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COMMENDATIONS

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

Kevin Alexander (Arkansas, Eastern District), by Charles A. Banks, United States Attorney for the Eastern District of Arkansas, Little Rock, for his outstanding achievements in the Asset Forfeiture program and for pursuing complicated narcotics cases that resulted in several large forfeiture settlements.

Leslie Banks and ***David Jennings*** (Texas, Southern District), by Morris M. Pallozzi, Director, Office of Enforcement, National Oceanic and Atmospheric Administration, Department of Commerce, Silver Spring, Maryland, for their participation in an in-service training program at the Federal Law Enforcement Training Center, and for their invaluable instruction on criminal case presentation and testifying skills.

Lawrence Beaumont (Illinois, Central District), by John E. Peterson, Deputy Area Administrator, Office of Labor-Management Standards, Department of Labor, Chicago, for his professionalism and legal skill in successfully prosecuting a union official for embezzlement of union funds.

Demetrius Bivins and ***Jack Frels*** (Texas, Western District), by Jeffrey J. Jamar, Special Agent in Charge, FBI, San Antonio, for their successful prosecution of a bank robbery case involving nearly a quarter of a million dollars, the highest dollar loss from a bank robbery ever in the history of San Antonio.

John Braddock (Texas, Southern District), by Janet Mortenson, Chief, State Securities Board, Houston, for his exceptional legal skill and expertise in a complex securities fraud case in which the jury returned guilty verdicts on all 47 counts.

James Brunson (Michigan, Eastern District), by David A. Kessler, M.D., Commissioner, Food and Drug Administration, Department of Health and Human Services, Rockville, Maryland, for his excellent representation and cooperative efforts in obtaining a felony plea agreement in a Prescription Drug Marketing Act case.

Tena Campbell (District of Utah), was presented a plaque by Eugene F. Glenn, Special Agent in Charge, FBI, Salt Lake City, for her outstanding efforts in the prosecution of financial fraud and white collar crime in the District of Utah. Also, ***Ms. Campbell*** received an award from the Inspector General, Department of Health and Human Services, for "contributing significantly to the mission of the Inspector General."

Patricia Cangemi (District of Minnesota), by Robert K. Dieffenderfer, Chief, Criminal Investigation Division, Internal Revenue Service, St. Paul, for her valuable assistance and special services provided to the agency in the complex area of civil seizures and forfeitures.

Kenneth R. Chadwell (Michigan, Eastern District), by Hal N. Helterhoff, Special Agent in Charge, FBI, Detroit, for his successful prosecution of an armed bank robbery case involving more than $475,000 in stolen bank funds.

Michael C. Colville (Pennsylvania, Western District), by Dennis F. Hoffman, Chief Counsel, Drug Enforcement Administration, Washington, D.C., for his excellent representation and ultimate success in obtaining the dismissal of a complex aviation maintenance services contract case.

David J. Cortes (North Carolina, Eastern District), by William J. Williamson, Special Agent in Charge, U.S. Secret Service, Raleigh, for his valuable assistance in bringing a counterfeit case to a successful conclusion.

Tom Dawson (Mississippi, Northern District), by William P. Tompkins, District Director, Office of Labor-Management Standards, Department of Labor, New Orleans, for his successful prosecution of a labor union embezzlement case, and for his valuable assistance in a number of other criminal investigations involving corrupt labor union officials.

Neil J. Evans (District of Oregon), by John A. Goss, Jr., Acting Special Agent in Charge, Bureau of Land Management, Department of the Interior, Portland, for his successful prosecution of an individual for defying federal river use regulations, thereby sending a message to other illegal operators to observe resource management regulations presently in place.

Carl F. Faller, Jr. and ***Jonathan B. Conklin*** (California, Eastern District), by Douglas A. Ball, Special Agent in Charge, FBI, Sacramento, for their valuable assistance and successful prosecutive efforts in a domestic terrorism case in which an IRS processing center in Fresno was bombed, causing an estimated $1.5 million in damages and lost revenue to the United States Government. (The chemical and electrical engineer was sentenced to an aggregate total of 45 years in prison, fined $45,000, and ordered to pay $335,000 in retribution to the IRS.)

Lawrence Finder, Don DeGabrielle, Ken Magidson, Nancy Herrera, and ***Terry Clark*** (Texas, Southern District), by Steven W. Hooper, Special Agent in Charge, U.S. Customs Service, Houston, for their participation in an in-service training session and for providing invaluable information on federal procedures and guidelines.

Richard Goolsby (Georgia, Southern District), by Mary Jo Jefferson, on behalf of the citizens of the Vernon Drive Community of Augusta, for his outstanding leadership, in cooperation with the Bureau of Alcohol, Tobacco and Firearms and the Augusta Police Department, in the arrest of a drug dealer operating in the area, and for removing the crime element and restoring order to the community.

Grant C. Johnson (Wisconsin, Western District), was nominated to the American College of Prosecuting Attorneys by the Honorable Tommy G. Thompson, Governor of the State of Wisconsin, Madison, for his dedication and personal accomplishments as a prosecutor. (The American College of Prosecuting Attorneys was established in 1989 as an honorary society for career prosecutors.)

Cedric L. Joubert (Texas, Southern District), by the Honorable Samuel B. Kent, Judge, U.S. District Court, Galveston, for his professional efforts and outstanding legal skill in the prosecution of a complex tax fraud case involving 33 counts variously alleged against four defendants, dozens of witnesses, and hundreds of pieces of documentary evidence.

J. Philip Klingeberger, David Miller, Deborah M. Leonard, Robert Trgovich, and the entire Fort Wayne Staff (Indiana, Northern District), by Ross E. Springer, District Counsel, Internal Revenue Service, Indianapolis, for their professional efforts and valuable services rendered in bringing a complex bankruptcy fraud case to a successful conclusion.

Sherry Leckrone and ***Colin Bruce*** (Illinois, Central District), by M/Sgt. Frederick Donini, Task Force Supervisor, South Central Illinois Drug Task Force, Litchfield, for their excellent representation and cooperative efforts in obtaining the conviction of two individuals on drug and weapons charges. (This is the first criminal case to go to trial since the formation of the Task Force in September, 1989.)

Thomas C. Lee (District of Oregon), was presented a plaque by the State Director of the Bureau of Land Management, Oregon/ Washington State Office, "in recognition of his outstanding legal efforts to maintain excellence in managing the O & C (Oregon and California) forest lands of Western Oregon."

D. Michael Littlefield (Oklahoma, Eastern District), by Bob A. Ricks, Special Agent in Charge, FBI, Oklahoma City, for convicting a Marietta, Oklahoma police officer who recovered in excess of $250,000 on five insurance claims with five different companies, two claims of which involved arson of his own personal residence. In 1989, this police officer was indicted and acquitted in a conspiracy to kidnap and possibly murder a suspected drug dealer in the Northern District of Texas. (Since his conviction, the police officer has been terminated from the police force.)

Mark Matthews, Robert Khuzami, and **Mark *Stein*** (New York, Southern District), by Lincoln C. Almond, United States Attorney for the District of Rhode Island, for their valuable assistance and cooperative efforts leading to the success of Operation Polar Cap V, an ongoing investigation since 1988 into the operation of a coast-to-coast ring that laundered millions of dollars obtained from the sale of Columbian cocaine.

Elizabeth Mattingly (Ohio, Southern District), by William Coonce, Special Agent in Charge, Drug Enforcement Administration, Columbus, for her professionalism and legal skill in successfully negotiating civil prosecutions involving four DEA Registered Corporations for Controlled Substances Act violations.

Joseph D. Newman (Georgia, Southern District), by David M. Gellatly, Chief of Police, Savannah, for his outstanding prosecutive efforts in four major cocaine distribution operations based in Savannah, one of which was responsible for several drug-related homicides in 1991.

Don Overall (District of Arizona), by Paul M. Levin, Supervisory Attorney, Claims Division, U.S. Postal Service, Washington, D.C., for his outstanding representation and successful efforts in negotiating a settlement in a civil torts case in favor of the government.

Thomas O. Plouff (Indiana, Northern District), by Guy A. Robinson, Inspector in Charge, U.S. Postal Service, Indianapolis, for his successful prosecution of a unique travel fraud case in which 2,800 customers lost at least $242,000 and two banks lost $21,000 as a result of this mail and bank fraud scheme.

Susan M. Poswistilo (District of Massachusetts), by Jerome C. Brennan, Litigation Counsel, Defense Logistics Agency, Department of Defense, Boston, for obtaining a favorable decision in a Chapter 11 bankruptcy proceeding, resulting in the repayment of $2.8 million in unliquidated Defense contract payments.

Matthew V. Richmond (Wisconsin, Eastern District), was presented a plaque on behalf of the Federal Wildlife Officers Association, Richmond, Virginia, for his outstanding contributions to wildlife law enforcement and his strong commitment to the protection of our wildlife resources. (Mr. Richmond is the first Assistant United States Attorney to be recognized by this national organization.)

Pamela G. Steele (Tennessee, Eastern District), by Joe La Grone, Manager, Oak Ridge Operations, Department of Energy, Oak Ridge, for her excellent representation and successful efforts in obtaining a favorable decision on behalf of the Department of Energy in a bankruptcy case involving complex and novel issues of bankruptcy law.

Tanya J. Treadway (District of Kansas), by James C. Esposito, Special Agent in Charge, FBI, Kansas City, for her successful prosecution of a financial institution fraud case against a constant barrage of defense objections by three defense attorneys. The jury returned a guilty verdict after only 90 minutes of deliberation.

Stewart C. Walz (District of Utah), by William S. Sessions, Director, FBI, Washington, D.C., for his outstanding leadership in organizing a Securities and Commodities Fraud Task Force and for successfully prosecuting approximately 25 over-the-counter stock market fraud cases thus far.

Stewart C. Walz and ***Mary Beth Walz*** (District of Utah), by David L. Barker, Supervisory Special Agent, FBI, Salt Lake City, for their aggressive prosecutive support necessary to obtain a conviction in a complicated stock fraud case, which included a Title III wire tap interception.

Ronald W. Waterstreet (Michigan, Eastern District), was presented a Certificate of Appreciation from Peter Lalic, Acting Chief, Criminal Investigation Division, Internal Revenue Service, Detroit, for his outstanding leadership in several investigations involving narcotics organizations and other crimes relating to domestic money laundering and income tax evasion.

Countess C. Williams (District of Massachusetts), by A. J. Behrle, Chief Advisory Unit, Special Procedures Staff, Internal Revenue Service, Boston, for her participation as a faculty member in an IRS Training Course, and for her excellent presentation on civil summons enforcement cases.

Brian Wilson (Florida, Northern District), by Michael Powers, Assistant Special Agent in Charge, Drug Enforcement Administration (DEA), Tampa, for his professionalism and legal skill in two separate civil cases, one of which was the largest civil settlement between DEA and a registered retail pharmacy in the history of the Diversion Control Group of the Tampa District Office.

SPECIAL COMMENDATION FOR THE DISTRICT OF OREGON

Stephen F. Peifer, Assistant United States Attorney for the District of Oregon, was commended by William P. Barr, Attorney General of the United States, for his outstanding skill and dedicated efforts in obtaining guilty pleas of a number of members of the Ecclesia Athletic Association to the federal charge of conspiracy against civil rights in an involuntary servitude case. Eldridge Broussard, Jr., the leader of the Ecclesia Athletic Association (now deceased), and seven of his followers compelled children to perform athletic drills by inflicting systematic beatings and other physical force against them, and intended to obtain money from corporate sponsors for the children's performance. The indictment, filed in February, 1991, charged that the conspiracy resulted in the beating death of an 8-year-old girl on October 14, 1988, in Sandy, Oregon. Numerous other children sustained physical injuries and extensive scarring. The defendants are presently serving their prison sentences, and none are eligible for parole before completion of their sentences.

Mr. Peifer demonstrated extreme sensitivity in interviewing traumatized children, as well as the utmost patience and tenacity in examining adult witnesses who remained loyal to the cult leader. His excellent rapport with the law enforcement community in the District of Oregon also greatly facilitated the extensive coordination required with the state officials who initially investigated the death of one of the children and who took the fifty-three surviving children into protective custody.

Pamela Heimuller, Victim-Witness coordinator, provided valuable psycho-logical counseling and other assistance to the victims, and ***Sharron Campbell*** of the secretarial support staff, played a major role in assisting the prosecutors throughout the lengthy grand jury investigation, the protracted pretrial hearings, and the preparation of voluminous pleadings.

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SPECIAL COMMENDATION FOR THE SOUTHERN DISTRICT OF INDIANA

Gerald A. Coraz, Assistant United States Attorney for the Southern District of Indiana, was commended by Paul M. Levin, Supervisory Attorney, Claims Division, U.S. Postal Service, Washington, D.C., for his outstanding representation and successful efforts in obtaining a favorable decision on behalf of the United States. The case involved a postal rural carrier who was operating his own personal vehicle while on his way to the Post Office and was involved in an accident resulting in the death of a private driver. A postal rural carrier on his way to the Post Office from his residence is covered by the Federal Employees Compensation Act and accordingly, it was basically plaintiff's contention that, for purposes of the Federal Tort Claims Act, the postal rural carrier was within the scope of his employment at the time of the accident.

After the U.S. District Court found for the government, plaintiff appealed the decision and the appellate court remanded the case back to the District Court for further discovery. However, the District Court again found for the government holding that an employee commuting to and from work is not within the scope of his employment. A decision to the contrary would have been devastating to the government, since it would have set a dangerous precedent for many future cases.

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SPECIAL COMMENDATION FOR THE DISTRICT OF KANSAS

Julie A. Robinson, Assistant United States Attorney for the District of Kansas, was commended by Ron Sanders, District Director, Immigration and Naturalization Service (INS), Kansas City, for her valuable assistance, guidance and legal expertise in a complex fraud case, which resulted in the conviction of six conspirators. The case targeted several suspects who conspired to assist approximately 750 undocumented aliens in applying for amnesty benefits to which they were not entitled. Receipt of such benefits would have entitled the aliens to eventually receive permanent resident alien status and subsequently, United States citizenship. The suspects not only prepared affidavits and applications that contained fraudulent information, but also directly assisted the aliens in submitting these applications to the INS. They coached the aliens on how to respond to INS interviewers, served as translators, and transported the aliens to Legalization Offices in Kansas City and St. Louis, Missouri. This investigation involved undercover operations, consensual monitoring, use of translators for seven government witnesses who spoke only Spanish, one who spoke Chinese and very little English, and several hours of undercover conversations in Spanish. It also generated a large amount of evidence in the form of documents, tape recordings, reports, statements and other information.

Ms. Robinson provided guidance to INS agents throughout the investigation and shaped the evidence, statements, and government witnesses into a concise and well-organized presentation at trial.

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SPECIAL HONORS FOR THE UNITED STATES ATTORNEYS

Attorney General William P. Barr Presents Awards

On March 2, 1992, at the United States Attorneys' Conference in Orlando, Florida, Attorney General William P. Barr and Acting Deputy Attorney General George Terwilliger, III, presented a plaque and a United States Attorney flag to the following United States Attorneys for their significant contributions to the ongoing work of the Department of Justice:

Timothy K. Leonard, Western District of Oklahoma, in recognition of his work on behalf of all United States Attorney as the Chairman of the Office Management and Budget Subcommittee of the Attorney General's Advisory Committee;

J. B. Sessions, III, Southern District of Alabama, for his significant achievements in the war against drug trafficking;

Otto G. Obermeier, Southern District of New York, for his significant achievements against organized crime;

Lourdes G. Baird, Central District of California, for her significant achievements in combatting financial institution fraud;

Michael Chertoff, District of New Jersey, in recognition of his strong support for the Department's violent crime initiatives;

Robert Q. Whitwell, Northern District of Mississippi, for his significant achievements in civil litigation;

Jeffrey R. Howard, District of New Hampshire, in recognition of his sustained support for the Department's and United States Attorneys' programs; and

Marvin Collins, Northern District of Texas, in recognition of his leadership of the Dallas Bank Fraud Task Force since its inception on August 1, 1987, and for his immeasurable contribution to the Financial Institution Fraud program.

