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COMMENDATIONS

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

Nancy L. Abell (Texas, Southern District), by Thomas E. Davis, Assistant Regional Administrator, Public Buildings Service, General Services Administration, Atlanta, for her professionalism and legal skill in resolving a Greyhound Bus Lines condemnation issue causing delays in the construction of the Miami Federal Law Enforcement Building.

Laura J. Birkmeyer (California, Southern District), by Julius C. Beretta, Special Agent in Charge, Drug Enforcement Administration, San Diego, for her successful prosecution of a case that concluded with the arrests of six defendants, the seizure of a fentanyl laboratory, and the seizure of over one pound of fentanyl. (Fentanyl, a substitute for heroin, is more lethal than heroin.)

Joseph Bottini, Kenneth Roosa and ***Mickale Carter*** (District of Alaska), by Colonel Richard L. Purdon, Staff Judge Advocate, Pacific Air Forces, Elmendorf Air Force Base, for their outstanding contribution to the success of the 1991 ALCOM Joint Legal Services Seminar. ***Ms. Carter*** received special thanks for her extra efforts in the ethics training session.

Joseph Bottini, Blaine Hollis, and ***Tim Burgess*** (District of Alaska), by Margaret Person Currin, United States Attorney for the Eastern District of North Carolina, Raleigh, for their invaluable assistance in the successful civil forfeiture of $1,000,000 following a guilty plea by Anangel Shipping Enterprises for submitting false reports to defraud the United States of money and cargo ship fuel.

Barbara Z. Brook and ***William T. Grimmer*** (Indiana, Northern District), by William S. Sessions, Director, FBI, Washington, D.C., for their outstanding efforts in handling the forfeiture aspects of a major Organized Crime Drug Enforcement Task Force investigation involving the distribution of more than 100,000 pounds of marijuana in Southern Michigan and Northern Indiana. More than $1,500,000 has been forfeited to date.

Colin S. Bruce (Illinois, Central District), by Joseph J. Vince, Jr., Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms (ATF), Oakbrook Terrace, for his outstanding prosecution efforts in a number of ATF cases, and for his contribution to the excellent working relationship between the United States Attorney's Office and ATF in their mutual fight against crime and violence.

Barbara M. Carlin (Pennsylvania, Western District), by Bob C. Reutter, Special Agent in Charge, FBI, Pittsburgh, for her successful prosecution of three individuals for theft of government property valued at approximately $300,000.00 from Fort Meade, Maryland.

Mickale C. Carter (District of Alaska), by Lt. General Thomas G. McInerney, Commander, Eleventh Air Force, Elmendorf Air Force Base, for her excellent representation and success in obtaining a favorable settlement on behalf of the government. Also, by Timothy Binder, Attorney, Office of General Counsel, Department of Agriculture, Portland, Oregon, for her valuable assistance in successfully resolving a matter of critical importance to the Farmers Home Administration.

Sean Coffey (New York, Southern District), by Frederick J. Hess, United States Attorney for the Southern District of Illinois, for his valuable assistance and successful results after four separate identity, detention, and removal hearings concerning a suspect arrested in the Bronx on a grand jury indictment from the Southern District of Illinois.

Patricia Conover (Alabama, Middle District), was presented a Certificate of Appreciation by Dale N. Richey, State Director, Farmers Home Administration (FmHA), Department of Agriculture, Montgomery, for her outstanding cooperative efforts in resolving a complex bankruptcy case that represented a serious abuse of the FmHA loan program.

Don DeGabrielle and ***Duke Millard*** (Texas, Southern District), by Andrew N. Childers, Vice President-Flight Operations, Continental Airlines, Houston, for their successful resolution of a complicated district court case involving the interference of a crewmember while in flight.

Edward F. Gallagher III (Texas, Southern District), by Andrew J. Duffin, Special Agent in Charge, FBI, Houston, for his successful prosecution of an individual believed to be responsible for millions of dollars worth of burglaries throughout the United States and is also awaiting trial on two capital murder charges in Los Angeles.

Pamela J. Grimm and ***Albert W. Schollaert*** (Pennsylvania, Western, District), by Thomas A. Gigliotti, Medical Center Director, Department of Veterans Affairs, Pittsburgh, for bringing a protracted equal employment opportunity case, representing many manhours, to a successful conclusion.

Patrick D. Hansen (Indiana, Northern District), by William S. Sessions, Director, FBI, Washington, D.C., for his successful prosecution of a local official on racketeering, conspiracy, bribery, and witness tampering.

Patrice Harris and ***Gaven Kammer*** (Louisiana, Eastern District), by William P. Tompkins, District Director, Office of Labor-Management Standards, Department of Labor, New Orleans, for their legal skill and dedicated efforts in obtaining guilty verdicts of two officials of Local Union 478.

Cynthia Hawkins and ***Greg Miller*** (Florida, Middle District), by Commander T.B. Doherty, Chief, Law Enforcement Branch, Fifth Coast Guard District, U.S. Coast Guard, Portsmouth, Virginia, for their valuable representation and dedicated efforts in obtaining an indictment and filing an asset forfeiture action in a complex case involving the smuggling of hundreds of tons of marijuana into the United States during the 1980s.

Bruce Hinshelwood and ***Roberto Moreno*** (Florida, Middle District), by William S. Sessions, Director, FBI, Washington, D.C., for their major contribution to the successful prosecution of the Walter Moody mail bomb case, by obtaining significant testimony from Moody's close associate who linked him directly to the construction of three pipe bombs that ultimately killed a federal judge and an NAACP official.

Ralph Hopkins (Florida, Middle District), by William H. Brown, Jr., Acting Field Counsel, Labor Law, U.S. Postal Service, Memphis, for his outstanding assistance and cooperative efforts in bringing a complex civil action to a successful conclusion.

Ronald J. Kurpiers II (Indiana, Northern District), by William S. Sessions, Director, FBI, Washington, D.C., for his outstanding prosecutive skill and successful efforts in an interstate transportation in aid of racketeering-murder for hire case, resulting in the conviction of the defendant for hiring an individual to kill three family members.

Crockett Lindsey (Mississippi, Southern District), by Colonel Robert G. Douglass, Chief, Claims and Tort Litigation Division, Air Force Legal Services Agency, U.S. Air Force, Washington, D.C., for his excellent representation and cooperative efforts in bringing a civil action to a successful resolution.

Lillian Lockary (Georgia, Middle District), by Saul Schultz, Assistant Regional Attorney, Office of General Counsel, Department of Agriculture, Atlanta, and Raymond H. Bryant, Chief, Farmer Programs, Farmers Home Administration (FmHA), Department of Agriculture, Athens, for obtaining a favorable court ruling in a FmHA case resulting in a substantial savings to the government, and for her excellent presentations on legal procedures at the FmHA State Meeting held recently in Macon.

William L. McKinnon, Jr. (Georgia, Northern District), by William S. Sessions, Director, FBI, Washington, D.C., for his successful prosecution of a county sheriff and two deputies on civil rights and interception of communications charges, as well as obstruction of justice violations.

Eric Nichols (Texas, Southern District), by Drew C. Arena, Director, Office of International Affairs, Criminal Division, Department of Justice, Washington, D.C., for his prompt action and expert legal skill in responding to an extradition hearing and obtaining an extradition order only five days after the arrest of a fugitive from Mexico.

Charles R. Niven (Alabama, Middle District), was presented a Certificate of Appreciation by Dale N. Richey, State Director, Farmers Home Administration (FmHA), Department of Agriculture, Montgomery, for his professionalism and legal skill in bringing a number of litigation cases in the Middle District of Alabama to a successful conclusion.

Sam Nuchia (Texas, Southern District), by Andrew J. Duffin, Special Agent in Charge, FBI, Houston, for his valuable assistance in the successful prosecution of "Operation Snowbrakes," an investigation involving a Colombian cocaine trafficking organization utilizing tractor trailer trucks to smuggle in large quantities of cocaine.

Elizabeth S. O'Leary (District of Alaska), by Richard W. Sponseller, Associate Director, Financial Litigation Staff, Executive Office for United States Attorneys, Department of Justice, Washington, D.C., for her special efforts in conducting a government sweep to collect more than $7 million owed by 163 state residents pursuant to the Federal Debt Collection Procedures Act.

Crandon Randell (District of Alaska), by Lt. Col. William F. Horn, Air Force Office of Special Investigations Detachment 1920 (AFOSI), Elmendorf Air Force Base, for his valuable assistance in a case against a government contractor resulting in a $40,000 uncontested recovery.

Laurie J. Sartorio (District of Massachusetts), was presented a Certificate of Appreciation by Laurence S. McWhorter, Director, Executive Office for United States Attorneys, for her outstanding contribution to the success of the first Asset Forfeiture Trial Advocacy course conducted by the Attorney General's Advocacy Institute.

Albert W. Schollaert (Pennsylvania, Western District), by John S. Pegula, District Director, Office of Labor-Management Standards, Department of Labor, Pittsburgh, for his valuable representation and expeditious handling of a complaint against the Labor Department concerning a Teamster Local Union 249 election.

Wevley William Shea, United States Attorney, and ***the Civil Division staff*** (District of Alaska), by John VanderMolen, Regional Counsel, Department of Housing and Urban Development (HUD), Seattle, for their outstanding success in obtaining the dismissal of a case without prejudice, and for their valuable assistance in effectively advocating HUD's position in affirmative and defensive litigation.

Richard E. Signorelli and ***David W. Denton*** (New York, Southern District), by the Honorable James H. Evans, Attorney General, State of Alabama, for their outstanding representation of the State of Alabama in obtaining a Second Circuit decision reversing the district court's order setting aside a robbery conviction.

Richard E. Signorelli (New York, Southern District), by Robert A. Bryden, Special Agent in Charge, Drug Enforcement Administration, Jamaica, New York, for obtaining a conviction, after a jury trial, of a drug trafficker for conspiracy to distribute heroin.

Sheldon Sperling (Oklahoma, Eastern District), by Rex A. Woodson, Special Agent, Quachita National Forest, U.S. Forest Service, Department of Agriculture, Hot Springs, Arkansas, for his valuable assistance in the successful prosecution of three individuals for cultivation of marijuana on two separate sites, resulting in significant sentences for those involved.

Bonnie Ulrich (District of South Dakota), by Stephen N. Marica, Assistant Inspector General for Investigations, Small Business Administration, Washington, D.C., for her professionalism and legal skill in obtaining a conviction in a difficult case, resulting in a recovery for the government of $65,835.00.

Stephen West and ***Thomas Swaim*** (North Carolina, Eastern District), by Richard L. Hattendorf, Attorney, Charlotte Police Department, for their excellent presentations before the investigators and administrators of the Police Department on asset forfeiture, and for their continued efforts to promote asset forfeiture and to educate the law enforcement community.

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SPECIAL COMMENDATION FOR THE DISTRICT OF ALASKA

Suzanne Hayden, Assistant United States Attorney for the District of Alaska, was commended by John A. McKay, United States Marshal; Fred Thomas, Resident Agent in Charge, Drug Enforcement Administration; Joseph P. Schulte, Jr., Special Agent in Charge, FBI; Colonel John Murphy, Director, Department of Public Safety, State of Alaska; and Kevin M. O'Leary, Chief of Police, Anchorage Police Department, all of Anchorage, Alaska, for her outstanding leadership in the largest drug case in Alaska history known as "Valley Thunder." ***Assistant United States Attorney Timothy Burgess*** provided valuable assistance and support, as well as ***Chris Supple*** and ***Pat Proctor.***

Last September, a federal grand jury returned a 29-count indictment charging twenty-eight individuals with conspiracy, money laundering and other crimes in connection with a marijuana-growing operation they allegedly ran in south-central Alaska and the Yakima Valley of Washington. The group, consisting of members of several families, set up an organization that included managers, recruiters, a financier and a property broker. As part of the conspiracy, the group bought residential properties suitable for indoor cultivation, easy to camouflage, and some distance from public roads. Some harvested and maintained marijuana crops while others distributed large quantities of marijuana in exchange for large quantities of cocaine. A Panamanian corporation allegedly was used to launder money from the illegal drug operation. To date, thirty people have either been indicted or charged, twenty-four defendants have pled guilty and entered into plea agreements, and $3 million in property has been seized. Enough indoor marijuana equipment to furnish thirty grow locations has also been seized.

United States Attorney Wevley William Shea said, "All of this ties in to President Bush's crime package to cut down on drugs, guns and violence. Unfortunately, I think this is just the tip of the iceberg when it comes to the complex drug problems we have in Alaska." Mr. Shea stated that the investigation is continuing.

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SPECIAL COMMENDATION FOR THE SOUTHERN DISTRICT OF TEXAS

Felicia Williams, Grand Jury Clerk, was commended by Floyd J. Miller, Lead Attorney, and Special Attorneys William E. Fitzgerald and Danny N. Roetzel, Western Criminal Tax Enforcement Section, Tax Division, Department of Justice, Washington, D.C., for her valuable assistance in a Houston grand jury proceeding involving a 53-count indictment against 24 defendants, 18 of whom were Nigerian nationals, for conspiracy to file false claims for income tax refunds. The team of federal prosecutors relied heavily on her during all of the critical phases of the proceedings, and her services and guidance went far beyond the call of duty.

* * * * *

PERSONNEL

George J. Terwilliger, III Is Nominated Deputy Attorney General

On February 14, 1992, President George Bush announced his intention to nominate ***George J. Terwilliger, III*** to the post of Deputy Attorney General of the United States. ***Mr. Terwilliger*** served as Principal Associate Deputy Attorney General from June, 1990 until November 1991, and assumed the responsibilities of Acting Deputy Attorney General in September, 1991, when former Deputy Attorney General William P. Barr became Acting Attorney General.

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CRIME/DRUG ISSUES

New Funds For The Crime And Drug War

Attorney General William P. Barr has announced a number of new grants to fight crime and drugs. The grants were made available under the Edward Byrne Memorial State and Local Law Enforcement Assistance Program, a program created under the Anti-Drug Abuse Act of 1988, and administered by the Bureau of Justice Assistance, a component of the Department's Office of Justice Programs. The program's formula funds are used by states and local units of government to carry out new and innovative law enforcement programs that offer a high probability of improving the functioning of the criminal justice system and enhance drug control efforts. The Department also encourages states to incorporate key priorities from the President's National Drug Control Strategy in their individual state strategies. The Attorney General said that since President Bush came to office, over $1.3 billion have been distributed nationwide directly to state and local law enforcement through this program alone.

While the Bureau of Justice Assistance is still in the appropriation and distribution process, the following states have been awarded grants as of February 28, 1992:

Alabama was awarded $237,927 to improve the quality of the state's criminal history recordkeeping. This award will help the Alabama Criminal Justice Information Center replace outdated data entry terminals, which will promote the increased productivity needed to improve the criminal history records operation. At the same time, the Alabama Administrative Office of the Courts will begin automating the local court records systems to enable the courts to forward their records to the Administrative Office more efficiently.

Alaska was awarded $1.8 million, which will be used to target street level enforcement, law enforcement training and technical assistance, and the improvement of criminal history records. This award represents a 266 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, Alaska has received a total of $6 million in federal assistance under this program.

California was awarded $44 million, which will fund programs to improve financial investigations, court delay reduction and criminal justice information systems. Funds will also target domestic sources of controlled or illegal substances, urban street level enforcement, improvement of drug control technology and improvements to the correctional system, including innovative correctional alternatives. This award represents a 408 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, California has received a total of $137 million in federal assistance under this program.

Florida was awarded $19.7 million, which will target urban enforcement, improve drug control technology, financial investigations, effective court processes, and the improvement of criminal history records. Funds will also be used for domestic and family violence programs, demand reduction education and community crime prevention. This award represents a 397 percent increase over the amount the state received in 1989, the first year funds were made available under the Byrne program. To date, Florida has received a total of $61.9 million in federal assistance under this program.

Illinois was awarded $17.5 million, which will target the improvement of drug control technology and criminal history records, intermediate sanctions, community policing, and law enforcement training. Funds will also be used to improve law enforcement operations in such areas as gang and drug control in low income housing projects. This award represents a 365 percent increase over the amount the state received in 1989, the first year funds were made available under the Byrne program. To date, Illinois has received a total of $57.1 million in federal assistance under this program.

Indiana was awarded $9 million, which will target integrated criminal apprehension programs, user accountability, drug testing, drug abuse resistance education, community crime prevention, and the improvement of criminal justice information systems. Funds will also be used to support programs in intensive supervision of probationers and parolees and alternative sentencing. This award represents a 354 percent increase over the amount the state received in 1989, the first year funds were made available under the Byrne program. To date, Indiana has received a total of $29.3 million in federal assistance under this program.

Iowa was awarded $5 million, which will target domestic sources of controlled and illegal substances, financial conspiracy, and drug trafficking and manufacture in public housing. Funds will also be used for training and demand reduction education. This award represents a 326 percent increase over the amount the state received in 1989, the first year funds were made available under the Byrne program. To date, Iowa has received a total of $16.6 million in federal assistance under this program.

Kentucky was awarded $6.3 million, which will target eradication efforts, community crime control, improvement of adjudication management systems, drug testing, law enforcement training, demand reduction education, and the improvement of criminal history records. Funds will also be used to implement a "Weed and Seed" program. This award represents a 338 percent increase over the amount the state received in 1989, the first year funds were made available under the Byrne program. To date, Kentucky has received a total of $20.8 million in federal assistance under this program.

Massachusetts was awarded $9.7 million, which will target specific cities for funding of street level enforcement efforts and fund community impact projects that create regional drug task forces. Funds will also be used for programs in pharmaceutical diversion, court delay reduction, domestic violence, management information systems, improvement of drug control technology, improvement of criminal history records, demand reduction education, and youth crime prevention. This award represents a 364 percent increase over the amount the state received in 1989, the first year funds were made available under the Byrne program. To date, Massachussetts has received a total of $31 million in federal assistance under this program.

Michigan was awarded $14.4 million, which will target street level enforcement, increased resources for adjudication, and the improvement of criminal history records. Funds will also be used for demand reduction education and community crime prevention. This award represents a 369 percent increase over the amount the state received in 1989, the first year funds were made available under the Byrne program. To date, Michigan has received a total of $46.5 million in federal assistance under this program.

Minnesota was awarded $7.3 million, which will be used for training and technical assistance for narcotics officers and prosecutors, gang intervention, intensive supervision, community-based crime prevention measures and demand reduction education. This award represents a 355 percent increase over the amount the state received in 1989, the first year funds were made available under the Byrne program. To date, Minnesota has received a total of $23.6 million in federal assistance under this program.

Mississippi was awarded $4.7 million, which will be used to target street level enforcement, community crime prevention, enhancement of forensic services, court delay reduction programs, demand reduction education, and the improvement of criminal history records. Funds will also be used for a Drug Prosecution Resource Center, which will assist local prosecutors in researching and preparing drug cases for prosecution. This award represents a 325 percent increase over the amount the state received in 1989, the first year funds were made available under the Byrne program. To date, Mississippi has received a total of $15.6 million in federal assistance under this program.

Missouri was awarded $8.4 million, which will target community crime prevention, improving drug control technology, court delay reduction, intensive supervision of probationers and parolees, demand reduction education, and the improvement of criminal history records. This award represents a 352 percent increase over the amount the state received in 1989, the first year funds were made available under the Byrne program. To date, Missouri has received a total of $27.3 million in federal assistance under this program.

New Jersey was awarded $12.2 million, which will target community policing, drug-free public housing, drug testing, demand reduction education, improving operational effectiveness of the court process, intermediate sanctions, and the improvement of criminal history records. This award represents a 364 percent increase over the amount the state received in 1989, the first year funds were made available under the Byrne program. To date, New Jersey has received a total of $39.3 million in federal assistance under this program.

New Mexico was awarded $3.2 million, which will target improved drug control technology, community crime prevention, improved effectiveness of court processing, intensive supervision of probationers and parolees, domestic violence, demand reduction education, and the improvement of criminal history records. This award represents a 306 percent increase over the amount the state received in 1989, the first year funds were made available under the Byrne program. To date, New Mexico has received a total of $10.6 million in federal assistance under this program.

North Dakota was awarded $1.9 million, which will be used to fund programs to enhance street level enforcement, drug testing, user accountability, alternative sentencing, and the improvement of criminal history records. Funds will also be used to support programs in drug education and prevention. This award represents a 264 percent increase over the amount the state received in 1989, the first year funds were made available under the Byrne program. To date, North Dakota has received a total of $6.6 million in federal assistance under this program.

Oklahoma was awarded $5.6 million, which will target marijuana eradication, street level enforcement, property crime, community crime prevention, intensive supervision, demand reduction education, and the improvement of criminal history records. This award represents a 326 percent increase over the amount the state received in 1989, the first year funds were made available under the Byrne program. To date, Oklahoma has received a total of $18.4 million in federal assistance under this program.

Puerto Rico was awarded $6.1 million, which will target organized crime, public corruption, juvenile crime, and child abuse. Funds will also be used to improve drug control technology, prosecution management, narcotic information networks, and criminal history records. Puerto Rico will also target public housing for implementation of a "Weed and Seed" program. This award represents a 356 percent increase over the amount they received in 1989, the first year funds were made available under the Byrne program. To date, Puerto Rico has received a total of $19.1 million in federal assistance under this program.

Tennessee was awarded $8.1 million, which will target urban enforcement, improving drug control technology, programs aimed at white collar crime and fraud, court delay reduction, and the improvement of criminal history records. This award represents a 351 percent increase over the amount the state received in 1989, the first year funds were made available under the Byrne program. To date, Tennessee has received a total of $26.2 million in federal assistance under this program.

Texas was awarded $25.5 million, which will target improving drug control technology, financial investigations, urban enforcement and prosecution and the improvement of criminal history records. Funds will also be used to combat gang-related violence in low income housing. This award represents a 379 percent increase over the amount the state received in 1989, the first year funds were made available under the Byrne program. To date, Texas has received a total of $82 million in federal assistance under this program.

Vermont was awarded $1.8 million, which will target operational effectiveness of enforcement, improvement of correctional systems, improvement of criminal justice records and demand reduction education. This award represents a 265 percent increase over the amount the state received in 1989, the first year funds were made available under the Byrne program. To date, Vermont has received a total of $6.2 million in federal assistance under this program.

Virgin Islands was awarded $1.2 million, which will target street level enforcement, domestic sources of controlled and illegal substances, community crime prevention, correctional system improvements, improving forensics, and the improvement of criminal history records. This award represents a 223 percent increase over the amount the state received in 1989, the first year funds were made available under the Byrne program. To date, the Virgin Islands has received a total of $4 million in federal assistance under this program.

Wyoming was awarded $1.7 million, which will target drug interdiction efforts, marijuana eradication, training for District and County attorneys, criminal history records improvement, and demand reduction education. This award represents a 251 percent increase over the amount the state received in 1989, the first year funds were made available under the Byrne program. To date, Wyoming has received a total of $5.7 million in federal assistance under this program.

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Anti-Semitic Incidents

John R. Dunne, Assistant Attorney General for the Civil Rights Division, expressed concern about the increase in the number of anti-Semitic incidents as reported in the 1991 Audit of Anti-Semitic Incidents. The report was released on February 6, 1992, by the Anti-Defamation League (ADL) of B'Nai B'rith. Assistant Attorney General Dunne pledged that federal law enforcement efforts to combat this phenomenon will continue to be a priority for the Department of Justice.

Mr. Dunne expressed appreciation for the ADL's recognition that federal and local law enforcement was responsible for the one bright spot in the ADL report -- a decrease in acts of violence and vandalism by racist youths known as Skinheads. In the past three years, 43 racist Skinheads have been prosecuted for federal law violations -- primarily in Dallas, Tulsa and Nashville. Mr. Dunne said that significant resources have been invested in assisting local prosecutive efforts against racist Skinheads around the country, and the ADL figures demonstrate that these efforts have had the desired deterrent impact. Assistant Attorney General Dunne said, "Skinheads and other racist groups should know that Attorney General Barr's focus on prosecuting violent street gangs includes them. The Department of Justice will not tolerate violent racial gang activity."

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Rearrest Record Of State Felons

According to a recent Bureau of Justice Statistics (BJS) study, courts in 32 counties in 17 states sentenced about 79,000 felons to either straight probation or a probation term following some time in a local jail during 1986. Within three years, 43 percent had been rearrested on charges of committing another felony. BJS, a component of the Department of Justice's Office of Justice Programs, found that about one-half of the new arrests were for violent crimes or drug offenses.

Of the new arrests, 20 percent were for alleged violent crimes, such as assault, robbery, murder or rape; 16 percent were for the alleged possession of illegal drugs, and 17 percent were on drug trafficking charges. About half of those arrested while on probation were arrested more than once. Sixty percent of the 4.3 million adults under some form of correctional sanction on any given day in the United States are on probation in the community. Of these, about one-half are convicted felons. The 17-state sample, accounting for one-fourth of the approximately 306,000 felons sentenced to some type of probation during 1986, represents the nation's largest follow-up study ever conducted among felony probationers. Other findings in the survey, which was based on criminal history records and probation agency files, included,

-- Twelve percent were on probation for a violent offense, 34 percent for a property offense, another 34 percent for a drug offense and 20 percent for other felonies.

-- During their probation, 62 percent of the probationers either had a disciplinary hearing for an alleged violation of their probation requirements or were rearrested on felony charges.

-- Within three years, 46 percent of the probationers had been sent to a jail or prison or had illegally left the jurisdiction in which they had been serving their probation sentences.

-- Twenty-one percent of the probationers had been sentenced to supervision in the community despite the fact that probation officials prior to sentencing had recommended against their release into the community. These probationers were almost twice as likely to be subsequently imprisoned while on probation (37 percent) compared to those who had been recommended for probation (22 percent).

-- Eighty-four percent of the probationers had been required to pay a financial penalty as a condition of their release. Types of financial penalties included victim restitution (29 percent), court costs (48 percent) and almost a third (32 percent) were required to contribute to the costs of their own supervision. The average financial penalty was $1,800. Victim restitution averaged $3,400, court costs $560 and supervision fees $680.

-- Fifty-three percent of the felony probationers were required to meet certain other special conditions, such as drug testing (31 percent), drug treatment (23 percent) or alcohol-abuse treatment (14 percent).

-- Among the probationers who completed their probation terms during the study's three-year period, 69 percent of those with special conditions had fully satisfied the conditions and 47 percent of those with a financial penalty had paid the penalty in full.

Of the estimated 583,000 felons convicted in state courts during 1986, 31 percent received straight probation that typically required a periodic visit with a probation officer but no incarceration. An additional 21 percent received probation combined with a period of time in a prison or a jail. Forty percent received a prison sentence only, 6 percent were sentenced to jail only and the remaining 2 percent received other sentences.

As of December 31, 1990, there were 2.7 million adults on probation in the United States, compared to 2 million at the end of 1985. During 1990 about 1.6 million men and women entered a probation term and 1.5 million completed such supervision.

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Project Triggerlock
Summary Report

Cases Indicted From April 10, 1991 Through January 31, 1992

Description	***Count***	***Description***	***Count***
Indictments/Informations.....	3,604	Prison Sentences.....	5,253 years; 2 life sentences
Defendants Charged.....	4,547	Sentenced to prison.....	860
Defendants Convicted.....	1,799		
Defendants Acquitted.....	50	Sentenced w/o prison or suspended.....	75

Numbers are adjusted due to monthly activity, improved reporting and the refinement of the data base. These statistics are based on reports from 94 offices of the United States Attorneys, excluding District of Columbia's Superior Court. [NOTE: All numbers are approximate.]

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Project Triggerlock

Summary Report for the District of Columbia's Superior Court

Cases Indicted From April 10, 1991 Through January 31, 1992
for violation of 22 D.C. §3204(b) *

Description	*Count*	*Description*	*Count*
Indictments/Informations	553	Prison Sentences	621 years
Defendants Charged	612	Sentenced to prison	110
Defendants Convicted	198	Sentenced w/o prison or suspended	8
Defendants Acquitted	15		

NOTE: All numbers are approximate.

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* 22 D.C. Code Section 3204(b) is the local equivalent of 18 U.S.C. Section 924(c).

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ASSET FORFEITURE

Attorney General's Authority To Warrant Title

On February 12, 1992, Cary H. Copeland, Director and Chief Counsel, Executive Office for Asset Forfeiture, issued a memorandum to all United States Attorneys, and other Department and Agency officials, concerning departmental policy on the Attorney General's authority to warrant title. Mr. Copeland discusses 1) general policy; 2) circumstances for the use of a special warranty deed and indemnification agreement; 3) circumstances for the use of a general warranty deed; and 4) dispute resolution.

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

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Strengthening Asset Forfeiture Nationally

The Department of Justice recognizes that asset forfeiture is a powerful law enforcement weapon and that it must be employed prudently. In an effort to improve the quality of asset forfeiture at every level of government, the Department has proposed adoption by all federal, state and local law enforcement agencies of a series of eight "quality assurance standards." This proposal is under review by federal agencies and by the National Association of Attorneys General, the National District Attorneys Association, the International Association of Chiefs of Police, the National Sheriffs Association, the National Troopers Coalition, and the Fraternal Order of Police. The proposed standards are as follows:

I. Law enforcement is the principal objective of asset forfeiture. Potential forfeiture revenues must not be allowed to override fundamental law enforcement considerations such as officer safety or the security of ongoing investigations.

