991) No. 89-2704.

8th Circuit rules government did not act in bad faith in refusing to move for substantial assistance departure. (712) The 8th Circuit affirmed the district court's determination that the government did not act in bad faith in refusing to move for a downward departure based upon defendant's substantial assistance. The record showed that defendant would not sign a plea agreement, later refused to provide any assistance to the government, and disputed the facts at trial. *U.S. v. Laird*, __ F.2d __ (8th Cir. Oct. 25, 1991) No. 91-1986.

9th Circuit reverses downward departure for lack of prior record, restitution, acceptance of responsibility, and family ties. (715)(736) In sentencing this "repentant white-collar embezzler who made restitution and pled guilty," the district judge departed downward and gave the defendant straight probation, based on his (1) lack of a prior record; (2) prompt total payment of restitution; (3) acceptance of responsibility; (4) his effort to keep his family together and the manner in which the family overcame its challenges; (5) the fact that incarceration would be "unjust and counterproductive;" and (6) the "totality of the situation." The 9th Circuit held that none of these reasons was sufficient to justify a departure, either separately or together. *U.S. v. Berlier*, __ F.2d __ (9th Cir. Oct. 31, 1991) No. 90-10376.

7th Circuit rules disparity between co-defendants who plead guilty and those who go to trial is not basis for resentencing. (716) Defendants, who were convicted after a trial, were each assigned a base offense level of 36 based on their involvement in 10 kilograms of heroin. They complained because each of their co-defendants who pled guilty were assigned a base offense level of 34 based upon between 3 and 9.9 kilograms of heroin. The 7th Circuit found that this disparity was not grounds for resentencing. The appropriateness of the base offense level turns on the quantity of drugs that was reasonably foreseeable to each defendant. A sentence which is mistaken, too draconian or too lenient as to one defendant does not grant a co-defendant the license to benefit from a lighter sentence nor does it impose the added burden of a tougher sentence. *U.S. v. Edwards*, __ F.2d __ (7th Cir. Oct. 15, 1991) No. 89-2880.

1st Circuit rules court was aware it could depart based on physical condition, employment and family ties. (736)(860) Defendant contended that the district court wrongly concluded that it lacked authority to depart downward based upon her physical condition, employment record, and family ties. The 1st Circuit concluded after reviewing the full record that the district court was aware of its ability to depart downward, but had concluded regretfully that the specific provisions of the guidelines that defendant wished to invoke simply did not permit departure under the circumstances of her case. The presentence report specifically discussed and rejected physical condition, employment record and family ties as factors that might warrant departure in defendant's case. The factors were again discussed in defendant's memorandum in objection to the presentence report, and were presented orally to the district court at the sentencing. *U.S. v. DiIorio*, __ F.2d __ (1st Cir. Oct. 16, 1991) No. 91-1340.

Sentencing Hearing (§6A)

3rd Circuit finds no 6th Amendment violation in court's refusal to grant continuance of sentencing hearing. (750) The 3rd Circuit originally remanded defendant's case for resentencing. Prior to resentencing, defense counsel withdrew. At the resentencing hearing, the public defender advised the court that defendant had been in touch with private counsel and wished a continuance so that his counsel of choice could represent him at the resentencing. Since defendant had already been granted two continuances, the district court denied a further continuance. The 3rd Circuit rejected defendant's claim that this violated his 6th Amendment right to counsel of his choice. Defendant was aware of the pending resentencing for four months prior to its occurrence. His attorney moved to withdraw on January 8, and the motion was granted on January 30. The resentencing took place on March 1. Defendant had a full month to find new counsel. Moreover, the federal defender who represented defendant at the resentencing had a month to prepare and ably represented defendant at the hearing. *U.S. v. Kikumura*, __ F.2d __ (3rd Cir. Oct. 15, 1991) No. 91-5197.