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Asset Forfeiture Awards

On April 1, 1992, the Executive Office for Asset Forfeiture, Office of the Deputy Attorney General, presented awards to the following United States Attorneys:

Charles W. Larson, Northern District of Iowa, was recognized for his staunch support for asset forfeiture as Chairman of the Financial Litigation Subcommittee of the Attorney General's Advisory Committee of United States Attorneys. He was also lauded for the success of his office in conducting an effective asset forfeiture program in a judicial district with limited federal investigative presence.

Robert W. Genzman, Middle District of Florida, was honored for his commitment to making asset forfeiture a priority program in his District, a commitment that made the Middle District of Florida one of the leading forfeiture producers in the country. ***Mr. Genzman*** was specially recognized for his leadership in the first BCCI forfeiture case, the 1991 judicial forfeiture of a multi-million dollar boatyard which was transferred to the U.S. Customs Service for official law enforcement use, and the repatriation of over $12 million in Swiss bank accounts to Florida for forfeiture and sharing with the Governments of Colombia and Switzerland.

On December 11, 1991, ***Joseph M. Whittle, Western District of Kentucky,*** was presented the Executive Office for Asset Forfeiture's Outstanding Service Award for his dedication to asset forfeiture and for his more than three years of devoted leadership, first as a member of the Financial Litigation Subcommittee, and later as Chairman of the Attorney General's Advisory Committee of United States Attorneys.

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1991 Federal Executive Of The Year

William A. Kolibash, United States Attorney for the Northern District of West Virginia, has been named the "1991 Federal Executive of the Year" by the Federal Executive Institute Alumni Association (FEIAA).

At a luncheon on February 7, 1992 in Washington, D.C., ***Mr. Kolibash*** was honored for his extraordinary achievements in executive management and personal leadership. The Department of Justice was represented by George J. Terwilliger, Acting Deputy Attorney General of the United States, and by his nominating official, Laurence S. McWhorter, Director, Executive Office for United States Attorneys. Constance Horner, Assistant to the President of the United States, was the keynote speaker. Over 200 persons were in attendance, including ***Rita Kolibash,*** and a number of members of the United States Attorney's staff.

The FEIAA, which is composed of graduates of the Federal Executive Institute, is located in Charlottesville, Virginia, and is operated by the Office of Personnel Management. It is the Federal Government's premier executive development center, and is sometimes referred to as the "West Point of the Civil Service."

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PERSONNEL

UNITED STATES ATTORNEY PERSONNEL

On March 4, 1992, ***Jack W. Selden*** became the Interim United States Attorney for the Northern District of Alabama.

On March 12, 1992, ***Gary L. Sharpe*** became the Interim United States Attorney for the Northern District of New York.

On March 7, 1992, ***John S. Simmons*** became the Interim United States Attorney for the District of South Carolina.

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DEPARTMENT OF JUSTICE PERSONNEL

Associate Attorney General

Wayne A. Budd, United States Attorney for the District of Massachusetts, has been nominated to serve as Associate Attorney General, the third highest position in the Department of Justice. The nomination was referred to the United States Senate for consideration on March 3, 1992. The responsibilities of the Associate Attorney General will be to oversee the Civil Division, the Antitrust Division, the Tax Division, the Civil Rights Division, and the Environment and Natural Resources Division.

On February 28, 1992. ***A. John Pappalardo*** became Acting United States Attorney for the District of Massachusetts.

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Office Of Policy And Communications

On March 16, 1992, ***Paul J. McNulty*** was appointed by Attorney General William P. Barr to serve as Director of the newly established Office of Policy and Communications. This new office will consolidate the offices of Policy Development (OPD), Public Affairs (OPA), and Liaison Services (OLS). ***Mr. McNulty*** has served as chief spokesman for the Attorney General since August of 1991, when Mr. Barr was named as the Acting Attorney General.

The Attorney General has selected three Deputy Directors of the Office of Policy and Communications as follows:

Steven R. Schlesinger will serve as Deputy Director for Policy. ***Mr. Schlesinger,*** who has been at the Justice Department since May of 1991, will continue to serve as the Director of the Office of Policy Development.

Rider Scott will serve as Deputy Director of Liaison, a position to enhance cooperation with the nation's law enforcement organizations. ***Mr. Scott*** was formerly the Executive Assistant to the United States Attorney for the Southern District of Texas.

Mary Kate Grant will serve as Deputy Director for Communications. ***Ms. Grant*** recently served as a speechwriter for President Bush from 1989 to 1992, and was also a Senior Writer for Communications for Bush-Quayle '88.

In addition to the supervisory staff of the Office of Policy and Communications, Attorney General Barr has made the following appointments:

Doug Tillett was selected to be the Director of the Office of Public Affairs. ***Mr. Tillett*** has served as Deputy Director and Acting Director since August of 1991.

Kristen Gear has been named the new Deputy Director of Public Affairs. ***Ms. Gear*** served as Associate Director of Media Affairs at the White House, and was also a Field Press Liaison for Bush-Quayle '88.

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Criminal Division

On February 26, 1992, Robert S. Mueller, III, Assistant Attorney General for the Criminal Division, made the following announcements:

Paul Maloney, Deputy Assistant Attorney General in charge of the Fraud, Child Exploitation and Obscenity and General Litigation and Legal Advice Sections, and an ex-officio member of the Sentencing Commission, has been appointed Senior Counsel for Policy. ***Mr. Maloney*** will continue in his role as ex-officio member of the Sentencing Commission, and will serve as liaison with United States Attorneys, Congress, state and local prosecutors, and bar associations.

Larry Urgenson, Chief of the Fraud Section, was appointed Acting Deputy Attorney General responsible for the Fraud, Child Exploitation and Obscenity, and General Litigation and Legal Advice Sections.

Gerry McDowell, Chief of the Public Integrity Section, was appointed Chief of the Fraud Section. In the meantime, ***Bill Keefer*** is serving as Acting Chief of the Public Integrity Section.

Drew Arena, Director, Office of International Affairs, has relocated to the Office of the Deputy Attorney General, where he will have responsibility for international programs.

George Proctor, Chief of the Asset Forfeiture Office, was appointed Director of the Office of International Affairs.

Lee Radek has been appointed Director of the Asset Forfeiture Office. ***Mr. Radek*** was formerly Deputy Chief of the Public Integrity Section.

Carolyn Stein and ***Tony Schall*** have been appointed Special Counsels to the Assistant Attorney General. ***Ms. Stein*** was formerly an Assistant United States Attorney for the District of Massachusetts, and ***Mr. Schall*** was formerly an Assistant to Attorney General William P. Barr and former Attorney General Dick Thornburgh.

Attached at the Appendix of this Bulletin as Exhibit A is a Criminal Division Organization Chart.

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United States Marshals Service

On February 24, 1992, ***Henry E. Hudson*** became the Acting Director of the United States Marshals Service. ***Mr. Hudson,*** formerly United States Attorney for the Eastern District of Virginia, succeeds ***K. Michael Moore,*** *who* was confirmed by the United States Senate on February 6, 1992 to be United States District Judge for the Southern District of Florida. ***Judge Moore*** was formerly United States Attorney for the Northern District of Florida.

Katherine K. Deoudes has joined the United States Marshals Service as the Director's Executive Assistant for Policy. ***Ms. Deoudes*** was formerly Deputy Director, Executive Office for Asset Forfeiture, Office of the Deputy Attorney General, and Associate Director of the Financial Litigation Staff of the Executive Office for United States Attorneys.

Larry Gregg has joined the United States Marshals Service as General Counsel. ***Mr. Gregg*** was formerly Assistant United States Attorney for the Eastern District of Virginia.

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Office Of Legal Education

Amy Lecocq has been appointed Associate Deputy Attorney General by George J. Terwilliger, III, Acting Deputy Attorney General. ***Ms. Lecocq*** served as the Director of the Office of Legal Education, Executive Office for United States Attorneys, since September, 1991. Prior to that time, she was an Assistant United States Attorney in the Western District of New York (Rochester) and Assistant United States Attorney in the Southern District of West Virginia (Charleston).

In the interim, ***Devon L. Gosnell,*** formerly Assistant Director for the Criminal Program, has been named Acting Director of the Office of Legal Education. ***Ms. Gosnell*** is on temporary duty from her post as Criminal Chief, United States Attorney's office for the Western District of Tennessee. ***David Downs,*** Executive Assistant for Operations, has been named Acting Deputy Director of the Office of Legal Education.

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DEPARTMENT OF JUSTICE HIGHLIGHTS

House Of Representatives Bank Matter

On March 20, 1992, Attorney General William P. Barr announced the appointment of retired Federal Judge Malcolm R. Wilkey as Special Counsel to take responsibility for conducting a Department of Justice preliminary review, recently initiated by the United States Attorney's office of the District of Columbia, into the House of Representatives bank matter. Upon completion of this preliminary inquiry, Judge Wilkey will report to the Attorney General on the extent, if any, to which further investigation is warranted.

Judge Wilkey served for fifteen years as a U.S. Circuit Court Judge in Washington, D.C. (1970-84). He is also an experienced federal prosecutor, having served as United States Attorney in Houston from 1954 to 1958, and as Assistant Attorney General in charge of the Criminal Division at the Department of Justice from 1958-1961. Judge Wilkey has held a total of six Presidentially appointed positions, four with Senate confirmation where there was never a dissenting vote. Most recently he served as Ambassador to Uruguay (1985-1990) and Chairman of the President's Commission on Reform of Federal Ethics Laws (1989).

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Largest Fine In History Is Imposed In A Major Hazardous Waste Case

On March 26, 1992, Rockwell International Corporation pleaded guilty in federal court to an information charging it with ten counts of environmental violations during its operation of the Rocky Flats Nuclear Weapons Plant near Boulder, Colorado, and agreed to pay $18.5 million in fines -- the largest amount ever imposed in a hazardous waste case. Michael J. Norton, United States Attorney for the District of Colorado, said that Rockwell agreed to pay $18.5 million in criminal fines to the United States, of which $2 million was remitted and will be paid to Colorado to settle state claims against the company. Rockwell pleaded guilty in U.S. District Court in Denver to four felony violations of the Resource Conservation and Recovery Act (RCRA) and to one felony and five misdemeanor violations of the Clean Water Act (CWA). The plea must be approved by the court.

In a federal sentencing memorandum filed with the court, Rockwell illegally stored and treated hazardous wastes generated during the production of plutonium "triggers" and other components of nuclear weapons at Rocky Flats, about 16 miles northwest of Denver. The government also asserted that the company improperly and illegally discharged wastes through its sewage treatment plant, creating the potential for contamination by runoff to a reservoir used for drinking water. Rockwell operated the Rocky Flats Nuclear Weapons Plant from 1975 to 1989. In August, 1988, the Department initiated a criminal investigation of Rocky Flats, which included, in June, 1989, a search warrant executed by 120 Federal Bureau of Investigation (FBI) and Environmental Protection Agency (EPA) agents. United States Attorney Norton said, "With public health and environmental safety possibly at stake for the people living near Rocky Flats, the Department vigorously pursued a complex investigation from the beginning. From the outset, our primary investigative goal has been to seek out and pursue serious criminal environmental conduct."

According to Barry M. Hartman, Acting Assistant Attorney General for the Environment and Natural Resources Division, a total of 3.5 million pages of documents relating to Rocky Flats and its operations during that time were examined. More than 800 witnesses were interviewed by criminal investigators, and 110 witnesses testified before the special grand jury. Attorney General William P. Barr praised Assistant United States Attorney Kenneth R. Fimberg of Denver, and Trial Attorney Peter J. Murtha of the Environment and Natural Resources Division in Washington, D.C., who led the trial team. He also cited the outstanding efforts of other federal investigators and prosecutors who devoted thousands of hours of effort during the 3-year investigation.

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$2.7 Million Settlement In Japanese Bidrigging Scheme

On February 24, 1992, the Department of Justice announced that 10 Japanese electronics companies will pay the United States $2.7 million to settle claims they rigged bids on contracts at U.S. military installations in Japan from 1981 through 1988. This settlement is in addition to the $34 million NEC Information Technologies Ltd. (NECIT) paid the federal government in May, 1991.

Stuart M. Gerson, Assistant Attorney General for the Civil Division, said the contracts, which totalled more than $103 million, were entered into by the U.S. Air Force Pacific Contracting Center at the Yokota Air Base near Tokyo for the operation and maintenance of U.S. military telecommunications systems. The Air Force called for competitive bids on the contracts, but then noticed a suspicious pattern of bidding. An investigation conducted by the Air Force Office of Special Investigations revealed that a bidrigging organization called the "Kabuto Kai" rigged bids on the contracts. Ultimately, a dozen companies became members of the organization, which resulted in a conspiracy that substantially raised the prices paid by the U.S. military for telecommunication service in Japan.

The companies involved in the settlement included ten of the twelve members of the Kabuto Kai. Only one of the members of the group besides NECIT (Daimei Denwa Kogyo) actually won any contracts. In general, the other companies submitted high, so-called "complementary" bids to ensure that NECIT would win most of the contracts. The Air Force investigation revealed that many of the bids submitted by the other companies were actually prepared by NECIT.

Mr. Gerson said, "The Civil Division will continue to pursue aggressively other cases on behalf of the American taxpayer to recover overcharges resulting from anticompetitive behavior. This case sets an important precedent for future cases against foreign companies engaged in bidrigging and similar practices that defraud the U.S. government."

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Improvements In Immigration Services And Immigration Laws

On February 9, 1992, Attorney General William P. Barr announced a series of steps to increase border security, deal with criminal aliens, and improve service to legal immigrants and travellers. The enhancements include 300 new Border Patrol Officers and 200 additional criminal investigators to combat illegal immigration and violent crime by criminal aliens, the creation of a National Criminal Alien Tracking Center, and the hiring of over 700 additional Immigration and Naturalization Service (INS) workers to improve services to legal immigrants and travellers. The initiatives will be achieved this year through the use of asset forfeiture proceeds, reprogramming of existing funds, and use of funds from fees and fines.

The new resources and initiatives for border-related and criminal alien law enforcement include:

-- 300 new Border Patrol officers to interdict illegal aliens and drugs at the border;

-- 200 additional INS investigators, 150 of whom will be assigned to locate and deport criminal aliens and to work on special anti-violent crime and street gang task forces in target cities, including New York; Los Angeles; Miami; Newark, New Jersey; and Chicago, and 50 of whom will bolster employer sanctions enforcement cases to help deter illegal immigrants by enforcing the laws against hiring illegal aliens.

-- As a further step to deter illegal immigrants, the establishment of a National Criminal Alien Tracking Center, funding in the first year with $1.5 million of fines collected by INS, to permit law enforcement agencies to contact INS 24 hours a day to identify, locate and track criminal aliens;

-- $5 million from the Department's Asset Forfeiture Fund to purchase new lighting, sensors, vehicles and other interdiction equipment. (The Department of Defense has been providing valuable surplus equipment to INS and efforts will be made to maximize use of these resources to free up as much money as possible for other enforcement purposes.);

-- $3.6 million for detention space to house exclusion cases interdicted in New York's Kennedy Airport; and

-- an initiative to combat document fraud by reissuing counterfeit resistant green cards and improving the counterfeit resistance of the Employment Authorization Document.

With regard to the service of legal immigrants and travellers, the enhancements include:

-- 250 additional temporary workers to relieve the backlog of applications;

-- $27 million (23%) increase in funding for INS adjudications;

-- 100 new Immigration Information Officers to reduce lines at INS offices;

-- improvements of information systems and other support to more fully automate the application process;

-- 100 new positions in refugee and asylum adjudications to reach more persons fleeing persecution;

-- 240 new airport inspectors to reduce lines at airports; and

-- a pilot program to extend the hours for public service of INS offices.

A large part of the initiative announced by the Attorney General, including personnel increases, will be funded by reallocating existing resources and by reducing the current subsidization of the costs for adjudicating applications. This reduction will free up funds for law enforcement purposes.