II. No prosecutor's or sworn law enforcement officer's employment or salary shall be made to depend solely upon the level of seizures or forfeitures he/she achieves.

III. Whenever practicable, and in all cases involving real property, seizures shall be pursuant to a warrant based upon a judicial finding of probable cause.

IV. Where a judicial seizure warrant is not secured, probable cause supporting the seizure shall promptly be reviewed by an accountable prosecuting or agency attorney.

V. Every seizing entity shall have policies and procedures for the quick release of seized property where appropriate and to ensure expeditious resolution of ownership claims.

VI. Every entity retaining forfeited property for official law enforcement use shall ensure that the property is subject to controls consistent with those applicable to property acquired through the normal appropriations process.

VII. Every entity receiving forfeiture proceeds shall maintain such monies in a special fund which is subject to accounting controls and annual financial audits.

VIII. Every seizing and forfeiting entity shall prohibit its employees from purchasing forfeited property.

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SENTENCING REFORM

Indictment And Plea Procedures Under Guideline Sentencing

On February 7, 1992, George J. Terwilliger, III, Acting Deputy Attorney General, issued a bluesheet (USAM 9-27.451) to all United States Attorneys, which set out procedures to be followed in making charging decisions, drafting indictments, and negotiating plea agreements in cases which come under the Sentencing Guidelines.

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

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Guideline Sentencing Update

A copy of the "Guideline Sentencing Update," Volume 4, No. 15, dated February 14, 1992, is attached at the Appendix of this Bulletin as Exhibit C.

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Federal Sentencing And Forfeiture Guide

Attached at the Appendix of this Bulletin as Exhibit D is a copy of the Federal Sentencing and Forfeiture Guide, Volume 3, No. 7, dated January 27, 1992, and Volume 3, No. 8, dated February 10, 1992, which is published and copyrighted by Del Mar Legal Publications, Inc., Del Mar, California.

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FINANCIAL INSTITUTION FRAUD ISSUES

Major Decision In The Eastern District Of Pennsylvania

The United States District Court for the Eastern District of Pennsylvania has written the first decision affirming the constitutionality of 12 U.S.C. §1833a, the civil penalty statute that was enacted as Section 951 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989. The decision, in United States v. Mullins, Civil Action No. 91-4331 (E.D. Pa.), was issued February 12, 1992, and is attached at the Appendix of this Bulletin as Exhibit E.

The suit arises out of a Pennsylvania limited partnership's loan arrangement with two federally-insured financial institutions, Skokie Federal Savings and Loan Asssociation and Ohio Valley Savings and Loan Association. The complaint alleges that the general partner of the partnership, Steven Mullins, and the accountant for the partnership, Paul Brown, made false statements to the institutions for the purpose of obtaining credit and concealing the diversion of $2.2 million of loan proceeds. The suit also alleges that after the partnership was in bankruptcy, Mullins prepared and submitted a false personal financial statement to Skokie for the purpose of influencing Skokie's decisions with respect to the partnership's plan of reorganization. These actions constitute violations of 18 U.S.C. §1014. The defendants responded to the complaint with motions to dismiss, arguing that the ex post facto doctrine and the statute's civil burden of proof rendered Section 1833a unconstitutional.

The court denied the motions without an opinion, and the defendants moved for reconsideration, or in the alternative, for certification to the Third Circuit Court of Appeals. In denying those motions, the Court wrote its opinion, expressly adopting the government's arguments with respect to the constitutionality of the statute.

Michael M. Baylson, United States Attorney, said, "Congratulations go to ***David Zalesne*** of our Civil Division who wrote the outstanding briefs with input from the Department's Civil Division."

* * * * *

Financial Institution Prosecution Updates

On February 10, 1992, 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 January 31, 1992. "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.

Bank Prosecution Update

Informations/Indictments	1,185
Estimated Bank Loss	$2,791,675,462
Defendants Charged	1,639
Defendants Convicted	1,312
Defendants Acquitted	25
Prison Sentences	1,643 years
Sentenced to prison	808
Awaiting sentence	254
Sentenced w/o prison or suspended	259
Fines Imposed	$ 5,011,581
Restitution Ordered	$ 317,304,059

CEOs, Chairmen, and Presidents:	
Charged by Indictments/ Informations	119
Convicted	105
Acquitted	1
Directors and Other Officers:	
Charged by Indictments/ Informations	377
Convicted	329
Acquitted	3

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Savings And Loan Prosecution Update

Informations/Indictments	616
Estimated S&L Loss	$ 10,576,321,213
Defendants Charged	1,036
Defendants Convicted	760
Defendants Acquitted	57 *
Prison Sentences	1,516 years
Sentenced to prison	472
Awaiting sentence	177
Sentenced w/o prison or suspended	122
Fines Imposed	$ 13,670,436
Restitution Ordered	$404,500,650

CEOs, Chairmen, and Presidents:	
Charged by Indictments/ Informations	118
Convicted	84
Acquitted	8
Directors and Other Officers:	
Charged by Indictments/ Informations	169
Convicted	146
Acquitted	5

* 21 borrowers dismissed in a single case in a District Court.

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Credit Union Prosecution Update

Informations/Indictments	69	CEOs, Chairmen, and Presidents:	
Estimated Credit Loss	$82,813,790	Charged by Indictments/ Informations	8
Defendants Charged	88	Convicted	8
Defendants Convicted	73	Acquitted	0
Defendants Acquitted	1		
Prison Sentences	106 years		
Sentenced to prison	54		
Awaiting sentence	11	Directors and Other Officers:	
Sentenced w/o prison or suspended	8	Charged by Indictments/ Informations	45
Fines Imposed	$ 3,750	Convicted	41
Restitution Ordered	$11,002,744	Acquitted	0

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POINTS TO REMEMBER

Memorandum Of Understanding Between The Department Of Justice And The Environmental Protection Agency

On February 13, 1992, a Memorandum of Understanding (MOU) was executed by the Department of Justice (DOJ) and the Environmental Protection Agency (EPA). The MOU establishes procedures by which certain Superfund cost recoveries and cost penalties will be collected through the DOJ Lockbox system. It also describes procedures that DOJ and EPA will follow to ensure that each agency, as well as the Department of the Treasury, is kept fully informed about the status of each debt and collections made. These procedures apply to consent decrees and other settlements which were obtained under the authority of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, as amended; now referred to as "Superfund"), and which DOJ litigated on behalf of the Hazardous Substance Superfund, or to other Superfund debts referred to DOJ for collection.

Previously, Superfund recoveries were sent to EPA for deposit in EPA's twelve lockbox banks, although the Environment and Natural Resources Division and the United States Attorneys' offices are responsible for litigating these claims. Under the terms of this agreement, all payments received by the United States as the result of litigation on Superfund cost recoveries and penalties will be processed by the United States Attorneys' offices for consent decrees executed on or after March 1, 1992. In addition, all settling defendants who sign a Superfund consent decree must also agree to deposit their payments by wire transfer (EFT) to DOJ's lockbox account. In return for this new source of payment, the United States Attorneys' offices will be responsible for coordinating and monitoring the wire transfers.

A copy of the Memorandum of Understanding (without the attachments) is attached at the Appendix of this Bulletin as Exhibit F. Further information will be forthcoming in the near future. If you have any questions, please contact Kathleen Haggerty of the Financial Litigation Staff, Executive Office for United States Attorneys, at (FTS) 241-7017 or (202) 501-7017.

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Witness Fees And Expenses

The Special Authorizations Unit of the Justice Management Division, Department of Justice, has responded to a number of questions which have recently been raised concerning witness fees and expenses as follows:

1. The expenses of a guardian ad litem appointed pursuant to the Crime Control Act of 1990 ordinarily are not chargeable to the Fees and Expenses of Witnesses (FEW) appropriation. However, if a minor is called to testify in the U.S. courts, the travel expenses of the guardian to accompany the witness may be charged to FEW.

2. Victims who attend sentencing hearings without the intention of testifying cannot be paid a fee and allowances from FEW. Victims who are called to testify at sentencing hearings are entitled to the fact witness fees and allowances.

3. The payment of fact witness fees and allowances to state and local law enforcement officials deputized to enforce federal laws is dependent on the deputization arrangements with the state and local governments. If the agreement waives the fees and expenses, no payments can be made. If the agreement waives the fees only, reimbursement of the expenses can be made. The United States Attorney's office should verify the agreement with the state or local government and inform the U.S. Marshal's office if fees and/or expenses should be paid to these persons.

4. The expenses incurred by Special Assistant United States Attorneys conducting cases in federal courts are paid in the same manner as expenses incurred by regular Department of Justice attorneys.

5. Department of Justice attorneys must follow their offices' internal procedures in submitting requests for witness expenses. Many offices have the authority to approve expert witness requests and most offices have tracking procedures to assure that requests are approved and invoices submitted in a timely manner. Following internal procedures will assist in tracking/locating requests and invoices.

6. Approval of the expert witness's invoice is the responsibility of the office retaining the expert witness. Prior to the submission of the invoice to the Fiscal and Data Service, the invoice must be 1) reviewed to ensure that it matches the approved request and that the services have been performed, and 2) approved by an authorized certifying officer. The approval should be performed as soon as possible after receipt of the invoice.

7. The Department of State has requested <u>at least two weeks</u> notice to obtain international witnesses. This advance time is necessary to locate/contact witnesses and arrange for visas, travel permits, airline tickets, etc. Additionally, to ensure that the Department of Justice does not infringe on the sovereignty of the foreign country, the requesting office must contact the Office of International Affairs of the Criminal Division, at (FTS) 368-0000 or (202) 514-0000.

If you have any questions or comments, please call the Special Authorizations Unit, at (FTS) 241-8429 or (202) 501-8429. The Fax number is (FTS) 241-8090 or (202) 501-8090.

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LEGISLATION

FY 1993 Department Of Justice Authorization Bill

The Office of Legislative Affairs has been working with the Justice Management Division to prepare the Department's FY 1993 authorization bill for transmittal to the Office of Management and Budget for clearance. This year's bill, consistent with last year's proposal, requests a permanent authorization for the Department, beginning in FY 1994. Congress has not enacted an authorization bill for the Department since 1980. Transmittal of the draft bill to the Office of Management and Budget is imminent.

* * * * *

Immigration Legislation

On behalf of the Department of Justice, the Office of Legislative Affairs has submitted draft immigration legislation to the Office of Management and Budget for clearance. The legislation addresses the need to more expeditiously process aliens who present fraudulent documents at U.S. ports of entry as well as the need to expeditiously remove criminal aliens from the Federal Prison system through transfers to their native countries. Legislative proposals will be submitted to Congress in the near future.

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Administrative Law Judge Corps Act

On February 6, 1992, the Senate Judiciary Committee reported by a 9-5 vote, S. 826, a bill to establish an independent agency of administrative law judges to be comprised of those ALJs now under the control of individual agencies. The Department objects to the bill on grounds that it would lessen agencies' control over their own decisions, reduce ALJs' expertise, and pose constitutional concerns, among others.

The bill now awaits action by the full Senate, and Department of Justice representatives are currently contacting key Senators to oppose passage. The House Judiciary Committee has yet to take up the companion measure.

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Antitrust Issues Concerning The Airline Industry

On February 21, 1992, Mark Schechter, Chief, Transportation Section, Antitrust Division, presented testimony, along with representatives of the Transportation Department, before the Senate Government Affairs Ad Hoc Consumer Affairs Subcommittee. The hearing examined issues such as airline mergers, bankruptcies, and barriers to entry impacting consumers. Mr. Schechter highlighted the Department's efforts to ensure competition in the industry by challenging anticompetitive transactions and making recommendations to the Transportation Department concerning entry barriers.

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CASE NOTES

CIVIL DIVISION

Supreme Court Confines Federal Tort Claims Act's Prohibition Against Punitive Damages To Those Damages Based On The Defendant's Culpability, Rejecting Our Argument That The Provision Barred Any Damages In Excess Of Compensation

The Federal Tort Claims Act (FTCA) precludes government liability for "punitive damages" (28 U.S.C. 2674). Petitioner Molzof was rendered permanently comatose as a result of medical malpractice by VA hospital personnel. In this FTCA suit, the district court awarded him $217,950 in damages and awarded his wife $150,000 for loss of consortium. It declined, however, to award damages for Molzof's loss of enjoyment of life on the ground that such damages would be punitive because they would not compensate him for any loss of which he was aware. The Seventh Circuit affirmed this decision.

In a unanimous decision (per Justice Thomas in his first opinion), the Supreme Court has now reversed, holding that the exclusion for punitive damages in the FTCA excludes only those damages whose purpose is to punish the defendant. The Court rejected our argument that any damages in excess of compensation were punitive. It remanded the case for a determination of whether state law would allow the types of damages sought by Molzof, a cash award for future medical expenses and damages for loss of enjoyment of life.

Molzof v. United States, No. 90-838 (January 14, 1992). DJ # 157-86-275

Attorneys: Anthony J. Steinmeyer - (202) 514-3388 or (FTS) 368-3388
Irene M. Solet - (202) 514-3542 or (FTS) 368-3542

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Supreme Court Holds That Flexible Standard Governs Requests For Modification Of Consent Decrees In Institutional Reform Litigation

This case began 20 years ago, when inmates at a county jail brought a class action challenging the conditions of confinement for pretrial detainees. The district court ruled in 1973 that those conditions violated due process. Remedial relief was entered in 1979 in a consent decree that provided for the construction of a new jail and which incorporated by reference an architectural plan providing for single occupancy cells. In 1989, in the face of continuing increases in the number of pretrial detainees, the Sheriff moved that the consent decree be modified to allow double-celling in the new jail. The district court denied this motion, on the ground that "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years 'of litigation with the consent of all concerned." United States v. Swift, 286 U.S. 106 (1932). The First Circuit affirmed.

The Supreme Court has now vacated and remanded. The Court's decision holds, in virtually full agreement with the position advanced by the United States as amicus curiae, that the Swift "grievous wrong" formulation is not applicable in "institutional reform" cases. Rather, where, as here, modification of a consent decree is sought in the context of a complex, ongoing remedial decree, a more flexible standard is required, pursuant to which a significant change of fact or law may justify a modification of agreed-upon terms, as long as the requested adjustment remains in keeping with the central purposes of the decree.

Rufo, Sheriff of Suffolk County, et al. v. Inmates of Suffolk County Jail, et al., Nos. 90-954/1004 (January 15, 1992). DJ # 145-0-3392.

Attorneys: Robert E. Kopp - (202) 514-3311 or (FTS) 368-3311
Thomas M. Bondy - (202) 514-4825 or (FTS) 368-4825

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Third Circuit Affirms Dismissal On Standing Grounds Of Municipality's Action To Set Aside Lease Of Excess Federal Property To Provider Of Shelter To The Homeless

The City of Clifton, New Jersey, sued to set aside a lease entered into pursuant to Title V of the Stuart B. McKinney Homeless Assistance Act of 1987, 42 U.S.C. § 11411, between the federal government and a local provider of services to the homeless, under which the provider agreed to establish a shelter on excess federal property in Clifton. The City contended that it had a better use for the property under the McKinney Act -- although it intended to use the property primarily to house the elderly, rather than the homeless. The district court dismissed the action on standing grounds, since the City had never filed an application to lease the property. The Third Circuit has now affirmed, stating that "[a]ny harm that Clifton could potentially claim from the lost opportunity to compete * * * for the lease was not the result of agency action, but was, instead, caused by Clifton's failure to apply."

City of Clifton, New Jersey v. HHS, No. 91-5557 (January 16, 1992). DJ # 145-16-3420.

Attorney: Michael Jay Singer - (202) 514-5432 or (FTS) 368-5432
John S. Koppel - (202) 514-2495 or (FTS) 368-2495

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Ninth Circuit Affirms Dismissal Of RICO Claim And Grants Government's Request For Award Of Attorney's Fees And Double Costs Under Rule 38, Fed. R. App. P.

Plaintiff Ross, a California attorney who represented himself and several other creditors in an unsuccessful bankruptcy action approximately ten years ago, has since brought repeated baseless actions against various federal district court judges, bankruptcy judges, government attorneys and private parties for their alleged malfeasance in connection with the bankruptcy case. This action was purportedly brought under the RICO statute, and was dismissed by the district court on absolute immunity grounds with respect to the federal defendants. The district court also fined plaintiff Ross $5,000 and awarded attorney's fees against him. Plaintiff appealed, and the Ninth Circuit has now affirmed in an unpublished memorandum opinion. Notably, the Court granted our request for attorney's fees and double costs under Rule 38, Fed. R. App. P., finding such an award appropriate "[i]n light of these frivolous arguments and Ross's prior record of practice."

Ross, et al. v. Elliott, et al., Nos. 89-55917, 89-56262, 90-55079 (January 13, 1992). DJ # 157-12-2891.

Attorneys: Barbara L. Herwig - (202) 514-5425 or (FTS) 368-5425
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Eleventh Circuit Reverses District Court Decision Invalidating Farmers Home Administration (FmHA) Regulations Governing Procedures For Eviction of Tenants From FmHA-Subsidized Housing

The National Housing Act authorizes the Secretary of Agriculture to issue regulations ensuring that persons living in housing financed by the FmHA whose assistance is substantially reduced or terminated by the private landlord be given written notice and an opportunity to present additional information on appeal. The Secretary originally implemented the statute with regulations providing an administrative process for review of evictions. After further notice and comment, however, the Secretary removed evictions from the administrative process, instead requiring landlords to use existing state judicial eviction procedures. Reversing the district court, the Eleventh Circuit (Tjoflat, Birch, Hill) has upheld the amended regulations as consistent with the statute and not arbitrary or capricious. The decision contains generally useful language regarding the deference to be paid to an agency under both the Chevron doctrine and the APA arbitrary and capricious standard.

Brenda Hussion v. Madigan, et al., No. 90-8873 (January 24, 1991).
DJ # 136-19-365.

Attorney: Barbara C. Biddle - (202) 514-2541 or (FTS) 368-2541

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ENVIRONMENT AND NATURAL RESOURCES DIVISION

Small Scale Test Drilling For Temporary Period Held Not a "Conversion" Within Meaning Of Land And Water Conservation Fund Act

The only major deposit of diamonds in the United States is in Crater of Diamonds State Park in Arkansas. For years, the state has allowed visitors to freely explore the area and extract diamonds, making the park a major tourist attraction. In this case, a coalition of environmental organizations brought an action challenging a decision by the Secretary of the Interior to allow small scale test drilling in the park. Since the Department of the Interior had made a grant to the state under the Land and Water Conservation Fund Act (LWCF Act), the issue whether preliminary testing to determine the feasibility of commercial diamond mining constitutes a "conversion" under the LWCF Act to non-park uses. The district court concluded that the initial testing was "inextricably intertwined" with mining and therefore constituted a nonrecreational use under the Act. The government appealed and the mining company, which had intervened, sought damages.

The court of appeals, by a two to one vote, reversed, on the LWCF issue. The court recognized that Interior's regional solicitor had originally rejected the limited testing proposal opining that it "could have the potential of progressing into a full-blown commercial diamond mining operation." The next day, after the Interior Department informed him that his opinion was premature, he withdrew his opinion. The court held that under Chevron Interior's construction of the LWCF was entitled to deference, and accordingly, that its view that test drilling, even the limited nonrecreational use of a small portion of the park, did not constitute a conversion, and was not arbitrary or capricious. The court accepted our argument that, if a conversion should occur and the Secretary has to substitute land of equal value and usefulness, that he must first know the value of the converted parcel; hence the Secretary properly determined that testing is a reasonable first step.

Sierra Club, et al v. Richard Davies, et al. 8th Cir. No. 90-2639EA (February 5, 1992) (Magill, Wollman; McMillian, dissenting)

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Robert L. Klarquist - (FTS) 368-2731 or (202) 514-2731

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District Court's Finding In Condemnation That Mining Was Not The Highest And Best Use Of The Property Sustained

In this condemnation case, the landowner appealed the district court's finding that the highest and best use of the property was for recreational purposes. The landowner claimed that the land, which was actually an ancient shell midden, had a highest and best use as a mine. The United States claimed that the mining use was too speculative because it depended upon obtaining a variety of federal, state and local permits. On appeal the landowner argued, relying on United States v. 320 Acres (Everglades), that to disallow any value for mining purposes based on an allegation that permits would be required, would constitute a taking in itself, thereby requiring the property to be valued without consideration of the need to obtain the permits.

The Fifth Circuit held that it is the function of the trier of fact to determine what, if any, effect the need to obtain permits has on the value of the land. The Court then explained that in Everglades, it did not say that "a landowner's suggested use must determine the value of the property if the landowner shows some possibility that a permit would be issued for that use." (Slip Op. at 10). The court concluded that there was ample support in the record for the district court's factual finding that the proposed shell mining project was too remote to contribute to the fair market value of the land on the date of taking. The court did caution the government to "walk a narrow path" in arguing that regulatory restrictions decrease the value of the property. The "permissible uses of the property must be narrowed enough to significantly decrease the value of the property, but not so narrowed as to take [the property]." (Slip Op. at 17.)

United States v. 62.50 Acres of Land in Jefferson Parish, Louisiana, 5th Cir. No. 91-3091 (Higginbotham, Barksdale, McBryde)

Attorneys: Albert M. Ferlo, Jr. - (FTS) 368-2757 or (202) 514-2757
Martin W. Matzen - (FTS) 368-2753 or (202) 514-2753

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Claimant Has No Compensable Property Interest Under The Fifth Amendment Prior To Completion Of Receipt Of a Patent Under The Color Of Title Action

Benton Cavin alleged a taking based on Forest Service activities on land over which there was a dispute of title between the Cavin family and Forest Service for 15 years or more. Cavin eventually received a patent to the property in 1984 under the Color of Title Act. Cavin then filed a taking claim in the Claims Court seeking $419,983.34 for damages allegedly caused by Forest Service activities. The Claims Court dismissed the action based on the statute of limitations. The Federal Circuit dismissed most of the action on a different basis.

The Federal Circuit concluded that the Cavins had no compensable property interest prior to the completion in 1984 of the requirements for a color of title act patent and, therefore, the Cavins could not claim damages for activities on the property before 1984. Nevertheless, Cavin's complaint included a taking claim based on the Forest Service's continued use of a road across the property after 1984. This particular claim was not time-barred and Cavin then had the requisite property interest. The Federal Circuit remanded to the Claims Court to determine whether the allegation of Forest Service road use after 1984 constitutes a compensable taking. Two other issues were addressed. The Federal Circuit held that the Claims Court properly refused to transfer tort claims to district court. The Court held that in light of the limited remand, it did not have to resolve the government's appeal of the award of costs against the government. (We argued that because the Claims Court dismissed for lack of jurisdiction, it could not enter a cost award.)

Cavin v. United States, Fed. Cir. Nos. 91-5098, 91-5106
(February 13, 1992) (Nies, Newman, Rader)

Attorneys: Ellen Durkee - (FTS) 368-4426 or (202) 514-4426
David C. Shilton - (FTS) 368-5580 or (202) 514-5580

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TAX DIVISION

District Court Rules That Nursing Students Are Employees

On February 7, 1992, the United States District Court for the Eastern District of Tennessee determined in a case of first impression, Johnson City Medical Center Hospital v. United States, that student nurses working at the Johnson City Medical Center Hospital in Johnson City, Tennessee, were employees of the hospital for tax purposes. The Court specifically determined that the services provided by the student nurses could not be considered an incidental part of their training. In reaching this result, the Court ruled that amounts received by these nurses from the hospital were subject to the social security tax provisions of the Internal Revenue Code.

This decision is extremely important to the Government. Currently, there are numerous cases pending in the federal district courts and at the administrative level involving this same issue. Furthermore, a House Ways and Means Committee Report estimates that nearly $510 million in social security taxes will be paid by nursing students employed by hospitals for the years 1991 through 1995.

* * * * *

Fourth and Fifth Circuits In Conflict On Important Employee Retirement Income Security Act Issue

On January 17, 1992, the Fifth Circuit affirmed the unfavorable decision of the Tax Court in Keystone Consolidated Industries, Inc. v. Commissioner. On January 31, 1992, the Fourth Circuit reversed the Tax Court's unfavorable decision on the same issue in Wood v. Commissioner. These appeals presented the question whether a plan sponsor's "funding" of a defined benefit retirement plan with notes payable to the sponsor constitutes a prohibited sale or exchange by a disqualified person within the meaning of Section 4975(c)(1)(A) of the Internal Revenue Code. If so, an excise tax is imposed upon the plan sponsor. The Tax Court held in each of these cases that an excise tax was not appropriate.

The Government argued in each of these cases that the transfer of property in satisfaction of an obligation is a "sale or exchange" of the property transferred for income tax purposes. The Fifth Circuit in Keystone Consolidated Industries rejected this argument, holding that a transfer of property to a pension plan in satisfaction of a minimum funding obligation is not a sale or exchange of the property transferred. In Wood, the Fourth Circuit expressly rejected this holding.

The issue presented by these cases is extremely important to the administration of law respecting minimum funding requirements for pension plans under the Employee Retirement Income Security Act of 1974.

* * * * *

Fifth Circuit Decides $200 Million Case In Favor Of Shell Oil

On February 6, 1992, the Fifth Circuit reversed the favorable opinion of the Tax Court in Shell Oil Company v. Commissioner, and remanded the case for further proceedings. The case, which involves $200 million, presented two issues concerning the calculation of the taxpayer's windfall profit tax liability: (1) whether the taxpayer correctly attributed indirect exploration expenses and abandonment losses to its producing and nonproducing properties; and (2) whether intangible drilling and development costs ("IDCs") should be included in the allocation base for allocating overhead and indirect expenses between producing and nonproducing properties.

As to the first issue, the Tax Court held that indirect exploration expenses and abandonment losses incurred with respect to property that the taxpayer ultimately did not lease are not overhead expenses allocable to taxpayer's producing properties. This resulted in an increase in the amount of net income attributable to producing properties, and a corresponding increase in the taxpayer's windfall profit tax liability. The Fifth Circuit, however, disagreed, holding that exploration was an integral part of the mining process and that these costs should be allocated among all of the taxpayer's producing properties.

With respect to the second issue, the Tax Court held that including IDCs in the allocation base produced a fairer result than excluding them. As IDCs generally are incurred with respect to properties that are not yet producing, this resulted in the allocation of substantial overhead costs to nonproducing properties. This again resulted in an increase in the amount of net income attributable to producing properties, and a corresponding increase in the taxpayer's windfall profit tax liability. The Fifth Circuit, however, determined that the Tax Court erred in determining whether the inclusion or exclusion of these costs in the allocation base produced a fairer result. It held, instead, that the appropriate standard was whether the taxpayer's position as to the proper allocation was defensible as a matter of cost accounting, and remanded the case for further proceedings on this issue.

* * * * *

Sixth Circuit Affirms Favorable Decision In Important DISC Case

On February 3, 1992, in a split-decision, the Sixth Circuit affirmed the favorable decision of the Tax Court in Brown-Forman v. Commissioner. This case, which involved $2 million, presented the question whether the portion of Brown-Forman's gross receipts attributable to its passing-on of liquor excise taxes on Jack Daniels and Southern Comfort could be excluded from the taxpayer's worldwide gross receipts for computing the maximum amount of income subject to deferral under the Domestic International Sales Corporation ("DISC") rules of the Internal Revenue Code.

A majority of the panel hearing this case determined that the excise tax was a cost of doing business and thus it should be included in the taxpayer's worldwide gross receipts. Under a formula prescribed by regulation, this holding reduces the amount of income eligible for deferral from taxation under the DISC provisions. The dissent disagreed with this result, reasoning that it caused a distortion of income.

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ADMINISTRATIVE ISSUES

Career Opportunities

Civil Rights Division

The Office of Attorney Personnel Management, Department of Justice, is seeking an experienced trial attorney for the position of Deputy Chief of the Coordination and Review Section, Civil Rights Division, in Washington, D.C. Responsibilities include directing the administrative enforcement of Title II of the Americans with Disabilities Act (ADA), and coordination of federal civil rights enforcement efforts, including regulation development and review. In addition, the Coordination and Review Section has primary staff responsibility for carrying out the duties set forth in Executive Order 12250, Leadership and Coordination of Nondiscrimination Laws. The Section operates a comprehensive coordination program to ensure that consistent and effective enforcement of Title VI of the Civil Rights Act of 1964, as amended, Title IX of the Education Amendments of 1972, as amended, Section 504 of the Rehabilitation Act of 1973, as amended, and similarly worded Federal statutes that prohibit discrimination on the basis of race, color, national origin, sex, handicap, or religion in federally assisted programs and on the basis of handicap in federally conducted programs. The Section also investigates complaints of discrimination against State and local correctional systems and institutions that are recipients of Federal financial assistance from the National Institute of Corrections. This position does not involve litigation responsibilities.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least 4 1/2 years post-J.D. experience. Applicants should submit a current SF-171 (Application for Federal Employment) or resume along with a writing sample to: U.S. Department of Justice, Civil Rights Division, P.O. Box 65310, Washington, D.C. 20035-5310, Attn: Sandra Bright. Current salary and years of experience will determine the appropriate salary level within the GM-15 range ($64,233 - $83,502). No telephone calls, please.