3rd Circuit refuses to reconsider issues decided in first appeal. (755)(770)(850) In *U.S. v. Kikumura*, 918 F.2d 1084 (3rd Cir. 1990) (*Kikumura I*), the 3rd Circuit held that (1) factual findings supporting an extreme departure must be proven by at least clear and convincing evidence, and (2) hearsay statements cannot be considered at sentencing unless other evidence demonstrates that they are reasonably trustworthy. The court assumed without deciding that the clear and convincing standard was sufficient because defendant did not ask for a higher standard of proof. In defendant's second appeal, the 3rd Circuit refused to reconsider these issues. Defendant could not "continue to litigate questions already decided by this court in a prior proceeding." The court's observation in *Kikumura I* that it might require a more demanding standard of proof "at some later date" was not an invitation to bring a second appeal. Similarly, the court refused to consider defendant's claim that hearsay may only be admitted if it satisfies the Confrontation Clause. This argument was rejected in *Kikumura I*, and was precluded by the law of the case. *U.S. v. Kikumura*, __ F.2d __ (3rd Cir. Oct. 15, 1991) No. 91-5197.

9th Circuit upholds court's statement that it was not relying on disputed facts. (760) In setting the defendant's base offense level and adding one point for managerial role, the district court stated that it was not relying on the facts challenged by the defendant. The court ruled that even if it were to accept all of the defendant's objections, sufficient information would remain to support its findings. The 9th Circuit ruled that this was sufficient compliance with the requirements of Rule 32, Fed. R. Crim. P. *U.S. v. Helmy*, __ F.2d __, (9th Cir. Oct. 28, 1991) No. 89-10659.

2nd Circuit remands where court failed to resolve role in offense prior to departing downward. (765) At defendant's sentencing hearing, the district judge stated his intention to depart downward based upon the low purity of the drugs involved, but there was a dispute concerning defendant's entitlement to a role in the offense reduction. Because it intended to depart downward, the sentencing court did not believe it needed to resolve the outstanding factual disputes. Starting at an offense level of 30, the minimum sentence was 97 months. The court departed downward to 70 months. However, this 70-month sentence was actually higher than bottom of the applicable guideline range which would have resulted if defendant had received a four-level minimal participant reduction. The 2nd Circuit remanded for resentencing, ruling that the district court should have resolved the factual dispute prior to departing downward. Since the downward departure resulted in a longer sentence than the bottom of the range that would have applied had the sentencing court found in defendant's favor, a remand was required. *U.S. v. Rosado-Ubiera*, __ F.2d __ (2nd Cir. Oct. 23, 1991) No. 91-1148.

7th Circuit reverses drug quantity determination because court failed to address specific objections. (765) Defendants' presentence report concluded that they were each responsible for 24 kilograms of cocaine, resulting in a base offense level of 34. Defendants raised numerous challenges to the inclusion of approximately 13.5 kilograms of cocaine. If these objections had been successful, the offense level would have been reduced to 32. Without ruling on each objection, the district court concluded that the evidence supported an offense level of 34. The 7th Circuit remanded for resentencing, ruling that the district court's refusal to "go through each allegation" violated Fed. R. Crim. P. 32(c)(3)(D). The district court's general conclusion that defendants were involved with between 15 and 50 kilograms of cocaine made meaningful appellate review impossible. *U.S. v. Jewel*, __ F.2d __ (7th Cir. Oct. 21, 1991) No. 90-2001.

9th Circuit finds defendant was given adequate opportunity to present information at sentencing. (765) The defendant filed a 27-page sentencing memorandum supported by 35 pages of attachments, a 32-page set of formal objections to the presentence report supported by 16 pages of attachments, and numerous letters. At sentencing, the court asked defense counsel if there were other materials that were supposed to be before the court, and counsel replied no. Accordingly, the 9th Circuit held that defendant was given an adequate opportunity to present information regarding disputed factors. *U.S. v. Helmy*, __ F.2d __, (9th Cir. Oct. 28, 1991) No. 89-10659.

11th Circuit upholds reliance on hearsay to determine that drug was crack cocaine. (770) Defendants contended that the district court relied upon unreliable hearsay to determine that the two transactions in which they participated involved crack cocaine rather than powder cocaine. The lab report merely indicated that the drug was cocaine, but did not state the type or form of cocaine. A state agent advised the court that the chemist who analyzed the cocaine told him that he did not make such a determination because state law did not distinguish between the two drugs. The 11th Circuit upheld the district court's determination that the drug involved was crack cocaine. Defendants represented to the informant that the drug they were giving to him was crack, and the informant so advised the state agent when he gave the drug to the agent. The agent testified that the drug had the consistency of crack. *U.S. v. Griffin*, __ F.2d __ (11th Cir. Oct. 22, 1991) No. 90-8200.