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Merger Antitrust Investigations

On March 6, 1992, the Department of Justice announced a new procedure under which the Antitrust Division and state antitrust enforcement agencies can coordinate the collection of information in investigating mergers when the parties voluntarily agree to waive confidentiality requirements. A copy of the Protocol is attached at the Appendix of this Bulletin as Exhibit B.

In many instances, the Antitrust Division and one or more state governments simultaneously investigate a single merger transaction, which can result in duplicative, overlapping and sometimes inconsistent requests for information that can increase considerably the costs of compliance and impede coordination. At the same time, the inability of federal and state enforcers to discuss the merits of the proposed transactions based upon commonly collected information can lead to divergent enforcement conclusions. The new procedure will permit the merging parties, at their initiative, to facilitate coordinated state and federal investigations.

To implement the procedure, the merging parties must give the Department a letter agreeing to provide to state enforcement agencies all information provided to the Department and waiving applicable confidentiality provisions to the extent necessary to allow discussions between the Department and state enforcement agencies of otherwise protected information. After receiving the necessary letters, the Department will provide the designated lead state copies of all information requests issued in the matter, and the expiration dates for all applicable waiting periods. To the extent practicable and desirable, the Department will cooperate with the lead state in analyzing the merger. Any such cooperation will be limited to avoid waiver of deliberative process, work product, or other privileges of either the Department or the state enforcement agencies.

James F. Rill, Assistant Attorney General, Antitrust Division, said, "The new coordination procedure, which is based on favorable practical experiences in a number of past parallel federal and state investigations, can, in appropriate cases, provide substantial benefits to merging parties, as well as to federal and state antitrust enforcement authorities."

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CRIME/DRUG ISSUES

New Funding For Criminal History Recordkeeping

On March 12, 1992, the Department of Justice announced that the Bureau of Justice Statistics (BJS) has awarded more than $16 million to 43 states, the District of Columbia and one territory to improve their criminal history records. The currently participating jurisdictions maintain 93 percent of all offender records and are inhabited by 87 percent of the U.S. population.

BJS, a Department of Justice component in the Office of Justice Programs, administers the program with funding from the Bureau of Justice Assistance and manages the three-year, $27 million program designed to assist states in upgrading current systems used to maintain records of arrests, prosecutions, convictions and sentences. Identifying felons who attempt to purchase firearms and the prosecution of career criminals are among the program's important uses. The program emphasizes the recording of arrest, conviction and sentencing information in a form that will make felony history information more reliable and complete. This is a crucial component of the overall objective to insuring that state criminal history records are up to date and available to criminal justice agencies for a wide array of authorized criminal justice and non-criminal justice purposes.

Attorney General Barr said, "By enhancing the ability of law enforcement to identify criminals who have histories of violent conduct, this program represents an essential element of federal and state law enforcement efforts to combat violent crime."

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More Grants To States For The Crime And Drug War

Attorney General William P. Barr has announced a number of new grants to states to fight the war on drugs and crime. A summary of the grants as of February 28, 1992 was included in the United States Attorneys' Bulletin, Volume 40, No. 3, dated March 15, 1992, at pp. 65-67.

On March 16, 1992, a number of additional states were granted similar awards. These 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 states will use the funds for programs in such areas as multi-jurisdictional drug task forces which integrate all levels of law enforcement and prosecution to facilitate cross-jurisdictional investigations and career criminal prosecutions.

American Samoa was awarded $796 thousand, which will be used to promote better interdiction and prosecution efforts. Funds will also target intelligence efforts and participation in networks, such as the South Pacific islands Criminal Intelligence Network, development of forensic services, improvement of prosecutorial records management, community crime prevention, demand reduction education, and the improvement of criminal justice records. This award represents a 423 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, American Samoa has received a total of $2.4 million in federal assistance under this program.

Arizona was awarded $6.3 million, which will be used to target adjudication, drug testing, criminal history records improvement, forensic laboratory improvement, and demand reduction education. This award represents a 361 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, Arizona has received a total of $20 million in federal assistance under this program.

Arkansas was awarded $4.4 million, which will be used to target drug testing, intermediate sanctions, marijuana eradication, law enforcement training and criminal history record improvement. This award represents a 320 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, Arkansas has received a total of $14.6 million in federal assistance under this program.

Colorado was awarded $5.8 million, which will be used to target street level enforcement, law enforcement training, intermediate sanctions, community crime prevention, demand reduction education, and the improvement of criminal history records. This award represents a 337 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, Colorado has received a total of $18.9 million in federal assistance under this program.

Connecticut was awarded $5.8 million, which will be used to target street level narcotics enforcement, court delay reduction, intensive supervision, demand reduction education, and the improvement of criminal history records. This award represents a 342 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, Connecticut has received a total of $18.6 million in federal assistance under this program.

Delaware was awarded $2 million, which will be used for drug prevention and education, community policing, expeditious processing of drug cases, and the improvement of criminal history records. The funds will also aid traditional law enforcement efforts through street level enforcement and drug units. This award represents a 273 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, Delaware has received a total of $6.6 million in federal assistance under this program.

District of Columbia was awarded $1.9 million, which will be used to fund improvements to law enforcement and the judicial process through training and technology. Funds will also be devoted to programs that reduce recidivism, respond to the city's increasing violence, continue criminal history recordkeeping efforts, and evaluate the effectiveness of current programming. This award represents a 264 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, the District of Columbia has received a total of $6.4 million in federal assistance under this program.

Georgia was awarded $10.4 million, which will be used to target public housing/urban enforcement, narcotics information and intelligence exchange, improvement of forensic services, upgrade of correctional resources, demand reduction education, and the improvement of criminal history records. This award represents a 370 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, Georgia has received a total of $33.2 million in federal assistance under this program.

Guam was awarded $1.2 million, which will be used to target marijuana eradication, narcotics importation reduction, enhancement of Guam's Crime Laboratory, maintaining a prosecution management support system, demand reduction education and the improvement of criminal justice records. This award represents a 438 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, Guam has received a total of $3.9 million in federal assistance under this program.

Hawaii was awarded $2.6 million, which will be used to target marijuana eradication, gang intelligence and enforcement, intermediate sanctions, financial investigations, domestic violence and criminal history records. Funds will also be used to support drug testing, demand reduction education and community policing. This award represents a 294 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, Hawaii has received a total of $8.7 million in federal assistance under this program.

Idaho was awarded $2.5 million, which will be used to target asset forfeiture efforts, intermediate sanctions, domestic violence investigations, community policing and demand reduction education. This award represents a 288 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, Kansas has received a total of $8.2 million in federal assistance under this program.

Kansas was awarded $4.6 million, which will be used to target domestic sources of controlled or illegal substances, street level enforcement, domestic and family violence, court delay reduction, community crime prevention, demand reduction education, and the improvement of criminal justice records. This award represents a 326 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, Kansas has received a total of $15.1 million in federal assistance under this program.

Louisiana was awarded $7.1 million, which will be used to target domestic sources of controlled and illegal substances, improved operational effectiveness of law enforcement and the court process, and criminal history records. Funds will also be used to support programs in drug education and prevention and programs in intensive supervision and pretrial detention. This award represents a 331 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, Louisiana has received a total of $23.7 million in federal assistance under this program.

Maine was awarded $2.8 million, which will be used to target marijuana eradication, pharmaceutical diversion, financial investigations, community policing and the improvement of criminal history records. This award represents a 300 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, Maine has received a total of $9.2 million in federal assistance under this program.

Maryland was awarded $7.9 million, which will be used to target street level enforcement, pharmaceutical drug diversion, marijuana eradication, intermediate sanctions, expedition of court court cases, and financial investigations. This award represents a 364 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, Maryland has received a total of $25.3 million in federal assistance under this program.

Montana was awarded $2.2 million, which will be used to target street sales enforcement, marijuana eradication, domestic violence, intermediate sanctions, drug testing, and demand reduction education/prevention. This award represents a 276 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, Montana has received a total of $7.3 million in federal assistance under this program.

Nebraska was awarded $3.3 million, which will be used to target urban street level enforcement, court delay reduction, intensive supervision, the computerized criminal history program, and other innovative programs designed to aid in drug control. This award represents a 305 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, Nebraska has received a total of $10.9 million in federal assistance under this program.

New Hampshire was awarded $2.6 million, which will be used to target asset forfeiture efforts, adjudication programs, criminal history records improvement, and demand reduction education. This award represents a 297 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, New Hampshire has received a total of $8.6 million in federal assistance under this program.

New York was awarded $27 million, which will be used to identify and investigate major drug organizations, enforcement at the street level and in public housing, increased drug seizures through eradication and interdiction, expeditious adjudication of narcotics offenses, demand reduction education, and the improvement of criminal justice records. This award represents a 379 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, New York has received a total of $86.6 million in federal assistance under this program.

North Carolina was awarded $10.6 million, which will be used to improve the prosecution of career criminals, financial investigations, operational effectiveness of the court process, criminal justice information systems, and to develop a statewide drug intelligence network. 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 369 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, North Carolina has received a total of $33.9 million in federal assistance under this program.

Ohio was awarded $16.7 million, which will be used to target pharmaceutical diversion, drug testing, court delay reduction, intensive supervision and criminal history records improvement. Funds will also be used for community crime prevention and victim/witness assistance. This award represents a 371 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, Ohio has received a total of $53.9 million in federal assistance under this program.

Pennsylvania was awarded $18.2 million, which will be used to target interdiction efforts, intermediate sanctions such as electronic monitoring and boot camps, enhancement of state crime laboratories, training for law enforcement and other criminal justice personnel, community policing and the improvement of criminal history records. This award represents a 369 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, Pennsylvania has received a total of $59 million in federal assistance under this program.

Rhode Island was awarded $2.5 million, which will be used to target street level enforcement, financial investigations, improvement of drug control technology and the improvement of criminal history records. The funds will also be used to target cities for implementation of a "Weed and Seed" program. This award represents a 289 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, Rhode Island has received a total of $8.2 million in federal assistance under this program.

South Carolina was awarded $6 million, which will be used to target the prosecution of career criminals, pharmaceutical diversion, marijuana eradication, demand reduction education, community-based policing, law enforcement training, criminal justice records administration and intensive supervision and electronic monitoring. This award represents a 343 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, South Carolina has received a total of $19.7 million in federal assistance under this program.

South Dakota was awarded $2 million, which will be used to target pharmaceutical diversion, chemical diversion, criminal history records improvement, domestic violence and demand reduction education. This award represents a 270 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, South Dakota has received a total of $6.8 million in federal assistance under this program.

Utah was awarded $3.5 million, which will be used to target financial investigations, gang enforcement, drug control technology, intensive supervision, child abuse prosecution, demand reduction education, and the improvement of criminal history records. This award represents a 315 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, Utah has received a total of $11.4 million in federal assistance under this program.

Virginia was awarded $9.9 million, which will be used to target asset seizure and forfeiture, improvement of criminal history records, enhanced drug enforcement, improvement of probation/parole information systems, and community crime prevention. This award represents a 371 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, Utah has received a total of $31.7 million in federal assistance under this program.

Washington was awarded $8 million, which will be used to target clandestine labs, crime lab enhancement, criminal history records improvement, law enforcement training, urban demonstration projects and community efforts in drug education and prevention. This award represents a 369 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, Washington has received a total of $25.5 million in federal assistance under this program.

West Virginia was awarded $3.6 million, which will be used to target improved effectiveness of law enforcement through use of crime analysis techniques and street sales enforcement and also the improvement of drug control technologies, such as forensic laboratories. Funds will also be used for jail construction, demand reduction education, and the improvement of criminal history records. This award represents a 302 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, West Virginia has received a total of $12.1 million in federal assistance under this program.

Wisconsin was awarded $8.1 million, which will be used to target enforcement in public housing, pharmaceutical diversion, narcotics information and intelligence exchange, improvement of forensic services, improvement of correctional resources, operational improvement of the court process and the improvement of criminal justice records. This award represents a 355 percent increase over the amount the state received in 1989, the first year funds were available under the Byrne program. To date, Wisconsin has received a total of $26.1 million in federal assistance under this program.

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Money Laundering

On February 27, 1992, Ronald Woods, United States Attorney for the Southern District of Texas, testified before the Permanent Subcommittee on Investigations, Committee on Governmental Affairs, United States Senate, concerning current trends in money laundering. The following is the text of his statement:

> I am pleased to be invited before you to provide an overview of the casa de cambio/giro house industry in Texas. Billions of dollars of cocaine, marijuana and heroin flow across the Texas/Mexico border each year. The 1200-mile Texas/Mexico border, sadly, has become one of the premier drug smuggling areas of the United States. As these billions of dollars of destruction flow north into our country, billions of dollars of U.S. currency flow south to Texas. A significant amount of this money ends up at currency exchanges in Texas, to be laundered.
>
> These businesses, generically referred to as casas de cambio (money exchanges) or giro houses (wire transfer businesses) exist in several areas of Texas, but predominately in Houston, the lower Rio Grande Valley and El Paso. Numerous federal investigations have shown that a significant portion of this industry thrives off of laundering illegal money, primarily, drug money. In Texas, the legislature recently passed licensing legislation to try to bring this industry under control.

Frequently these businesses hold themselves out as currency exchanges, but they also operate under the guise of check cashers, travel agencies, and "multi-service" businesses for persons from Mexico, Central and South America. What they have in common, regardless of their name, is the transmittal of hundreds of millions of dollars of drug money in a manner that disguises the true owner of the funds and the nature of the funds. These businesses also utilize false documentation to disguise their activities.

As the committee learns more about this industry in the Southwest, I encourage you to seek answers to the following questions: Who runs this industry? Who primarily benefits from it? What is the source of the money it transmits around the nation and abroad? Can the people of the United States reasonably rely on this industry to discipline itself?

* * * * *

Project Triggerlock
Summary Report

Cases Indicted From April 10, 1991 Through February 29, 1992

Description	*Count*	*Description*	*Count*
Indictments/Informations.....	4,262	Prison Sentences.....	7,654.75 years; 7 life sentences
Defendants Charged.....	5,455		
Defendants Convicted.....	2,259	Sentenced to prison.....	1,196
Defendants Acquitted.....	68	Sentenced w/o prison or suspended.....	101

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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ASSET FORFEITURE

Administrative Forfeiture Of Bank Accounts

On February 28, 1992, Cary H. Copeland, Director and Chief Counsel, Executive Office for Asset Forfeiture, issued an opinion to all United States Attorneys, and other Department and Agency officials, concerning whether it is permissible to administratively forfeit seized bank accounts under the provisions of either Section 1607(a)(1) or Section 1607(a)(4) of Title 19, United States Code. Mr. Copeland concluded that bank accounts are not "monetary instruments" and therefore may not be administratively forfeited pursuant to 19 U.S.C. §1607(a)(4). However, bank accounts of a value of $500,000 or less may be administratively forfeited pursuant to 19 U.S.C. §1607(a)(1).

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

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INTERNATIONAL AFFAIRS

New Extradition And Mutual Legal Assistance Treaties

The Office of International Affairs of the Criminal Division has been working with the Department of State to revise many of the United States' outdated extradition treaties, and to negotiate new treaties on mutual legal assistance in criminal matters. In the last few years, this effort has resulted in new extradition treaties entering into force with several countries, including the United Kingdom, Canada, Thailand, and Costa Rica. New mutual legal assistance treaties have entered into force with Canada, Mexico, the Bahamas, and the Cayman Islands.

New extradition treaties have been signed with several countries, including Germany, Australia, Switzerland, Belgium, and the Bahamas, and mutual legal assistance treaties with Panama, Argentina, Uruguay, Spain, Nigeria, and Jamaica. All of these treaties are awaiting approval by the United States Senate. The Office of International Affairs is working with federal prosecutors to determine what countries should be targeted for future negotiations.

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POINTS TO REMEMBER

Prosecutorial Immunity After Burns v. Reed

The recent Supreme Court decision in Burns v. Reed, 111 S.Ct. 1934 (1991), has been perceived as increasing the specter of liability over prosecutors. The Court limited the scope of absolute immunity for a prosecutor's actions and established a new test to measure which conduct deserves absolute immunity. Significant portions of prosecutorial conduct are currently protected only by qualified immunity. Thus, the prosecutor's shield from liability has been lowered by the Court's ruling. As a result of this decision, the United States Attorneys have expressed concern about the possible increase in liability for federal prosecutors.