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Immigration And Naturalization Service

The Office of Attorney Personnel Management, Department of Justice, is seeking an experienced attorney for a job-share position (20 hours per week) with the Immigration and Naturalization Service in Fort Snelling (Twin Cities), Minnesota. Responsibilities include assisting with litigation reports and recommendations for review, legal research on various issues, drafting legal opinions, and handling MSPB/EEO and employee arbitration cases.

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). Applicants must submit a resume, writing sample, law school transcript and letter to: Robert E. Popken, Regional Counsel, U.S. Immigration and Naturalization Service, Bishop Henry Whipple Federal Building, Room 13C, One Federal Drive, Fort Snelling, Minnesota 55111-4007.

Current salary and years of experience will determine the appropriate grade and salary levels. The possible grade/salary range is GS-11 to GS-14 ($16,000 - $35,000). This position is open until filled. No telephone calls, please.

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U.S. Trustee Office
Shreveport, Louisiana and San Bernardino, California

The Office of Attorney Personnel Management, Department of Justice, is seeking two experienced attorneys for the U.S. Trustee's office in Shreveport, Louisiana and one experienced attorney for the U.S. Trustee's office in San Bernardino, California. Responsibilities include assisting with the administration of cases filed under Chapters 7, 11,12, or 13 of the Bankruptcy Code; drafting motions, pleadings, and briefs; and litigating cases in Bankruptcy Court and the U.S. Distrist 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. For the position in Shreveport, applicants must submit a resume and law school transcript to: U.S. Department of Justice, Office of the U. S. Trustee, 400 Poydras Street, Suite 1820, New Orleans, Louisiana 70130. For San Bernardino, applicants must submit a resume and law school transcript to: U.S. Department of Justice, Office of the U.S. Trustee, 699 N. Arrowhead Avenue, Room 106, San Bernardino, California 92401, Attn: Timothy J. Farris.

Current salary and years of experience will determine the appropriate grade and salary level. The possible range in Shreveport is GS-11 ($32,423 - $42,152) to GS-14 ($54,607 - $70,987). The possible range in San Bernardo is GS-11 (35,017 - $45,524) to GS-12 ($41,970 - $54,577). These positions are open until filled.

* * * * *

APPENDIX

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

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

Effective Date	Annual Rate	Effective Date	Annual Rate	Effective Date	Annual Rate
10-21-88	8.15%	01-12-90	7.74%	04-05-91	6.26%
11-18-88	8.55%	02-14-90	7.97%	05-03-91	6.07%
12-16-88	9.20%	03-09-90	8.36%	05-31-91	6.09%
01-13-89	9.16%	04-06-90	8.32%	06-28-91	6.39%
02-15-89	9.32%	05-04-90	8.70%	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%	12-13-91	4.41%
07-28-89	7.75%	10-27-90	7.51%	01-10-92	4.02%
08-25-89	8.27%	11-16-90	7.28%	02-07-92	4.21%
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 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
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District of Columbia	Jay B. Stephens
Florida, N	Kenneth W. Sukhia
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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
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Indiana, S	Deborah J. Daniels
Iowa, N	Charles W. Larson
Iowa, S	Gene W. Shepard
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Louisiana, M	P. Raymond Lamonica
Louisiana, W	Joseph S. Cage, Jr.
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Missouri, W	Jean Paul Bradshaw

DISTRICT	U.S. ATTORNEY
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Nebraska	Ronald D. Lahners
Nevada	Leland E. Lutfy
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Oklahoma, E	John W. Raley, Jr.
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Wisconsin, W	Kevin C. Potter
Wyoming	Richard A. Stacy
North Mariana Islands	Frederick Black

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U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

EXHIBIT A

February 12, 1992

MEMORANDUM

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

FROM: Cary H. Copeland CHC
Director and Chief Counsel

SUBJECT: Departmental Policy on Attorney General's Authority to Warrant Title

I. GENERAL POLICY

Section 2002 of the Crime Control Act of 1990, which amends 28 U.S.C. § 524(c), gives the Attorney General the authority to warrant clear title upon transfer of forfeited property. Section 524(c)(10) reads as follows:

> Following the completion of procedures for the forfeiture of property pursuant to any law enforced or administered by the Department, the Attorney General is authorized, at his discretion, to warrant clear title to any subsequent purchaser or transferee of such forfeited property.

The authority of the Attorney General to dispose of forfeited real property and to execute deeds and warrant title has been delegated to the Director of the U.S. Marshals Service, by 28 C.F.R. § 0.111(i), and redelegated to chief deputies or deputy U.S. Marshals by 28 C.F.R. § 0.156.

The preferred deed to transfer forfeited property is a U.S. Marshal's quitclaim deed (USM-159A) executed by the Marshal. The quitclaim deed makes no warranty representations. It serves only

to convey whatever right, title and interest that the Government had as of the execution date. A special warranty deed[1] may be used instead when the Marshal, in consultation with the United States Attorney, concludes that such a deed is necessary and appropriate under the facts of a particular case, as described in Section II below. Finally, property may be transferred by a general warranty deed,[2] but it is Department policy to use general warranty deeds only in exceptional circumstances as outlined in Section III below.[3]

II. CIRCUMSTANCES FOR THE USE OF A SPECIAL WARRANTY DEED AND INDEMNIFICATION AGREEMENT

The Department recognizes that in some situations the use of the Marshal's quitclaim deed will not be sufficient for title company requirements to insure title for a purchaser of forfeited property. Such limited circumstances include the following situations:

a. The owner of the defendant property is a fugitive and the Government cannot prove the fugitive was served in the forfeiture action.

b. The owner of the defendant property is a fugitive and title to the property is held by a constructive trustee.

c. One of the owners of the defendant property is a fugitive who holds title to the property in a cotenancy with innocent owners.

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[1] The special warranty deed assures the grantee/buyer that the United States, as the current seller, has done nothing to encumber the property nor has it conveyed any right, title or interest in the property while the Government was the owner of the property. In effect, the special warranty deed warrants the forfeiture process.

[2] A general warranty deed assures the grantee/buyer that title to the property is free and clear of any and all liens and encumbrances, and insures the grantee/buyer from any future claims against the property.

[3] As used in this policy, the terms "general warranty deed" and "special warranty deed" are not intended to be limiting in their application. In some states, warranty deeds are not used (e.g., in California a "grant deed" provides limited statutory warranties). The use of such state variations equivalent to a general warranty deed is satisfactory for purposes of this policy.

d. The owner of the defendant property dies before or during the forfeiture process and there is some question of proper service or substitution of the successors or representatives of the deceased party.

e. The owner of defendant property is a United States or foreign corporation and the United States cannot prove that the corporation was properly served in the forfeiture action.

f. The forfeiture is subject to a pending appeal.

g. Such other situations in which a special warranty deed with certain indemnification provisions or a separate indemnification agreement is appropriate. (e.g. jurisdictions in which title insurance is unattainable without such a deed.)

If such special circumstances exist, the Marshal in consultation with the United States Attorney may execute a special warranty deed to the buyer specifically warranting against claims arising from the applicable circumstances as enumerated in a. through g. above. Such special warranty deeds are permitted by the authority delegated to the Marshal in 28 C.F.R. § 0.156.

It is suggested that the language of the special warranty deed be as follows, with the insertion of the specifically applicable circumstances as enumerated in a. through g. above:

> The grantor covenants to specially warrant the title to the property hereby conveyed against any claim arising from... [Insert the specifically applicable circumstances here.]

Further, when such special circumstances exist, the buyer may also request the United States to provide certain indemnifications in order to obtain title insurance. These indemnification agreements establish affirmative measures to be taken by the United States, beyond the basic terms and obligations of its warranty deed, in the event that claims are later made against the property. The indemnification agreement may be included either in the terms of the special warranty deed or in a separate document which incorporates the deed by reference. In either form, indemnification agreements will be limited to the following terms:

(1) The United States will specially warrant its title against defects or clouds arising out of the forfeiture process, and hold the buyer harmless as a result of such defects in title

or clouds involving the propriety of the forfeiture of the property.

(2) In the event that a court in a final judgment rules that the United States did not acquire valid legal title to the real property through the forfeiture process and therefore was not able to convey clear title to the buyer, the United States will refund to the buyer the amount of the purchase price of the property, plus the value of any improvements made to the property by the buyer. The amount will be paid out of the Assets Forfeiture Fund, plus interest on the total amount at the current rate as provided in 28 U.S.C. § 1961 from the date of the purchase of the property by the buyer to the date of the final judgment.

(3) The United States, by its special warranty deed, does not warrant the title of the prior owner of the property who acquired title before the forfeiture.

Requests to the Seized Assets Division of the U.S. Marshals Service for approval to convey title through a special warranty deed with indemnification must be accompanied by the following:

a. An explanation of the special circumstances which justify the indemnification;

b. A proposed indemnification agreement, whether in a separate agreement or as additional paragraphs in a special warranty deed; and

c. A statement of the amount of the purchase price which potentially may have to be refunded.

III. CIRCUMSTANCES FOR THE USE OF A GENERAL WARRANTY DEED

If the buyer of the forfeited property is still unable to procure a title insurance policy, then the Marshal may be authorized by a Significant Property Decision to execute a general warranty deed.

It is the policy of the Department that the Attorney General's discretion to warrant clear title, through the use of a general warranty deed, will be exercised only in compelling circumstances where the financial advantage of offering a general warranty deed in the particular case, compared to the available alternatives, far outweighs both the potential cost of honoring the warranty in that case and the potential effect of increased purchaser demand for general warranty deeds in future sales of other forfeited properties. The Seized Asset Division of the U.S. Marshals Service, in the exercise of sound business judgment, shall also consider the cumulative potential liability

which will accrue over time as a result of each successive use of a general warranty deed.

If one or more of the circumstances listed in paragraphs a. through g. of Section II is present, and the Marshal and the United States Attorney responsible for the forfeiture action deem it appropriate to warrant clear title, the Marshal and the United States Attorney shall request approval from the Seized Assets Division to convey title through a general warranty deed or its equivalent.

Requests to the Seized Assets Division of the U.S. Marshals Service for approval to convey title through a general warranty deed or its equivalent shall include the following:

a. A title report identifying specific deficiencies and/or exceptions that are the basis of the inability to secure title insurance, and a written explanation from the responsible Assistant United States Attorney addressing why the deficiencies and/or exceptions have not been or cannot be corrected in order to avoid the necessity of a general warranty deed;

b. An explanation establishing that a special warranty deed (e.g., warranting only the forfeiture process) would not be sufficient;

c. A statement of, and an explanation of the basis for, the estimated financial advantage of offering a general warranty deed as compared to other options;

d. An explanation of the circumstances that do not permit disposition of the property by allowing the lienholder to foreclose, sell the property, recover the amount of the lien plus interest and expenses from the proceeds of the sale, and pay to the Marshal for forfeiture, any remaining proceeds in return for the release of the lis pendens on the property.

It is suggested that the language of the general warranty deed, or its equivalent, provide as follows:

> The grantor does hereby fully warrant the title to said real property, and will hold the grantee harmless against the lawful claims of all persons whomsoever.

It should be noted that the requirements of a general warranty deed may differ between jurisdictions.

IV. DISPUTE RESOLUTION

The Executive Office for Asset Forfeiture will resolve any disputes that may arise in the event the United States Attorney and the U.S. Marshal cannot agree on the appropriate form of deed to be used.

U.S. Department of Justice

Office of the Deputy Attorney C

EXHIBIT B

The Deputy Attorney General

Washington, D.C. 20530

February 7, 1992

To: Holders of United States Attorneys' Manual Title 9

From: Office of the Deputy Attorney General

George J. Terwilliger, III
Acting Deputy Attorney General

Re: Indictment and Plea Procedures Under Guideline Sentencing

Affects: 9-27.451

Purpose: This bluesheet sets out procedures to be followed in making charging decisions, drafting indictments, and negotiating plea agreements in cases which come under the Sentencing Guidelines.

The following is a new section:

On March 13, 1989, United States Attorney General Dick Thornburgh issued a Memorandum to all Federal prosecutors, entitled "Plea Bargaining Under The Sentencing Reform Act." On June 16, 1989, he issued a second Memorandum entitled "Plea Bargaining in Cases Involving Firearms." This bluesheet is a clarification of the procedures outlined in those memoranda, which remain in full force. Copies of these two memoranda, known as Thornburgh I and Thornburgh II, are attached.

1. General Plea Procedures

The following procedures shall be adopted as to all pleas of guilty:

A. All negotiated plea agreements to felonies or misdemeanors negotiated from felonies shall be in writing and filed with the court. Thus any time a defendant enters into a negotiated plea, that fact and the conditions thereof will be memorialized and a copy of the plea agreement maintained in the office case file or elsewhere.

B. There shall be within each office a formal system for approval of negotiated pleas. The approval authority shall be vested in at least a supervisory criminal Assistant United States Attorney, or a supervisory attorney of a litigating division in the Department of Justice, who will have the responsibility of assessing the appropriateness of the plea agreement under the policies of the Department of Justice pertaining to pleas, including those set forth in the Thornburgh Memos. Where certain predictable fact situations arise with great frequency and are given identical treatment, the approval requirement may be met by a written instruction from the appropriate supervisor which describes with particularity the standard plea procedure to be followed, so long as that procedure is otherwise within Departmental guidelines. An example would be a border district which routinely deals with a high volume of illegal alien cases daily.

C. The plea approval process will be part of the office evaluation procedure.

D. The United States Attorney in each district, or a supervisory representative, should, if feasible, meet regularly with a representative of the district's Probation Office for the purpose of discussing guideline cases.

2. Substantial Assistance Pleadings

A. Authority to File. Section 5K1.1 of the Sentencing Guidelines allows the United States to file a pleading with the sentencing court which permits the court to depart below the indicated guideline, on the basis that the defendant provided substantial assistance in the investigation or prosecution of another. Authority to approve such pleadings is limited to the United States Attorney, the Chief Assistant United States Attorney, and supervisory criminal Assistant United States Attorneys, or a committee including at least one of these individuals. Similarly, for Department of Justice attorneys, approval authority should be vested in a Section Chief or Office Director, or such official's deputy, or in a committee which includes at least one of these individuals.

B. Recordkeeping. Every United States Attorney or Department of Justice Section Chief or Office Director shall maintain documentation of the facts behind and justification for each substantial assistance pleading. The repository or repositories of this documentation need not be the case file itself. Freedom Of Information Act considerations may suggest that a separate form showing the final decision be maintained.

C. Rule 35(b) Motions. The procedures described above shall also apply to Motions filed pursuant to Rule 35(b), Federal Rules of Criminal Procedure, where the sentence of a cooperating defendant is reduced after sentencing on Motion of the United States. Such a filing is deemed for sentencing purposes to be the equivalent of a substantial assistance pleading.

3. Enhancements of Drug Penalties Based on Prior Convictions

Current drug laws provide for increased maximum, and in some cases minimum, penalties for many offenses on the basis of a defendant's prior criminal convictions. See, e.g., 21 U.S.C. §§ 841 (b)(1)(A), (B), and (C), 848 (a), 960 (b)(1), (2), and (3), and 962. However, a court may not impose such an increased penalty unless the United States Attorney has filed an information with the court, before trial or before entry of a plea of guilty, setting forth the previous convictions to be relied upon. 21 U.S.C. §851.

For the purposes of applying the rules of the Thornburgh memoranda, every prosecutor should regard the filing of an information under 21 U.S.C. §851 concerning prior convictions as equivalent to the filing of charges. Just as a prosecutor must file a readily provable charge, he or she must file an information under 21 U.S.C. §851 regarding prior convictions that are readily provable and that are known to the prosecutor prior to the beginning of trial or entry of plea. The only exceptions to this requirement are those found in Thornburgh I. Such exceptions to the requirements that enhancement pleadings be filed are where: (1) the failure to file or the dismissal of such pleadings would not affect the applicable guideline range from which a sentence may be imposed; or (2) in the context of a negotiated plea, the United States Attorney, the Chief Assistant United States Attorney, the senior supervisory Criminal Assistant United States Attorney, or, within the Department of Justice, a Section Chief or Office Director has approved the negotiated agreement. The reasons for such an agreement must be set forth in writing as required by paragraph 2B, above. Consistent with Thornburgh I, such a reason might include, for example, that the United States Attorney's office is particularly overburdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office. The permissible agreements within this context include: (1) not filing an enhancement, (2) filing an enhancement which does not allege all relevant prior convictions, thereby only partially enhancing a defendant's potential sentence, and (3) dismissing a previously filed enhancement.

A negotiated plea which uses any of the options described in this section must be made known to the sentencing court. In addition, the sentence which can be imposed through the negotiated plea must adequately reflect the seriousness of the offense.

4. Firearm charges pursuant to Title 18 United States Code §924(c).

Prosecutors are reminded that when a defendant commits an armed bank robbery or other crime of violence or drug trafficking crime, appropriate charges include Title 18, United States Code §924(c).

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

March 13, 1989

MEMORANDUM

TO: Federal Prosecutors

FROM: Dick Thornburgh
Attorney General

SUBJECT: Plea Bargaining Under The Sentencing Reform Act

In January, the Supreme Court decided Mistretta v. United States and upheld the sentencing guidelines promulgated by the Sentencing Commission pursuant to the Sentencing Reform Act of 1984. The Act was strongly supported by the Department of Justice, and the Department has defended the guidelines since they took effect on November 1, 1987. Under these guidelines, it is now possible for federal prosecutors to respond to three problems that plagued sentencing prior to their adoption: 1) sentencing disparity; 2) misleading sentences which were shorter than they appeared as a result of parole and unduly generous "good time" allowances; and 3) inadequate sentences in critical areas, such as crimes of violence, white collar crime, drug trafficking and environmental offenses. It is vitally important that federal prosecutors understand these guidelines and make them work. Prosecutors who do not understand the guidelines or who seek to circumvent them will undermine their deterrent and punitive force and will recreate the very problems that the guidelines are expected to solve.

This memorandum cannot convey all that federal prosecutors need or should want to know about how to use the guidelines, and it is not intended to invalidate more specific policies which are consistent with this statement of principles and may have been adopted by some litigating divisions to govern particular offenses. This memorandum does, however, set forth basic departmental policies to which all of you will be expected to adhere. The Department consistently articulated these policies during the drafting of the guidelines and the period in which their constitutionality was tested. Compliance with these policies is essential if federal criminal law is to be an effective deterrent and those who violate the law are to be justly punished.

Plea Bargaining

Charge Bargaining

Charge bargaining takes place in two settings, before and after indictment. Consistent with the Principles of Federal Prosecution in Chapter 27 of Title 9 of the United States Attorneys' Manual, a federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the defendant's conduct. Charges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned in an effort to arrive at a bargain that fails to reflect the seriousness of the defendant's conduct

Whether bargaining takes place before or after indictment, the Department policy is the same: any departure from the guidelines should be openly identified rather than hidden between the lines of a plea agreement. It is inevitable that in some cases it will be difficult for anyone other than the prosecutor and the defendant to know whether, prior to indictment, the prosecutor bargained in conformity with the Department's policy. The Department will monitor, together with the Sentencing Commission, plea bargaining, and the Department will expect plea bargains to support, not undermine, the guidelines.

Once prosecutors have indicted, they should find themselves bargaining about charges which they have determined are readily provable and reflect the seriousness of the defendant's conduct. Should a prosecutor determine in good faith after indictment that, as a result of a change in the evidence or for another reason (e.g., a need has arisen to protect the identity of a particular witness until he testifies against a more significant defendant), a charge is not readily provable or that an indictment exaggerates the seriousness of an offense or offenses, a plea bargain may reflect the prosecutor's reassessment. There should be a record, however, in a case in which charges originally brought are dropped.

Sentence Bargaining

There are only two types of sentence bargains. Both are permissible, but one is more complicated than the other. First, prosecutors may bargain for a sentence that is within the specified guideline range. This means that when a guideline range is 18-24 months, you have discretion to agree to recommend a sentence of 18 or 20 months rather than to argue for a sentence at the top of the range. Similarly, you may agree to recommend a downward adjustment of two levels for acceptance of responsibility if you conclude in good faith that the defendant is entitled to the adjustment.

Second, you may seek to depart from the guidelines. This type of sentence bargain always involves a departure and is more complicated than a bargain involving a sentence within a guideline range. Departures are discussed more generally below.

Department policy requires honesty in sentencing; federal prosecutors are expected to identify for U.S. District Courts departures when they agree to support them. For example, it would be improper for a prosecutor to agree that a departure is in order, but to conceal the agreement in a charge bargain that is presented to a court as a fait accompli so that there is neither a record of nor judicial review of the departure.

In sum, plea bargaining, both charge bargaining and sentence bargaining, is legitimate. But, such bargaining must honestly reflect the totality and seriousness of the defendant's conduct and any departure to which the prosecutor is agreeing, and must be accomplished through appropriate guideline provisions.

Readily Provable Charges

The basic policy is that charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt as to the government's ability readily to prove a charge for legal or evidentiary reasons. It would serve no purpose here to seek to further define "readily provable." The policy is to bring cases that the government should win if there were a trial. There are, however, two exceptions.

First, if the applicable guideline range from which a sentence may be imposed would be unaffected, readily provable charges may be dismissed or dropped as part of a plea bargain. It is important for you to know whether dropping a charge may affect a sentence. For example, the multiple offense rules in Part D of Chapter 3 of the guidelines and recent changes to the relevant conduct standard set forth in 1B1.3(a)(2) will mean that certain dropped charges will be counted for purposes of determining the sentence, subject to the statutory maximum for the offense or offenses of conviction. It is vital that federal prosecutors understand when conduct that is not charged in an indictment or conduct that is alleged in counts that are to be dismissed pursuant to a bargain may be counted for sentencing purposes and when it may not be. For example, in the case of a defendant who could be charged with five bank robberies, a decision to charge only one or to dismiss four counts pursuant to a bargain precludes any consideration of the four uncharged or dismissed robberies in determining a guideline range, unless the plea agreement included a stipulation as to the other robberies. In contrast, in the case of a defendant who could be charged with five counts of

fraud, the total amount of money involved in a fraudulent scheme will be considered in determining a guideline range even if the defendant pleads guilty to a single count and there is no stipulation as to the other counts.

Second, federal prosecutors may drop readily provable charges with the specific approval of the United States Attorney or designated supervisory level official for reasons set forth in the file of the case. This exception recognizes that the aims of the Sentencing Reform Act must be sought without ignoring other, critical aspects of the federal criminal justice system. For example, approval to drop charges in a particular case might be given because the United States Attorney's office is particularly over-burdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office.

To make guidelines work, it is likely that the Department and the Sentencing Commission will monitor cases in which charges are dropped. It is important, therefore, that federal prosecutors keep records justifying their decisions not to go forward with readily provable offenses.

Departures Generally

In Chapter 5, Part K of the guidelines, the Commission has listed departures that may be considered by a court in imposing a sentence. Some depart upwards and others downwards. Moreover, 5K2.0 recognizes that a sentencing court may consider a departure that has not been adequately considered by the Commission. A departure requires approval by the court. It violates the spirit of the guidelines and Department policy for prosecutors to enter into a plea bargain which is based upon the prosecutor's and the defendant's agreement that a departure is warranted, but that does not reveal to the court the departure and afford an opportunity for the court to reject it.

The Commission has recognized those bases for departure that are commonly justified. Accordingly, before the government may seek a departure based on a factor other than one set forth in Chapter 5, Part K, approval of United States Attorneys or designated supervisory officials is required, after consultation with the concerned litigating Division. This approval is required whether or not a case is resolved through a negotiated plea.

Substantial Assistance

The most important departure is for substantial assistance by a defendant in the investigation or prosecution of another person. Section 5K1.1 provides that, upon motion by the government, a court may depart from the guidelines and may impose a non-guideline sentence. This

departure provides federal prosecutors with an enormous range of options in the course of plea negotiations. Although this departure, like all others, requires court approval, prosecutors who bargain in good faith and who state reasons for recommending a departure should find that judges are receptive to their recommendations.

Stipulations of Fact

The Department's policy is only to stipulate to facts that accurately represent the defendant's conduct. If a prosecutor wishes to support a departure from the guidelines, he or she should candidly do so and not stipulate to facts that are untrue. Stipulations to untrue facts are unethical. If a prosecutor has insufficient facts to contest a defendant's effort to seek a downward departure or to claim an adjustment, the prosecutor can say so. If the presentence report states facts that are inconsistent with a stipulation in which a prosecutor has joined, it is desirable for the prosecutor to object to the report or to add a statement explaining the prosecutor's understanding of the facts or the reason for the stipulation.

Recounting the true nature of the defendant's involvement in a case will not always lead to a higher sentence. Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others and the government agrees that self-incriminating information so provided will not be used against the defendant, section 1B1.8 provides that the information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement. The existence of an agreement not to use information should be clearly reflected in the case file, the applicability of section 1B1.8 should be documented, and the incriminating information must be disclosed to the court or the probation officer, even though it may not be used in determining a guideline sentence.

Written Plea Agreements

In most felony cases, plea agreements should be in writing. If they are not in writing, they always should be formally stated on the record. Written agreements will facilitate efforts by the Department and the Sentencing Commission to monitor compliance by federal prosecutors with Department policies and the guidelines. Such agreements also avoid misunderstandings as to the terms that the parties have accepted in particular cases.

Understanding the Options

A commitment to guideline sentencing in the context of plea bargaining may have the temporary effect of increasing the proportion of cases that go to trial, until defense counsel and defendants understand that the Department is committed to the statutory sentencing goals and procedures. Prosecutors should understand, and defense counsel will soon learn, that there is sufficient flexibility in the guidelines to permit effective plea bargaining which does not undermine the statutory scheme.

For example, when a prosecutor recommends a two level downward adjustment for acceptance of responsibility (e.g., from level 20 to level 18), judicial acceptance of this adjustment will reduce a sentence by approximately 25%. If a comparison is made between the top of one level (e.g., level 20) and the bottom of the relevant level following the reduction (e.g., level 18). it would show a difference of approximately 35%. At low levels, the reduction is greater. In short, a two level reduction does not mean two months. Moreover, the adjustment for acceptance of responsibility is substantial, and should be attractive to defendants against whom the government has strong cases. The prosecutor may also cooperate with the defendant by recommending a sentence at the low end of a guideline range, which will further reduce the sentence.

It is important for prosecutors to recognize while bargaining that they must be careful to make all appropriate Chapter Three adjustments -- e.g., victim related adjustments and adjustments for role in the offense.

Conclusion

With all available options in mind, and with full knowledge of the availability of a substantial assistance departure, federal prosecutors have the tools necessary to handle their caseloads and to arrive at appropriate dispositions in the process. Honest application of the guidelines will make sentences under the Sentencing Reform Act fair, honest, and appropriate.

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

June 16, 1989

MEMORANDUM

TO: Federal Prosecutors

FROM: Dick Thornburgh
Attorney General

SUBJECT: Plea Bargaining in Cases Involving Firearms

On May 15, 1989, the President outlined a comprehensive program to combat violent crime. In it he noted that to ensure the objective that those who commit violent crimes are held fully accountable, plea bargaining procedures must be uniformly and strictly applied. Accordingly, he has directed me to issue and fully implement guidelines for federal prosecutors under the Sentencing Reform Act to ensure that federal charges always reflect both the seriousness of the defendant's conduct and the Department's commitment to statutory sentencing goals and procedures. This means that, in all but exceptional cases such as those in which the defendant has provided substantial assistance to the government in the investigation or prosecution of crimes by others, federal prosecutors will seek conviction for any offense involving the unlawful use of a firearm which is readily provable. This will implement the congressional mandate that mandatory minimum penalties be imposed by the courts upon violent and dangerous felons.

As you recall, in my March 13, 1989 memorandum to all federal prosecutors on the subject of plea bargaining, I stated (at pp. 2-3):

> *** The Department will monitor, together with the Sentencing Commission, plea bargaining, and the Department will expect plea bargains to support, not undermine, the guidelines.
>
> Once prosecutors have indicted, they should find themselves bargaining about charges which they have determined are readily provable and reflect the seriousness of the defendant's conduct. Should a prosecutor determine in good faith after indictment that, as a result of a change in the evidence or for another reason (e.g., a need has arisen to protect

> the identity of a particular witness until he testifies against a more significant defendant), a charge is not readily provable or that an indictment exaggerates the seriousness of an offense or offenses, a plea bargain may reflect the prosecutor's reassessment. There should be a record, however, in a case in which charges originally brought are dropped.
>
> * * * *
>
> Department policy requires honesty in sentencing; federal prosecutors are expected to identify for U.S. District Courts departures when they agree to support them. For example, it would be improper for a prosecutor to agree that a departure is in order, but to conceal the agreement in a charge bargain that is presented to a court as a fait accompli so that there is neither a record of nor judicial review of the departure.
>
> In sum, plea bargaining, both charge bargaining and sentence bargaining, is legitimate. But, such bargaining must honestly reflect the totality and seriousness of the defendant's conduct and any departure to which the prosecutor is agreeing, and must be accomplished through appropriate guideline provisions. (Emphasis added.)