Plea Agreements, Generally (§6B)

7th Circuit rules district court need not advise defendant of likely sentence prior to accepting guilty plea. (780) Defendant contended that the decision in *U.S. v. Salva*, 902 F.2d 483 (4th Cir. Oct. 11, 1990) created a procedural rule requiring a district court to give a defendant "as good an idea as

possible" of the sentence he would receive prior to accepting the defendant's guilty plea. The 7th Circuit found that defendant misinterpreted the case, and that there was no rule requiring a district court to advise the defendant of his likely sentence prior to accepting the plea. Here, a review of the record indicated that the district court adequately informed defendant of the range of sentencing possibilities, including the maximum and minimum sentences. *U.S. v. Elmendorf*, __ F.2d __ (7th Cir. Oct. 11, 1991) No. 89-3378.

8th Circuit affirms that no plea agreement existed between defendant and government. (780) Defendant's first counsel testified that the government offered to drop a firearm count in return for defendant's guilty plea on the robbery count, but that defendant rejected this offer. The attorney further testified that he and the government continued negotiations after defendant was indicted. During these subsequent negotiations the government "made something of an offer" which defendant also rejected as satisfactory. After a suppression hearing, defendant's second counsel informed the government that defendant wished to accept the government's offer. The assistant U.S. attorney responded that no plea offer had ever been made and maintained that he only discussed the possibility of a plea agreement. The district court found that there had never been a firm plea offer, let alone a plea agreement. The 8th Circuit affirmed, finding no error in the district court's conclusion that the government never made a firm offer to enter a plea agreement. *U.S. v. Halford*, __ F.2d __ (8th Cir. Oct. 25, 1991) No. 91-1246.

8th Circuit holds defendant's acknowledgement of accuracy of plea agreement established factual basis for plea. (780) The 8th Circuit rejected defendant's claim that the district court failed to establish a factual basis for his plea. The plea agreement's description of the essential facts underlying the charges against defendant supported a finding of guilt. Therefore, defendant's acknowledgement of the accuracy of the plea agreement satisfied Rule 11's requirement that the court establish a factual basis for the defendant's guilty plea. *U.S. v. Abdullah*, __ F.2d __ (8th Cir. Oct. 16, 1991) No. 90-1615.

8th Circuit finds no abuse of discretion in refusing defendant's request to withdraw his guilty plea. (790) The 8th Circuit upheld the district court's refusal to permit defendant to withdraw his guilty plea. Defendant did not present a fair and just ground for granting his motion for withdrawal. Contrary to his allegations, defendant was informed of his right to confront witnesses and was given an opportunity by the government to examine its case file. There was also no merit to defendant's claim that his guilty plea was involuntary because his counsel pressured him to plead guilty, thus denying him effective assistance of counsel. On two separate occasions at his plea hearing defendant stated that he was satisfied with his counsel and never indicated that he was under pressure to plead guilty. *U.S. v. Abdullah*, __ F.2d __ (8th Cir. Oct. 16, 1991) No. 90-1615.

8th Circuit holds that Rule 11 does not require defendant to be advised that offense level would be determined by aggregating cocaine sold by co-conspirators. (790) Defendant argued that the district court failed to inform him of the direct consequences of his guilty plea as required by Rule 11. He contended that the court was required to disclose that his offense level would be determined by combining the cocaine he distributed with the cocaine distributed by his co-conspirators. The 8th Circuit found no Rule 11 violation, since failure to disclose the various factors that might influence the defendant's offense level for sentencing purposes does not violate Rule 11. *U.S. v. Abdullah*, __ F.2d __ (8th Cir. Oct. 16, 1991) No. 90-1615.