Attached at the Appendix of this Bulletin as Exhibit D is a case note and article prepared by Deborah Westbrook, Legal Counsel, Executive Office for United States Attorneys, which addresses and clarifies the current parameters of absolute and qualified prosecutorial immunity. If you have any questions, please call the Legal Counsel's office at (FTS) 378-4024 or (202) 514-4024.

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Office Of Special Counsel For Immigration-Related Unfair Employment Practices Announces $3 Million Grant Program

On March 25, 1992, the Department of Justice announced that the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) will make $3 million in grant money available to community-based and other nonprofit organizations to fund programs addressing the rights of potential victims of employment discrimination. The grants, ranging from $50,000 to $150,000, also will support programs describing the responsibilities of employers under the antidiscrimination provision of the Immigration Reform and Control Act of 1986 (IRCA). Additionally, OSC may award grants of up to $250,000 to a limited number of proposals of exceptional quality, either regional or national in scope. A special appropriation tripled the amount of money available for grants this year, compared to the previous two years. Last year the Office of Special Counsel awarded grants ranging in size from $48,649 to $150,000 to eleven nonprofit organizations.

Special Counsel William Ho-Gonzalez, in announcing the grant program, said, "Although OSC has an extensive record of vigorous enforcement, more needs to be done to educate potential victims about their rights and employers about their responsibilities under the antidiscrimination provision of IRCA. While we are committed to enforcing the law and ensuring that all individuals protected under IRCA are treated fairly, we are also committed to educating employers and the general public about the law."

The application deadline for grant proposals is May 18, 1992. More information on the grants program is available in the March 19, 1992, Federal Register or contact Juan Maldonado, Senior Trial Attorney, Office of Special Counsel for Immigration Related Unfair Employment Practices, P.O. Box 65490, Washington, D.C. 20035-5490.

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Japanese-Americans Receive Redress Payments In Honolulu Ceremony

On March 1, 1992, at a special ceremony in Honolulu, the Office of Redress Administration (ORA) of the Civil Rights Division presented $20,000 redress checks to 16 Japanese-Americans evacuated during World War II from the Lualualei Homesteads or a military installation containing a field artillery in south Oahu. John R. Dunne, Assistant Attorney General for the Civil Rights Division, said, "The determination of eligibility was based on evidence that the evacuation was a result of federal government action taken solely on the basis of their Japanese ancestry. These criteria are in accordance with the provisions set forth in the Civil Liberties Act of 1988."

During the evacuation of Lualualei in 1942, only individuals of Japanese ancestry were prevented by the military from staying in their homes at night. They were permitted to work on their farms from 6:00am to 6:00pm. After they were evacuated to the Wainae Plantation, they were required to work once a week on the plantation to pay for housing provided by the government. The military order for the evacuation from the field artillery in south Oahu also affected only individuals of Japanese ancestry. ORA is researching the circumstances of 23 other locations in Hawaii to determine if Japanese Americans evacuated from those areas meet eligibility criteria.

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Street Gang Publications

Attached at the Appendix of this Bulletin as Exhibit E is a list of publications relating to street gangs and other gang issues, which was prepared under the auspices of the Organized Crime and Violent Crime Subcommittee of the Attorney General's Advisory Committee. This list was compiled by the staff of Joyce J. George, United States Attorney for the Northern District of Ohio, and includes publications prepared by federal government agencies. The publications may provide valuable information on the nature and scope of gang violence in our cities, and may also provide insight into the prevention, disruption and control of gang activity. It should be noted that many state and local law enforcement agency publications covering local gangs are not included on this list, and should not be overlooked.

Please note that the publications prepared by the United States Marshals Service and the Bureau of Alcohol, Tobacco and Firearms are available for the use of the law enforcement community only. The United States Marshals Service has advised that they will streamline each publication and make them readily available to the general public upon request.

If you have any questions or require further information concerning any of these publications, please call Joanne Harrison, Law Enforcement Coordinator, of the United States Attorney's Office for the Northern District of Ohio, at (FTS) 293-3940 or (216) 363-3940.

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United States Attorneys' Manual Bluesheet
(Reporting of Restitution)

On March 20, 1992, Laurence S. McWhorter, Director, Executive Office for United States Attorneys, issued bluesheet USAM 3-12.411, Reporting of Restitution, to all United States Attorneys. This bluesheet sets forth guidelines for the reporting of restitution payments in the case management system.

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

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SENTENCING REFORM

Guideline Sentencing Update

A copy of the Guideline Sentencing Update, Volume 4, No. 16, dated February 28, 1992, Volume 4, No. 17, dated March 17, 1992, and Volume 4, No. 18, dated March 27, 1992, is attached as Exhibit G at the Appendix of this Bulletin.

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Federal Sentencing And Forfeiture Guide

Attached at the Appendix of this Bulletin as Exhibit H is a copy of the Federal Sentencing and Forfeiture Guide, Volume 3, No. 9, dated February 24, 1992, and Volume 3, No. 10, dated March 9, 1992, which is published and copyrighted by Del Mar Legal Publications, Inc., Del Mar, California.

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FINANCIAL INSTITUTION FRAUD ISSUES

Financial Institution Prosecution Updates

On March 9, 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 February 29, 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....	1,217
Estimated Bank Loss.....	$2,818,232,485
Defendants Charged.....	1,694
Defendants Convicted.....	1,368
Defendants Acquitted.....	26
Prison Sentences.....	1,717 years
Sentenced to prison.....	849
Awaiting sentence.....	254
Sentenced w/o prison or suspended.....	276
Fines Imposed.....	$ 5,084,081
Restitution Ordered.....	$ 322,471,930

CEOs, Chairmen, and Presidents:	
Charged by Indictments/ Informations.....	123
Convicted.....	110
Acquitted.....	1
Directors and Other Officers:	
Charged by Indictments/ Informations.....	392
Convicted.....	343
Acquitted.....	3

Savings And Loan Prosecution Update

Informations/Indictments...	644
Estimated S&L Loss.....	$ 10,662,191,750
Defendants Charged.....	1,093
Defendants Convicted.....	797 (93%)
Defendants Acquitted.....	58 *
Prison Sentences.....	1,613 years
Sentenced to prison.....	490 (78%)
Awaiting sentence.....	181
Sentenced w/o prison or suspended.....	138
Fines Imposed.....	$ 14,866,561
Restitution Ordered.....	$394,412,712

CEOs, Chairmen, and Presidents:	
Charged by Indictments/ Informations.....	124
Convicted.....	87
Acquitted.....	8
Directors and Other Officers:	
Charged by Indictments/ Informations.....	180
Convicted.....	151
Acquitted.....	5

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

Credit Union Prosecution Update

Informations/Indictments.....	71
Estimated Credit Loss.....	$83,216,477
Defendants Charged.....	90
Defendants Convicted.....	79
Defendants Acquitted.....	1
Prison Sentences.....	117 years
Sentenced to prison.....	60
Awaiting sentence.....	10
Sentenced w/o prison or suspended.....	9
Fines Imposed.....	$12,250
Restitution Ordered.....	$11,882,792

CEOs, Chairmen, and Presidents:	
Charged by Indictments/ Informations.....	8
Convicted.....	8
Acquitted.....	0
Directors and Other Officers:	
Charged by Indictments/ Informations.....	46
Convicted.....	44
Acquitted.....	0

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LEGISLATION

Weed And Seed Implementation Act Of 1992

On March 17, 1992, at the direction of Associate Deputy Attorney General Tim Shea, the Weed and Seed Implementation Act of 1992 was forwarded to the Office of Management and Budget (OMB) for interagency review and clearance. Among other things, this draft will authorize appropriations for Operation Weed and Seed for FY 1993 and for each fiscal year thereafter. The Department has requested that clearance be expedited.

On March 26, 1992, Department representatives met with OMB staff to discuss a number of agency comments that were received on the draft bill, and to make appropriate changes. The draft bill was resubmitted for further review.

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Department of Justice FY 1993 Authorization Bill

On March 26, 1992, the Department's FY 1993 authorization bill was transmitted to Congress where its prospects are uncertain. The Department has been without an enacted authorization bill for well over a decade.

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Immigration And Naturalization Service (INS) Authorization Hearing

On March 25, 1992, Gene McNary, Commissioner, Immigration and Naturalization Service (INS), testified before the House Judiciary Subcommittee on International Law, Immigration, and Refugees, regarding the INS budget and other issues. The hearing's focus tended toward the recently announced and approved reprogramming of resources for FY 1992, as well as the increasing problem of illegal entry through airports. For the first time, the airline industry expressly supported the concept of expanded exclusion authority for INS officers at ports of entry.

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Civil Liberties Act Amendments

On March 26, 1992, John Dunne, Assistant Attorney General, Civil Rights Division, testified before the House Judiciary Subcommittee on Administrative Law and Governmental Relations in support of the Department's bill to amend the Civil Liberties Act. The Act provides for redress payments to Japanese Americans who were evacuated and interned during World War II.

The Department of Justice proposal would expand coverage to include spouses and parents, not of Japanese ancestry, who were interned with their Japanese American spouses and children. The bill also would increase the authorization to permit payments to all eligible individuals based upon current estimates. The proposal would discontinue funding for the educational component of the program, a function that the Department believes has been largely fulfilled by other government programs and the private sector.

* * * * *

Taxpayer Bill Of Rights

In anticipation of congressional passage of H.R. 4210, the tax bill, the Tax Division prepared a letter to the conferees addressing several troublesome provisions of the Taxpayer Bill of Rights, which was included (in different forms) in both the House and Senate versions of H.R. 4210. Although a number of provisions were problematic, from both policy and constitutional perspectives, one of the most troublesome proposals would have subjected IRS employees to personal liability for certain actions taken in the course of their employment. H.R. 4210 passed the House and Senate on March 20, 1992, and was vetoed later the same day.

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CASE NOTES

NORTHERN DISTRICT OF ILLINOIS

Significant Appellate Victory For The Civil Division Will Enable United States To Use The False Claims Act More Effectively In a Great Variety Of Cases

The Small Business Administration (SBA) had guaranteed a $490,000 loan made by the First National Bank of Cicero to the owner of a Chicago auto dealership. Within a few months after the loan was made, the dealership was destroyed in an arson-for-profit scheme. The owner and several others were indicted on arson and other charges.

After the criminal case had been completed, a lawsuit was filed on behalf of SBA to recover the amount paid to the bank on the guaranteed loan, and also to seek treble damages under the False Claims Act. The FBI criminal investigation had disclosed that the bank had done nothing to check the accuracy of the borrower's loan application which was fraught with misstatements about the financial viability of the dealership. After lengthy discovery, motions for summary judgment were filed. The Judge ruled against the government on all counts.

The issue concerning the False Claims Act concerned whether a court could read a causation requirement into the Act. (Several other appellate courts in different circuits had done so.) The District Court Judge had adopted this interpretation of the Act holding that the loss to the SBA was caused by the fire and not by the false statements made in the application.

On February 27, 1992, the Seventh Circuit ruled in the government's favor on all issues. In essence, the Court rejected the causation requirement which had been required by the Third and Fifth Circuits. Besides allowing the government to use the False Claims Act more effectively, it should allow the government to recover treble damages on the loan in this case.

U.S. v. First National Bank of Cicero, Slip Op. 90-2404, entered Feb. 27, 1992.

Attorney: Linda Wawzenski, Assistant United States Attorney,
(312) 353-1994 or (FTS) 353-1994

* * * * *

EASTERN DISTRICT OF NORTH CAROLINA

District Court Holds That Claim Of Negligent Hiring And Supervision Is Barred By Assault And Battery Exception

Plaintiff Bajkowski sued the United States alleging that the Army had been negligent in hiring, retaining and supervising one of its soldiers who had known violent tendencies and assaulted her.

At the time that the soldier assaulted Bajkowski, he had previously been arrested by civil authorities for rape and was out on bond awaiting trial.

The government moved to dismiss the action, arguing that it was barred by the assault and battery exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(h). The government argued that prior to Sheridan v. United States, 487 U.S. 392, 108 S. Ct. 2449, 101 L. Ed. 2d 352 (1988), the Fourth Circuit precedent was clear that the government was not liable for the intentional torts of its employees. The effect of Sheridan was to provide for potential liability where a duty completely independent of the employment status existed. The government asserted that Sheridan simply recognized that when the government undertook a duty, independent of the employment relationship, then the government had a duty to act reasonably. Bajkowski argued that Sheridan had nullified the precedent and opened the door to a wide range of negligence claims against the government, based on the employment relationship.

The district court granted the government's Motion to Dismiss and adopted the government's position. According to the court, the impact of Sheridan was to acknowledge potential liability should an independent duty be owed by the government to the plaintiff. Otherwise, the action is barred by the assault and battery exception.

Bajkowski v. United States, 91-10-CIV-3-BR (E.D.N.C.), December 16, 1991

Attorney: Paul M. Newby, Assistant United States Attorney - (FTS) 672-4530 or (919)-856-4530

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CIVIL DIVISION

Supreme Court Holds That A Private Damages Remedy Is Available Under The Anti-Discrimination Provisions Of Title IX

Title IX of the Educational Amendments of 1972 prohibits discrimination on the basis of sex in activities receiving federal financial assistance. Plaintiff in this case is a female student who was raped by her high school economics teacher. Her complaint alleges that this conduct constitutes intentional discrimination on the basis of sex in violation of Title IX. Based upon the private cause of action provided in Cannon v. University of Chicago, 441 U.S. 677 (1979), plaintiff sought legal damages against the school district. The Supreme Court, reversing the court of appeals, has now agreed with her that damages are available under Title IX.

In an opinion for six Justices, Justice White adopted the presumption that, since Cannon recognized a cause of action under Title IX, a court has available to it all available remedies, including damages, for such claims. "[A]bsent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." Justice Scalia (with Rehnquist and Thomas, concurring) agreed with us that there was no justification for treating congressional silence concerning remedies as the equivalent of the broadest imaginable grant of remedial authority, but concurred in the judgment on the basis that subsequent enactments by Congress operated as an "implicit acknowledgment" that damages were available under Title IX. Since similar antidiscrimination provisions are found in Title VI of the Civil Rights Act and section 504 of the Rehabilitation Act of 1973, this decision will very likely lead to implication of a damages remedy under those statutes as well. The decision also implicitly stresses the importance of the "cause of action" question under federal statutes since the Court appears willing to provide all available remedies to a plaintiff once a cause of action is found.

Franklin v. Gwinnett County School District, No. 90-918 (February 26, 1992).
DJ # 145-0-3389.

Attorneys: Robert S. Greenspan - (202) 514-4116 or (FTS) 368-5428
John P. Schnitker - (202) 514-5425 or (FTS) 368-4116

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Supreme Court Holds That Bankruptcy Code Section 106(c) Does Not Waive Sovereign Immunity For Monetary Relief

In Hoffman v. Connecticut Dep't of Income Maintenance, a plurality of the Supreme Court concluded that the waiver of sovereign immunity for certain causes of action created by the Bankruptcy Code contained at 11 U.S.C. § 106(c) did not waive immunity for damages in suits by states. Lower courts divided on the application of this ruling in suits against the federal government.

The Supreme Court, in a 7-2 decision authored by Justice Scalia, has now ruled that § 106(c) does not permit suits for monetary relief. The opinion reaffirms that waivers of sovereign immunity are to be strictly construed. It also contains language emphasizing that the waivers of sovereign immunity contained in 106(a) and (b) turn on the filing of a government claim.

United States v. Nordic Village, Inc., No. 90-1629 (February 25, 1992).
DJ # 77-57-1062.

Attorneys: William Kanter - (202) 514-4575 or (FTS) 368-4575
Mark B. Stern - (202) 514-5089 or (FTS) 368-5089
(Case was handled by the Appellate Section of the Tax Division)

* * * * *

First Circuit Allows District Court To Rely Solely On Plaintiff's Allegations To Overturn The Attorney General's Scope Certification Under The Westfall Act

Plaintiff brought state tort claims against her supervisor, Major Charles D. Owens, for alleged sexual harassment. Based on its conclusion that the allegations were untrue, the United States certified that Major Owens was acting within the scope of his employment under the Federal Employees Liability Reform and Tort Compensation Act ("Westfall Act"). The district court rejected the certification on the ground that sexual harassment was outside the scope of employment.