On the subject of minimum mandatory penalties for violent firearms offenses, the Department's November 1, 1987 Prosecutors Handbook on Sentencing Guidelines provides (at p. 50):

> ... in no event is a ... 18 U.S.C. 924(c) [minimum mandatory firearms] charge not to be pursued unless it cannot be readily proven or unless absolutely necessary to enable imposition of an appropriate sentence on someone who has rendered substantial assistance to the government, and then only with the consent of ... the United States Attorney as to 18 U.S.C. 924(c) charges.

The specific affirmation of these policies by the President requires that you be especially vigilant about their full implementation in your district. Any questions about these matters will continue to be handled by the appropriate Assistant Attorney General.

Guideline Sentencing Update

FEDERAL

EXHIBIT C

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

Publication of *A 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 15 • FEBRUARY 14, 1992

Probation and Supervised Release

REVOCATION OF PROBATION

Ninth Circuit holds that when probation must be revoked for drug possession and defendant sentenced to "not less than one-third of the original sentence," the "original sentence" means the term of probation, not guideline range. Defendant pled guilty to counterfeiting in 1989. His guideline range was 1-7 months and he was sentenced to three years' probation. The next year he was arrested on a drug charge and a urinalysis showed traces of methamphetamine. The court determined defendant had violated probation by possessing drugs and revoked probation. The Anti-Drug Abuse Act of 1988 had amended 18 U.S.C. § 3565(a) by adding the following: "Notwithstanding any other provision of this section, if a defendant is found by the court to be in possession of a controlled substance, thereby violating the condition imposed by section 3563(a)(3), the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence." The district court read this section to require a term of imprisonment not less than one-third of the original sentence of probation, and sentenced defendant to one year in prison. Defendant appealed, but the appellate court affirmed.

The circuit court analyzed the statutory language and legislative history and determined that a sentence of probation is a "sentence" for purposes of the reference in § 3565(a) to "one-third of the original sentence": "Penologically and semantically, probation is a sentence under the Sentencing Reform Act [of 1984]. It is no longer an alternative to sentencing; it is a sentence in and of itself." The court noted that "this schema is also used in language Congress added to 18 U.S.C. § 3583(g) as part of the same Anti-Drug Abuse Act of 1988," which states that if supervised release is revoked for drug possession "the court shall . . . require the defendant to serve in prison not less than one-third of the term of supervised release."

The court distinguished cases interpreting the general revocation provision in § 3565(a)(2). Four circuits, including the Ninth, have held that the language "any other sentence that was available . . . at the time of the initial sentencing" means the guideline sentence that applied to the original offense of conviction, and a sentence imposed upon revocation of probation is limited thereby. *See U.S. v. Alli*, 929 F.2d 995, 998 (4th Cir. 1991); *U.S. v. White*, 925 F.2d 284, 286–87 (9th Cir. 1991); *U.S. v. Von Washington*, 915 F.2d 390, 391–92 (8th Cir. 1990) (per curiam); *U.S. v. Smith*, 907 F.2d 133, 135 (11th Cir. 1990). The 1988 amendment begins with "Notwithstanding any other provision of this section . . . ," which the court concluded "indicates that the added provision was intended to take precedence over the general language of subsection (a)(2) in cases where the probationer violates probation by possessing a controlled substance."

The court also held that "the validity of the 12-month sentence imposed here" was supported by the district court's use of the Guidelines' policy statements on revocation of probation, §§ 7B1.1, 7B1.3, and 7B1.4 (Revocation Table). Under those sections, a sentencing range of 12–18 months applied.

U.S. v. Corpuz, No. 91-10132 (9th Cir. Jan. 8, 1992) (Aldisert, Sr. J.).

Departures

MITIGATING CIRCUMSTANCES

Eighth Circuit holds that extraordinary restitution may warrant downward departure, and that criminal conduct spanning one year and several transactions was not "single act of aberrant behavior." Defendant, a car dealer, pledged the same vehicles as collateral for separate loans from two banks over a one-year period. Charged with 44 counts of bank fraud, he pled guilty to one count and was sentenced to twelve months and one day. He asserted on appeal that several factors warranted downward departure, including the fact that he had liquidated all his assets to ensure full restitution to the banks more than a year before indictment (he entered into settlement agreements with both banks and turned over his assets of $1.4 million) and, because he had a good reputation in the community, was consistently employed, and continued to lead a respectable life, his criminal conduct was "aberrant behavior," U.S.S.G. Ch. 1, Pt. A, 4(d), p.s.

The appellate court remanded for reconsideration of the first ground, holding that "the guidelines provide the district judge with authority to depart downward based on extraordinary restitution." The court acknowledged that voluntary payment of restitution before adjudication of guilt is a factor considered for acceptance of responsibility, § 3E1.1, comment. (n.1(b)), but held that the district court "should consider whether the extent and timing of Garlich's restitution are sufficiently unusual to warrant a downward departure. . . . If . . . the two-level reduction for acceptance of responsibility inadequately addresses Garlich's restitution, the district court may impose a reasonable sentence outside the guidelines range." *See also U.S. v. Brewer*, 899 F.2d 503, 509 (6th Cir.) ("unusual" restitution could warrant departure), *cert. denied*, 111 S. Ct. 127 (1990); *U.S. v. Carey*, 895 F.2d 318, 322–23 (7th Cir. 1990) (same).

The court affirmed the denial of departure for "single act of aberrant behavior," concluding that defendant's "actions in planning and executing the financing scheme over a one-year period were not 'spontaneous and seemingly thoughtless,'" quoting *U.S. v. Glick*, 946 F.2d 335, 338 (4th Cir. 1991) (conduct over ten-week period involving numerous actions and extensive planning is not single act of aberrant behavior). *See also Carey, supra*, 895 F.2d at 325 (check-kiting scheme over 15-month period not single act of aberrant behavior).

But cf. U.S. v. Takai, 930 F.2d 1427, 1433–34 (9th Cir. 1991) (conduct over eight-day period in bribery offense properly construed as "single act of aberrant behavior").

U.S. v. Garlich, 951 F.2d 161 (8th Cir. 1991).

Substantial Assistance

Eastern District of New York holds that § 5K1.1, p.s. does not apply to downward departure based on Congress' request for clemency for defendant who assisted Congressional investigation. Defendant pled guilty to violating munitions export laws and was subject to a guideline range of 8–14 months. The Chief Counsel of the Committee on Foreign Affairs of the House of Representatives sent a letter to the sentencing court requesting it to consider defendant's cooperation with the Committee in an ongoing investigation. The letter noted that defendant's cooperation had been helpful, even though it might not lead to any criminal prosecutions.

The court held that a §5K1.1, p.s. departure was not proper because there was no government motion and the defendant did not aid the prosecution of another. The court reasoned, however, that in the Second Circuit § 5K1.1 does not *prohibit* departure under § 5K2.0, p.s. when a defendant provides substantial assistance outside the confines of § 5K1.1. It noted that the Second Circuit allowed a downward departure for a defendant whose cooperation helped the district courts' seriously overcrowded docket. *See U.S. v. Garcia*, 926 F.2d 125, 128 (2d Cir. 1991) (§ 5K1.1 covers cooperation with prosecution and does not prohibit departure for assistance to courts). *See also U.S. v. Agu*, 949 F.2d 63, 67 (2d Cir. 1991) (summarizing Second Circuit law: "cooperation with the Government in respects other than the prosecution of others or cooperation with the judicial system can, in appropriate circumstances, warrant a departure notwithstanding the absence of a Government motion"); *U.S. v. Khan*, 920 F.2d 1100, 1106–07 (2d Cir. 1991) (in dicta, assistance to government other than information relevant to prosecution of others may provide basis for § 5K2.0 departure). The district court concluded that "courts have sentencing authority to reward cooperation of a defendant with an agency other than the prosecution when the United States Attorney has not requested a downward departure."

U.S. v. Stoffberg, No. CR 91-524 (E.D.N.Y. Jan. 21, 1992) (Weinstein, J.).

Adjustments

Obstruction of Justice

U.S. v. Williams, No. 90-6600 (6th Cir. Dec. 17, 1991) (Milburn, J.) (reversed: district court's factual finding that defendant's false statements, made while not under oath to law enforcement officers during investigation of offense, significantly impeded the investigation was clearly erroneous, and pursuant to § 3C1.1, comment. (nn. 3(g) and 4(b)), an obstruction of justice enhancement was improper—"The focus of the guideline is on whether defendant, by actively making material false statements (and not by a passive refusal to cooperate), succeeded in significantly impeding the investigation. Failed attempts to shift the investigative searchlight elsewhere are not covered by the guidelines. . . . It is true that defendant Williams lied to investigating agents . . . , but Application Note 4(b) specifically permits lies to investigating agents provided they do not significantly obstruct or impede the investigation") (Joiner, Sr. Dist. J., dissented from holding that district court's factual finding was clearly erroneous). *Accord U.S. v. Moreno*, 947 F.2d 7, 9–10 (1st Cir. 1991) (obstruction enhancement improper for defendant who, while not under oath, gave alias to law enforcement officers during investigation, because there was no showing that it actually impeded investigation, § 3C1.1, comment. (nn. 3(g) and 4(b)).

U.S. v. Bell, No. 91-1479 (1st Cir. Jan. 2, 1992) (Campbell, J.) (reversed: failure to appear defendant should not receive obstruction enhancement for using false name to obtain post office box during time he was avoiding capture (citing *Moreno, supra*, and n.3(g)); also, fact that defendant carried gun and ammunition at time of recapture, and briefly paused before obeying police officers' command to "get down, freeze," did not, without more, warrant enhancement under § 3C1.2 for "recklessly creat[ing] a substantial risk of death or serious bodily injury . . . in the course of" resisting arrest).

Determining the Sentence

Fines

Fifth Circuit holds that cost-of-imprisonment fine under § 5E1.2(i) is constitutional and does not violate Sentencing Reform Act. Defendant was convicted on several drug charges and given a lengthy prison term. He was also fined $280,823.80, of which $180,823.80 was imposed pursuant to the requirement in U.S.S.G. § 5E1.2(i) that a sentencing court "impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release," subject to § 5E1.2(f) (ability to pay/burden on dependents).

The appellate court rejected defendant's claim that the imposition of "an additional fine amount" under § 5E1.2(i), beyond the amounts set forth in the fine table at § 5E1.2(c), violates 18 U.S.C. § 3553(a)(2) of the Sentencing Reform Act by imposing punishment "greater than necessary." The court reasoned that "the Commission developed a two-level system: the court must first look to the fine table to determine the initial range and then complete its calculation by looking to the cost of imprisonment. . . . Together, these calculations comprise the Commission's effort to realize section 3553(a)(2)'s goals."

The court also rejected defendant's argument that the cost-of-imprisonment fine is irrational—because the fines collected are actually used for a crime victim fund rather than to defray costs of imprisonment—and therefore amounts to a deprivation of property without due process in violation of the Fifth Amendment: "[W]e find . . . that the uniform practice of fining criminals on the basis of their individualistic terms of imprisonment—an indicator of the actual harm each has inflicted on society—is a rational means to assist the victims of crime collectively." *Cf. U.S. v. Doyan*, 909 F.2d 412, 414-16 (10th Cir. 1990) ("Sections 5E1.2(e) and 5E1.2(i) . . . mandate a punitive fine that is at least sufficient to cover the costs of the defendant's incarceration and supervision," and § 5E1.2(i) does not violate the equal protection component of the Due Process Clause of the Fifth Amendment).

U.S. v. Hagmann, 950 F.2d 175 (5th Cir. 1991).

EXHIBIT D

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

Vol. 3, No. 8 | FEDERAL SENTENCING GUIDELINES AND FORFEITURE CASES FROM ALL CIRCUITS. | February 10, 1992

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NEW FEATURE: SUMMARIES OF RECENT GUIDELINES ARTICLES

Commencing with this issue, we expand our coverage to include summaries of recent articles. See topic numbers 700 and 750 for articles from the December, 1991 *Federal Probation* and *Notre Dame Law Review*. *AUTHORS:* we encourage you to send us summaries of your articles, with suggested topic numbers for indexing.

Guideline Sentencing, Generally

9th Circuit says "letter grade" system of Crime Control Act of 1990 did not affect statutory penalties. (110)(224) As part of the Crime Control Act of 1990, Congress enacted 18 U.S.C. 3559 which grades felonies from A through E and misdemeanors from A through C, and prescribes the maximum penalty for each grade of offense. In this case, the defendant argued that section 3559 had reduced the maximum sentence for robbery from 20 to 12 years. The 9th Circuit rejected the argument, noting that Congress has never implemented the letter grading system, and in any event, under section 3559(b), the maximum term specified in the statute describing the offense is controlling. *U.S. v. Schiffbauer*, __ F.2d __ (9th Cir. February 4, 1992) No. 90-10624.

6th Circuit upholds referral of case for federal prosecution because of stiffer sentences. (110)(135) Defendant was arrested by state police but his case was referred to federal prosecutors for federal prosecution. The 6th Circuit rejected defendant's claim that the unguided referral by state law enforcement personnel, which defendant believed to be motivated by the stiffer sentences available under federal law, violated due process and equal protection. The court agreed with the 10th Circuit's

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decision in *U.S. v. Andersen*, 940 F.2d 593 (10th Cir. 1991), which rejected a similar argument and emphasized a prosecutor's broad discretion in determining whether to bring charges against a particular defendant. Although the state strike force would be well served by written guidelines addressing referral decisions, such guidelines are not constitutionally mandated. *U.S. v. Allen*, __ F.2d __ (6th Cir. Jan. 24, 1992) No. 91-5205.

2nd Circuit upholds enhancements for both more than minimal planning and abuse of trust in bank officer embezzlement case. (125)(160)(450) Defendant embezzled $9 million from the bank where he was employed. The 2nd Circuit rejected defendant's claim that it was impermissible double counting to enhance his sentence for more than minimal planning and for abuse of a position of trust. These are not duplicative enhancements. When a ranking bank officer abuses his position of trust to facilitate commission of a crime and engages in more than minimal planning, he is properly subject to both enhancements. *U.S. v. Marsh*, __ F.2d __ (2nd Cir. Jan. 23, 1992) No. 91-1429.

2nd Circuit upholds sentence at top of range based on facts already considered in offense level. (125)(280)(775) The judge imposed the maximum guideline sentence based on defendant's possession of a weapon during the drug offense, and his attempt to smuggle marijuana into prison while awaiting sentencing. Defendant contended that this constituted impermissible double counting, since the marijuana smuggling was already accounted for in the denial of acceptance of responsibility, and the gun possession was accounted for by his five-year consecutive sentence under 18 U.S.C. section 924(c)(1). The 2nd Circuit found no double counting, noting that the Commentary to section 2K2.4, which directs a court to avoid double counting under section 924(c), only precludes a court from enhancing a defendant's base offense level under section 2D1.1(b)(1). *U.S. v. Olvera*, __ F.2d __ (2nd Cir. Jan. 15, 1992) No. 91-1437.

5th Circuit rejects double jeopardy challenge to punishment for felon in possession of a firearm who used it during a felony. (125)(330) The 5th Circuit rejected defendant's claim that his cumulative punishments for possession of a firearm by a felon and use of a firearm during the commission of a felony violated the double jeopardy clause. Each statute requires proof of a fact that the other does not. The first requires proof that defendant has a prior final conviction for a felony; the second requires proof that the firearm was used in the commission of a felony. *U.S. v. Allison*, __ F.2d __ (5th Cir. Jan. 30, 1992) No. 90-8686.

8th Circuit affirms more than minimal planning adjustment for repeated thefts. (125)(160)(220) Defendants were part of a conspiracy which used "boosters" to shoplift merchandise from retail outlets, and then retagged the merchandise and resold it through another retail outlet. Over time, the conspiracy stole $475,000 worth of merchandise. The 8th Circuit upheld an enhancement under section 2B1.2(b)(4)(B) for more than minimal planning, rejecting defendants' claim that the conspiracy charge and the nine level increase they received for the value of the stolen property both took into account this aspect of their crimes. The more than minimal planning enhancement increases the punishment for repeated criminal acts, regardless of the amount stolen. The the court rejected defendants' claim that the enhancement requires extensive planning, complex activity or concealment. The conspiracy clearly involved more than minimal planning, even if defendants were not the planners. *U.S. v. Wilson*, __ F.2d __ (8th Cir. Jan. 29, 1992) No. 90-2777.

7th Circuit rejects ex post facto challenge because guideline section 1B1.2(d) is merely clarification

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.*

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of existing law. (131)(165) As a result of two different efforts to burn down a building, defendant pled guilty to one count of conspiracy to commit arson. Relying upon guideline section 1B1.2(d), the district court determined that defendant's offense level should be adjusted upward as if he had been convicted of a separate count of conspiracy for each offense that he conspired to commit, and that those two convictions should not be grouped under guideline section 3D1.2. Section 1B1.2 was adopted after the date of defendant's offense. Nonetheless, the 7th Circuit rejected defendant's ex post facto challenge, ruling that section 1B1.2(d) was enacted to clarify existing procedure under the guidelines, and was not a substantive change. *U.S. v. Golden,* __ F.2d __ (7th Cir. Jan. 28, 1992) No. 90-3465.

1st Circuit holds letters to conceal embezzlement extended scheme past effective date of guidelines. (132) Defendant, in his capacity as guardian for a disabled veteran, embezzled Veterans' Administration funds. The 1st Circuit upheld the application of the guidelines to the offense, even though all of the acts of embezzlement occurred prior to November 1, 1987, the effective date of the guidelines. Defendant wrote letters to the Veterans Administration in 1988 which the district court concluded were an effort to conceal the embezzlement. Therefore, the embezzlement scheme continued into 1988. *U.S. v. Young,* __ F.2d __ (1st Cir. Jan. 28, 1992) No. 90- 1581.

1st Circuit rejects cruel and unusual punishment challenge to seven year sentence for LSD offense. (140) The 1st Circuit rejected defendant's claim that his seven year sentence for possessing with intent to distribute 7.7 grams of LSD was so disproportionate to the crime as to violate the 8th Amendment. In *Harmelin v. Michigan,* 111 S.Ct. 2680 (1991), three Supreme Court Justices cited with approval a case upholding a 40 year sentence for possessing with intent to distribute nine ounces of marijuana, a less potent drug. Even if an inter-jurisdictional comparison still remained relevant after *Harmelin,* which the court deemed a "doubtful proposition," this would not have helped defendant. He could have received up to 10 years if prosecuted in a Maine court. *U.S. v. Lowden,* __ F.2d __ (1st Cir. Jan. 29, 1992) No. 90-1605.

8th Circuit rejects cruel and unusual punishment challenge where defendant received substantial downward departure. (140) Defendant received an 87-month sentence for her role in a conspiracy to cultivate and distribute marijuana. The 8th Circuit rejected defendant's claim that the sentence constituted cruel and unusual punishment even though other participants who had a longer involvement in the conspiracy received the same sentence. Because defendant and the others received substantial downward departures, the cruel and unusual punishment argument lacked merit. Senior Judge Heaney concurred separately to stress that minimal and latecomer participants in a drug conspiracy may not necessarily be chargeable for drug quantities attributable to other conspirators. *U.S. v. Knapp,* __ F.2d __ (8th Cir. Jan. 30, 1992) No. 91-1507.

8th Circuit upholds career offender sentence against cruel and unusual punishment challenge. (140)(520) Defendant was convicted of aiding and abetting the manufacture of a controlled substance. He was found to be a career offender, and received a 262-month sentence. The 8th Circuit rejected defendant's claim that the career offender provisions resulted in a sentence which was unconstitutionally disproportionate to the gravity of the crime. In *Harmelin v. Michigan,* 111 S.Ct. 2680 (1991), the Supreme Court upheld a life sentence for a first offense of cocaine possession. Since defendant was convicted of a series of drug offenses and received a lesser sentence, his 8th Amendment claim had no merit. Senior Judge Heaney, joined by Chief Judge Arnold, concurred separately, stating that the career offender provisions "create penalties so distorted as to hamper federal criminal adjudications." *U.S. v. Gordon,* __ F.2d __ (8th Cir. Jan. 23, 1992) No. 91-1653.

Application Principles, Generally (Chapter 1)

11th Circuit reviews relevant conduct under clearly erroneous standard. (170)((870) The 11th Circuit reviewed under the clearly erroneous standard the district court's determination of whether criminal activity was part of the same course of conduct as the offense of conviction. *U.S. v. Rodgers,* __ F.2d __ (11th Cir. Jan. 28, 1992) No. 90-7140.

Offense Conduct, Generally (Chapter 2)

4th Circuit rules attempted murder guideline should apply to attempt to blow up husband. (210)(330)(380) Defendant pled guilty to four firearms offenses as a result of two instances where she attempted to blow up her ex-husband. Following cross-references in the firearms guidelines, the court applied guideline section 2X1.1. Relying on section 2S1.1(a), the district court found that because defen-

dant intended to kill her ex-husband, the "object offense" was first degree murder. Defendant was sentenced accordingly, although the court departed downward from the offense level for first degree murder to the level for second degree murder. The 4th Circuit reversed, ruling that the district court should have applied the attempted murder guideline, section 2A2.1. Once the district court applied the attempt guideline (section 2X1.1), it then should have determined whether a specific guideline covered defendant's attempted offense, i.e., the guideline for attempted murder. *U.S. v. Dickerson,* __ F.2d __ (4th Cir. Jan. 31, 1992) No. 91-5037.

1st Circuit avoids sentencing entrapment claim because defendant was predisposed to commit crime. (242) Defendant was arrested in a reverse sting operation in which his organization had negotiated to buy 5.6 kilograms of heroin from a government agent. He contended that the government entrapped him into committing an offense greater than he was predisposed to commit. The 1st Circuit found it unnecessary to decide whether there is such a doctrine as sentencing entrapment. There was no indication in the record that defendant was not predisposed toward acquiring the entire 5.6 kilograms. To the contrary, defendant had bragged to the undercover agent on several occasions of the extent of his illegal drug activities. *U.S. v. Panet-Collazo,* __ F.2d __ (1st Cir. Jan. 21, 1992) No. 91-1404.

5th Circuit rejects equal protection challenge to crack/powder cocaine sentencing scheme. (242) The 5th Circuit rejected defendant's claim that the heavier penalties for possession of crack than for powder cocaine violated equal protection because crack is used more by blacks and powder cocaine is used more by whites. Even if defendant could prove a disparate impact, no heightened scrutiny of the disparity would be necessary because defendant did not claim a discriminatory intent on the part of the sentencing commission. The fact that crack is more addictive, more dangerous, and can therefore be sold in smaller quantities was a reasonable basis for providing harsher penalties for its possession. *U.S. v. Watson,* __ F.2d __ (5th Cir. Jan. 31, 1992) No. 91-3313.

6th Circuit rules defendant waived challenge to Drug Quantity Table. (242)(855) Defendants contended that 21 U.S.C. section 841(b)(1)(b) and the Drug Quantity Table in guideline section 2D1.1 violate due process and equal protection by treating, one plant as equivalent to one kilogram of marijuana, for offenses involving 50 or more marijuana plants, while one plant is treated as 100 grams of marijuana for offenses involving less than 50 plants. The 6th Circuit ruled that defendant had waived this argument. He raised the issue for the first time in a motion for correction of sentence under Fed. R. Crim. P. 35. The district court denied the motion, and defendant did not appeal the denial. *U.S. v. Allen,* __ F.2d __ (6th Cir. Jan. 24, 1992) No. 91-5205.

7th Circuit rejects claim that indictment must notify defendant of government's intent to seek enhanced penalties under section 841(b)(1)(B). (245)(761) The 7th Circuit found no due process violation in the indictment's failure to notify defendant of the government's intention to seek an enhanced sentence based upon the weight of the drugs involved under 21 U.S.C. section 841(b)(1)(B). The quantity of drugs is not an element of the offense, but relates to a sentencing factor. Guideline sections 6A1.1 through 1.3 and Fed. R. Crim. Pr. 32 require the district court to give defendant notice of factors which may be used to determine his sentence post-conviction, not pretrial. *U.S. v. Levy,* __ F.2d __ (7th Cir. Jan. 30, 1992) No. 91-1002.

5th Circuit rejects ambiguity challenge where defendant was sentenced within most lenient punishment range. (245) The law provids two contradictory punishments for the same quantity of methamphetamine: 21 U.S.C. section 841(b)(1)(A)(viii) provides for a sentence of 10 years to life, while 21 U.S.C. section 841(b)(1)(B)(viii) provides for a sentence of between five and 40 years. Defendant received a 240 month sentence. The 5th Circuit held that since the district court applied the more lenient punishment range, the defendant incurred no injury, and therefore lacked standing to complain about the ambiguity in the statute. *U.S. v. Allison,* __ F.2d __ (5th Cir. Jan. 30, 1992) No. 90-8686.

1st Circuit upholds drug weight obtained at first weighing. (250) The presentence report determined the gross weight of LSD-impregnated blotter paper and LSD-bearing liquid that defendant sold to an undercover agent based upon a government chemist's analysis. Two subsequent analyses performed months later showed a lower weight. The district court found that the gross weight in the presentence report was correct, based upon testimony that some of the liquid and paper could have been consumed during the analyses. The 1st Circuit affirmed the use of the weight in the presentence report. Given the first chemist's analysis, and the testimony explaining how later analysis might have found a lower gross weight, the district court's finding was not clearly erroneous. *U.S. v. Lowden,* __ F.2d __ (1st Cir. Jan. 29, 1992) No. 90-1605.

7th Circuit affirms calculation of drug quantity based on police officer's testimony. (250)(770) The 7th Circuit found no merit in defendant's claim that the district court incorrectly calculated the amount of cocaine involved in his conspiracy. The most that defendant could establish was that another permissible view of the evidence existed; defendant merely questioned the district court's decision to credit an officer's testimony that defendant admitted to delivering six to eight pounds of cocaine. The district court was in the best position to evaluate the credibility of witnesses. *U.S. v. Levy*, __ F.2d __ (7th Cir. Jan. 30, 1992) No. 91-1002.

1st Circuit upholds consideration of gross weight of LSD-bearing liquid. (251) The 1st Circuit affirmed the district court's decision to base defendant's sentence on the gross weight of LSD-impregnated blotter paper and LSD-bearing liquid that he sold to an undercover agent. In *Chapman v. United States*, 111 S.Ct. 1919 (1991), the Supreme Court held that sentencing based on the weight of blotter paper containing LSD did not violate due process. Even assuming that *Chapman* left room for a constitutional challenge in a case involving a particularly heavy or unusual carrier, this was not such a case. Blotter paper appeared to be the "carrier of choice" for LSD, and defendant presented no evidence that the liquid here (apparently water) was an unusual medium in which to mix LSD. *U.S. v. Lowden*, __ F.2d __ (1st Cir. Jan. 29, 1992) No. 90-1605.

6th Circuit rejects due process challenge to government's destruction of marijuana plants. (253) The 6th Circuit upheld the district court's determination that there were more than 100 marijuana plants in defendants' marijuana patch. Two police officers testified that they counted 122 plants. The only contrary evidence was a co-defendant's testimony that although he planted 140 plants, after a heavy rain he counted only 82 plants. Defendant's due process rights were not violated by the government's destruction of the plants, which prevented defendant from independently counting the plants. Defendant did not contend that the government acted in bad faith in destroying the plants. According to the proof, the plants were counted and recounted. Given this and no evidence of bad faith, there was no due process violation. *U.S. v. Allen*, __ F.2d __ (6th Cir. Jan. 24, 1992) No. 91-5205.

2nd Circuit remands again because sentence was based on co-conspirator's unexplained income. (254)(275) Defendant was a "lieutenant" in a cocaine conspiracy. The district court initially computed his offense level by (1) approximating how much cocaine was distributed based on the amount of money spent by the leader during the conspiracy, and (2) attributing the full amount to defendant. In the first appeal in this case, *U.S. v. Mickens*, 926 F.2d 1323 (2nd Cir. 1991), the 2nd Circuit approved this method in general, but found insufficient evidence linking defendant to the quantity of cocaine. On remand, the district court again attributed the entire quantity to defendant. The 2nd Circuit again reversed and remanded, ruling that under the existing evidence, defendant should be sentenced only for the cocaine he personally sold. If new evidence established what portion of the leader's income was attributable to the conspiracy in which defendant was involved, he could be sentenced for that quantity, as long as that quantity was reasonably known by or foreseeable to defendant. *U.S. v. Jacobs*, __ F.2d __ (2nd Cir. Jan. 23, 1992) No. 91-1477.