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

3rd Circuit refuses to review whether court properly considered at sentencing defendant's intent to kill. (855) Defendant was convicted of numerous counts of transporting explosives in interstate commerce. The district court departed upward based on defendant's intent to kill. In defendant's first appeal, the 3rd Circuit remanded for resentencing, but did approve defendant's intent to kill as a basis for departure. After resentencing, defendant again appealed, claiming that his explosives convictions were "too slender a reed" to support consideration at sentencing of his intent to commit multiple murders, since he had not been convicted of that crime. The 3rd Circuit ruled that the claim was not properly before it for two reasons. First, defendant explicitly waived any objection to the government's introduction of evidence of his intent to kill by failing to object. Second, in defendant's first appeal, the appellate court explicitly authorized the district court to impose an upward departure for defendant's intent to kill. The district court, on remand, was bound to follow that mandate. *U.S. v. Kikumura*, __ F.2d __ (3rd Cir. Oct. 15, 1991) No. 91-5197.

7th Circuit refuses to review refusal to depart based upon family ties and circumstances. (860) Defendant argued that the district court declined to grant a downward departure based upon its erroneous perception that family ties and circumstances were an inappropriate reason for a departure. The 7th Circuit rejected this contention, finding that the district court considered all the factors raised by defendant and simply refused to grant a downward departure. Nowhere did the judge state he was unable to consider factors such as family ties and circumstances. The judge stated that he was convinced that a downward departure was not appropriate in this instance. A district court's refusal to depart downward is not reviewable on appeal. *U.S. v. Welch*, __ F.2d __ (7th Cir. Oct. 15, 1991) No. 90-2676.

9th Circuit holds that in interpreting the guidelines, where the issue is factual, the clearly erroneous standard applies. (870) The defendant argued that the essential inquiry was legal, not factual, because it involved ascertaining the meaning of a particular sentencing guideline, section 2M5.2. Here, however, the issue was whether the district court properly found "that the underlying offense involved a sophisticated weapon, the Condor II, and that MX-4926 was itself a sophisticated material." The 9th Circuit ruled that "[b]ecause the issue of whether a particular item falls within the category of sophisticated weaponry is strictly a factual one, we review the district court's determination of that issue for clear error." *U.S. v. Helmy*, __ F.2d __, (9th Cir. Oct. 28, 1991) No. 89-10659.

Forfeiture Cases

5th Circuit upholds forfeiture because claimant did not perfect ownership interest in automobile under state law. (920)(960) Claimant, an attorney, made an oral agreement with his client to represent the client for $50,000. The client offered $6,500 in cash and his 1977 Porsche Carrera 911. Claimant then entered into a written form contract in which the client agreed to pay a retainer in the amount of $50,000. The contract did not mention the car. Nonetheless, that day, claimant took physical possession of the car. Although the client had obtained the car several months before, he did not register his title to it until after claimant obtained possession of the car. The certificate assigning title to claimant remained unrecorded during a subsequent forfeiture action against the car based on the client's drug activities. The 5th Circuit held claimant's possessory interest gave him standing to challenge the forfeiture, but rejected his innocent owner defense because his interest in the vehicle was not valid against third parties under Texas law. Since neither claimant or his client had a perfected title in the car when it was seized, claimant acquired the car subject to the forfeiture interest of the government. *U.S. v. 1977 Porsche Carrera*, __ F.2d __ (5th Cir. Oct. 30, 1991) No. 90-8638.

10th Circuit denies Rule 41(e) jurisdiction because judicial forfeiture action provided adequate remedy. (940) After claimants' property was seized, they filed a motion under Fed. R. Crim. P. 41(e) for return of the illegally seized property. The 10th Circuit affirmed the district court's refusal to exercise equitable jurisdiction, ruling that claimants had an adequate remedy at law in a judicial forfeiture action. At the time claimant's Rule 41(e) hearing took place, a judicial forfeiture complaint had been filed, warrants for arrest of the property had been served, and notice of service of the complaint had been mailed. Thus, the claimants had an adequate remedy to challenge the seizure because the legality of a seizure may be tested in a judicial forfeiture proceeding. The fact that the court had extended the deadlines in the forfeiture proceeding did not alter the analysis. *Frazee v. Internal Revenue Service*, __ F.2d __ (10th Cir. Oct. 22, 1991) No. 91-6034.

Del Mar Legal Publications, Inc.
2670 Del Mar Heights Rd. Suite 247
Del Mar, California 92014

U.S. G.P.O.:1991-312-344:60003