We appealed, arguing that the district court could not overturn the Attorney General's certification without conducting an evidentiary hearing to determine whether the alleged conduct indeed occurred. We argued alternatively that Title VII was plaintiff's exclusive remedy for a claim of sexual harassment in federal employment. The court of appeals has now affirmed the decision of the district court with regard to the certification issue and refused to consider the Title VII claim. It stated that an evidentiary hearing was not warranted here but only in "rare circumstances" where the factual dispute concerning the certification issue was "incidentally coextensive with the merits of the case."

Wood v. United States, No. 91-1324 (February 5, 1992). DJ # 15736-4418.

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Lori Beranek - (202) 514-1265 or (FTS) 368-1265

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First Circuit Affirms Department of Education's Refusal To Reimburse State Of Maine For $1.7 Million In Costs Attributed To The Guaranteed Student Loan Program

The State of Maine sought return of money it had six years earlier voluntarily repaid to the United States Department of Education. Maine claimed that the money represented valid reimbursement for administrative expenses incurred by the state in operating the Guaranteed Student Loan Program.

The First Circuit has now issued an opinion affirming DOE's position. Although the agency's assessment of Maine's account was not supported by a regulation setting forth the precise accounting standards to be used in this aspect of the loan program, the Court gave the agency great deference, and held that "[i]t is normally reasonable for an agency administering a large grant program to insist upon punctiliousness in money matters, applying rather strict accounting principles, to prevent fraud, to prevent waste, and to help understand, and thereby to evaluate, program operation." Thus, even though there were arguments to be made by both sides on this issue, the agency was entitled to stand upon "form," and to "insist upon a fairly literal reading of books of account and requests for reimbursement."

Maine State Board Of Education v. Cavazos, No. 91-1538 (February 13, 1992). DJ # 145-0-2942.

Attorneys: William Kanter - (202) 514-4575 or (FTS) 368-4575
Richard Olderman - (202) 514-1838 or (FTS) 368-1838

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Third Circuit Issues Important Freedom Of Information Act Decision Protecting Privacy Interests In FBI Files But Releasing Source Information

The Third Circuit has issued an important Freedom of Information Act decision which broadly protects the privacy of FBI employees, persons interviewed, persons mentioned, and local officials named in an FBI murder investigation file. However, based on a ten-year-old Third Circuit precedent, the panel stated it was constrained to order the release of information provided by FBI sources even though this ruling is in conflict with the views of six other Circuits.

Landano v. United States Department of Justice, No. 91-5161 (February 11, 1992). DJ # 145-12-8433.

Attorneys: Leonard Schaitman - (202) 514-3441 or (FTS) 368-3441
John F. Daly - (202) 514-2496 or (FTS) 368-2496

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Fourth Circuit Holds That District Court Lacked Statutory Authority To Use The Personal Expenses Component of the Consumer Price Index to Calculate The Cost of Living Adjustment Permitted By The Equal Access To Justice Act.

The district court used the Personal Expenses component of the Consumer Price Index, rather than the overall Consumer Price Index, to calculate the cost of living adjustment permitted by the Equal Access to Justice Act, 28 U.S.C. 2412(d) ("EAJA").

The Fourth Circuit (Luttig, Sprouse and Butzner) has now reversed in a published decision, concluding that 28 U.S.C. 2412(d)(2)(A) requires the use of a broad cost of living index. It agreed with us that the term "cost of living," which is not defined in the EAJA, must be given its common and ordinary meaning -- the costs of food, shelter, clothing and other basic goods and services needed for daily life -- and that the structure of the Act confirms that Congress wanted the term to be given its ordinary meaning. Accordingly, said the appellate court, the district court erred in using an index which reflects, albeit roughly, the increases in the market rates for legal fees. This decision is significant because it is the first appellate court decision squarely addressing the index issue. Moreover, use of the index we are urging results in an hourly rate about 30 percent lower than the rate resulting from the use of the personal expenses index.

Gennie Sullivan v. Louis W. Sullivan, Secretary of Health and Human Services, No. 91-2176 (February 25, 1992). DJ # 137-671704

Attorneys: Michael Jay Singer - (202) 514-5432 or (FTS) 368-5432
Mary K. Doyle - (202) 514-4826 or (FTS) 368-4826

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ENVIRONMENT AND NATURAL RESOURCES DIVISION

Court Sustains FAA's Approval Of Runway Expansion At Standiford Field In Louisville, Ky. Against Challenges Based On Noise Impacts From Single Event Levels

The court denied a petition for review of the Federal Aviation Administration's approval of runway expansion at Standiford Field in Louisville, Kentucky. The expansion is specifically designed to accommodate UPS' growing number of night cargo flights into Louisville. Understandably, several neighboring communities sought to have the FAA consider noise impacts beyond the agency's customary day-night average noise standard of 65 Ldn; in specific, they argued that the agency was required to consider the impacts of Single Event Levels (SEL) of noise on protected historic and 4(f) properties.

The court noted that there was no judicial support for the argument that the FAA is required to go beyond Ldn methodology and stated that "Petitioners apparently want this court not only to tell the FAA that SEL is superior to Ldn, but also to tell the FAA how the SEL data should affect its analysis. If this court were to grant petitioners' request, it would be traveling far outside both its constitutional role and its expertise." The court also held that it was not arbitrary or capricious for the FAA to determine that an increase in noise levels would not affect the relevant characteristics of the historic communities.

Communities, Inc. v. Skinner, 6th Cir. Nos. 91-3222, 91-5386 (February 13, 1992) (Jones, Nelson and Rosen)

Attorney: M. Alice Thurston - (FTS 368-2772 or (202) 514-2772
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Court Sustains FAA's Revoking, Realigning, And Establishing Restricted Airspace Over Eastern North Carolina At The Request Of The Navy

North Carolina petitioned for review of a final rule issued by the FAA revoking, realigning, and establishing restricted airspace over eastern North Carolina at the request of the Navy. The State primarily alleged National Environmental Policy Act (NEPA) violations: FAA's alleged failure to conduct its own independent assessment of environmental impact, to consider the cumulative impact of existing and proposed military airspace restrictions elsewhere in the State, and to prepare an Environmental Impact Statement (EIS). While expressing sympathy with the State's underlying concern over the extent to which its airspace is subject to military use restrictions, the court of appeals still rejected the State's legal claims and denied the petition.

On the first point, the court found that the FAA had in fact performed independent analysis before adopting the Navy's Environmental Assessment (EA) and issuing its own Finding Of No Significant Impact (FONSI). The court was willing to look to the agency's actual conduct here, rather than to the terms of its dated operating procedures which express the position that compliance with NEPA was the Navy's responsibility. Although both the Council on Environmental Quality (CEQ) and the General Accounting Office (GAO) had criticized this position, and FAA had agreed to modify its procedures to require independent environmental analysis, FAA had not yet (and still has not) modified its procedural handbook. Fortunately, the record demonstrated that FAA had followed NEPA rather than its handbook.

On cumulative impact, the court of appeals agreed with the State that NEPA would at some point require cumulative assessment of the several existing and proposed special use airspace areas in eastern North Carolina. But the court of appeals sustained the FAA's decision not to do this for this rather minor airspace action, giving substantial weight to the fact that the Armed Services/FAA are in the process of preparing such a regional assessment at the insistence of CEQ in an EIS for a "major" military airspace proposal involving coastal North Carolina. No die is cast or resource irretrievably committed by the instant airspace action, which can be revised if subsequent regional environmental analysis were to indicate such a need. Hence, FAA did not act arbitrarily or capriciously in omitting a cumulative impact analysis from the instant rulemaking.

On need for an EIS, the court of appeals repeats and applies some favorite principles: FONSIs may appropriately rest in part on a comparison of proposed with existing use in finding insignificance; controversy is not to be equated with environmental significance; and agency has substantial discretion in evaluating alternatives, especially in EA.

State of North Carolina v. Federal Aviation Admin., 4th Cir. No. 90-1768 (Feb. 24, 1992) (Ervin, Sprouse, Butzner, Circuit Judges)

Attorney: Martin W. Matzen - (FTS) 368-2753 or (202) 514-2753
Dirk D. Snel - (FTS 368-4400 or (202) 514-4400

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TAX DIVISION

Supreme Court Rules That Investment Banking And Legal Fees Incurred Incident To A Friendly Takeover Cannot Be Deducted

On February 26, 1992, the Supreme Court unanimously affirmed the favorable decision of the Third Circuit in Indopco, Inc. v. Commissioner. Taxpayer, formerly known as National Starch and Chemical Co., sought to deduct investment banking and legal fees incurred by it incident to a friendly takeover transaction in which Unilever acquired all of taxpayer's stock. The issue presented by the case was whether these expenditures were deductible as "ordinary and necessary" business expenses under Section 162 of the Internal Revenue Code. Relying upon a line of cases that had, in our view, misconstrued an earlier Supreme Court opinion, taxpayer contended that expenditures could not be classified as capital expenses unless they resulted in the creation or enhancement of a separate and distinct asset. Since the reorganization expenses here did not create such a distinct asset, taxpayer claimed that it was entitled to deduct them as ordinary and necessary business expenses.

The Supreme Court, in an opinion by Justice Blackmun, disagreed, concluding that when "the purpose for which the expenditure is made has to do with the corporation's operations and betterment . . . for the duration of its existence or for the indefinite future or for a time somewhat longer than the current taxable year," then the expenditure is a capital expenditure and not deductible under Section 162. Justice Blackmun, whose earlier opinion had given rise to the "separate and distinct asset" test, thus put matters back on an even keel. This decision will have a significant impact on tax revenues in light of the spate of takeover activity during the 1980s.

* * * * *

Supreme Court Grants Certiorari In Summons Case Involving The Church Of Scientology

On March 2, 1992, the Supreme Court granted certiorari in Church of Scientology v. United States and Frank Zolin. This summons enforcement case presents the issue whether a summons enforcement proceeding is rendered moot once the materials sought by the Internal Revenue Service are turned over to it. This case, which centers on audiotapes in which various officials and attorneys of the Church of Scientology discussed reorganizing the Church in order to defeat IRS investigations, was previously before the Supreme Court during its 1988 Term. In that earlier round, the Supreme Court held that the Government was not required to produce extrinsic evidence in order to invoke the crime-fraud exception to the attorney-client privilege. If the allegedly privileged materials themselves indicated that the communications were in furtherance of fraudulent or criminal schemes, the attorney-client privilege could not shield them from discovery. On remand, the Ninth Circuit determined that information contained in the summoned material appeared to establish the applicability of the crime-fraud exception and, on further remand, the district court ordered the material to be turned over to the Government. The Church appealed from that enforcement order.

The district court, the court of appeals, and Justice O'Connor denied the Church's applications for a stay of the district court's order, and the material was thereafter turned over to the IRS. The Government then moved to dismiss the appeal as moot, and the Ninth Circuit granted that motion. Although the overwhelming weight of authority holds that a summons enforcement proceeding is rendered moot once materials sought by the IRS are turned over to it, the Third Circuit has held to the contrary. The Church filed its petition for certiorari on the basis of this conflict.

* * * * *

Supreme Court Rules That The United States Is Immune From Monetary Claims In A Bankruptcy Proceeding

On February 25, 1992, the Supreme Court reversed the adverse ruling of the court of appeals in IRS v. Nordic Village, 915 F.2d 1049 (6th Cir. 1990), rev'd sub nom. United States v. Nordic Village. The Court held (7-2, per Justice Scalia) that 11 U.S.C. § 106(c) does not waive the sovereign immunity of the United States from an action seeking monetary recovery in bankruptcy. The court of appeals' ruling had opened the door to a variety of monetary claims against the government in bankruptcy cases in which the government had not otherwise waived its immunity.

* * * * *

Supreme Court Rules That Trustee In Bankruptcy Is Responsible For Filing Income Tax Returns And Paying Tax

On February 25, 1992, the Supreme Court reversed the unfavorable decision of the court of appeals in In re Holywell Corp., 911 F.2d 1539 (11th Cir. 1990), rev'd sub nom. Holywell Corp. v. Smith. The Court held (9-0, per Justice Thomas) that the trustee of a liquidating trust set up under a confirmed Chapter 11 plan of reorganization must file returns and pay taxes for both corporate and individual debtors. The ruling closes a substantial loophole opened by the Eleventh Circuit when it ruled that the trustee was not responsible for filing income tax returns or paying income taxes with respect to that income. According to that court, only the debtors, who no longer had any assets, had those responsibilities.

* * * * *

Third Circuit Holds Delaware Utility Tax Unconstitutional As Applied To Utility Services Provided To The United States

Reversing an adverse judgment of the District Court in United States v. State of Delaware, the Third Circuit held that the Delaware Public Utility tax imposed on the distribution of electricity was unconstitutional when applied to the sale of electricity to Dover Air Force Base. The Third Circuit found that, although the distributor of the electricity paid the tax to the State of Delaware, Delaware state law required that the tax be passed on to the consumer. Since the consumer in this instance was the United States, the Court held that the tax here transgressed the "venerable constitutional principle of intergovernmental tax immunity implied [by the Supreme Court since McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)] from the Supremacy Clause, US Const, art VI, cl 2." It noted, however, that the distinction drawn by the Supreme Court between direct state taxation of the federal government and indirect state taxation of the federal government was not required by the text of the United States Constitution and that it did not make economic sense. The Third Circuit thus suggested that the Supreme Court might wish to revisit this issue.

* * * * *

Fourth Circuit Holds That IRS Must Effectuate Delivery Of Deficiency Notice Despite Statutory Command That Proper Mailing Without More, "Shall be Sufficient"

On March 3, 1992, the Fourth Circuit reversed the decision of the Tax Court in Clayton J. Powell, et ux. v. Commissioner, concluding that the Postal Service's failure to deliver a deficiency notice invalidated the notice even though it was sent to the taxpayer at his most recent address then listed on the Internal Revenue Service's computer. Taxpayer moved in 1987 and "notified" the IRS of his change of address by listing that new address on his 1987 tax return which he filed in February of 1988. Shortly thereafter, the IRS sent taxpayer a notice of deficiency for 1984. Because the new address had not yet been posted in the IRS computer, this notice was sent to his "old" address. Taxpayer had provided the Post Office with a forwarding address, but the Post Office neglected to send the deficiency notice to him at that new address.

Section 6212(b)(1) of the Internal Revenue Code provides that a notice of deficiency mailed to the taxpayer's "last known address" "shall be sufficient" regardless of whether the notice is actually received by the taxpayer. The holding here that the IRS must be deemed to "know" about address changes not available under current systems design and that it is chargeable with breakdowns in the Postal system is highly troubling. The holding also appears to be at odds with the Ninth Circuit's decision in King v. Commissioner, 857 F.2d 676 (9th Cir. 1988). The Tax Division is currently considering filing a petition for rehearing.

* * * * *

District Court Rules In Favor Of The IRS In Wrongful Levy Action Involving Antique Autos

On March 5, 1992, the United States District Court for Montana ruled that the Internal Revenue Service had properly levied on 91 antique Ford automobiles to collect substantial tax delinquencies owed by Edward Towe, a prominent Montana businessman. Towe Antique Ford Foundation ("TAFF"), an entity whose tax-exempt status was recently revoked, claimed that Mr. Towe had donated the antique automobiles to it in 1981. The Tax Division argued that TAFF is the alter ego and nominee of Mr. Towe with respect to the automobiles and that any transfer of the automobiles by Mr. Towe was fraudulent as to the United States. The District Court agreed, holding that the levy was not wrongful.