1st Circuit affirms that defendant's organization was capable of purchasing 5.6 kilograms of heroin. (265) Defendant and his co-conspirators negotiated with a government agent to purchase 5.6 kilograms of heroin from the agent. The heroin was to be purchased in eight 700 gram units, each unit to be sold at half-hour intervals. One of the conspirators informed the agent that he had arranged financing for all eight units. After the money was produced for the first unit, the conspirators were arrested. The 1st Circuit affirmed the trial court's consideration of the full 5.6 kilograms of heroin, despite defendant's claim that he was unable to produce enough money to purchase this quantity. The district court found that although defendant's organization did not have sufficient cash to purchase the entire amount, it was engaged in financial negotiations to acquire the additional funding. *U.S. v. Panet-Collazo*, __ F.2d __ (1st Cir. Jan. 21, 1992) No. 91-1404.

2nd Circuit rules failure to object to drug quantity in presentence report waived challenge. (265)(765)(855) Defendants claimed that it was error to sentence them on the basis of the amount of heroin they negotiated to purchase because they lacked the money to make the purchase. The 2nd Circuit ruled that defendants waived this claim by failing to object to the drug quantity listed in the presentence report. The district court asked defendants whether they disputed any of the findings in the presentence report, and when they declined, the judge adopted the findings of the presentence report. Defendants had the responsibility to advise the judge that there was a question regarding their reasonable capacity to produce a negotiated amount of money or drugs. *U.S. v.*

Caba, __ F.2d __ (2nd Cir. Jan. 29, 1992) No. 91-1219.

2nd Circuit affirms defendants' ability to deliver additional cocaine. (265)(770) The 2nd Circuit found no error in the district court's determination that defendants were reasonably capable of delivering five additional kilograms of cocaine to the confidential informant. One defendant admitted in his plea allocution that he conspired with the another defendant to distribute the five kilograms. In a letter to the Assistant U. S. Attorney, the three defendants explained that their drug "boss" had been ready with five kilograms on the day of the deal, but when the informant failed to show up; the deal did not go through. In addition, evidence seized at defendants' apartment, including 87 percent pure cocaine, weapons, bullet-proof vests, electronic scales and other narcotics paraphernalia, indicated that defendants were not low level traffickers. Two defendants made tape-recorded statements in which they agreed to supply the informant with five kilograms of cocaine. *U.S. v. Olvera,* __ F.2d __ (2nd Cir. Jan. 15, 1992) No. 91-1437.

11th Circuit affirms that drug transactions were part of same course of conduct. (270) The 11th Circuit affirmed the district court's determination that drugs involved in transactions occurring in November and December of 1988 were part of the same course of conduct as transactions which took place January 14, 1989. In November, defendant and his co-conspirator sold 11.11 grams of cocaine to an undercover agent. In December, when the agent called the co-conspirator to purchase more cocaine, defendant told the agent the co-conspirator had gone out to pick up a package of cocaine. On January 14, the co-conspirator was found asleep at defendant's residence when defendant was arrested there for possession of cocaine. Since the acts were closely related in time, involved some of the same parties, and nothing indicated a break in defendant's drug activities, the district court was not clearly incorrect in determining that the transactions were part of the same course of conduct. *U.S. v. Rodgers,* __ F.2d __ (11th Cir. Jan. 28, 1992) No. 90-7140.

6th Circuit remands to determine whether defendant knew co-conspirator possessed large quantity of cocaine. (275) Although defendant pled guilty to three cocaine sales totalling 1 2/8 ounces, the district court held defendant accountable for the one pound bag of cocaine possessed by defendant's brother. The 6th Circuit remanded because the district court failed to find that defendant knew or should have known the amount of cocaine his brother possessed, or that a conspiracy to distribute the larger amount of cocaine was established. Although the district court found that a conspiracy existed between defendant and his brother for the purpose of admitting hearsay statements made in furtherance of the conspiracy, it did not state what it found to be the object of the conspiracy or its extent. *U.S. v. Blankenship,* __ F.2d __ (6th Cir. Jan. 28, 1992) No. 90-6417.

2nd Circuit holds that defendant had sufficient connection with apartment in which guns were found to merit enhancement. (284) Defendant contended that his only connection with an apartment in which drugs and weapons were discovered was his presence, and that therefore an enhancement under section 2D1.1(b)(1) was improper. The 2nd Circuit ruled that there was sufficient evidence for the district court to find that defendant had substantial contact with the apartment and that the weapon was connected to the offense. *U.S. v. Olvera,* __ F.2d __ (2nd Cir. Jan. 15, 1992) No. 91-1437.

6th Circuit upholds firearms enhancement despite dismissal of firearms charges. (284) The 6th Circuit rejected defendant's contention that an enhancement under guideline section 2D1.1(b)(1) for carrying a firearm during a drug trafficking crime was improper because the government had dismissed the charge of using or carrying a firearm in relation to a drug trafficking offense, in violation of 18 U.S.C. section 924(c)(1). There is a distinction between possession of firearms required for enhancement under the guidelines and using or carrying required for a violation of section 924(c)(1), and an enhancement can be proper even if a defendant has been acquitted of the section 924(c)(1) charge. *U.S. v. Blankenship,* __ F.2d __ (6th Cir. Jan. 28, 1992) No. 90-6417.

1st Circuit rules that RICO conviction did not take into account defendant's official status. (290)(450) Defendant, a police officer, was convicted of RICO offenses as a result of his participation in a payoff scheme involving local prostitutes. Guideline section 2E1.1 directs a district court to use an offense level that is the greater of 19 and the offense level applicable to the underlying racketeering activity. The parties agreed that defendant's underlying racketeering activity was extortion under color of right, which carries an offense level of 10. The district court refused to apply an enhancement under guideline section 3B1.3 for abuse of public trust because it found that this was an element of the offense of extortion under color of right. Since the 3B1.3 adjustment could not be added to the base offense level of 10 for the underlying racketeering activity, the district court reasoned that it also could not be added to the base of-

fense level of 19. The 1st Circuit reversed, ruling that section 2E1.1(a)(1) established a generic base offense level for RICO crimes, that includes no particular offense characteristic or special skill. *U.S. v. Butt*, __ F.2d __ (1st Cir. Jan. 27, 1992) No. 91-1227.

3rd Circuit affirms use of defendant's "gross gain" to calculate loss caused by defendant's fraud. (300) In his capacity as bank president, defendant approved loans to several real estate developers on condition that the developers use on their construction projects one or more electrical companies in which defendant or his family had an interest. The district court calculated the loss caused by defendant's fraud by adding together the amounts of the three electrical contracts awarded by the developers to the family companies. The 3rd Circuit affirmed, holding that under the circumstances of this case, it was appropriate to look to the gain that defendant received, rather than the amount of the bank's loss. The case was distinguishable from *U.S. v. Kopp*, __ F.2d __ (3rd Cir. Dec. 4, 1991) No. 91-5453, which held that fraud loss is the amount of money the victim has actually lost, estimated at the time of sentencing. Here, the gravamen of the offense, unlike the situation in *Kopp*, was the benefit defendant received from the developers. Judge Weis dissented, agreeing that the offender's "gross gain" was the appropriate standard, but believing that it should be reduced by the companies' cost of performing the contracts. *U.S. v. Badaracco*, __ F.2d __ (3rd Cir. Jan. 24, 1992) No. 91-5484.

1st Circuit affirms that defendant's perjury interfered with the administration of justice. (320) Defendant, a police officer, participated in a payoff scheme involving local prostitutes. He was convicted of committing perjury before a grand jury investigating the scheme. The 1st Circuit affirmed a three level enhancement under guideline section 2J1.3(b)(2) because such perjury "resulted in substantial interference with the administration of justice." Had defendant admitted his involvement at the outset, the government arguably would not have needed to locate all three of the prostitutes who testified about receiving police protection in return for weekly payments, or the several witnesses who corroborated this testimony. Had defendant testified truthfully, the government might not have immunized persons whom it otherwise could have prosecuted. *U.S. v. Butt*, __ F.2d __ (1st Cir. Jan. 27, 1992) No. 91-1227.

2nd Circuit upholds enhanced sentence under 18 U.S.C. section 924(c) for second of two simultaneous robbery convictions. (330) After committing two armed bank robberies, defendant was convicted of various charges, including two counts of using a firearm during the commission of a crime of violence, 18 U.S.C. section 924(c). He received a five year sentence for the first 924(c) conviction and an enhanced 20 year sentence for the second 924(c) conviction. The 2nd Circuit affirmed that section 924(c) provides for an enhanced sentence for the second of two simultaneous convictions under the statute. It clearly provides that for a "second or subsequent" conviction under section 924(c), an offender shall receive a 20 year sentence. An analogy cannot be drawn to the career offender provisions of the guidelines, which require convictions separated in time to enhance a sentence. The language in guideline section 4B1.1 is different and plainly requires that the conviction for which an enhanced penalty is imposed occur after the other convictions. *U.S. v. Bernier*, __ F.2d __ (2nd Cir. Jan. 22, 1992) No. 91-1370.

5th Circuit rejects supervised release term for use of a firearm during a felony. (330)(580) Defendant was convicted of various counts, including use of a firearm in the commission of a felony, in violation of 18 U.S.C. section 924. The district court imposed a three year term of supervised release on each of the four counts, all running concurrently. Since no supervised release is allowed under the punishment provisions of section 924, the 5th Circuit reformed the sentence on the firearm count to delete the term of supervised release. *U.S. v. Allison*, __ F.2d __ (5th Cir. Jan. 30, 1992) No. 90-8686.

7th Circuit affirms that setting fire to building in urban area recklessly endangered others. (330) The 7th Circuit affirmed an enhancement under guideline section 2K1.4 for recklessly endangering the safety of another. On two separate occasions, defendant and others attempted to burn down a building with dangerous combustibles designed to ignite and spread fire quickly. At neither time did defendant or his co-conspirators make any effort to determine whether anyone was in the building before setting it ablaze, and they ignored the danger of igniting neighboring homes. Defendant's claim that no one was "actually endangered" was rejected, since arson of an urban structure is per se reckless endangerment of others. Defendant's claim that he was not aware that his conduct might endanger other people was incredible. *U.S. v. Golden*, __ F.2d __ (7th Cir. Jan. 28, 1992) No. 90-3465.

Adjustments (Chapter 3)

7th Circuit rejects vulnerable victim enhancement for defendant who defrauded war veterans. (410)

Defendant fraudulently solicited war memorabilia from veterans and their widows, and then sold the memorabilia for his personal gain. The 7th Circuit found insufficient evidence to support a vulnerable victim enhancement under section 3A1.1 based on the victims' age and status as war veterans. Although defendant primarily targeted World War II veterans and their widows, he also contacted Vietnam veterans. Some of his solicitations were published in a general magazine with a national circulation. From this targeted group, a court could not conclude that defendant targeted the elderly. Without any specific evidence, the court based the sentence on unsupported generalizations about elderly veterans' nostalgia regarding their wartime experience. A court could have concluded that because old veterans tend to be attached to their memorabilia, they are unusually *invulnerable* to such a fraud. *U.S. v. Sutherland,* __ F.2d __ (7th Cir. Jan. 28, 1992) No. 91-1961.

11th Circuit rules role adjustment must be based solely on role in offense of conviction. (430) The 11th Circuit held that an aggravating role adjustment under guideline section 3B1.1 must be based on a defendant's role in the offense of conviction, rather than other relevant criminal conduct. Since defendant was convicted only of possession of marijuana with intent to distribute, which by its nature, involves no more than one participant, the three level enhancement under section 3B1.1(b) was improper. *U.S. v. Rodgers,* __ F.2d __ (11th Cir. Jan. 28, 1992) No. 90-7140.

1st Circuit upholds supervisory role for drug conspirator. (431) The 1st Circuit upheld a three level enhancement for defendant's supervisory role in a drug conspiracy under section 3B1.1(b). The district court found that although defendant was not the organizer, he was the supervisor of another conspirator. "He was involved in the transaction, he had certain authority to do and undo, get the people together . . . so the transaction could be done." This assessment of defendant's role focused on the appropriate factors and was supported by the record. *U.S. v. Panet-Collazo,* __ F.2d __ (1st Cir. Jan. 21, 1992) No. 91-1404.

1st Circuit holds that defendant had control over "money men" for purposes of determining leadership enhancement. (431) The 1st Circuit ruled that the district court could have reasonably found that defendant had control over four, rather than two, other participants in a drug conspiracy for purposes of an enhancement under guideline section 3B1.1. In addition to the two participants which defendant conceded he supervised, there was evidence that two other individuals who were present at the drug transaction served as "money men" for defendant. These individuals were there to finance the transaction. *U.S. v. Panet-Collazo,* __ F.2d __ (1st Cir. Jan. 21, 1992) No. 91-1404.

7th Circuit affirms that two defendants can qualify as organizers. (431) Defendant was recruited by a businessman to burn down the building of a competitor. Defendant in turn recruited two other people to assist him in two separate efforts to burn the building. Following both fires, defendant received a payment from the businessman, and distributed a share of it to his accomplices. However, he kept most of the money himself. The 7th Circuit affirmed that this was sufficient to support the district court's determination that defendant was an organizer under guideline section 3B1.1. The district court could assign the same degree of responsibility to defendant as to the businessman. Co-defendants can both qualify as organizers. *U.S. v. Golden,* __ F.2d __ (7th Cir. Jan. 28, 1992) No. 90-3465.

7th Circuit affirms managerial enhancement for prisoner who persuaded prison guard to smuggle contraband into prison. (431) The 7th Circuit affirmed an enhancement under guideline section 3B1.1(c) based upon defendant's managerial role in an conspiracy to smuggle drugs into prison. Defendant was a prisoner, and he talked a prison guard into smuggling in contraband so that the guard could prove that he was the prisoner's friend. Defendant arranged for his girlfriend to bring a second set of drugs to the prison, and persuaded the guard to meet with her to pick up the drugs. The trial court concluded that the guard was a weak person easily influenced by others, and that defendant was adept at influencing the guard. *U.S. v. Lewis,* __ F.2d __ (7th Cir. Jan. 27, 1992) No. 90-3584.

3rd Circuit rules that real estate developers were not participants in bank president's fraud scheme. (432) In his capacity as bank president, defendant approved loans to several real estate developers on condition that the developers use on their construction projects one or more electrical companies in which defendant or his family had an interest. The 3rd Circuit rejected the government's contention that the developers were criminally responsible, and thus could be considered "participants" for purposes of imposing a leadership enhancement on defendant under guideline section 3B1.1(c). There was no evidence that the developers knew that defendant had a personal interest in any of the electrical companies or that he was concealing that interest from the bank.

Thus, they did not have the criminal state of mind necessary to convict them for aiding and abetting defendant's bank fraud or the intent to influence and reward defendant. *U.S. v. Badaracco,* __ F.2d __ (3rd Cir. Jan. 24, 1992) No. 91-5484.

2nd Circuit rejects mitigating role adjustment for defendant who weighed drugs and was present during sale to informant. (445) The 2nd Circuit rejected defendant's claim that he was entitled to a mitigating role reduction. The district court found that defendant weighed narcotics and secreted them around the apartment from which his co-conspirators sold drugs. Defendant was present when his co-conspirators sold cocaine to the informant and when one co-conspirator negotiated a five-kilogram deal. In addition, defendant admitted to weighing drugs and acting as a driver in various instances. *U.S. v. Olvera,* __ F.2d __ (2nd Cir. Jan. 15, 1992) No. 91-1437.

7th Circuit rejects mitigating role adjustment for mid-level cocaine distributor. (445) The 7th Circuit rejected defendant's contention that he was entitled to a reduction based upon his mitigating role in a cocaine conspiracy. The probation department and the district court concluded that defendant was a mid-level cocaine distributor, and as such, held neither an aggravating nor a mitigating role in the offense. *U.S. v. Navarez,* __ F.2d __ (7th Cir. Jan. 27, 1992) No. 90-2397.

8th Circuit upholds denial of minor role adjustments to defendants in stolen goods conspiracy. (445) Defendants were part of a conspiracy which used "boosters" to shoplift merchandise from retail outlets, and then retagged the merchandise and resold the merchandise through another retail outlet. The 8th Circuit affirmed the denial of a minor role adjustments for two defendants who resold the property stolen by the boosters. This activity made the conspiracy work, and defendants were aware that at least some of the goods they sold were stolen. A third defendant who received stolen property from the boosters and stored it at her house was also denied a mitigating role adjustment. *U.S. v. Wilson,* __ F.2d __ (8th Cir. Jan. 29, 1992) No. 90-2777.

5th Circuit rules that imposing concurrent sentences was a downward departure. (470)(650)(700) Defendant received a 240-month sentence for conspiracy to manufacture methamphetamine, and a concurrent 120-month sentence for being a felon in possession of a firearm. The 5th Circuit rejected defendant's claim that his firearm sentence represented an upward departure. If he had been convicted of the firearm count alone, his sentence would have been 18 to 24 months. However, once the two counts were combined under the multiple count section, 3D1.1(a)(3), defendant had a guideline range of 360 months to life. Under section 5G1.2(d) the court would have had to impose the statutory maximum 240-month sentence for the drug count, and a consecutive 120 month sentence for the firearm count. By imposing concurrent sentences, the district court actually was departing downward, without stating any reasons on the record. However, since no complaint was made on appeal, the appellate court refused to address any possible error. *U.S. v. Allison,* __ F.2d __ (5th Cir. Jan. 30, 1992) No. 90-8686.

5th Circuit affirms denial of credit for acceptance of responsibility for defendant who failed to object. (480)(855) The 5th Circuit found no error in the district court's refusal to grant defendant a reduction for acceptance of responsibility. Defendant failed to raise or prove acceptance of responsibility either in his written objections to the presentence report or when the district court asked for objections in open court at the sentencing. A defendant bears the burden of proving his entitlement to an acceptance of responsibility reduction. *U.S. v. Allison,* __ F.2d __ (5th Cir. Jan. 30, 1992) No. 90-8686.

7th Circuit affirms denial of acceptance of responsibility reduction where defendant denied distributing cocaine. (488) The 7th Circuit affirmed the district court's denial of an acceptance of responsibility reduction. The district court found that defendant persisted in denying that he had distributed six pounds of cocaine, and also noted defendant's "belated remorse does not suggest the timeliness of conduct manifesting the acceptance of responsibility." *U.S. v. Levy,* __ F.2d __ (7th Cir. Jan. 30, 1992) No. 91-1002.

2nd Circuit upholds denial of acceptance of responsibility reduction for defendant who smuggled marijuana into prison. (494) The district court denied defendant a reduction for acceptance of responsibility because defendant had attempted to smuggle marijuana into prison while awaiting sentencing. Defendant contended that the small quantity suggested that he only intended the marijuana for personal use for his marijuana addiction, and that he should not be denied the reduction because of his drug abuse. The 2nd Circuit upheld the denial of the reduction, because the fact that a defendant commits a second crime after pleading guilty and while awaiting sentencing is a relevant consideration in denying the acceptance of responsibility reduction. *U.S. v.*

Olvera, __ F.2d __ (2nd Cir. Jan. 15, 1992) No. 91-1437.

6th Circuit holds denial of acceptance of responsibility reduction was properly based upon continuing criminal conduct. (494) While in jail on unrelated charges, defendant perpetrated a credit card fraud and was involved in a scheme to fraudulently obtain Dilaudid. Defendant had a history of such fraudulent schemes. The district court denied defendant a reduction for acceptance of responsibility because "it does appear to this Court that [defendant] is engaged in on-going criminal activity; that he is incorrigible." The 6th Circuit affirmed, rejecting defendant's claim that the reduction was improperly based upon his prior conduct. The court's statements indicated it believed that defendant was continuing to engage in unlawful activities, as evidenced by the order to supervise defendant's use of the phone. *U.S. v. Downs,* __ F.2d __ (6th Cir. Jan. 30, 1992) No. 91-5504.

Criminal History (§4A)

8th Circuit holds that unsupervised probation constitutes a criminal justice sentence. (500) Under guideline section 4A1.1(d), two points are added to a defendant's criminal history score for committing the instant offense while under a criminal justice sentence. The 8th Circuit rejected defendant's claim that unsupervised probation did not constitute a criminal justice sentence. Section 4A1.1(d) defines a criminal justice sentence to include probation, and makes no distinction between supervised and unsupervised probation. *U.S. v. Bailey,* __ F.2d __ (8th Cir. Jan. 23, 1992) No. 91-1705.

7th Circuit upholds consideration of reckless driving offense despite stipulation in previous presentence report. (504) While serving a sentence for drug charges, defendant walked away from the prison camp. After pleading guilty to escape, defendant waived preparation of a new presentence report and allowed the court to rely on the report created for his drug conviction. That report showed a 1981 reckless driving conviction for which defendant had received two years probation. The report also stated that as part of their plea agreement for the drug offense, the government agreed that defendant had no prior convictions and fell within criminal history category I. In the subsequent sentencing for escape, the 7th Circuit upheld the inclusion of the reckless driving charge in defendant's criminal history. The conviction was not a minor traffic infraction under section 4A1.2(c)(2). The stipulation not to consider the reckless driving offense was with reference to the earlier drug conviction. It was not clear that by waiving the preparation of a new presentence report, defendant meant to rely upon that stipulation. Any misunderstanding would have been dispelled during sentencing, when defendant acknowledged the conviction. *U.S. v. Ayala-Rivera,* __ F.2d __ (7th Cir. Jan. 24, 1992) No. 90-2300.

7th Circuit upholds offense level departure where criminal history category was under-representative. (510)(715) The 7th Circuit upheld the district court's addition of two points to defendant's offense level because defendant's criminal history category did not properly reflect the seriousness of defendant's criminal record. Defendant had 22 criminal history points, which was nine more than the minimum needed to place him in criminal history category VI, the highest category. Guideline section 4A1.3 authorizes a departure where a defendant's criminal history is significantly more serious than that of most defendants in the same criminal history category. Moreover, defendant had two prior sentences that substantially exceeded one year. Guideline section 4A1.3(b) permits an upward departure if there are prior sentences of substantially more than one year as a result of independent crimes committed on different occasions. *U.S. v. Lewis,* __ F.2d __ (7th Cir. Jan. 27, 1992) No. 90-3584.

6th Circuit finds "persistent involvement in drug-related criminal activity" inadequate for upward departure. (514) Defendant fell within criminal history category VI and had a guideline range of 37 to 46 months. The district court departed upward and sentenced defendant to 120 months, stating that his criminal history was not adequately reflected by the guidelines, and that he had "persistent involvement with drug-related criminal activity, both in and out of jail." The 6th Circuit found this was not an adequate statement of grounds for the upward departure as required by 18 U.S.C. section 3553(c)(2). Moreover, normally when making a criminal history departure a district court must first consider the next highest criminal history category. Here, where defendant was already in the highest criminal history category, "the need for a specific and reasoned explanation [was] particularly compelling." *U.S. v. Downs,* __ F.2d __ (6th Cir. Jan. 30, 1992) No. 91-5504.

Determining the Sentence (Chapter 5)

3rd Circuit rejects restitution order based upon defendant's gain rather than victim's loss.

(610)(855) In his capacity as bank president, defendant approved loans to several real estate developers on condition that the developers use on their construction projects one or more electrical companies in which defendant or his family had an interest. The district court ordered restitution equal to the sum of the three electrical contracts awarded to the family companies by the developers. The 3rd Circuit reversed, ruling that the restitution figure must be based on the losses actually suffered by the bank as a result of defendant's fraud, rather than defendant's gain from the fraud. Since this constituted plain error, the court did not need to decide whether defendant waived the issue by not raising it below. *U.S. v. Badaracco,* __ F.2d __ (3rd Cir. Jan. 24, 1992) No. 91-5484.

3rd Circuit rules Korean immigrant did not present facts warranting a downward departure based upon cultural differences. (660)(736) Defendant, a Korean immigrant, attempted to bribe an IRS agent with $5,000 after being advised that he owed $27,000 in tax deficiencies and penalties. He urged the district court to depart downward based upon the cultural differences between Korea and the United States. The 3rd Circuit, assuming without deciding that in some cases cultural differences might justify a downward departure, found defendant did not present such a case. Defendant had been in the country for 12 years and was a naturalized citizen when he committed the offense. He was a professional tax preparer who had accumulated property and thus had some familiarity with United States laws. He had some college level and legal education in this country, and extensive education in Korea. Defendant almost admitted that he knew his actions were a crime. The obvious conclusion was that defendant was motivated by a desire to save $22,000, not his belief that he was culturally bound to offer the bribe. Judge Becker dissented. *U.S. v. Yu,* __ F.2d __ (3rd Cir. Jan. 28, 1992) No. 90-1436.

Departures Generally (§5K)

Article assesses departure standards. (700) In *"An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines,"* Judge Bruce M. Selya of the First Circuit and Matthew R. Kipp canvass the various cases in which courts have addressed departures from the guidelines sentence. After summarizing the appellate courts' jurisdiction over district judges' departure decisions, the authors identify the various factors that courts have regarded as sufficiently unusual to justify a departure. The authors pay particular attention to disagreements among the circuits as to how to evaluate the reasonableness of the extent of a departure, criticizing courts that have strictly required that courts analogize to other guideline provisions for justification. 67 NOTRE DAME L. REV. 1 (1991).

Article suggests that departure arguments too frequently focus on criminal history. (700) In *"The Untapped Potential for Judicial Discretion Under the Federal Sentencing Guidelines: Advice for Counsel,"* Judge Gerald Bard Tjoflat of the Eleventh Circuit argues that advocates have too frequently failed to call judicial attention to offense-specific factors that could justify departure from the guidelines sentence. "[P]erhaps unable to rid themselves of the vestiges of rehabilitative sentencing," advocates commonly urge the court to make criminal history departures, based on the characteristics of the offender. But the author argues that the court's discretion to make such departures is more limited than is its discretion to depart on offense-specific grounds. For example, the author suggests that departures from guidelines sentences might be appropriate for crimes based on the relative frequency with which they are committed in a particular jurisdiction, with alien smuggling justifying a higher sentence in Southern California than in other areas. FEDERAL PROBATION 1 (Dec. 1991).

Article emphasizes judicial discretion under guidelines, criticizes reluctance to depart. (700) In *"Flexibility and Discretion Available to the Sentencing Judge Under the Guidelines Regime,"* Judge Edward R. Becker of the Third Circuit identifies departures, fact-finding, choosing where within the guidelines range to sentence, and alternatives to incarceration as among the significant areas of discretion available to sentencing judges under the guidelines. Noting that departure rates vary widely among the district courts, the author concludes that some judges are "overly reluctant to depart." Departure was intended by the Sentencing Commission in part as a way to identify areas in which the guidelines needed refining, and the Commission's response to departures shows that it is willing to take judicial commentary seriously when it is offered. FEDERAL PROBATION 10 (Dec. 1991).

10th Circuit says court cannot depart downward under Rule 35 without government motion. (712) The 10th Circuit held that the district court lacked jurisdiction to depart downward under Fed. R. Crim. P. 35(b) in the absence of a government motion. Given the similarity between Rule 35(b) and guideline section 5K1.1, the analysis of the two provision's requirements of a government motion is the same.

The court refused to review defendant's claim that the government's failure to file such a motion violated a post-trial agreement with him, since defendant failed to raise this issue below. *U.S. v. Perez,* __ F.2d __ (10th Cir. Jan. 29, 1992) No. 91-3010.

8th Circuit refuses to review failure to depart downward. (715)(860) Defendant spent 10 months between his federal indictment and sentencing in federal custody because when indicted, he was serving a two-year sentence on related state charges. He received no credit toward his federal sentence for this time served, but did receive credit toward his state sentence. Defendant argued that he would have been paroled by the state had he not been in federal custody, and therefore was forced to serve two sentences consecutively that would otherwise have been served concurrently, thus justifying a downward departure. The 8th Circuit held that it lacked discretion to review a district court's discretionary decision to deny a downward departure under section 5K2.0. *U.S. v. Wilson,* __ F.2d __ (8th Cir. Jan. 29, 1992) No. 90-2777.

1st Circuit rejects downward departure to correct disparate sentences based on prosecutor's charging decision. (716) Defendant, a police officer, was convicted of RICO and Hobbs Act offenses as a result of his participation in a payoff scheme involving local prostitutes. His partner, who also participated in the scheme, was only charged with perjury in connection with the grand jury investigation of the scheme. Defendant received a 30 month sentence while his partner received an 18 month sentence. The 1st Circuit rejected defendant's contention that the district court should have departed downward to correct for the alleged prosecutorial impropriety in the framing of the indictment. A perceived need to equalize sentences among similarly situated defendants is not a ground for a downward departure. The case is stronger here where defendant and his partner were charged with and convicted of different crimes, and thus were not similarly situated. *U.S. v. Butt,* __ F.2d __ (1st Cir. Jan. 27, 1992) No. 91-1227.