* * * * *

Mercedes-Benz Seeks Refund Of Excise Tax Imposed On Insurance Premiums Paid To Foreign Insurer

Mercedes-Benz of North America, Inc. recently filed suit in the United States District Court for New Jersey seeking to recover $2,465,934 in excise taxes imposed on insurance premiums paid to a foreign insurer for casualty insurance under Section 4371 of the Internal Revenue Code. Section 4371 imposes an excise tax on, inter alia, each policy of insurance issued by a foreign insurer to a domestic corporation "with respect to hazards, risks, losses, or liabilities wholly or partly within the United States." Mercedes-Benz of North America, Inc., a domestic corporation, is the importer and distributor of Mercedes-Benz automobiles and parts in the United States. Cars that are shipped to it from Germany are insured by German insurance companies against casualty losses.

The IRS imposed a tax under Section 4371 because the plaintiff effectively bore the economic burden of paying insurance premiums to the German insurers and the insurance was with respect to hazards, risks, losses and liabilities that were partly within the United States. The plaintiff contends, however, that the excise tax should not be imposed because, in order for Section 4371 to be applicable, the insurance must be primarily for risks within the United States and under the facts of this case over 90 percent of the coverage at issue related to the carrying of automobiles in international waters.

* * * * *

ADMINISTRATIVE ISSUES

CAREER OPPORTUNITIES

Civil Rights Division

The Office of Attorney Personnel Management, U.S. Department of Justice, is seeking an experienced attorney for the position of Deputy Chief of the Voting Section, Civil Rights Division, in Washington, D.C. Responsibilities include directing the activities of a staff of over 70 attorneys and support personnel. The Voting Section is responsible for the enforcement of the Voting Rights Act of 1976, the Voting Accessibility for the Elderly and Handicapped Act, the Uniformed and Overseas Citizens Absentee Voting Act, and other statutory provisions designed to safeguard the right to vote of racial and language minorities, disabled and illiterate persons, overseas citizens, persons who change their residences shortly before a Presidential election, and persons 18 to 20 years of age. To carry out its mission, the Section brings lawsuits against states, counties, cities and other jurisdictions to remedy denials and abridgement of the right to vote; defends lawsuits that the Voting Rights Act authorizes to be brought against the Attorney General; reviews changes in voting laws and procedures administratively under Section 5 of the Voting Rights Act; and monitors election day activities through the assignment of federal observers under Section 8 of the Voting Rights Act. Current salary and years of experience will determine the appropriate grade and salary level within the GM-15 range ($64,233-$83,502). No telephone calls, please.

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 of post-J.D. experience. Applicants must 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. 20530-5310 - Attn: Sandra Bright.

* * * * *

Office of United States Trustee
Phoenix, Arizona, Louisville, Kentucky, and Worcester, Massachusetts

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

Applicants must possess a J.D. degree for at least one year and be an active member of the bar in good standing (any jurisdiction). Outstanding academic credentials are essential and familiarity with bankruptcy law and the principles of accounting is helpful. Applicants must submit a resume and law school transcript to:

Department of Justice
Office of the U.S. Trustee
320 N. Central Avenue, Room 100,
Phoenix, Arizona 85004
Attn: Janet Jones.

Department of Justice
Office of the U.S. Trustee
601 W. Broadway, Suite 512
Louisville, Kentucky 40202
Attn: Joseph J. Golden

Department of Justice
Office of the U.S. Trustee
10 Causeway Street, Room 472
Boston, Massachusetts 40222
Attn: E. Franklin Childress, Jr.

Current salary and years of experience will determine the appropriate grade and salary level. The possible grade/salary range in these cities is GS-11 ($32,423 - $42,152) to GS-13 ($46,210 -$60,070). The positions are open until filled. No telephone calls, please.

* * * * *

APPENDIX

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

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

Effective Date	Annual Rate	Effective Date	Annual Rate	Effective Date	Annual Rate
10-21-88	8.15%	01-12-90	7.74%	04-05-91	6.26%
11-18-88	8.55%	02-14-90	7.97%	05-03-91	6.07%
12-16-88	9.20%	03-09-90	8.36%	05-31-91	6.09%
01-13-89	9.16%	04-06-90	8.32%	06-28-91	6.39%
02-15-89	9.32%	05-04-90	8.70%	07-26-91	6.26%
03-10-89	9.43%	06-01-90	8.24%	08-23-91	5.68%
04-07-89	9.51%	06-29-90	8.09%	09-20-91	5.57%
05-05-89	9.15%	07-27-90	7.88%	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%	03-06-92	4.58%
10-20-89	7.90%	01-11-91	6.62%	04-03-92	4.55%
11-16-89	7.69%	02-13-91	6.21%		
12-14-89	7.66%	03-08-91	6.46%		

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

* * * * *

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California, E	George L. O'Connell
California, C	Lourdes G. Baird
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Georgia, M	Edgar Wm. Ennis, Jr.
Georgia, S	Hinton R. Pierce
Guam	Frederick Black
Hawaii	Daniel A. Bent
Idaho	Maurice O. Ellsworth
Illinois, N	Fred L. Foreman
Illinois, S	Frederick J. Hess
Illinois, C	J. William Roberts
Indiana, N	John F. Hoehner
Indiana, S	Deborah J. Daniels
Iowa, N	Charles W. Larson
Iowa, S	Gene W. Shepard
Kansas	Lee Thompson
Kentucky, E	Karen K. Caldwell
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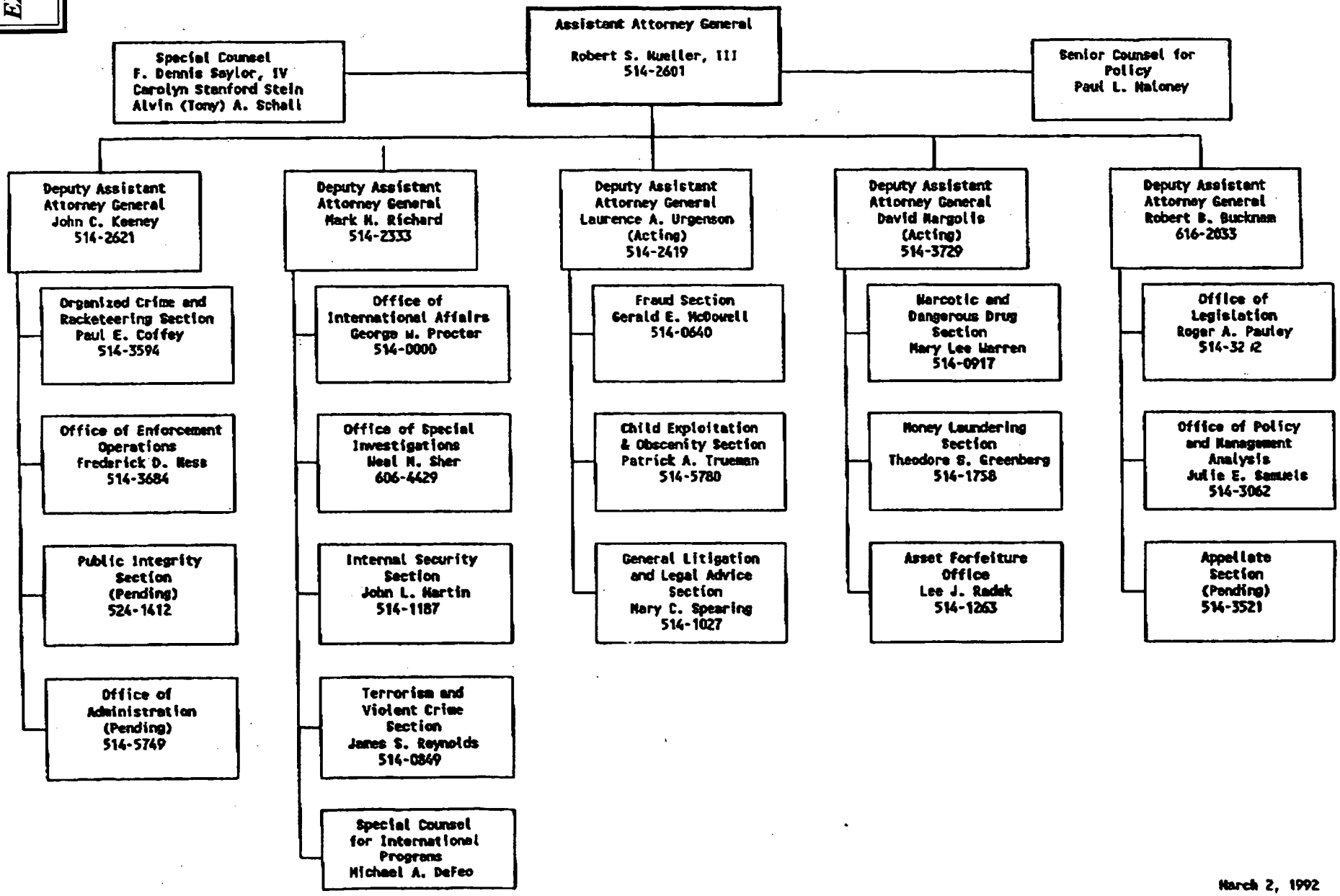
Mississippi, N	Robert Q. Whitwell
Mississippi, S	George L. Phillips
Missouri, E	Stephen B. Higgins
Missouri, W	Jean Paul Bradshaw

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

* * * * *

EXHIBIT A

CRIMINAL DIVISION ORGANIZATION CHART



March 2, 1992

EXHIBIT
B

PROTOCOL FOR COORDINATION IN MERGER INVESTIGATIONS BETWEEN THE ANTITRUST DIVISION AND STATE ATTORNEYS GENERAL

Some mergers and acquisition may become subject to parallel investigations by the Antitrust Division of the U.S. Department of Justice and one or more State Attorneys General. In such cases, parties to the merger may find it desirable to facilitate coordination between state and federal antitrust enforcers reviewing the transaction. This protocol describes the procedures under which the Antitrust Division will, upon the request of the merging parties, provide certain otherwise confidential information to State Attorneys General in order to facilitate investigative coordination.

PROCEDURES

This protocol shall apply, upon the request of the merging parties, where all acquiring and acquired persons in the transaction submit a letter to the Division that:

1. agrees to provide to the lead state, as designated under the National Association of Attorneys General Voluntary Premerger Disclosure Compact, all information submitted to the Antitrust Division pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("the HSR Act") or pursuant to Civil Investigative Demands; and

2. waives the confidentiality provisions of the HSR Act, 15 U.S.C. § 18a(h), and the the Antitrust Civil Process Act, 15 U.S.C. § 1313(c)(3), to the extent necessary to allow discussions of protected materials between the Antitrust Division and State Attorneys General.

Where the foregoing requirements have been satisfied, the Antitrust Division will provide to the lead state:

1. copies of all requests for additional information issued pursuant to the HSR Act;

2. copies of all civil investigative demands issued pursuant to the Antitrust Civil Process Act;

3. the expiration dates of all applicable waiting periods under the HSR Act.

To the extent practicable and desirable in the circumstances of a particular case, the Antitrust Division will cooperate with the lead state in analyzing the merger.

EXHIBIT C

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

February 28, 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, United States Marshals Service
Chief Postal Inspector
Commissioner, Internal Revenue Service
Director, Bureau of Alcohol, Tobacco, and Firearms
Director, United States Secret Service
Chief, United States Park Police

FROM: Cary H. Copeland CHC
Director and Chief Counsel

SUBJECT: Opinion on Administrative Forfeiture of Bank Accounts

Executive Summary: The question has arisen whether it is permissible to administratively forfeit seized bank accounts under the provisions of either section 1607(a)(1) or section 1607(a)(4) of Title 19, United States Code.

We have concluded that bank accounts are not "monetary instruments" and therefore may not be administratively forfeited pursuant to 19 U.S.C. § 1607(a)(4). However, bank accounts of a value of $500,000 or less may be administratively forfeited pursuant to 19 U.S.C. § 1607(a)(1).

Rationale: Section 1607(a)(4) of Title 19 does not apply to bank accounts. Rather, it states that "monetary instruments" may be administratively forfeited without regard to dollar value and incorporates by reference 31 U.S.C. § 5312(a)(3) which defines the term "monetary instrument" to mean currency, travellers' checks, various forms of bearer paper, and "similar material". The legislative history of 31 U.S.C. § 5312(a)(3) indicates that Congress intended the term "monetary instrument" to apply only to

highly liquid assets.[1] The relevant regulatory definition of "monetary instruments", 31 C.F.R. § 103.11(m), cannot be construed as encompassing bank accounts. Consequently, section 1607(a)(4) may not be used as a basis for the administrative forfeiture of seized bank accounts.

By contrast, section 1607(a)(1) may be used as a basis for administratively forfeiting bank accounts of a value of $500,000 or less. When incorporated by reference into substantive forfeiture statutes, the provisions of the customs laws are to be viewed as procedural rules only and do not define or limit the scope of those substantive forfeiture statutes. The only limitation on the scope of property forfeitable under the procedures 19 U.S.C. § 1607(a)(1) is the "$500,000 or less" language. The listing of specific types of property in 1607(a)(1) merely refers to the types of property forfeitable under the customs laws and in no way disallows the application of the procedures in section 1607 to other types of property forfeitable under other forfeiture statutes. Moreover, 18 U.S.C. § 981(d) and 21 U.S.C. § 881(d) expressly state that the provisions of the customs laws relating to the seizure and forfeiture of property for violation of the customs laws (i.e., 19 U.S.C. §§ 1602 et seq.) apply to forfeitures under those statutes "insofar as they are applicable and not inconsistent with" their provisions. Consequently, property valued at $500,000 or less which is forfeitable under the governing forfeiture statute may be administratively forfeited pursuant to the procedures set forth at 19 U.S.C. § 1602, et seq.

In sum, administrative proceedings are not to be used to forfeit bank accounts exceeding $500,000 in value. The Criminal Division's Asset Forfeiture Office (FTS 368-1263) is available to provide guidance regarding these issues and should be notified of any challenges to the validity of previously concluded administrative forfeitures of bank accounts.

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[1] H. Rep. No. 91-975, 91st Cong. 1, 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 4407. "It is not the intention of your committee, however, that this broadened authority be expanded any further than necessary to cover those types of bearer instruments which may substitute for currency."

EXHIBIT
D

PROSECUTORIAL IMMUNITY
(Burns v. Reed, 111 S.Ct. 1934 (1991))

Case Note

The Supreme Court has held that prosecutors have absolute immunity from damage claims arising out of their participation in a search warrant proceeding but have only qualified immunity for claims arising out of the provision of legal advice to the police. The Court explained that a prosecutor's court appearance and presentation of evidence in support of a search warrant should enjoy absolute immunity because such conduct is closely tied to the adjudicatory process and would have to been protected by the common law immunity principles. The Court, however, held that the provision of legal advice to the police did not warrant similar protection because it is too far removed from the judicial process, would not have been protected by common law immunity principles, and was less likely to generate vexatious litigation challenging the prosecutor's actions.

The decision suggests that any prosecutorial conduct involving an appearance before a judicial official will be protected by absolute immunity. It also suggests, however, that, unless an analogous immunity would have been recognized at common law, it will be difficult to establish absolute immunity for such other prosecutorial functions as investigating a charge or screening a case for indictment. The government participated in the case as amicus curiae.

Scope of Qualified Immunity

The formerly lucid parameters of absolute immunity have been obscured after Burns. However, it is obvious that prosecutors will have to place increased reliance on the qualified immunity defense when facing constitutional tort suits. In Burns, the Court stated that qualified immunity "provides ample support to all but the plainly incompetent or those who knowingly violate the law." The Court also reasoned that forcing prosecutors to consider their acts/advise more carefully, by not affording them absolute immunity, is a positive result. A focus of future litigation will be on the scope and meaning of qualified immunity.

Qualified immunity is an affirmative defense and must be pled. However, the burden is on the plaintiff to establish violations of clearly established law on the face of the complaint. Unless the plaintiff meets his burden of proof, then the defendant is entitled to judgement. Denials of qualified immunity are immediately appealable. Mitchell v. Forsyth, 472 U.S. 511 (1985).