1st Circuit refuses to review claim that court vindictively sentenced defendant at top of range. (716)(775)(860) Defendant asserted that the district court improperly sentenced him in the upper part of the guideline range, while his co-conspirator, who had a larger role in the conspiracy, received a sentence in the middle of the range. Defendant contended that the trial court improperly treated him more harshly because he chose to stand trial while his co-conspirator pled guilty. The 1st Circuit refused to review the issue, finding it had no jurisdiction to review a sentence within the proper guideline range. *U.S. v. Panet-Collazo,* __ F.2d __ (1st Cir. Jan. 21, 1992) No. 91-1404.

Article provides overview of case law relating to fact-finding. (750) In *"Fact-Finding in Sentencing,"* David N. Adair, Jr., and Toby D. Slawsky collect the cases that have addressed a number of issues relevant to the process of fact-finding under the guidelines: the role of the presentence report, the burden of persuasion, the quality of evidence at sentencing, confrontation rights, the exclusionary rule, and the role of negotiated stipulations. While noting that many of the informal procedures employed to find facts under preguidelines practice have been approved in guidelines cases, the authors suggest that greater protections may be in order. FEDERAL PROBATION 58 (Dec. 1991).

Sentencing Hearing (86A)

9th Circuit finds no violation of right to allocution despite interruption by trial court. (750) The defendant addressed the trial court at sentencing. He spoke of the "giant loopholes" which exist in the tax laws, and scorned the IRS as incompetent. He discussed his work experience, his ability to avoid the tax laws, his letters to high government officials, the problem of national debt, and the fall of Eastern Europe. When the court proposed a recess, defendant stated "Your honor, I was going to say, when you're talking about balancing the budget and paying off the debt of the United States, that can't be done in ten minutes. That takes years and years of training. Finally -- you figure it out . . . " In these circumstances the 9th Circuit held that defendant's right to allocution was not violated. *U.S. v. Kellogg,* __ F.2d __ (9th Cir. February 3, 1992) No. No. 90-50522.

1st Circuit upholds use of preponderance of evidence standard at sentencing. (755) The 1st Circuit rejected defendant's contention that the standard of proof for determining the weight of a controlled substance is "beyond a reasonable doubt." The Supreme Court has held that the preponderance of the evidence standard satisfies due process. *U.S. v. Lowden,* __ F.2d __ (1st Cir. Jan. 29, 1992) No. 90-1605.

1st Circuit rules defendant waived right to challenge late notice of government's intent to seek enhancement. (761) The government did not notify defendant or the trial court of its intent to seek an enhancement under section 2J1.3(b)(2) until the morning of defendant's sentencing. The 1st Circuit ruled that defendant waived his right to challenge his

late notice of the enhancement. The district court offered to postpone its proceedings so that defendant might have additional time to brief the enhancement issue. Defendant declined the invitation in the interest of bringing the matter to a close. He informed the court that he was familiar enough with the pertinent case law to argue the matter and proceeded to do so. *U.S. v. Butt,* __ F.2d __ (1st Cir. Jan. 27, 1992) No. 91-1227.

8th Circuit finds district court considered factors listed in 18 U.S.C. section 3553(a). (775) The 8th Circuit rejected defendant's claim that in imposing sentence, the district court failed to properly consider the factors enumerated in 18 U.S.C. section 3553(a). The district court discussed the scope and objectives of the conspiracy; the defendants' lack of prior criminal records; the objectives of punishment, general deterrence and incapacitation; the applicable guideline ranges and the justification for downward departures; the lesser culpability of three of the defendants; and the inability of four of the defendants to pay a fine. *U.S. v. Knapp,* __ F.2d __ (8th Cir. Jan. 30, 1992) No. 91-1507.

8th Circuit rules district court need not give individualized statement of reasons for similar defendants. (775) Defendant was one of five co-defendants involved in a conspiracy to cultivate and distribute marijuana. The 8th Circuit rejected defendant's claim that her sentence was unlawful because the district court did not support it with an individualized statement of reasons. While the court did not address all five defendants individually, it stated at length its reasons for granting downward departures to all five defendants. In granting lesser sentences to defendant and two other caretakers of the marijuana plants, the court stated its belief that they may not have been aware of the enormity of the enterprise. A court is not required to give an individualized statement of reasons when the same reasons may apply to two or more co-defendants. *U.S. v. Knapp,* __ F.2d __ (8th Cir. Jan. 30, 1992) No. 91-1507.

Plea Agreements (§6B)

2nd Circuit rules failure to advise defendants that they could face deportation did not violate Rule 11. (780) The 2nd Circuit rejected defendants' claim that the district court violated Fed. R. Crim. P. 11(c)(1) by failing to inform them that their maximum punishment could include court-ordered deportation. Deportation is a collateral consequence of a guilty plea and therefore not a basis for attack under Rule 11. The district court's deportation "order" was beyond its authority but the error was harmless because the court's order was not binding on the Attorney General, who has sole discretion to institute deportation proceedings. *U.S. v. Olvera,* __ F.2d __ (2nd Cir. Jan. 15, 1992) No. 91-1437.

3rd Circuit rules government breached stipulation that offense did not involve more than minimal planning. (790) The government stipulated in defendant's plea agreement that his offense did not involve more than minimal planning. At sentencing, the prosecutor noted the stipulation, but pointed out one act by defendant which constituted "an affirmative step" indicating defendant was "concealing something." The 3rd Circuit ruled that the government breached its obligation under the plea agreement. The characterization of defendant's conduct as an affirmative step, rather than a "significant" affirmative step was not relevant, since the government's meaning and intention were clear. The government's statement was not a permissible reference to the nature and extent of defendant's activities, because it was made in the course of a discussion about the more than minimal planning stipulation. The government was aware of defendant's concealment when it entered into the plea agreement; it was not free to breach the agreement because it decided it made a bad bargain. *U.S. v. Badaracco,* __ F.2d __ (3rd Cir. Jan. 24, 1992) No. 91-5484.

Appeal of Sentence (18 U.S.C. §3742)

1st Circuit upholds its jurisdiction to review whether district court had discretion to depart on grounds urged by defendant. (860) The 1st Circuit upheld its ability to review the district court's failure to depart downward where it appeared that the court was aware of its ability to depart, but believed that it lacked discretion to depart on the particular ground urged by defendant. *U.S. v. Butt,* __ F.2d __ (1st Cir. Jan. 27, 1992) No. 91-1227.

8th Circuit considers merits of appeal despite overlapping ranges. (865) Defendant challenged the addition of two criminal history points which pushed him from criminal history category II to III. Under category III, he had a guideline range of 292 to 365 months, while under category II, his guideline range would have been 262 to 327 months. He received a sentence of 292 months. Despite the overlapping ranges, the 8th Circuit found that defendant's claim was properly before it, since if defendant prevailed and the case was remanded to the district court, he could get a lesser sentence. *U.S. v. Jacobs,* __ F.2d __ (2nd Cir. Jan. 23, 1992) No. 91-1477.

TABLE OF CASES

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

Vol. 3, No. 7 | FEDERAL SENTENCING GUIDELINES AND FORFEITURE CASES FROM ALL CIRCUITS. | January 27, 1992

IN THIS ISSUE:

Sentencing Commission seeks public comment on proposed 1992 Amendments. On January 2, 1992, the Sentencing Commission published in the Federal Register its proposals for amendments to take effect on November 1, 1992. Public comments should be received by the Commission no later than March 2, 1992, in order to be considered by the Commission in time for the May 1, 1992 deadline for submission of the amendments to Congress. A number of significant proposed amendments are summarized by topic in this newsletter.

Guideline Sentencing, Generally

4th Circuit upholds use of dangerous weapon in aggravated assault case despite claim of double counting. (125)(215) Defendant pled guilty to aggravated assault. The district court refused to apply an enhancement under section 2A2.2(b)(2)(B) for use of a dangerous weapon because it believed it constituted impermissible double counting, since the guidelines define the base offense level of aggravated assault to include assault with a dangerous weapon. The 4th Circuit reversed, finding the district court's view inconsistent with the language and structure of the guidelines. The crime of aggravated assault with a dangerous weapon with intent to do bodily injury will not always result in the four-level enhancement under section 2A2.2(b)(2)(B). The base offense level set by section 2A2.2 applies to this assault offense because it "involved" a dangerous weapon, but the four-level adjustment applies only if the defendant "used" the dangerous weapon. Moreover, an adjustment that clearly applies must be imposed unless the guidelines expressly exclude its applicability. The guidelines are explicit when double-counting is forbidden. *U.S. v. Williams*, __ F.2d __ (4th Cir. Jan. 14, 1992) No. 91-5399.

Florida District Court rules denial of hunting and sporting reduction would violate double jeopardy. (125)(330) Defendants were arrested on Eglin Air Force Base and each received various hunting citations, including unauthorized possession of a shotgun in a closed hunting area. Defendants were subsequently prosecuted in federal court for being a felon in possession of a firearm. The Northern District of Florida rejected defendants' claim that the subsequent federal prosecution violated double jeopardy, because it did not require the government to prove the same conduct which constituted the offense for which they had already been prosecuted. However, defendants were entitled to a six level reduction in offense level under guideline section 2K2.1(b)(2), which is applicable if the defendant possessed the firearm solely for lawful sporting purposes and did not unlawfully use such firearm. Normally, defendants would not be entitled to the reduction, because they possessed the weapons in connection with the hunting violations. However, the hunting violations could not be considered without running afoul of the double jeopardy clause. *U.S. v. Stewart,* __ F.Supp. __ (N.D. Fla. Dec. 9, 1991) No. 91-03068-RV.

5th Circuit grants rehearing to apply reduced money laundering guideline amendment retroactively. (131)(360) Defendant was convicted of failing to file a currency report declaring that he was transporting more than $10,000 in cash from the United States. He was sentenced under guideline section 2S1.3(a)(1)(B), which carries an offense level of 13, and the 5th Circuit affirmed. On rehearing, the 5th Circuit vacated that portion of its opinion because after the decision was published, amendments to the guidelines rendered defendant's sentence excessive. Amendment 379, effective November 1, 1991, created a new section 2S1.4, carrying a reduced offense level for offenses involving the failure to file a currency report. Section 1B1.10(d) provides that Amendment 379 applies retroactively. *U.S. v. Park,* __ F.2d __ (5th Cir. Jan. 14, 1992) No. 90-1761, *vacating in part U.S. v. Park,* 947 F.2d 130 (5th Cir. 1991).

D.C. Circuit directs district court to consider ex post facto problem caused by amendment to immigration guideline. (131)(340) Defendant pled guilty to illegally entering the United States. He received a four-level adjustment under guideline section 2L1.2(b)(1) because he had previously been deported after conviction of a non-immigration felony. Subsection (b)(1) was added to section 2L1.2 on November 1, 1989. Defendant illegally entered the country May 1989, six months before the amendment went into effect. The trial court and the parties failed to consider this issue or raise it on appeal. Since the case was being remanded on other grounds, the D.C. Circuit directed the district court to consider the ex post facto problem. *U.S. v. Molina,* __ F.2d __ (D.C. Cir. Jan. 7, 1992) No. 90-3261.

2nd Circuit affirms that local branches of union were part of same RICO enterprise. (132)(290) Over a 35-year period, defendant held various positions in the General Service Employees International Union (the "International"), including president of Local 200, trustee of several employee funds, and secretary-treasurer of Local 362. He was convicted of a RICO in connection with his embezzlement and improper use of union funds. Defendant contended that the sentencing guidelines did not apply to the RICO charge because the only racketeering act that occurred after the effective date of the guidelines involved Local 362, which he contended was a separate RICO "enterprise" from Local 200 and the employee benefit funds. The 2nd Circuit rejected this argument, ruling that Local 362 was part of the same enterprise as the other entities. An "enterprise" under the RICO statute may consist of more than one entity, so long as those entities have been connected by a defendant's participation in them through a pattern of racketeering activity. Here, the indictment charged a broad enterprise that included Local 200, the pen-

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sion funds, and Local 362. There was proof that these entities were all under the umbrella of the International, and that defendant participated in these otherwise lawful organizations through a pattern of racketeering. *U.S. v. Butler,* __ F.2d __ (2nd Cir. Jan. 17, 1992) No. 91-1191.

5th Circuit rules wire fraud is not a continuing offense. (132)(300)(630) The district court imposed a $1 million fine under the Criminal Fine Enforcement Act of 1984, then codified at 18 U.S.C. section 3623. Section 3623 provided for a fine of $250,000 for any felony committed between January 1, 1985 and November 1, 1987, and $1,000 per count for any wire fraud offense committed before January 1, 1985. All six wire transfers for which defendant was convicted occurred in 1984. The 5th Circuit held that the $1 million fine violated the ex post facto clause, rejecting the government's claim that although the actual fraudulent wire transfers for which defendant was convicted occurred in 1984, the scheme to defraud continued into 1985 and should be treated as a continuing offense. Each wire transmission in furtherance of a scheme to defraud constitutes a separate crime. It is not the scheme to defraud but the use of the mails or wire that constitutes mail or wire fraud. *U.S. v. St. Gelais,* __ F.2d __ (5th Cir. Jan. 14, 1992) No. 90-2726.

7th Circuit affirms that conspiracy continued past effective date of guidelines. (132) The 7th Circuit affirmed the application of the guidelines to defendant, finding sufficient evidence to support the district court's conclusion that the conspiracy continued past November 1, 1987. Calls were made from defendant's phone to a co-conspirator's beeper number after November 1, 1987. Further, the co-conspirator testified that his last transaction with the conspiracy occurred sometime in the late fall of 1987 or early winter 1988. Defendant presented no evidence that he withdrew from the conspiracy. Although a defendant does not bear the burden of proving withdrawal from a conspiracy, he does have the burden of presenting sufficient affirmative evidence to raise the issue for the jury. *U.S. v. Rossy,* __ F.2d __ (7th Cir. Jan. 8, 1992) No. 91-1539.

5th Circuit rejects constitutional challenges to 100:1 cocaine to crack ratio in Drug Equivalency Table. (135)(242) The 5th Circuit rejected defendant's claim that the ratio in the Drug Equivalency Tables equating 1 kilogram of crack to 100 kilograms of cocaine violated due process and equal protection. Cocaine base is a different drug from cocaine, and it does not violate due process to treat the two substances differently. Although the ratio may have a disproportionate impact against blacks, to violate equal protection the impact must be traced to a discriminatory purpose. The government provided evidence of the intent of the Sentencing Commission when it adopted 2D1.1, and evidence of the legislative history and intent of Congress when it enacted the Drug Abuse Act of 1986. None of the evidence indicated a discriminatory intent. *U.S. v. Galloway,* __ F.2d __ (5th Cir. Jan. 8, 1992) No. 91-5617.

7th Circuit suggests court should not pronounce sentence on one count until it has disposed of all counts. (150)(470) Defendant was charged with five related money laundering counts. He was acquitted of counts one and two, and found guilty of count five. The jury was unable to reach a verdict on counts three and four, and the district judge ordered a mistrial on those counts. Defendant was then sentenced to 46 months prison on count five, and the sentence was stayed pending appeal. In holding it lacked jurisdiction over the appeal because of the pending counts, the 7th Circuit suggested that in future cases, the district judge should not pronounce any sentence until it has disposed of all counts. The grouping rules set forth in guideline section 3D1.1 create special problems when a conviction on one count of an indictment occurred at an earlier time than conviction on other counts. *U.S. v. Kaufmann,* __ F.2d __ (7th Cir. Jan. 7, 1992) No. 91-2294.

7th Circuit affirms that firearms offenses involved more than minimal planning. (160)(330) After a bar owner ejected defendant from his bar and took defendant's gun, defendant returned to the bar later that night with a stolen assault weapon. The 7th Circuit affirmed an enhancement for more than minimal planning. Defendant planned his return to the bar with care, not only arming himself "to the teeth" but modifying the assault weapon by changing barrels. Hoping to escape detection, he also switched cars. *U.S. v. Smith,* __ F.2d __ (7th Cir. Jan. 14, 1992) No. 90-3606.

9th Circuit upholds civil rights sentence on the basis of underlying offense. (165) Guideline section 2H1.3 provides that if no injury occurred, the base offense level is the greater of 10 or 2 plus the offense level for any underlying offense. Here, the underlying offense carried a base offense level of 12, so defendant received an offense level of 14. The 9th Circuit rejected defendant's argument that because the district court selected section 2H1.3 as most applicable to his offense, it was improper for the district court to look to the base offense level of any other guideline. Looking to the base offense level for an underlying offense was necessary to apply section 2H1.3(a)

and consistent with section 2H1.3 being the applicable section. Although defendant did not stipulate in his plea agreement to the facts necessary to prove the underlying offense, section 1B1.2(a) did not prohibit the district court from using the base offense level from the underlying offense. Section 1B1.2(a) governs only the initial selection of the guideline section most applicable to the offense of conviction. *U.S. v. Byrd,* __ F.2d __ (9th Cir. Jan. 23, 1992) No. 91-50578.

Commission proposes to clarify that "relevant conduct" is not necessarily the same for every co-conspirator. (170)(260) In its preliminary 1992 amendments, the Commission proposes to amend the Commentary to Section 1B1.3 to state that "the scope of the jointly-undertaken criminal activity is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant." The Commission proposes to add an example (f) as follows: "Defendant J knows about her boyfriend's ongoing drug trafficking activity, but agrees to participate in this activity on only one occasion. Defendant J is held accountable only for the drug quantity involved on that one occasion." Proposed example (g) would clarify that a street level drug dealer is not accountable for drugs sold by other street level drug dealers, "even if all share a common source of supply," unless they pool their "resources and profits." 57 *Federal Register* 89 (January 2, 1992).

Commission seeks comment on whether dismissed and acquitted conduct may be used in sentencing. (175)(270)(718)(780) In *U.S. v. Castro-Cervantes,* 927 F.2d 1079 (9th Cir. 1990) the 9th Circuit held that conduct underlying counts that had been dismissed pursuant to a plea agreement could not be considered in departing upward. In *U.S. v. Brady,* 928 F.2d 844 (9th Cir. 1991) the 9th Circuit held that conduct of which the defendant had been acquitted could not be considered in sentencing. In its proposed 1992 amendments, the Commission seeks comment on whether the guidelines should be amended to approve or to disapprove both decisions. 57 *Federal Register* 89 (January 2, 1992).

Commission proposes to broaden exclusion of information obtained during cooperation agreement. (185) Section 1B1.8 currently permits the government to agree not to use self-incriminating information obtained from a defendant while he is "providing information concerning unlawful activities of others." In its 1992 amendments, the Commission proposes to broaden section 1B1.8 to permit the government to agree not to use such self-incriminating information even when the only information provided by the defendant pertains to the defendant's own unlawful activities. 57 *Federal Register* 89 (January 2, 1992).

Commission proposes to add new policy statement regarding juvenile delinquents. (190) In its 1992 amendments, the Sentencing Commission proposes to add a policy statement to section 1B1.2 stating that even though the guidelines do not apply to a defendant sentenced under the Federal Juvenile Delinquency Act (18 U.S.C. sections 5031-5042), "the guidelines can provide an appropriate starting point for considering a sentence in such cases." The proposed policy statement would state that "[t]o the extent that a juvenile delinquent's age and youthfulness and lesser culpability associated with such age and youthfulness, distinguished the juvenile delinquent from an otherwise similarly-situated adult defendant, a sentence that is below the guideline range applicable to an otherwise similarly-situated adult defendant may be appropriate." 57 *Federal Register* 89 (January 2, 1992).

Offense Conduct, Generally (Chapter 2)

9th Circuit affirms using offense level in section 2A6.1 for defendant who made threatening anti-Semitic phone calls. (215)(315) Defendant and his co-conspirators made threatening, anti-Semitic telephone calls to a Jewish businessman, and pled guilty to conspiring to interfere with federally protected activities. Defendant was sentenced under section 2H1.3(a), which carries an offense level of 2 plus the offense level applicable to the underlying offense. The 9th Circuit held that the underlying offense, making threatening phone calls, was covered by guideline section 2A6.1. That section applies to violations of 18 U.S.C. section 875(c), making threatening phone calls in interstate commerce. The court said that although defendant's phone calls were not made in interstate commerce, once jurisdiction is established over the offense of conviction, such jurisdictional requirements are irrelevant in computing a sentence. Thus, 18 U.S.C. section 875(c) constituted an underlying offense and section 2A6.1 was the appropriate guideline section to apply. *U.S. v. Byrd,* __ F.2d __ (9th Cir. Jan. 23, 1992) No. 91-50578.

2nd Circuit affirms refusal to return stolen money as grounds for upward departure. (220)(715) Defendants were convicted of stealing $3.7 million from their armored car company. The district court departed for refusal to return the stolen money. The 2nd Circuit agreed that the guidelines did not ade-

quately consider the defendants' refusal to return stolen money because they were willing to exchange time in prison for "instant riches" upon release. The court rejected the argument that consideration of defendants' failure to return the stolen money violated their right against self-incrimination, noting that producing the money would not implicate them in any crimes other than those for which they had already been convicted. Nor would it prejudice defendants' rights on appeal, since production of the money would not be part of the appellate record. Here, however, the district court failed to make proper findings of fact concerning defendant's possession of the money. The case was remanded to permit defendants to present evidence indicating that they did not have control over the money. *U.S. v. Bryser,* __ F.2d __ (2nd Cir. Jan. 14, 1992) No. 91-1220.

Commission proposes to eliminate "more than minimal planning" from theft and fraud guidelines and increase higher offense levels. (220)(300) In its 1992 amendments, the Commission proposes to eliminate the specific offense characteristic of "more than minimal planning" and build the 2-level increase for "more than minimal planning" into the high end of the loss tables. The Commission explained that the offense characteristic of "more than minimal planning" has proven "difficult to apply consistently in practice." The Commission offers a number of alternative loss tables for public comment. The Commission also proposes to increase the offense level by four levels "if the offense affected a financial institution." 57 *Federal Register* 89 (January 2, 1992).

1st Circuit holds that "cocaine base" means crack under 21 U.S.C. section 841(b) and the guidelines. (240) A chemist who analyzed a suitcase chemically bonded with a controlled substance testified that the substance had "cocaine as the base," but that the substance was not crack. The 1st Circuit reversed the district court's classification of the cocaine substance as cocaine base, instead of cocaine. It held that the term "cocaine base" under the guidelines and 21 U.S.C section 841(b) refers to crack. The court rejected the government's contention that the term "cocaine base" includes crack but is not the same thing as crack. There are only two forms of cocaine that people use: cocaine and crack. Although there is a wide variety of each type according to purity, quality and grade, there is no third form of cocaine. *U.S. v. Lopez-Gil,* __ F.2d __ (1st Cir. Jan. 3, 1992) No. 90-2059.

7th Circuit upholds drug quantity determination based upon testimony of government witnesses. (250) The 7th Circuit upheld the district court's finding that defendant distributed at least five kilograms of cocaine. One witness described three separate transactions with defendant, involving a total of 2 1/2 kilograms of cocaine. Another witness testified that he engaged in three or four transactions with defendant, each of which involved about a kilogram. *U.S. v. Rossy,* __ F.2d __ (7th Cir. Jan. 8, 1992) No. 91-1539.

8th Circuit affirms district court's drug quantity determination based upon testimony of government witnesses. (250) The 8th Circuit affirmed the district court's determination that defendants' conspiracy involved between five and 15 kilograms of cocaine. Defendants' challenges to the testimony of government witnesses were essentially challenges to their credibility. There was nothing in the record that suggested it was error for the district court to credit the testimony of the witnesses as to the amounts of cocaine involved in the conspiracy. One defendant's additional claim that he was being sentencing on the basis of cocaine with which he was not personally involved had no merit because the evidence at trial clearly established his personal involvement with at least 10 kilograms. Moreover, as a conspirator, he was liable for the amounts of cocaine handled by the conspiracy which were foreseeable to him. *U.S. v. Pou,* __ F.2d __ (8th Cir. Jan. 6, 1992) No. 91-1765.

1st Circuit affirms using weight of suitcase chemically bonded with cocaine. (251) Defendant carried into the United States a fiberglass suitcase chemically bonded with cocaine. The weight of the suitcase, less metal trimming and parts, was 14 kilograms. The net weight of the cocaine alone was 2.6 kilograms. Following its decision in *U.S. v. Mahecha-Onofre,* 936 F.2d 623 (1st Cir. 1991), the 1st Circuit affirmed the district court's use of the suitcase's weight, less metal parts, to determine defendant's sentence, rather than the net weight of the cocaine. It recognized that both the 6th and the 11th Circuits have decided this issue differently, but found it was bound by Circuit precedent. Senior Judge Brown of the 5th Circuit, sitting by designation, thought *Mahecha-Onofre* had been decided incorrectly and encouraged *en banc* review of this decision. *U.S. v. Lopez-Gil,* __ F.2d __ (1st Cir. Jan. 3, 1992) No. 90-2059.

5th Circuit upholds consideration of stalks, fibers and seeds from marijuana plants. (253) The 5th Circuit held that the district court correctly calculated defendant's offense level by including the entire weight of the marijuana plants he imported, including stalks, fibers and seeds. The court agreed that under 21 U.S.C. section 960(b)(4), the weight of the

stalks, fibers and seeds could not be included for purposes of conviction. However, the sentencing guidelines calculate the sentencing range based upon the total weight of the marijuana. *U.S. v. Vasquez,* __ F.2d __ (5th Cir. Jan. 14, 1992) No. 91-8321.

9th Circuit rejects converting cash into drugs where no connection shown. (254) Defendant sold 25 grams of heroin to a government informant. Agents who later executed a search warrant on his residence found him flushing the toilet; balloons containing 3.49 grams of heroin were on the floor around the toilet. Also found in the apartment were 1.67 grams of cocaine, drug records, two guns and $1,541 in cash. The district court converted the $1,541 into 14 grams of heroin, and ruled that defendant was responsible for 42.49 grams of heroin. The 9th Circuit reversed, noting that although other courts have relied upon application note 2 to guideline section 2D1.4 to approve the conversion of cash into its equivalent in drugs, in each of these cases, there was evidence of a connection between the money seized and a drug transaction. Here, there was no evidence connecting the $1,541 to drug related activities. Moreover, the probation officer specifically found defendant responsible only for the drugs he sold and possessed. The additional drugs could not be based upon heroin which the government speculated was flushed down his toilet, since there was no evidence that defendant flushed a particular amount of heroin. *U.S. v. Gonzalez-Sanchez,* __ F.2d __, (9th Cir. Jan. 17, 1992) No. 91-30000.

5th Circuit affirms that defendants were involved in negotiations to purchase 1500 pounds of marijuana. (265)(770) The 5th Circuit affirmed that the evidence was sufficient to conclude that defendants were involved in negotiations to purchase 1500 pounds of marijuana. The presentence report made this conclusion based upon the probation officer's conversation with a DEA agent who participated in the reverse sting. The DEA agent met with a co-defendant, acting as a middleman for defendants, to discuss the potential purchase of the 1500 pounds. The defendants participated in conversations concerning the purchase of the 1500 pounds. That defendants denied the facts in the presentence report did not make the report unreliable. The district court could chose to believe the unsworn report of the DEA agent, as related to the probation officer who prepared the presentence report, over the unsworn and unsupported assertions of the defendants. Moreover, the presentence report was not the only evidence in the record to support the district court's finding. The agent stated in a sworn criminal complaint and testified at defendants' detention hearing that defendants told the agent that they would purchase 1500 pounds. *U.S. v. Sherbak,* __ F.2d __ (5th Cir. Jan. 8, 1992) No. 91-8128.

5th Circuit refuses to review validity of relevant conduct provisions. (270)(855) Defendants claimed for the first time on appeal that the sentencing commission exceeded its authority in drafting guidelines which allowed the consideration, for sentencing purposes, of conduct for which a defendant was not convicted. The 5th Circuit refused to consider this claim, since it was raised for the first time on appeal. Although the argument raised was a purely legal issue, failure to consider it would not result in "manifest injustice." *U.S. v. Sherbak,* __ F.2d __ (5th Cir. Jan. 8, 1992) No. 91-8128.

6th Circuit okays use of defendant's statements made during presentence interview. (270)(770) Defendant was arrested in possession of 135 grams of crack cocaine. Because the court urged defendant to cooperate fully in the probation officer's investigation, defendant admitted to the probation officer that he had made four prior crack sales in the two months prior to his arrest. Based upon this information, the district court determined that defendant was involved with a total of 985.5 grams of crack cocaine. The 6th Circuit rejected defendant's objection to the use of the information he provided to his probation officer. Such uncharged drugs were clearly relevant conduct under the guidelines, and thus the district court was authorized to consider the uncharged drugs in determining defendant's base offense level. Prior Circuit precedent has upheld the use of information that a defendant provides to his probation officer during a presentence interview. Judge Jones concurred in the result because the court was bound by precedent, but disagreed with that precedent. *U.S. v. Wilson,* __ F.2d __ (6th Cir. Jan. 21, 1992) No. 91-3136.