The Supreme Court has held that the test for qualified immunity is an objective legal reasonableness test. It is generally stated as "whether a reasonable officer, in context of facts of specific case, could have believed that the conduct was lawful." If so, then summary judgment is proper. Anderson v. Creighton, 483 U.S. 635 (1987); Harlow v. Fitzgerald, 457 U.S. 800 (1982). When the qualified immunity defense is raised, the plaintiff bears the heavy burden of demonstrating substantial correspondence between the conduct in question and prior law allegedly establishing that defendant's actions were prohibited. Laidley v. McClain, 914 F.2d 1386 (10th Cir. 1990). The qualified immunity defense has been very successful in protecting the discretionary acts of government officials. In the past, there have been very few adverse verdicts from the thousands of suits filed against federal employees.

In the first post-Burns case involving prosecutorial immunity, the Third Circuit applied Burns to the actions of an Assistant United States Attorney who obtained the seizure of real and personal property in a civil forfeiture action pursuant to 21 U.S.C. § 881(a)(6)-(7). Schrob v. Catterson, No. 90-6051 (3rd Cir. Nov. 15, 1991). After reviewing the prosecutor's conduct in this matter, the Court considered whether absolute immunity applied to his conduct during four distinct phases of the case. First, the Court ruled that the prosecutor's preparation and filing of an in rem complaint for the forfeiture of criminal property is protected by absolute immunity. Id. at 24. Second, the Court ruled that absolute immunity protected the preparation of and application for a seizure warrant by a prosecutor. Id. at 33. Third, the prosecutor's participation in an ex parte hearing for the issuance of a seizure warrant is also afforded absolute immunity. Id. at 34. The Court ruled that the prosecutor is entitled to only qualified immunity for the fourth category of conduct. This category includes actions in managing and retaining seized property, negotiating the return of seized property, and making statements to the press regarding seized property. Id. at 43.

Breadth of Departmental Representation

The policy and practice of the Department is to represent federal employees who are personally sued for money damages based upon actions undertaken in their official capacities. This policy has been established as a two prong test which is codified at 28 C.F.R. §§ 50.15 and 50.16. An employee must clearly establish both prongs of the test to qualify for government representation. One, the employee's actions must appear to be within scope of his/her federal employment. And two, the provision of representation must be in the interest of the United States. See Booth v. Fletcher, 101 F.2d 676 (D.C. Cir. 1938), cert. denied, 307 U.S. 628 (1939); Barr v. Matteo, 360 U.S. 564, 591 (1959) (Brennan, J. dissenting); Falkowski v. Equal Employment Opportunity Commission, 783 F.2d 252 (D.C. Cir. 1985), reh'g denied, 783 F.2d 252 (D.C. Cir. 1986), cert. denied, 478 U.S. 1014 (1986)(the Executive Branch determines qualifications of representation); USAM 4-5.212. This process of representation through the Department is not automatic, but instead an option to be exercised at the Department's discretion. Thus, Assistant U.S. Attorneys may not always qualify for representation by the government and may need to seek private counsel.

The essence of immunity is to assure the appropriate outcome of litigation and relieve the defendant from the burdens of litigation. See Russell v. Hardin, 879 F.2d 417 (8th Cir. 1989). Nevertheless, federal employees can remain personally responsible for the satisfaction of a judgement entered solely against them. USAM 4-5.212. Therefore despite representation by the government, employees may find themselves in need of additional financial resources.

The Department is authorized to indemnify employees for judgments, when it is determined to be appropriate by the Attorney General or his designee. 28 C.F.R. §5015(c)(1). An employee may request indemnification to satisfy a verdict, judgement, or award. 28 C.F.R. §50.15(c)(4). However, this indemnification process is no guarantee of protection to Assistants, who fall outside the range of acceptable professional conduct. Therefore, there is no guarantee of the government providing protection for the entire gambit of actions engaged in by an employee.

Professional Liability Insurance

Combining the amounts of absolute and qualified immunity still available to prosecutors after Burns, there has not been a significant decrease in the protection provided to them. Qualified immunity alone protects public officials, except those who are plainly incompetent or those who knowingly violate the law. Burns, supra; Doe v. Connecticut Dept. of Children and Youth Services. 712 F. Supp. 277 (D. Conn. 1989). Thus, there is no compelling reason for federal prosecutors to purchase professional liability insurance at this juncture. However, the acquisition of insurance may provide an additional sense of security and further safeguard employees against possible financial burdens in connection with a malpractice judgement, which might not be covered by the Department in the event that the employees have exceeded their legal authority.

The Department has not promulgated an official policy on the acquisition of professional liability insurance, and only a limited number of companies even offer policies which cover government employees. Professional liability insurance will cost about $200 per year. Currently, these costs must be covered completely by the individual seeking professional liability insurance, although the amount may be tax deductible as a business expense. If an employee wishes to limit any potential liability in light of the alterations made after Burns, he or she should contact either the American Bar Association or a local insurance broker for further details.

For further information, please contact Deborah Westbrook, Legal Counsel, Executive Office for United States Attorneys at (FTS) 368-4024 or (202) 514-4024.

EXHIBIT E

GANG PUBLICATIONS

Prepared Under the Auspices of the Organized Crime and Violent Crime Subcommittee of the Attorney General's Advisory Committee

January 31, 1992

DEPARTMENT OF JUSTICE

Office of the Attorney General

1. Drug Trafficking: A Report To The President (August 3, 1989)

Bureau of Justice Assistance

1. Organized Crime/Narcotics Program A Program Brief

Copies of these documents are available by calling the Bureau of Justice Assistance Clearing House - 1-800-688-4252

Office of Policy Development (OPD)

1. Prison Gangs: Their Extent, Nature and Impact on Prisons

This 220-page document was prepared in July, 1985 - Copies are not available For information, call: (202) 514-4601 or (FTS) 368-4601

Criminal Division

1. Report on Asian Organized Crime (Testimony by Robert S. Mueller, III, Assistant Attorney General, Criminal Division, November 6, 1991, before the Senate Permanent Subcommittee on Investigations, Committee on Governmental Affairs)

To order a copy, call: Office of Legislative Affairs, Department of Justice: (202) 514-2117 (FTS) 368-2117

United States Marshals Service

1. Threat Analysis Division
2. Street Gangs - Bloods and Crips
3. Street Gangs
4. Asian and Pacific and Islander Organized Crime
5. Crystal Methamphetamine - Recognition/Safety
6. Street Gangs - Terminology
7. Motorcycle Gangs
8. Glossary of Dangerous Motorcycle Gangs - Terminology
9. Hate Violence and White Supremacy
10. Skinheads
11. Jamaican Organized Crime
12. Prison Gangs (Tattoos)
13. Colombian Drug Cartels

These publications are not available to the general public. They are for the use of the law enforcement community only.

For information on ordering any of these publications, call: (202) 307-9250 or (FTS) 367-9250

NATIONAL INSTITUTE OF JUSTICE (NIJ)

1. OJP Initiatives on Gangs: Drugs and Violence in America
2. Gang Involvement in Cocaine "Rock" Trafficking
3. Major Issues in Organized Crime Control: Symposium Proceedings (1987) (215 pages)
4. Study of Organized Crime Business-Type Activities and Their Implications for Law Enforcement (128 pages)
5. Organized Crime In the United States: A Review of the Public Record (1982) (183 pages)
6. Differences Between Gang and Non-Gang Homicides (1985)
7. Measuring the Effectiveness of Organized Crime Control (143 pages)
8. Police Response to Street Gang Violence: Improving the Investigative Process, Executive Summary (65 pages)
9. Drug Trafficking (1986-87)
10. Impact of Police Investigations on Police-Reported Rates of Gang and Non-Gang Homicides
11. Street Gang Violence (From Violent Crime, Violent Criminals

These publications are available either through an interlibrary loan @ $4.50, microfish @ $2.00; or photocopying @ $5.00 per document, and 10 cents per page.

No. 9 - "Drug Trafficking" is a videotape at a cost of $21.30.

To place an order, call: 1-800-851-3420

OFFICE OF JUVENILE JUSTICE DELINQUENCY PREVENTION (OJJDP)

1. Community Responses Crucial for Dealing with Youth Gangs
2. National Youth Gang Suppression and Intervention Program
3. Juvenile Gangs: Crime and Drug Trafficking
4. Social Processes of Delinquency and Drug Use Among Urban Gangs (from Gangs in America)
5. Safer Schools, Better Schools
6. Youth Gangs: Problem and Response
7. Strategies and Perceived Agency Effectiveness in Dealing With the Youth Gang Problem from Gangs in America)
8. Why the United States Has Failed to Solve its Youth Gang Problem (from Gangs in America)

These publications are available. To place an order, call: 1-800-638-8736

OJJDP - Cont'd.

9. Youth Gangs: Continuity and Change (from Crime and Justice: A Review of Research, Vol. 12)
10. Crime File: Drugs, Youth Gangs
11. Targeting Programs for Delinquency Intervention with an Emphasis on Gang Prevention/Intervention

BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS

1. Crips and Bloods Streets Gangs (3 volumes)
2. Jamaican Organized Crime (Vol. 1-6)
3. Special Operations Division, Intelligence Branch Crips and Bloods

These publications are available to law enforcement officials only. They are not available to the general public.

To place an order, call (202) 927-7890

GENERAL ACCOUNTING OFFICE

1. Drug Investigations: Organized Crime Drug Enforcement Task Force Program's Accomplishments
2. Criminal Penalties Resulting from the Organized Crime Drug Enforcement Task Forces
3. Drug Investigations - Organized Crime Drug Enforcement Task Force Program - A Coordinating Mechanism
4. Organized Crime Figures and Major Drug Traffickers - Parole Decisions and Sentences Served
5. Organized Crime: Issues Concerning Strike Forces
6. Nontraditional Organized Crime: Law Enforcement Official's Perspectives on Five Criminal Groups

These publications are available by calling: (202) 275-6241

DEPARTMENT OF THE AIR FORCE

1. NARC Brief 88-10 - Black Street Gangs, The Crips and the Bloods
2. NARC Brief 90-7 - Street Gang Assessment, East St. Louis, Illinois
3. NARC Brief 88-18 - Street Gangs: Drugs and Crime

Availability of these publications is not known.

For information, call: (202) 767-6077

NATIONAL INSTITUTE ON DRUG ABUSE (NIDA)

1. Drugs and Violence

This publication is referred to as Research Monograph #103.

For further information, call: National Clearinghouse for Alcohol and Drug Information - 1-800-729-6686

PRESIDENT'S COMMISSION ON ORGANIZED CRIME

1. Organized Crime and Heroin Trafficking (Series of Hearings in 1985)
2. America's Habit - Drug Abuse, Drug Trafficking, and Organized Crime (1986)
3. Impact - Organized Crime Today

This Commission was established by Executive Order 12435 on July 28, 1983. The Commission was dissolved in 1986.

These publications are available on loan from the Criminal Division Library, Bond Building, Washington, D.C. - For information, call: (202) 514-1141 or (FTS) 368-1141

* * * * *

U.S. Department of Justice

Executive Office for United States Attorneys

EXHIBIT F

Office of the Director

Washington, D.C. 20530

March 20, 1992

TO: Holders of United States Attorneys' Manual Title 3

FROM: United States Attorneys' Manual Staff
Executive Office for United States Attorneys

/s/ Laurence S. McWhorter
Director

RE: Reporting of Restitution

NOTE: 1. This is issued pursuant to USAM 1-1.510.
2. Distribute to Holders of Volume I, USAM.
3. Insert in front of affected section.

AFFECTS: USAM 3-12.411

PURPOSE: This bluesheet sets forth guidelines for the reporting of restitution payments in the case management system.

The following new section has been added to USAM 3-12.400.

3-12.411 Reporting of restitution.

Any payments of restitution received by the United States Attorneys' offices on or after the effective date of this policy shall be reported in the case management system (PROMIS, USACTS-II or PC-USACTS), without regard to whether the victim is the United States or a third party. Such payments shall be reported in accordance with the appropriate case management system users manual. Use of the USA-117A (Criminal Debtor Card) is no longer authorized.

Guideline Sentencing Update

FEDERAL J

EXHIBIT G

VOLUME 4 • NUMBER 18 • MARCH 27, 1992

Departures

MITIGATING CIRCUMSTANCES

Ninth Circuit upholds downward departures for drug-smuggling "mules" for whom § 3B1.2 mitigating role adjustment was unavailable. In two separate cases consolidated for appeal, a Mexican citizen with no prior criminal record received money ($1,000 and $2,000) to drive a carload of marijuana (190 pounds and 50–100 kilograms) into the U.S. from Mexico. Both pled guilty to possession with intent to distribute. Neither was eligible for a mitigating role adjustment, § 3B1.2, because each was the only participant in the offense. *See U.S. v. Zweber*, 913 F.2d 705, 708–09 (9th Cir. 1990) (may not receive § 3B1.2 reduction for role in uncharged or unconvicted conspiracy). They were separately sentenced by the same judge, who departed from their 41–51-month ranges to impose 15- and 8-month terms. The judge departed because the guideline ranges overstated the seriousness of the defendants' conduct as mere "mules" in the drug trade along the Arizona-Mexico border, particularly in light of guideline sentences, including probation, the court was imposing in more serious drug smuggling cases.

The appellate court affirmed, relying on *U.S. v. Bierley*, 922 F.2d 1061, 1065–66 (3d Cir. 1990), which held that departure may be considered for a defendant who could not qualify for an adjustment under § 3B1.2 because he was the only "criminally responsible 'participant'" in the offense of conviction. "Applying *Bierley* . . . we find that the marginal roles played by [defendants] in the drug trade, coupled with the unavailability of the section 3B1.2 downward adjustment, could well represent a permissible basis for a downward departure."

The court also held that the district court could consider "the socioeconomics and the internal politics of the drug trade along the Mexican border and the sentencing patterns in other drug cases arising from trafficking across that border. . . . '[M]ules' along the Mexican border are uniquely situated in terms of their role in the drug trade, being even less involved in the overall drug business and with less to gain from the success of the drug enterprise than ordinary underlings in conspiracy cases. This is a peculiar condition that the Sentencing Commission did not address." *Cf. U.S. v. Alba*, 933 F.2d 1117, 1121–22 (2d Cir. 1991) (even with § 3B1.2 reduction, departure for "less than minimal" role may be warranted for "extremely limited nature of [defendant's] involvement" in offense).

Note: *Bierley* held that such a departure "would be limited to the 2 to 4 level adjustment" allowed under § 3B1.2. Here, the court did not rule on the issue because the government did not appeal the extent of the departures.

U.S. v. Valdez-Gonzalez, No. 89-1027 (9th Cir. Feb. 19, 1992) (Tang, J.) (Fernandez, J., dissenting).

U.S. v. Boshell, 952 F.2d 1101, 1106–09 (9th Cir. 1991) (Affirming downward departure for defendant who faced much longer sentence under Guidelines than comparable and more culpable co-conspirators who, unlike defendant, were allowed to plead to pre-Guidelines offenses: "[T]he need to avoid unwarranted sentencing disparities among co-defendants involved in the same criminal activity has long been considered a legitimate sentencing concern. . . . [W]here unusual circumstances are present, departure for equalization of co-defendants' sentences may be warranted." *Cf. U.S. v. Ray*, 930 F.2d 1368, 1372–73 (9th Cir. 1990) (departure warranted where co-defendants received much lower sentences in period Ninth Circuit held Guidelines unconstitutional).

The sentencing court also departed based on defendant's personal characteristics, background, and job history. The appellate court remanded for articulation of the specific reasons for departure and the underlying factual basis: "Only in extraordinary circumstances may a court rely on one of the six factors listed in [U.S.S.G. §§ 5H1.1–1.6, p.s.] to depart from the guidelines range.").

Sentencing Procedure

EVIDENTIARY ISSUES

Second Circuit holds courts must consider illegally seized evidence at sentencing. "We conclude that the benefits of providing sentencing judges with reliable information about the defendant outweigh the likelihood that allowing consideration of illegally seized evidence will encourage unlawful police conduct. Absent a showing that officers obtained evidence expressly to enhance a sentence, a district judge may not refuse to consider relevant evidence at sentencing, even if that evidence has been seized in violation of the Fourth Amendment." *See also U.S. v. Lynch*, 934 F.2d 1226, 1234–37 (11th Cir. 1991) (illegally seized evidence may be considered), *cert. denied*, 112 S. Ct. 885 (1992); *U.S. v. Torres*, 926 F2d. 321, 325 (3d Cir. 1991) (same); *U.S. v. McCrory*, 930 F.2d 63, 68 (D.C. Cir. 1991) (same, adding that evidence unlawfully seized for the purpose of increasing sentence may require suppression), *cert. denied*, 112 S. Ct. 885 (1992).