1st Circuit affirms that transactions conducted without defendant's participation were part of conspiracy. (275) Defendant, a part-owner of a bar, introduced an undercover agent to a co-conspirator, who sold cocaine to the agent. Over the next month, defendant and his co-conspirator were involved in various drug transactions with the undercover agent. After August 2, three additional drug transactions involving a total of 753 grams of cocaine were conducted between the co-conspirator and the agent. None of these three transactions originated at defendant's bar or involved defendant in any overt manner. The 1st Circuit affirmed the district court's inclusion in defendant's base offense level of the 753 grams of cocaine involved in the three transactions that oc-

curred after August 2. Defendant introduced the undercover agent to his co-conspirator for the express purpose of facilitating drug transactions. Defendant was aware of the nature and salient details of the relationship that developed between the two men. There was no evidence of defendant's withdrawal from the conspiracy or of any other intervening event. When defendant's bar was searched in November, the office safe contained cocaine. *U.S. v. Garcia,* __ F.2d __ (1st Cir. Jan. 16, 1992) No. 91-1708.

1st Circuit holds that amended indictment did not limit district court's ability to consider relevant conduct. (275)(790) Defendant and a co-conspirator were charged with conspiracy to distribute cocaine from an unknown date until November 29, 1990. As part of defendant's plea agreement, the government amended the indictment to reflect that the charged conspiracy ended August 2, 1990. The plea agreement did not represent what effect, if any, the amended indictment would have on defendant's sentence. The 1st Circuit rejected defendant's claim that it violated his plea agreement for the district court to consider drugs involved in transactions that occurred after August 2. Any expectation that the sentence would not be based upon the post-August 2 drugs was not reasonable. The plea agreement itself contained no such provision, and defendant admitted during the plea hearing that nothing had been omitted from the agreement. The plea agreement recited that no promises or inducements outside the agreement had been made. The district court took pains to insure that defendant was aware that the court was not bound by the government's sentencing recommendation. *U.S. v. Garcia,* __ F.2d __ (1st Cir. Jan. 16, 1992) No. 91-1708.

8th Circuit upholds firearm enhancement based upon firearms seen in apartment from which cocaine was distributed. (284) The 8th Circuit upheld an enhancement under guideline section 2D1.1(b)(1) based upon defendant's possession of a firearm during a drug trafficking crime. Firearms were seen in defendant's apartment on more than one occasion, which was the same apartment from which cocaine was distributed. *U.S. v. Pou,* __ F.2d __ (8th Cir. Jan. 6, 1992) No. 91-1765.

2nd Circuit reverses downward departure in RICO case where offense level for underlying activity was less than RICO offense. (290) Defendant was convicted of a RICO offense carrying a base offense level of 19 under guideline section 2E1.1(a)(1). The district court departed downward to level 15 because it found that this was not a typical case. In choosing level 15, the court referred to the introductory commentary to the racketeering guideline which states that the offense level usually will be determined by the offense level of the underlying conduct, which in this case was 15. The 2nd Circuit reversed the downward departure. Application note 3 to section 3E1.1 makes it clear that the Sentencing Commission was aware that with certain RICO convictions, the base offense level for the underlying offense would be less than 19, but that nevertheless, the base offense level is to be 19. Thus, the sole justification for the departure had been considered and rejected by the Commission. *U.S. v. Butler,* __ F.2d __ (2nd Cir. Jan. 17, 1992) No. 91-1191.

4th Circuit rules actual loss caused by fraudulent loan was not too speculative to calculate. (300) Defendant was convicted of obtaining credit from a bank by fraud, and making a false statement on a loan application. The loan was in the amount of $480,000, and was secured by a deed of trust on a condominium appraised at $600,000. The 4th Circuit reversed the district court's refusal to enhance defendant' sentence under section 2F1.1 based upon the amount of loss. The district court's finding that defendant intended no loss was not clearly erroneous. However, contrary to the district court's determination, the actual loss was not too speculative to calculate. The amount recovered or reasonably anticipated to be recovered from collateral that secures a loan should be considered in calculating the amount of actual loss. However, speculative amounts the title insurance company that covered the bank's loss might be able to recover in a civil proceeding from defendant's other assets need not be considered, since this was akin to restitution. The evidence concerning the value of the condominium at the time the offense was discovered and the reasonable expenses incurred by the title company was sufficient to permit the district court to calculate a reasonable estimate of the range of loss. *U.S. v. Rothberg,* __ F.2d __ (4th Cir. Jan. 17, 1992) No. 91-5307.

8th Circuit affirms application of sporting or collection reduction despite erroneous belief that shotgun was a collector's piece. (330) Defendant was convicted of possessing an unregistered sawed-off shotgun, which carries an offense level of 16 under section 2K2.1(a)(1). The district court purported to depart downward to offense level 6 because it believed defendant had initially acquired the weapon for hunting purposes and that defendant believed the weapon was a collector's item. The 8th Circuit affirmed defendant's sentence, although it found that the district court did not depart downward but instead applied section 2K2.1(b)(1). That section provides for a base offense level of 6 "if the defendant

obtained or possessed the firearm . . . solely for lawful sporting purposes or collection." The district court concluded that defendant did not possess the shotgun for an unlawful purpose and that he believed the weapon was a collector's item. Even though this belief was mistaken, that did not make section 2K2.1(b)(1) inapplicable. The guidelines discuss a defendant's intent; they do not require that the intent be reasonable. *U.S. v. Napoli,* __ F.2d __ (8th Cir. Jan. 15, 1992) No. 91-2003.

5th Circuit upholds application of section 2L1.2 for falsely representing citizenship to border agent. (340) While entering the United States, defendant falsely represented that he was a U.S. citizen. Six months later, he was arrested at his place of employment, and was subsequently convicted of falsely representing his citizenship to a border patrol agent in violation of 18 U.S.C. section 911. The guidelines' Statutory Index lists two provisions as applicable to violations of 18 U.S.C. section 911: section 2F1.1 (Fraud and Deceit) and section 2L2.2 (Fraudulently Acquiring Evidence of Citizenship). The 5th Circuit upheld the district court's application of guideline section 2L1.2 (Unlawfully Entering or Remaining in the United States). The November 1989 version of comment 13 to guideline section 2F1.1 explicitly grants the district court the discretion to look for the most applicable guideline when the Statutory Index refers the court to section 2F1.1. Section 2L1.2 aptly described defendant's offense, even though 18 U.S.C. section 911 is not listed under section 2L1.2. *U.S. v. Castaneda-Gallardo,* __ F.2d __ (5th Cir. Jan. 15, 1992) No. 91-2273.

Commission proposes to amend alien smuggling guideline to make offense level depend on number of aliens smuggled. (340) In its proposed 1992 amendments, the Commission would amend section 2L1.1(b)(2) to delete the 2-level increase for having a prior alien smuggling offense. In its place, the Commission would insert a table increasing the offense level depending on the number of aliens smuggled, transported, or harbored. A similar amendment is proposed for false document cases. The Commission explains that it believes that the number of aliens smuggled is a "more direct measure of the scope of the offense" than the prior record of the defendant. "Moreover the inclusion of a prior criminal record variable in the offense guideline seems inconsistent with the general treatment of prior record as a separate dimension in the guidelines." The Commission also requests comment on whether enhancements for death or bodily injury should be incorporated into this guideline, and whether the level of enhancement should vary with the defendant's state of mind, or whether such issues are best addressed as guideline departures. 57 *Federal Register* 89 (January 2, 1992).

3rd Circuit affirms that optical receivers and infra-red domes for Sidewinder missiles were sophisticated weaponry. (345) Defendant was convicted of conspiring to export to Taiwan certain components of military equipment without the required export license. The 3rd Circuit affirmed an enhancement under guideline section 2M5.2 for "sophisticated weaponry." Defendant exported DSU-15 optical receivers, which are used in the guidance system of Sidewinder missiles, and infra-red domes, which serve as "windshields" for the guidance of infra-red military missile systems such as the Sidewinder. The enhancement is proper if the item is a component of a sophisticated weapon or weapons system. Since there was testimony from which the district court could find that the dome and optical receiver were "critical" components of the Sidewinder missile, the government proved that the exported equipment was weaponry. In addition, giving the term "sophisticated" its plain and ordinary meaning, and applying deferential review, the district court could conclude that the weaponry was sophisticated. *U.S. v. Tsai,* __ F.2d __ (3rd Cir. Jan. 21, 1992) No. 91-1202.

3rd Circuit rejects upward departure in arms export case based on threat to national security. (345)(734) Defendant was convicted of conspiring to export to Taiwan certain components of military equipment without the required export license. The district court departed upward from level 24 in section 2M5.2 to level 29, based on the threat to national security and the large quantity of commerce involved. The 3rd Circuit reversed, holding that the case clearly fell within the heartland of cases considered by the sentencing commission. Application note 2 to section 2M5.2 indicates that the guideline assumes some threat to national security. Although level 29 is the offense level for unauthorized disclosure of top secret information, where a guideline already contemplates the potential harm of a crime, the court cannot depart upward by analogy to another crime involving the same potential harm. Under application note 2, the amount of commerce would have to be extreme to justify an upward departure. Although defendant requested a price for 5,000 units of the equipment, only 11 units were ever exported, and there was no evidence that defendant's organization was capable of exporting any greater quantity. *U.S. v. Tsai,* __ F.2d __ (3rd Cir. Jan. 21, 1992) No. 91-1202.

9th Circuit upholds aggregation of money involved in various currency reporting offenses. (360)(470) Defendants were convicted of conspiracy, failure to file currency transaction reports and structuring financial transactions to avoid currency reporting requirements. The 9th Circuit found no error in the district court's aggregation of the currency exchanged in the various transactions for which defendants were convicted. Under guideline section 3D1.2(d), the district court must group money laundering counts and counts involving the failure to file currency transaction reports. The appropriate offense level for the grouped offenses is the offense level corresponding to the aggregated quantity of all grouped counts. *U.S. v. Shin,* __ F.2d __ (9th Cir. Jan. 10, 1992) No. 90-50604.

Adjustments (Chapter 3)

1st Circuit reviews role in the offense determinations only for clear error. (420)(870) The 1st Circuit reaffirmed that it reviews a sentencing court's determination of a defendant's role in the offense only for clear error, and that such a determination, if based upon reasonable inferences drawn from undisputed facts, cannot be clearly erroneous. *U.S. v. Garcia,* __ F.2d __ (1st Cir. Jan. 16, 1992) No. 91-1708.

3rd Circuit holds that aggravating role adjustment does not preclude a mitigating role adjustment. (420) Although defendant received an adjustment based upon his managerial role in the offense, he contended that he was also entitled to a mitigating role adjustment which would cancel out the aggravating role adjustment. The 3rd Circuit rejected the government's contention that it was logically inconsistent for a defendant to receive both adjustments. Nothing in the guidelines or in the enabling legislation compels such a conclusion. Because the district court assumed that defendant's receipt of the upward adjustment for his role in the offense precluded a downward adjustment, the case was remanded for resentencing. The appellate court did not decide whether defendant would be entitled to such a reduction, however. *U.S. v. Tsai,* __ F.2d __ (3rd Cir. Jan. 21, 1992) No. 91-1202.

Commission proposes changes in "role in offense" guidelines. (420) At present, section 3B1.1 provides that a "person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant." In its proposed 1992 amendments, the Commission would change this definition to state that the term "participant" includes anyone who "plays a role of a participant," specifically including undercover agents, as well as participants who are unaware of their role in the crime, such as "a person recruited to drive the getaway car from a robbery who is unaware that a robbery is to be committed, or a person expressly hired to collect money for charitable purposes who is unaware that a fraud is being perpetrated." This amendment would change the holding in *U.S. v. Anderson,* 942 F.2d 606 (9th Cir. 1991) (*en banc*). Other proposed amendments would eliminate the "otherwise extensive" language and would clarify that "couriers and mules by virtue of the function they play in a criminal activity are neither presumed to be eligible nor ineligible for mitigating role reduction." The Commission also requested comment on whether a defendant's role should be determined in comparison to others involved in the same offense, or in comparison with those who "typically participate in similar criminal conduct." 57 *Federal Register* 89 (January 2, 1992).

3rd Circuit rejects managerial enhancement in the absence of evidence that defendant directed activities of at least one other person. (432) The 3rd Circuit rejected a managerial enhancement under section 3B1.1 for a crack house manager because there was no evidence that he managed any other persons. In the context of section 3B1.1, the terms "managing or supervising" refer to the management of other people, not a building or other tangible or intangible thing. *U.S. v. Fuentes,* __ F.2d __ (3rd Cir. Jan. 17, 1992) No. 90-1929.

1st Circuit rejects mitigating role adjustment for drug courier. (445) The 1st Circuit found no error in the district court's refusal to grant defendant a mitigating role adjustment under guideline section 3B1.2 for acting as a mere drug courier. A defendant has the burden of proving entitlement to such an adjustment. Being a drug courier does not automatically entitle a defendant to such an adjustment. *U.S. v. Lopez-Gil,* __ F.2d __ (1st Cir. Jan. 3, 1992) No. 90-2059.

7th Circuit rejects minor role adjustment for drug courier. (445) The 7th Circuit rejected defendant's claim that he should have been sentenced as a minor participant under section 3B1.2 because his only role in the drug conspiracy was that of a "somewhat naive courier." There is no per se rule entitling drug couriers to minor participant status. There was no error in the district court's conclusion that defendant was not a minor participant where he was personally involved in the sale of more than five kilograms of cocaine, at least two of which he transported across

state lines. *U.S. v. Rossy,* __ F.2d __ (7th Cir. Jan. 8, 1992) No. 91-1539.

11th Circuit rejects mitigating role adjustment for drug courier. (445) The 11th Circuit rejected defendant's claim that she was entitled to a mitigating role adjustment because she was a merely a courier in the drug conspiracy. Defendant and three other women were arrested together at the Miami airport, each carrying a package containing more than 1,100 grams of cocaine tied to her inner thigh. Defendant knew that all four women were attempting to bring into the United States a substantial quantity of cocaine. She travelled together with the other three and all were obvious participants in the conspiracy. The fact that she carried slightly less cocaine with a lower degree of purity than the drugs carried by the other conspirators did not make her the least culpable. *U.S. v. Cacho,* __ F.2d __ (11th Cir. Jan. 21, 1992) No. 90-5585.

4th Circuit holds failure to supervise government cashier did not transform job into a position of trust. (450) Defendant worked as a government cashier for a fund which reimbursed employees for certain travel and purchase expenses. During defendant's employment, her supervisor never audited the traveler's check portion of the fund. Over a year's period, defendant embezzled $20,050 from the traveler's check portion of the fund. The 4th Circuit affirmed the district court's determination that defendant did not hold a position of trust under guideline section 3B1.3. Defendant's employment was functionally equivalent to that of an ordinary bank teller. Defendant's embezzlement was not "difficult to detect," since she signed all the traveler's checks in her own name. The fact that defendant's supervisors were lax in their supervision did not transform her job into a position of trust. *U.S. v. Helton,* __ F.2d __ (4th Cir. Jan. 10, 1992) No. 91-5805.

8th Circuit says defendant's conviction for resisting arrest on instant offense should be excluded from criminal history. (460)(504) The 8th Circuit held that the district court erred in including in defendant's criminal history his conviction for resisting arrest, since that charge arose from his arrest on the instant offense. The resisting arrest charge was a part of the conduct of the instant offense, and thus was not a "prior sentence." The conduct could be taken into account under the guidelines as obstruction of justice. *U.S. v. Simpkins,* __ F.2d __ (8th Cir. Jan. 9, 1992) No. 91-2474.

Commission asks for comments on "high speed chase" guideline. (460) Guideline section 3C1.2 presently provides for an upward adjustment of two levels for a defendant who recklessly endangers the lives of other people while fleeing from law enforcement. In its proposed 1992 amendments, the Commission has asked for comment on whether this section "adequately accounts for and punishes the full range of behavior to which it is applicable." More specifically, the Commission asks whether the guidelines should incorporate a "floor offense level for creating a substantial risk of death or serious bodily injury (e.g., a level from 12-15)" with additional enhancements for physical injury. Alternatively, the Commission asks whether a cross reference to another guideline should be used instead of, or in conjunction with this section. 57 *Federal Register* 89 (January 2, 1992).

Commission asks for comments on proposals to amend acceptance of responsibility provision. (480) In its proposed 1992 amendments, the Sentencing Commission is seeking comment as to whether the "acceptance of responsibility" provision should (1) be limited to the offense of conviction, or alternatively, require acceptance of responsibility as to all "related" conduct; (2) award a three level reduction for crimes with offense levels of 30 and above; (3) provide an automatic two level reduction if the defendant pleads guilty, or admits his guilt while exercising his constitutional right to a trial to assert and preserve issues not related to factual guilt. 57 *Federal Register* 89 (January 2, 1992).

5th Circuit finds that court adopted the presentence report's recommendation on acceptance of responsibility. (482)(765) The 5th Circuit rejected defendant's argument that the district court failed to state at sentencing whether defendant deserved a reduction for acceptance of responsibility. The presentence report recommended against a reduction because defendant made only limited admissions of his involvement in the offense, denied his intent to purchase a larger quantity of drugs, refused to discuss the large quantity of cash found in the trunk of his car, and refused to discuss prior drug deals. Defendant objected to the presentence report's recommendation, but did not put any facts into dispute. When a defendant objects to his presentence report but offers no rebuttal evidence to refute the facts, the district court is free to adopt the facts in the presentence report without further inquiry. By assigning defendant an offense level of 28, the court "obviously" adopted the finding of the presentence report that defendant had not demonstrated his acceptance of responsibility. Given defendant's limited admissions, the refusal to grant the reduction was not clearly erroneous.

U.S. v. Sherbak, __ F.2d __ (5th Cir. Jan. 8, 1992) No. 91-8128.

9th Circuit denies acceptance of responsibility reduction to defendant who sent one-paragraph letter to judge. (488) The 9th Circuit affirmed the district court's denial of a reduction for acceptance of responsibility where defendant's proof of acceptance of responsibility consisted of a one-paragraph letter sent to the judge nine days before the sentencing hearing. The district court found the letter perfunctory and unconvincing. Moreover, defendant not only remained silent when questioned by the FBI after his arrest, but lied about his involvement in the robbery. *U.S. v. Johnson,* __ F.2d __, (9th Cir. Jan. 13, 1992) No. 90-50559.

Criminal History (§4A)

Commission seeks comment on whether to add new criminal history categories at low and high ends of the scale. (500) In its proposed 1992 amendments, the Commission seeks comment on whether it should adopt a new criminal history category of zero for offenders with no known criminal history of any kind (including arrests). The Commission suggests that such offenders might be eligible for reduced sentences. At the high end of the scale, the Commission suggests there may be a need for a new category VII, and seeks comments on how this new category would apply with respect to departures and career criminals. 57 *Federal Register* 89 (January 2, 1992).

2nd Circuit holds DWAI conviction was not a "minor traffic infraction." (504) The 2nd Circuit upheld the district court's inclusion in defendant's criminal history of a prior driving-while-ability-impaired ("DWAI") conviction, rejecting defendant's claim that it was constitutionally invalid and that it was a minor traffic infraction. Defendant presented no evidence of any prior judicial declaration that the conviction was invalid. Although under the 1990 version of application note 6 to guideline section 4A1.2, courts retain discretion to collaterally review the validity of a defendant's prior convictions, such a review was unnecessary. Defendant presented nothing more than conclusory allegations that the conviction was invalid. The DWAI conviction was not a "minor traffic infraction" which could be excluded from his criminal history under section 4A1.2(c). The commentary to this section specifically excludes "driving while intoxicated" from the definition of minor traffic infraction. *U.S. v. Jakobetz,* __ F.2d __ (2nd Cir. Jan. 9, 1992) No. 91-1125.

7th Circuit holds forgery of money order stolen during robbery was not part of same scheme or plan as robbery. (504) Defendant robbed a supermarket and a few days later forged a money order that was part of his "haul" from the robbery. The 7th Circuit rejected defendant's claim that the robbery was part of the same scheme or plan as the forgery, and thus the two prior convictions were related under guideline section 4A1.2(a)(2). A crime merely suggested by or arising out of the commission of a previous crime is not related to the earlier crime in the sense of being part of a common scheme or plan. Here, defendant scooped up the contents of a cash register which just happened to include a money order. The decision to commit the forgery arose only after defendant discovered what he had taken. *U.S. v. All,* __ F.2d __ (7th Cir. Jan. 10, 1992).

Commission proposes to clarify rules on expunged convictions. (504) In its proposed 1992 amendments, the Commission attempts to provide more consistency with respect to the counting of convictions that have been reversed, vacated, annulled, set aside, expunged, or pardoned. The Commission notes that currently, whether such sentences are counted depends on the terminology used by the various jurisdictions. For example, sentences resulting from convictions that have been annulled or set aside are counted; sentences resulting from convictions that have been expunged are not. The Commission suggests two different options for a new guideline in this area. 57 *Federal Register* 89 (January 2, 1992).

D.C. Circuit directs district courts to supply "some reasoned basis" for extent of departures. (508) The district court found that criminal history VI was inadequate. It departed upward from 30 months and imposed a 60-month sentence, the statutory maximum. The D.C. Circuit remanded for resentencing, ruling that the district court failed to adequately justify the extent of the departure. Although several Circuits have developed specific procedures for district courts to use in structuring criminal history departures, the court declined to adopt any particular procedure. Instead, trial courts must "supply some reasoned basis" for the extent of a departure for a defendant who falls in criminal history category VI. The "percentage" approach adopted by the 7th Circuit and the analogy to the career offender provisions used by the 10th Circuit both have merit in certain cases. Here, the district court failed to follow any discernible methodology in departing, simply stating that the unusual factors in this case warranted a five-

year sentence. *U.S. v. Molina,* __ F.2d __ (D.C. Cir. Jan. 7, 1992) No. 90-3261.

2nd Circuit rules court need not assign points for each incident in criminal history departure. (510) The district court departed upward from criminal history category IV to VI because defendant had a prior sexual assault which did not result in a conviction and because at the time of the instant sexual assault, defendant had a pending drug charge and a pending driving while intoxicated charge. The 2nd Circuit affirmed the departure, despite the district court's failure to assign specific point values to each prior incident used to support the criminal history departure. In making an upward criminal history departure, a court must first determine the defendant's criminal history category, and then proceed sequentially through each subsequent category, considering whether it adequately reflects the seriousness of the defendant's prior conduct. A district court need not, however, assign specific point values to the conduct evaluated. Comparisons to the guidelines may assist the appellate court in determining the reasonableness of the departure, but in some instances, there are no counterparts available. *U.S. v. Jakobetz,* __ F.2d __ (2nd Cir. Jan. 9, 1992) No. 91-1125.

Commission seeks comment on whether to disapprove "lack of youthful guidance" departures. (510)(670)(736) In *U.S. v. Floyd,* 945 F.2d 1096 (9th Cir. 1991), the 9th Circuit permitted a downward departure based on the defendant's "youthful lack of guidance." In its proposed 1992 amendments, the Commission requests comment on whether it should amend its policy statements to expressly state whether a court may consider a defendant's lack of youthful guidance, history of family violence, or a similar factor as a ground for departure from the guideline range. Such an amendment would either reaffirm or disapprove the holding in *Floyd.* 57 *Federal Register* 89 (January 2, 1992).

D.C. Circuit reverses upward departure where some of the grounds relied on were improper. (514) The district court departed upward because of (a) defendant's repeated illegal entries into the United States, (b) his extensive criminal history, (c) his numerous prior arrests, (d) the fact that some offense were committed while on parole, (e) obstruction of justice based upon his past use of aliases, and (f) the fact that defendant had never "done anything constructive" in the United States. The D.C. Circuit remanded for resentencing, ruling that a departure based upon defendant's prior arrests, parole status or past use of aliases was prohibited by the guidelines. Defendant's apparent failure to contribute anything to society was irrelevant. The first two factors may have been appropriate grounds, but the sentence could be affirmed only if the reliance on the improper ground was "harmless" under the three-part test adopted in *U.S. v. Jones,* __ F.2d __ (D.C. Cir. Oct. 25, 1991) No. 90-3266. Here, the error was not harmless because there was no indication of the weight the district court gave the various departure factors. *U.S. v. Molina,* __ F.2d __ (D.C. Cir. Jan. 7, 1992) No. 90-3261.

4th Circuit holds shared motivation for two felonies did not make them one offense for career offender purposes. (520) Defendant had previously been convicted of armed bank robbery and the murder of a jewelry store owner during a different robbery. Defendant contended that because the two crimes were both motivated by his heroin addiction, they should have been consolidated for the purpose of determining whether he was a career offender. The 4th Circuit rejected this argument, holding that "shared motivation cannot transform two crimes committed three months apart, prosecuted in different jurisdictions and involving different victims, into one illicit act." *U.S. v. Sanders,* __ F.2d __ (4th Cir. Jan. 21, 1992) No. 90-5654.

Determining the Sentence (Chapter 5)

Commission proposes to enlarge the number of defendants eligible for alternatives to imprisonment. (550) In its proposed 1992 amendments, the Commission proposes to redefine the "split sentence" and increase the number of defendants who are eligible for alternatives to imprisonment. The Commission seeks comment on whether these options are appropriate or whether they compromise the structure of the guidelines as originally drafted. The Commission further seeks comment on whether these alternatives should apply to all defendants at the offense levels specified or whether an offense-by-offense approach (e.g. excluding white collar offenders) should be adopted. With respect to this amendment, a working group report on alternatives to imprisonment is available for inspection at the Commission's offices. 57 *Federal Register* 89 (January 2, 1992).

9th Circuit upholds supervised release for drug offenses committed after effective date of Anti-Drug Abuse Act of 1986. (580) Defendant committed a drug crime between October 27, 1986, the effective date of the Anti-Drug Abuse Act of 1986 (ADAA), and November 1, 1987, the effective date of 18 U.S.C. sec-

tion 3583, the supervised release provision of the Sentencing Reform Act. The 9th Circuit rejected defendant's claim that the district court lacked authority to sentence him to a term of supervised release. Under the Supreme Court's decision in *Gozlon-Peretz v. United States*, 111 S.Ct. 840 (1991), the ADAA's supervised release provisions became effective on the date of its enactment, October 27, 1986. *Rodriguera v. U.S.*, __ F.2d __, (9th Cir. Jan. 14, 1992) No. 89-56205.

9th Circuit rules failure to advise defendant of mandatory supervised release term was reversible error. (580) Although defendant was advised that he faced a maximum penalty of five to 40 years imprisonment, the district court failed to inform him that he also faced a minimum supervised release term of four years. The 9th Circuit ruled that this was reversible error, since his supervised release term could be revoked so as to result in a confinement exceeding 40 years. The court concluded that 18 U.S.C. section 3583, rather than 21 U.S.C. 841(c), governs supervised release terms imposed for drug offenses committed between October 27, 1986 and November 1, 1987. Under section 3583(e)(2), a supervised release term may be extended, potentially to a life term, any time before it expires. Thus, under the worst case scenario, defendant's liberty could be restricted for more than 40 years. *Rodriguera v. U.S.*, __ F.2d __, (9th Cir. Jan. 14, 1992) No. 89-56205.

5th Circuit upholds full restitution order where defendant failed to provide court with personal financial statement. (620) In a pre-guidelines case, the 5th Circuit found no abuse of discretion in the district court's failure to articulate its findings regarding restitution or in its calculation of the amount of restitution. Specific findings regarding restitution are not required if the record is sufficient for the appellate court to conduct its mandated review. Here, the record provided an adequate basis for the decision to impose full restitution. There was no abuse of discretion in the district court's adoption of the presentence report's finding that the total loss caused by defendant's fraud was $12,120,244. The court had no choice but to impose full restitution because under 18 U.S.C. section 3664, the burden of demonstrating a defendant's financial resources rests with the defendant. Here, defendant refused to provide the court with a personal financial statement. *U.S. v. St. Gelais*, __ F.2d __ (5th Cir. Jan. 14, 1992) No. 90-2726.

8th Circuit affirms order to pay share of taxable trial costs. (630) Under 28 U.S.C. section 1918(b), the district court ordered each defendant to pay his share of taxable trial costs. The 8th Circuit affirmed, notwithstanding defendants' claim of indigence at the time of sentencing. The court taxed costs with the amounts to be deducted from defendants' prison earnings. The court found nothing wrong with imposing financial obligations on convicted defendants who are indigent at the time of sentencing when it reasonably can be foreseen that in the future they will have the ability to pay the obligation. Given the length of defendants' prison terms, their prison wages should be more than enough to pay the costs. *U.S. v. Pou*, __ F.2d __ (8th Cir. Jan. 6, 1992) No. 91-1765.

11th Circuit vacates $100,000 fine because district court did not discuss factors which might justify it. (630) The 11th Circuit vacated a $100,000 fine and remanded the case for further consideration since the record was insufficient to determine whether the fine was an appropriate amount. The district court imposed the fine without an explicit discussion of the factors that might justify the fine. *U.S. v. Paskett*, __ F.2d __ (11th Cir. Jan. 10, 1992) No. 90-5196.

Commission proposes to amend guidelines to permit departure for unusual specific offender characteristics. (660)(736) In its proposed 1992 amendments, the Commission proposes to amend the introductory comment to chapter 5, part H, to expressly provide that departures may be appropriate when offender characteristics that are ordinarily not relevant to a guideline departure are present to an unusual degree, either alone or in combination, and are important to the sentencing purposes in the particular case. In addition, a proposed amendment to section 5H1.1 would permit departures where age is combined with other factors, for example "young *and* naive or elderly *and* infirm." [Emphasis added.] 57 *Federal Register* 89 (January 2, 1992).

11th Circuit rejects downward departure based upon parental status. (690)(736) The 11th Circuit rejected defendant's claim that the district court improperly believed it lacked authority to depart downward based her status as the mother of four small children. The district court's statement should be interpreted as stating that under the guidelines, defendant's family situation did not warrant a downward departure. The court further agreed with decisions in the 4th, 6th and 8th Circuits holding that unless there are extraordinary circumstances, a district court may not depart downward to reflect a defendant's parental status. *U.S. v. Cacho*, __ F.2d __ (11th Cir. Jan. 21, 1992) No. 90-5585.

Departures Generally (§5K)

7th Circuit refuses to review whether prosecutor acted in bad faith in refusing to move for downward departure. (710) The 7th Circuit rejected defendant's claim that a court could review whether the failure of a prosecutor to move for a downward departure under section 5K1.1 could be reviewed for arbitrariness or bad faith. Nothing in the language of section 5K1.1 suggests limits on the exercise of prosecutorial discretion. The lack of such limits is not unconstitutional. Section 5K1.1 simply allows a prosecutor to "open a door to lenity," and is similar to the prosecutor's decision to bring lesser charges or engage in plea bargaining. Such decisions are not reviewable for arbitrariness and neither is the prosecutor's decision not to file a substantial assistance motion. This does not mean a prosecutor can breach a promise to file such a motion, because a guilty plea induced by an unkept bargain is involuntary. Judge Cudahy, concurring in the judgment, disagreed with this portion of the opinion, but found the discussion dictum. *U.S. v. Smith,* __ F.2d __ (7th Cir. Jan. 14, 1992) No. 90-3606.

Supreme Court grants certiorari to decide whether government motion is required for substantial assistance departure. (712) In *U.S. v. Wade,* 936 F.2d 169 (4th Cir. 1991), the 4th Circuit ruled that the prosecutor is not required to explain his refusal to move for a substantial assistance departure. The 4th Circuit held that absent a motion filed by the government, the district court has no authority to depart downward from a mandatory minimum sentence based upon a defendant's substantial assistance. On December 9, 1991, the Supreme Court granted certiorari to review this ruling. *U.S. v. Wade,* 936 F.2d 169 (4th Cir. 1991), *cert. granted sub nom Wade v. U.S.,* 112 S.Ct. __ (December 9, 1991).

7th Circuit rejects downward departure in the absence of a government motion. (712) The 7th Circuit rejected defendant's argument that a district court may depart downward under a guideline section other section 5K1.1 for a defendant's substantial assistance. Courts may depart under section 5K2.0 only if the Sentencing Commission did not adequately consider a circumstances, and the Commission adequately considered whether a prosecutorial motion was necessary. Section 5K1.1 is written without leeway, and nothing suggests that the terms of departure for assistance to the prosecution "have been less than exhaustively canvassed." *U.S. v. Smith,* __ F.2d __ (7th Cir. Jan. 14, 1992) No. 90-3606.

Commission proposes to eliminate requirement of government motion for substantial assistance departures. (712) In its proposed 1992 amendments, the Commission proposes an amendment to eliminate the requirement of a government motion before a court may depart downward based on the defendant's substantial assistance to the government. Instead, the court would be permitted to depart based upon the *court's* finding that the defendant has provided such substantial assistance. The guidelines would simply indicate that "substantial weight" should be given to the government's evaluation of the extent and value of the defendant's assistance. However, the proposed guideline would recognize that "a departure below a statutorily required minimum sentence may be made only upon the motion of the government." See 18 U.S.C. section 3553(e). 57 *Federal Register* 89 (January 2, 1992).

1st Circuit finds defendant was not entitled to an evidentiary hearing where he did not challenge facts in presentence report. (765) The 1st Circuit rejected defendant's claim that he was entitled to an evidentiary hearing on his role in the offense. By failing to object to the facts in the presentence report (as opposed to objecting to the interpretation of those facts), defendant obviated the need for an evidentiary hearing. Moreover, because defendant waited until the objections to the presentence report had been resolved and the imposition of sentence was underway before suggesting that evidence be taken, his request was untimely. *U.S. v. Garcia,* __ F.2d __ (1st Cir. Jan. 16, 1992) No. 91-1708.

Sentencing Hearing (§6A)

5th Circuit rules district court failed to resolve factual dispute concerning drug quantity. (765) Both defendants challenged the presentence report's determination that they negotiated to purchase 1500 pounds of marijuana, contending that they only intended to purchase the 115 pounds they actually received. The district court made a specific finding of 200 pounds in one defendant's case, then purported to sentence him on the basis of the total quantity negotiated, although it never made a factual determination of what amount was negotiated. The 5th Circuit ruled that the district court failed to satisfy Fed. R. Crim. P. 32, and remanded the case for factual findings as to the disputed amount of marijuana that could be used to determine defendant's offense level. No remand was necessary for the other defendant, because the district court expressly adopted the facts

set forth in the presentence report. *U.S. v. Sherbak,* __ F.2d __ (5th Cir. Jan. 8, 1992) No. 91-8128.

8th Circuit rules court did not rely upon hearsay. (770) The 8th Circuit rejected defendant's claim that the district court sentenced him on the basis of unreliable hearsay. The district court based its findings on testimony presented at trial as to the amount of cocaine involved and defendant's role in the offense. *U.S. v. Simpkins,* __ F.2d __ (8th Cir. Jan. 9, 1992) No. 91-2474.

7th Circuit affirms reliance upon prior bad act which did not result in conviction. (775) The 7th Circuit rejected a constitutional challenge to the district court's consideration, in selecting a particular sentence within defendant's guideline range, of an incident in which defendant shot a man, despite the fact that defendant was never convicted of the event. Notwithstanding the contrary view expressed by the 9th Circuit in *U.S. v. Brady,* 928 F.2d 844 (9th Cir. 1991), a judge may consider prior acts that did not result in a conviction. *U.S. v. Smith,* __ F.2d __ (7th Cir. Jan. 14, 1992) No. 90-3606.

9th Circuit upholds written statement of reasons. (775) The 9th Circuit affirmed that the district court's written "Memorandum of Sentencing Hearing and Report of Statement of Reasons" adequately stated its reasons for choosing a particular sentence within the guideline range, as required by 18 U.S.C. section 3553(c). The statement indicated that defendant had committed four prior robberies, each within a short time after release from prison for previous robberies, and each motivated by a heroin addiction. A written statement serves as well as an oral statement under section 3553(c). *U.S. v. Johnson,* __ F.2d __, (9th Cir. Jan. 13, 1992) No. 90-50559.

Plea Agreements (§6B)

2nd Circuit rules government did not void plea agreement by failing to recommend acceptance of responsibility reduction. (790) Defendant's plea agreement provided that the government would recommend an acceptance of responsibility reduction, conditioned upon defendant's full disclosure of the circumstances surrounding his offense. The agreement further provided that if defendant violated any term of the agreement, engaged in any criminal activity or failed to appear for sentencing, the government could void the agreement. Defendant failed to appear for sentencing, and was subsequently arrested on unrelated drug charges. The 2nd Circuit rejected defendant's claim that the government's failure to move for an acceptance of responsibility reduction was an exercise of its option to void the plea agreement, thus releasing him from his guilty plea. The "reasonable meaning" of the plea agreement was that defendant's failure to appear for sentencing would not release him from his guilty plea, but would release the government from its obligations to recommend an acceptance of responsibility reduction. The government did not exercise its option to void the agreement. *U.S. v. Rivera,* __ F.2d __ (2nd Cir. Jan. 21, 1992) No. 91-2277.

Violations of Probation and Supervised Release (Chapter 7)

5th Circuit rules defendant waived his right to object to court's failure to consider Chapter 7 policy statements. (800)(855) Defendant contended that the district court erred in failing to consider, in revoking his supervised release, the Chapter 7 policy statements in the guidelines. The 5th Circuit ruled that defendant waived this objection by failing to raise the issue during the sentencing hearing. Defendant received a two year sentence. Although Chapter 7 suggested a one year sentence, the district court had discretion to impose a two year sentence. The colurt's failure to articulate that it considered the policy statements was not plain error. *U.S. v. Montez,* __ F.2d __ (5th Cir. Jan. 21, 1992) No. 91-5504.

5th Circuit holds that exclusionary rule does not apply to revocation of supervised release. (800) The 5th Circuit held that, absent a showing of harassment, the exclusionary rule does not apply to hearings to revoke supervised release. Most circuits hold that the exclusionary rule does not apply to probation revocation hearings absent harassment because in order to determine whether an offender is ready for rehabilitation, it is extremely important that all available evidence be available to the court. This rationale applies equally to hearings on the revocation of supervised release. The value to society of safely reintegrating former prisoners clearly outweighs whatever marginal benefit might accrue from extending the exclusionary rule to supervised release revocation hearings which do not result from harassment. *U.S. v. Montez,* __ F.2d __ (5th Cir. Jan. 21, 1992) No. 91-5504.

Appeal of Sentence (18 U.S.C. §3742)

8th Circuit rules appeal of guideline sentence is foreclosed by mandate from original appeal. (850) The district court originally departed downward

based on defendant's status as a bi-racial child adopted by white parents. In the first appeal, the 8th Circuit reversed, ruling this was an inappropriate ground for departure, and directing the district court to sentence defendant within the guideline range. Defendant then was sentenced at the bottom of the range. Defendant appealed again, contending that the district court was under the mistaken belief that the appellate court had completely limited the district court's authority to depart downward from the guidelines. The 8th Circuit ruled that defendant's argument was foreclosed by its mandate in the original appeal, which was to sentence defendant within the guideline range, giving due regard to his status as a bi-racial adopted child and other factors. *U.S. v. Prestemon,* __ F.2d __ (8th Cir. Jan. 9, 1992) No. 91-2553.

7th Circuit finds dispute over applicable guideline was waived by failure to object. (855) Defendant was convicted of firearms offenses, but, following the direction of guideline section 2K2.1(c)(2) and section 2X1.1, the district court sentenced him under section 2A2.2, the assault guideline. The 7th Circuit noted that the language was subject to an interpretation different from the district court's, which would have resulted in the addition of one point to defendant's offense level. However, defendant waived any objection to the use of section 2A2.2 by failing to object and the government waived the issue by failing to appeal. The possible one point error was not plain error, and therefore the issue was not decided by the appellate court. *U.S. v. Smith,* __ F.2d __ (7th Cir. Jan. 14, 1992) No. 90-3606.

7th Circuit refuses to review decision not to depart. (860) The 7th Circuit refused to review the district court's decision not to depart downward from the guideline range in spite of mitigating factors presented by defendant. The decision not to depart is entrusted to the sentencing court's unreviewable discretion where the court has reviewed the mitigating factors prior to making that decision. *U.S. v. Rossy,* __ F.2d __ (7th Cir. Jan. 8, 1992) No. 91-1539.

8th Circuit rules district court would have imposed the same sentence regardless of criminal history error. (865) Defendant was incorrectly placed in criminal history category IV, rather than category III. His sentence of 360 months fell within the applicable guideline range for both category III and IV. The 8th Circuit refused to remand for resentencing, because it found that the district court would have imposed the same sentence regardless of the error. The district court had discussed defendant's challenge to his criminal history calculation, and said it was questionable whether he should be placed in the higher category. The court then noted that the 360-month sentence would be at the low end of the category IV range and at the high end of the category III range. Therefore, it was clear that the district court selected a sentence it considered appropriate regardless of the ultimate disposition of defendant's objection. *U.S. v. Simpkins,* __ F.2d __ (8th Cir. Jan. 9, 1992) No. 91-2474.

11th Circuit refuses to consider which base offense level was applicable where sentencing ranges overlapped. (865) Although the district court imposed a two level enhancement challenged by defendant, the court stated that it would impose the same sentence regardless of the offense level. The 11th Circuit refused to consider defendant's appeal, since the guideline ranges for the two offense levels overlapped, and the district court made it clear that it would impose the same sentence under both offense levels. *U.S. v. De La Torre,* __ F.2d __ (11th Cir. Jan. 7, 1992) No. 90-5732.

1st Circuit reviews de novo interpretation of "cocaine base." (870) The 1st Circuit found that the interpretation of the statutory definition of the term "cocaine base" is a legal issue subject to de novo review. *U.S. v. Lopez-Gil,* __ F.2d __ (1st Cir. Jan. 3, 1992) No. 90-2059.

4th Circuit reviews abuse of trust determination under clearly erroneous standard. (870) The 4th Circuit held that whether a person abused a position of trust under guideline section 3B1.3, including whether that person held a position of trust in the first place, is a factual determination reviewed under the clearly erroneous standard. *U.S. v. Helton,* __ F.2d __ (4th Cir. Jan. 10, 1992) No. 91-5805.

9th Circuit reviews de novo whether district court provided adequate statement of reasons. (870) The 9th Circuit reviewed de novo defendant's claim that when the district court sentenced him to 240 months, it failed to state its reasons for deciding on that particular point within the guideline range, as required by 18 U.S.C. section 3553(c). *U.S. v. Johnson,* __ F.2d __ (9th Cir. Jan. 13, 1992) No. 90-50559.

Forfeiture Cases

5th Circuit holds claim of ownership and government's allegations of claimant's involvement with seized cash established standing. (920) The 5th Circuit reversed the district court's determination

that claimant failed to establish standing to challenge the forfeiture of $38,570 seized from his companion. A bare assertion of ownership of the res, without more, is insufficient to prove an ownership interest and establish standing. Thus, claimant's assertion that "I own the money," without more, did not establish his standing to challenge the forfeiture. However, standing was established because the government admitted claimant's relationship with the cash, and the complaint clearly specified that claimant exercised some form of dominion over the currency. *U.S. v. $38,570 U.S. Currency,* __ F.2d __ (5th Cir. Jan. 15, 1992) No. 90-2667.

5th Circuit affirms striking of untimely claim. (930) Claimant received notice March 12 of the seizure of certain cash in which he had an interest. The marshal's return of service was filed March 15, indicating that process had been executed against the res March 9. Claimant filed an answer on April 9, and a claim for the currency on April 11. The 5th Circuit affirmed the district court's decision to strike claimant's claim and answer as untimely. A claimant must file a verified claim within 10 days after process has been executed. Although the warrant served on claimant did not give the precise date of execution of process, it put him on notice that execution on the res had recently occurred or was imminent. Claimant had constructive notice on March 15 (the date the marshal's return of service was filed), that process had been executed March 9, and that he had until March 19 to file a claim. Even if the language of the warrant served on claimant suggested he had 10 days after publication to file his claim, this would have given him only until April 2 to file his claim. There was no abuse of discretion in striking claimant's answer. An answer is to be filed within 20 days after filing the claim, and defendant filed his answer two days before filing his claim. *U.S. v. $38,570 U.S. Currency,* __ F.2d __ (5th Cir. Jan. 15, 1992) No. 90-2667.

Amended Opinions

U.S. v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, New York, (2nd Cir. Nov. 13, 1991) *republished with minor amendments,* __ F.2d __ (2nd Cir. Jan. 3, 1992) No. 90-6268.

U.S. v. Quarles, __ F.2d __ (8th Cir. Nov. 27, 1991), *republished with minor amendments,* __ F.2d __ (8th Cir. Jan. 14, 1992) No. 90-5536.

TABLE OF CASES

EXHIBIT
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CIVIL ACTION
v.	:	
STEVEN M. MULLINS and PAUL A. BROWN	:	NO. 91-4331

MEMORANDUM AND ORDER

BUCKWALTER, J. February 12, 1992

Defendants have filed a motion asking that I reconsider my order of December 31, 1991 by which I denied the defense motions to dismiss plaintiff's complaint.

By way of background, the plaintiff, United States of America (hereafter United States) brought a civil action against defendants Steven M. Mullins (hereafter Mullins) and Paul A. Brown (hereafter Brown) under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), 12 U.S.C. §1811, et seq., for the award of civil penalties. Specifically, the action was brought pursuant to 12 U.S.C. §1833a.

Section 1833a provides as follows:

> (a) In general
> Whoever violates any provision of law to which this section is made applicable by subsection (c) of this section shall be subject to a civil penalty in an amount assessed by the court in a civil action under this section.
>
> (b) Maximum amount of penalty
> (1) Generally
> The amount of the civil penalty shall not exceed $1,000,000.

(2) Special rule for continuing violations

In the case of a continuing violation, the amount of the civil penalty may exceed the amount described in paragraph (1) but may not exceed the lesser of $1,000,000 per day or $5,000,000.

(3) Special rule for violations creating gain or loss

(A) If any person derives pecuniary gain from the violation, or if the violation results in pecuniary loss to a person other than the violator, the amount of the civil penalty may exceed the amounts described in paragraphs (1) and (2) but may not exceed the amount of such gain or loss.

(B) As used in this paragraph, the term "person" includes the Bank Insurance Fund, the Savings Association Insurance Fund and the National Credit Union Share Insurance Fund.

(c) Violations to which penalty is applicable

This section applies to a violation of, or a conspiracy to violate -

(1) section 215, 656, 657, 1005, 1006, 1007, 1014, or 1344 of Title 18; or

(2) section 287, 1001, 1032, 1341 or 1343 of Title 18 affecting a federally insured financial institution.

This section shall apply to violations occurring on or after August 10, 1984.

The above section (c) is set forth as amended November 29, 1990. The Act also provides as to burden of proof:

(e) Burden of proof

In a civil action to recover a civil penalty under this section, the Attorney General must establish the right to recovery by a preponderance of the evidence.

The defendants seek to dismiss the complaint in this matter for two reasons:

1. The retroactive application of 1833a is violative of the Constitution's prohibition of ex post facto laws; and

2. Section 1833a is unconstitutional because it permits the assessment of punitive sanctions while relieving the government of the burden of proving its case beyond a reasonable doubt.

As to their first argument, essentially the defendants feel that because FIRREA's civil sanctions are punitive in nature, they may not be applied retroactively. In United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892 (1989), the court considered "whether and under what circumstances a civil penalty may constitute 'punishment' for the purposes of double jeopardy analysis." The question which the court faced in that case was "whether a civil sanction, in application, may be so divorced from any remedial goal that it constitutes punishment for the purpose of double jeopardy analysis." See page 1899. The holding in Halper was

> "we therefore hold that under the double jeopardy clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution."

In the case now before me, defendants want the court to find that the civil sanctions imposed under 1833a are "divorced from any remedial goal" and are therefore forms of retroactive punishment prohibited by the ex post facto clause of the Constitution. At this stage of the proceedings where I must accept the well-plead facts in plaintiff's complaint as being true and accurate, I cannot make the finding that defendants request. Among the purposes of the statute, it seems to me, is the possible repayment of the loss a person has suffered as a result of the defendants' act. The USA alleges damages to it in excess of a million dollars as a result of defendants' conduct. In this connection, I

note that person according to the statute includes the Bank Insurance Fund, the Savings Association Insurance Fund and the National Credit Union Share Insurance Fund. To this extent, the sanction of a civil penalty appears remedial because it provides a remedy to persons who have suffered a loss as a result of defendants' conduct.

Defendants' second argument, namely that Section 1833a is unconstitutional because it permits the assessment of punitive sanctions while relieving the government of the burden of proof beyond a reasonable doubt is also premised upon the court's finding that the sanction of a civil penalty imposed under 1833a is punitive or criminal. A quote from United States v. Ward, 448 U.S. 242, 100 S.Ct. 2636 (1980), is instructive:

> This Court has often stated that the question whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction (citations omitted). Our inquiry in this regard has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other (citations omitted). Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention (citations omitted). In regard to this latter inquiry, we have noted that "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground."

Certainly, the defendants have not offered "clearest proof" that the penalty here in question is punitive in either purpose or effect. In general, I accept the analysis of the Kennedy v. Mendoza-Martinez factors, 372 U.S. at 168-169, 83 S.Ct. at 567-568, set forth in plaintiff's brief filed November 15, 1991.

Finally, the defendants have asked me to certify an interlocutory order for appeal pursuant to 28 U.S.C. §1292(b).

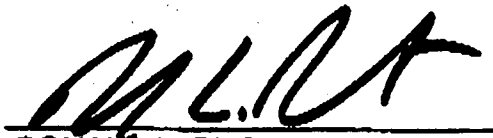
I have always been of the firm belief that this statute should be applied sparingly as indeed case law suggests. Moreover, while there are grounds for differences of opinion in the interpretation of the applicable FIRREA statute, I do not believe those grounds to be substantial enough to certify an interlocutory order for appeal.

Based upon the foregoing, the following order is entered:

ORDER

AND NOW, this 12th day of February, 1992, upon consideration of defendants' motion for reconsideration, or in the alternative, certification pursuant to 28 U.S.C. §1292(b), and the response of the United States thereto, it is hereby ORDERED that defendants' motions are DENIED.

BY THE COURT:



RONALD L. BUCKWALTER, J.

EXHIBIT F

MEMORANDUM OF UNDERSTANDING
BETWEEN
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
AND THE UNITED STATES DEPARTMENT OF JUSTICE
ON PROCEDURES FOR REMITTANCE OF SUPERFUND DEBTS THROUGH
THE DEPARTMENT OF JUSTICE LOCKBOX SYSTEM

This Memorandum of Understanding (MOU) between the United States Environmental Protection Agency (EPA) and the Department of Justice (DOJ) establishes procedures by which certain Superfund cost recoveries and cost penalties will be collected through the Department of Justice Lockbox system. It also describes procedures that DOJ and EPA will follow to ensure that each agency, as well as the Department of Treasury, is kept fully informed about the status of each debt and collections made.

These procedures apply to consent decrees and other settlements which were obtained under the authority of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, as amended, hereafter referred to as Superfund) and which DOJ litigated on behalf of the Hazardous Substance Superfund, or to other Superfund debts referred to DOJ for collection.

Every 90 days the EPA Financial Management Division will meet with DOJ representatives to review implementation and to resolve problems relating to the use of the DOJ lockbox system.

Other Superfund debts and collections (namely oversight billings, Superfund State Contract cost shares, stipulated penalty assessments, "cash outs" to EPA under section 122(b)(3) or under other authorities, small settlements obtained administratively by EPA, or refunds of overpayment to contractors, grantees or employees) will continue to be received by EPA through its lockbox system.

1. Any consent decree or settlement (except those noted above) creating debts due the Hazardous Substance Superfund will require the potentially responsible party (PRP) to use Electronic Funds Transfer (EFT) to make payment to the United States Government.[1] The U.S. Attorney's Office will be responsible for providing the PRP with all necessary instructions for making EFT payment to the Department of Justice's lockbox bank. These instructions shall include the detail listed in Item 12 of the instructions for making the electronic fund transfer (Attachment B).

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[1] In the event that an exception must be made to the EFT requirement, such as in cases involving relatively small amounts of dollars, the PRP should be advised to send payment in the form of a certified check directly to the appropriate U.S. Attorney's Office, which will deposit the check into the DOJ lockbox.

2. The consent decree will cite the amount due and the time frame within which payment must be made after execution of the consent decree. The consent decree must contain an EPA reference number, which the EPA Regional Counsel must include in the consent decree before filing the case with the Department of Justice, and which the Department of Justice must reference in all future correspondence. The EPA reference number will be the site-specific identification number for the site. [EXAMPLE: EPA Site Identifier "0101" represents Region 01 (Boston) and Site 01 (Picillo Site)].

3. Generally within 3 business days after its availability from the courts, the U.S. Attorney's Office will ensure that a file-stamped and court signed copy of the consent decree is provided to the responsible EPA Regional Counsel and the DOJ Environment and Natural Resources Division attorney. Time is of the essence in forwarding this documentation to these offices.

The U.S. Attorney's Office will also notify DOJ's Debt Accounting Operations Group to expect an EFT from the relevant PRP(s). The U.S. Attorney's Office will notify the Debt Accounting Operations Group by telefaxing a DOJ "Electronic Funds Transfer Memorandum," with the appropriate Superfund site-specific identifiers (referring agency file number) entered on the form, to that office (see Attachment A -- Note that the U.S. Attorney's Office is required to designate the amounts attributable to cost recovery and to penalties).

4. In addition, no later than 1 business day after receipt of the consent decree from the U.S. Attorney's Office, the EPA Regional Counsel will provide copies to the EPA Regional Financial Management Office and to the EPA regional Superfund program office. The EPA Regional Counsel will transmit the copy to the EPA Regional Financial Management Office via a memorandum stating the site name and site-specific identification number and the payment due date(s) and amount(s).

5. Within 1 business day of receipt of the consent decree from the EPA Regional Counsel, the EPA regional finance office will establish a site-specific accounts receivable for the debt due the Trust Fund in EPA's Integrated Financial Management System (IFMS). <u>However, DOJ is responsible for enforcement of this claim</u>.

6. As noted above, the U.S. Attorney's Office will provide the PRP(s) with instructions on remitting payment through EFT by attaching to the consent decree a copy of the instructions for making the electronic fund transfer (Attachment B), which must be given to the sending bank by the debtor or the debtor's attorney.

7. The PRP must use EFT to transmit payment, no later than the date specified in the consent decree, to the DOJ lockbox bank. Interest will accrue until paid, as detailed in the consent decree.

8. The U.S. Attorney's Office will monitor the due dates for funds and ensure that appropriate follow up action is taken to collect the amounts due, including any interest accruals. DOJ will contact EPA if payment is not received within 30 days.

9. The DOJ lockbox bank will deposit to the credit of DOJ's Treasury account all EFT funds received by 11:00 A.M. (Eastern Time) each day. EFTs received after that time will be credited on the next work day. By the end of the day the funds were received, the lockbox bank will transmit to the DOJ Debt Accounting Operations Group the data accompanying the EFT payment. The data required in the EFT transmission will provide sufficient information to allow the Debt Accounting Operations Group to readily match the EFT credit with the site-specific "Electronic Funds Transfer Memorandum" (Attachment A), which the U.S. Attorney's Office had telefaxed to them earlier (See "6" above).

10. No later than 10 A.M. of the work day following credit of the receipt to DOJ's Treasury account, the DOJ Debt Accounting Operations Group will use the Treasury OPAC system to transfer individually (i.e. by site and by payee) to the EPA Financial Management Division's Financial Reports and Analysis Branch (Agency location code 68-01-0030), the prior work day's receipts. (EPA will deposit the funds to cost recovery, Treasury Account 20X8145.4; and to fines and penalties, Treasury Account 20X8145.3). The information on the prior day's receipts will appear as a report (Attachment D) on the terminal's screen when OPAC is accessed by the EPA Financial Reports and Analysis Branch.

11. Concurrent with the OPAC transfer, the DOJ Debt Accounting Operations Group will also telefax a DOJ "Notification of Receipt of Electronic Funds Transfer Memorandum" (Attachment C) to the appropriate U.S. Attorney's Office. In addition, the DOJ Debt Accounting Operations Group will FAX the "Debt Management System Detail Listing to Support the Transfer of Funds" (Attachment E), which is a detailed report supporting the OPAC transfer, to the EPA Financial Reports and Analysis Branch, Financial Management Division and to the DOJ Environment and Natural Resources Division. The detail will include the site-specific identifier, the name of the debtor, the amount received, and the type of collection (e.g., cost recovery, and penalty, or the distribution to each if applicable).

12. Upon EPA's receipt of OPAC's automated notification that funds were credited to EPA, the Financial Management Division (FMD) will ensure that the Department of the Treasury credits these amounts to the EPA Hazardous Substance Superfund and invests the amounts received in securities of the same maturity as existing investments.

13. Upon receipt of the "Management System Detail Listing to Support Transfer of Funds" (Attachment E) from the DOJ Debt Accounting Operations Group, the EPA Financial Management Division will compare the OPAC information (Attachment D) with Attachment E.

14. The EPA Financial Management Division will send copies of Attachment D to each of the affected regions and concurrently transfer the corresponding amounts by Interoffice Transfer Voucher to the regional accounts. The regional EPA Financial Management Offices will use these reports as source documents from which to code in the receipt of these funds to the appropriate EPA Integrated Financial Management System site-specific accounts receivable.

15. The EPA Financial Management Division will be responsible for reconciling reports and for resolving any discrepancies between data provided by the DOJ Debt Accounting Operations Group, reported by the regional EPA Financial Management Offices, and/or amounts invested by the Treasury.

16. This Memorandum of Understanding applies to all consent decrees or other settlement documents signed by a PRP on or after March 1, 1992, and shall remain in effect indefinitely. This agreement may be amended at any time by written agreement of the parties.

Judge Tim Murphy 2-13-92

Judge Tim Murphy
Associate Deputy Attorney General
U.S. Department of Justice

Sallyanne Harper 2/12/92

Sallyanne Harper, Director
Financial Management Division
Office of the Comptroller
U.S. Environmental Protection Agency

* U.S. G.P.O.:1992-312-344:60085