U.S. v. Tejada, No. 91-1071 (2d Cir. Feb. 21, 1992) (Meskill, J.).

PLEA AGREEMENTS

Fourth Circuit holds that Chapter 6 of the Sentencing Guidelines did not change the standard for withdrawal of guilty pleas. Defendant pled guilty to one count pursuant to a plea agreement where the government agreed to dismiss a second count and recommend sentencing at the low end of the guideline range. At the plea hearing the court accepted defendant's guilty plea but deferred acceptance of the plea agreement pending the PSR. Before the court accepted the agreement, defendant moved to withdraw his guilty plea. The district court denied the motion, holding that defendant had not established a "fair and just reason" for withdrawal under Fed. R. Crim. P. 32(d), and later imposed sentence in accordance with the agreement. On appeal defendant claimed that sections of Chapter 6 "require a new, less rigorous standard to govern motions for withdrawal made before the district court accepts a plea agreement."

The appellate court rejected that contention: "Ewing essentially argues that since sections 6B1.1–.3[,p.s.] prevent the sentencing court from accepting a plea agreement until the court has reviewed the presentence report, the rule should be the same for a guilty plea. Until then, he argues, the court has not accepted the plea, and thus he should be able to withdraw his plea upon some showing of cause less demanding than the current fair and just reason standard. . . . The flaw in Ewing's position is its failure to acknowledge the distinction between a plea of guilty and a plea agreement." The plea agreement here was made under Rule 11(e)(1)(A) and (B), and "the rule in no way suggests that the plea of guilty may be withdrawn as a matter of right . . . at any time after its acceptance except when a type (e)(1)(A) or (C) plea agreement is rejected by the court. Thus, once a plea of guilty is accepted by the court, the defendant is bound by his choice and may withdraw his plea in only two ways relevant here, either by showing a fair and just reason under Rule 32(d), or by withdrawing under Rule 11(e)(4) after a rejected plea agreement."

The Sentencing Guidelines did not change this. Section 6B1.1(c), p.s. "requires the sentencing court to defer its decision whether to accept a plea agreement until there has been an opportunity to examine the presentence report; Rule 11 standing alone gives the court the discretion as to whether to defer. . . . We have no occasion here to resolve the patent conflict between the Rule and the Guideline, for the district court did not abuse its discretion in accepting the guilty plea and later approving the plea agreement as it was permitted to do under the Rule and required to do under the Guidelines."

U.S. v. Ewing, No. 91-5250 (4th Cir. Feb. 20, 1992) (Widener, J.).

Relevant Conduct

Eighth Circuit analyzes interplay of relevant conduct and plea bargains in fraud loss case. Defendant pled guilty to three counts of mail fraud for selling three cars with altered odometers. In exchange, the government dismissed other counts, including a conspiracy count involving over 300 cars with altered odometers sold at auction for other car dealers. Defendant was sentenced on the basis of the loss in the three counts of conviction, but the government argued on appeal that the amount of loss should have included the amount from the dismissed conspiracy count as relevant conduct.

The appellate court remanded: "To determine the amount of loss in this case, the district court considers all harm resulting from 'all . . . acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction.' U.S.S.G. § 1B1.3(a)(2) . . . . The mail fraud counts to which Morton pleaded guilty included a preamble incorporating by reference assertions contained in the conspiracy count." The court held this was not sufficient proof for relevant conduct: "[T]he 'offense of conviction' is the substantive offense to which the defendant pleads guilty. . . . There is no written plea agreement in this case. Instead, Morton pleaded guilty to three counts of mail fraud in open court and specifically denied knowledge that the cars involved in the conspiracy count had rolled-back odometers. The transcript of the plea hearing does not show anyone informed Morton he was conceding facts underlying the conspiracy. Under the circumstances, '[t]o permit a greater offense to be incorporated by reference into each count of the indictment destroys the plea bargain process.' *U.S. v. Sharp*, 941 F.2d 811, 815 (9th Cir. 1991). By incorporating the entire scheme into each count, the Government concedes little when it agrees to dismiss many counts in exchange for a plea including the entire scheme. *Id.*"

The Court concluded: "[W]e agree with the district court that Morton's guilty plea is not a basis for including the conspiracy's cars in the loss calculation. [However], the loss resulting from the conspiracy's cars may still be included under U.S.S.G. § 1B1.3 if the conspiracy is 'part of the same course of conduct or common scheme or plan' as the mail fraud. '[T]his is a fact intensive inquiry in which the district court is given broad discretion to assess the relevant facts.' . . . The relevancy of conduct and the amount of loss under the fraud guidelines are factual findings reversible only for clear error."

U.S. v. Morton, No. 91-2618 (8th Cir. Feb. 24, 1992) (Fagg, C.J.).

Adjustments

Victim-Related Adjustments

U.S. v. Sutherland, No. 91-1961 (7th Cir. Jan. 28, 1992) (Eschbach, Sr. J.) (Reversed—there was insufficient evidence to find that World War I and II veterans and families were, as a group, "unusually vulnerable" under § 3A1.1 to fraud scheme based on collecting and converting their personal war memorabilia, or that defendant specifically targeted the elderly. "In a fraud case where the defendant issues an appeal to a broad group, the court should focus on whom the defendant targets, not on whom his solicitation happens to defraud. . . . § 3A1.1 is designed to punish criminals who choose vulnerable victims, not criminals who target a broad group which may include some vulnerable persons." There must be specific evidence showing vulnerability of the victim—the enhancement may not be based on a "broad and unsupported generalization.") *See also U.S. v. Cree*, 915 F.2d 352, 353–54 (8th Cir. 1990) (enhancement improper where defendant did not know extent of or intend to exploit victim's vulnerability); *U.S. v. Wilson*, 913 F.2d 136, 138 (4th Cir. 1990) (random targets of solicitation not vulnerable); *U.S. v. Creech*, 913 F.2d 780, 781 (10th Cir. 1990) (no evidence that recently-married husbands are unusually vulnerable to threats to family). *But cf. U.S. v. Boise*, 916 F.2d 497, 506 (9th Cir. 1990) (defendant need not intentionally select victim because of vulnerability).

Obstruction of Justice

U.S. v. Capps, 952 F.2d 1026, 1028–29 (8th Cir. 1991) (Affirming § 3C1.1 enhancement for obstruction of justice based on defendant's statement to third party in a bar that a co-conspirator—who had become a confidential government informant—"was snitching on her and that she was bringing in some bikers to kick his ass and deal with the snitch." Defendant argued that because the threat was never communicated to the informant the enhancement was improper. The appellate court disagreed and held that "since the adjustment applies to attempts to obstruct justice, it is not essential that the threat was communicated to [the informant] if it reflected an attempt by Capps to threaten or intimidate her conspirators into obstructing the government's investigation." The threat was "more than idle bar talk," and there was also evidence defendant had threatened others in the conspiracy.).

U.S. v. Amos, 952 F.2d 992 (8th Cir. 1991) (Reversed—defendant who withdrew guilty plea and then denied guilt at trial should not have received a two-level adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1: "The fact that Amos admitted to the crime and accepted responsibility when he entered his guilty plea became irrelevant once he proceeded to trial and denied the offense.").

Guideline Sentencing Update

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Appellate Review

Supreme Court holds that remand is not required for departure based on both valid and invalid factors when same sentence would have been imposed absent invalid factors. In so holding the Court resolved a split among the circuits. Several circuits had held that a departure based in part on invalid factors may be affirmed on a case-by-case basis if there are valid factors that warrant departure and it appears the same sentence would have been imposed absent the invalid factors. *See U.S. v. Jones*, 948 F.2d 732, 741 (D.C. Cir. 1991); *U.S. v. Glick*, 946 F.2d 335, 339–40 (4th Cir. 1991); *U.S. v. Alba*, 933 F.2d 1117, 1122 (2d Cir. 1991); *U.S. v. Diaz-Bastardo*, 929 F.2d 798, 800 (1st Cir. 1991); *U.S. v. Jagmohan*, 909 F.2d 61, 65 (2d Cir. 1990); *U.S. v. Franklin*, 902 F.2d 501, 508 (7th Cir.), *cert. denied*, 111 S. Ct. 274 (1990); *U.S. v. Rodriguez*, 882 F.2d 1059, 1068 (6th Cir. 1989). Two circuits had held that remand was automatically required in such a situation. *See U.S. v. Zamarripa*, 905 F.2d 337, 342 (10th Cir. 1990); *U.S. v. Hernandez-Vasquez*, 884 F.2d 1314, 1315–16 (9th Cir. 1989) (per curiam).

In the case before the Court, defendant received an upward departure in his criminal history category based upon several prior arrests that were not reflected in his criminal history score and two prior convictions that were too old to be counted. Although the first ground was an improper basis for departure, *see* U.S.S.G. § 4A1.3, p.s., the appellate court affirmed the sentence because it held the latter factor was valid and justified the increase. *U.S. v. Williams*, 910 F.2d 1574, 1580 (7th Cir. 1990).

The Supreme Court remanded because it was unable to determine whether the appellate court had concluded that the same sentence would have been imposed absent the invalid factor. However, the Court held that remand is not *automatically* required in such circumstances. In reaching its conclusion, the Court determined that "the reviewing court is obliged to conduct two separate inquiries. First, was the sentence imposed either in violation of law or as a result of an incorrect application of the Guidelines? If so, a remand is required under § 3742(f)(1).... [A] reviewing court may not affirm a sentence based solely on its independent assessment that the departure is reasonable under § 3742(f)(2)." However, a remand under (f)(1) is not required "every time a sentencing court might misapply a provision of the Guidelines .... When a district court has intended to depart from the guideline range, a sentence is imposed 'as a result of' a misapplication of the Guidelines if the sentence would have been different but for the district court's error. Accordingly, in determining whether a remand is required under § 3742(f)(1), a court of appeals must decide whether the district court would have imposed the same sentence had it not relied upon the invalid factor or factors."

"If the court concludes that the departure is not the result of an error in interpreting the Guidelines, it should proceed to the second step: is the resulting sentence an unreasonably high or low departure from the relevant guideline range? If so, a remand is required under § 3742(f)(2)." Whether a departure sentence is reasonable is determined by "the amount and extent of the departure in light of the grounds for departing.... A sentence... can be 'reasonable' even if some of the reasons given by the district court... are invalid, provided that the remaining reasons are sufficient to justify the magnitude of the departure."

Note that "the party challenging the sentence on appeal, although it bears the initial burden of showing that the district court relied upon an invalid factor at sentencing, does not have the additional burden of proving that the invalid factor was determinative in the sentencing decision. Rather... a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, i.e., that the error did not affect the district court's selection of the sentence imposed. *See* Fed. Rule. Crim. Proc. 52(a)."

The Court added instruction on "the degree of an appellate court's authority to affirm a sentence when the district court, once made aware of the errors in its interpretation of the Guidelines, may have chosen a different sentence. Although the [Sentencing Reform] Act established a limited appellate review of sentencing decisions, it did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion. The selection of the appropriate sentence from within the guideline range, as well as the decision to depart from the range in certain circumstances, are decisions that are left solely to the sentencing court. U.S.S.G. § 5K2.0, p.s. The development of the guideline sentencing regime has not changed our view that, except to the extent specifically directed by statute, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'"

Because the issue was not properly presented for argument, the Court declined to review whether outdated convictions that are not similar to the instant offense may be considered for departure. *Compare U.S. v. Aymelek*, 926 F.2d 64, 73 (1st Cir. 1991) (may be appropriate in some cases); *U.S. v. Williams*, 910 F.2d 1574, 1578–79 (7th Cir. 1990) (same); *U.S. v. Russell*, 905 F.2d 1439, 1443–44 (10th Cir. 1990) (same); *U.S. v. Carey*, 898 F.2d 642, 646 (8th Cir. 1990) (same) *with U.S. v. Leake*, 908 F.2d 550, 554 (9th Cir. 1990) (only if similar). *See also* U.S.S.G. § 4A1.2, comment. (n.8) ("evidence of similar misconduct" in outdated convictions may be considered for departure).

Williams v. U.S., No. 90-6297 (U.S. Mar. 9, 1991) (O'Connor, J.) (White, Kennedy, JJ., dissenting).

Relevant Conduct

Ninth Circuit holds relevant conduct is not limited to conduct that would constitute federal offense. Defendant, an employee of a government contractor, pled guilty to submitting two false petty cash vouchers, totaling less than $200, which were later charged to the United States. He also admitted to submitting false vouchers worth $214,705.39 over the years to his employer. There was no proof that the United States was charged for these expenses and thus no indication that these submissions violated federal law. The district court included all the vouchers in calculating defendant's base offense level under U.S.S.G. § 1B1.3(a)(2). Defendant appealed, claiming that because the federal government had no jurisdiction over the $214,000 worth of false vouchers they should not have been used to compute his sentence.

The appellate court affirmed, holding that actions amounting to state offenses but not federal offenses may be considered under the relevant conduct provisions: "We find no intention by the Sentencing Commission to narrow §§ 1B1.3(a)(2) and (a)(3) to federal conduct only. Those subsections specifically direct the consideration of all acts that were part of the same course of conduct or common scheme or plan, as well as all harm that resulted from those acts. . . . [A]ll of Newbert's actions took place in the same general course of conduct. There was no difference in the way he committed the state offenses compared to the federal offenses. . . . There is no indication the Sentencing Commission intended to distinguish among the jurisdictional components of a clearly common pattern of criminal conduct. Rather, the Sentencing Guidelines evidence a clear intent that persons who commit a scheme of fraud be punished in accordance with the total harm caused by the fraud." *See* § 1B1.3(a)(2), comment. (backg'd).

U.S. v. Newbert, 952 F.2d 281, 284 (9th Cir. 1991).

Criminal History

Career Offender Provision

Fourth Circuit holds that, in determining whether offense is a "crime of violence," courts should look only to conduct charged in the indictment, not underlying conduct. Defendant pled guilty to being a convicted felon in possession of firearms after police discovered firearms buried in his backyard. He had two prior convictions for violent offenses and was sentenced as a career offender under U.S.S.G. § 4B1.1. He appealed that designation, claiming the instant offense was not "a crime of violence" as defined by § 4B1.2. The appellate court agreed and remanded. It first held that, in determining whether an offense is "violent," "the sentencing court is limited to an evaluation of the conduct explicitly charged in the indictment" and may not look to other facts surrounding the offense, even for offenses not specifically listed in § 4B1.2. *See* U.S.S.G. § 4B1.2, comment. (n.2) (Nov. 1991) (court may look to "conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted").

The court also held that "the offense, felon in possession of a firearm, in the absence of any aggravating circumstances charged in the indictment, does not constitute a per se 'crime of violence.'" *Accord U.S. v. Chapple*, 942 F.2d 439, 441–42 (7th Cir. 1991) [4, #8]. *Contra U.S. v. Stinson*, 943 F.2d 1268, 1271–72 (11th Cir. 1991) [4, #10]; *U.S. v. O'Neal*, 937 F.2d 1369, 1375 (9th Cir. 1990) (amending and superseding 910 F.2d 663 [3, #13])). Other circuits have held that possession plus other threatening or violent behavior constitutes a crime of violence. See cases listed in 4 *GSU* #8 summary of *Chapple*.

Note: Effective Nov. 1, 1991, U.S.S.G. § 4B1.2, comment. (n.2) states, "The term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon."

U.S. v. Johnson, 953 F.2d 110, 113–15 (4th Cir. 1991).

Third Circuit holds that in determining whether an offense involved "serious potential risk of physical injury to another," inquiry into underlying conduct is not required if the statute of conviction indicates such a risk. Defendant was sentenced as a career offender, partly on the basis of a prior state felony conviction for first degree reckless endangering that resulted from pushing and slapping a store clerk during a shoplifting attempt. Defendant offered to testify at the sentencing hearing that he did not commit those acts and that there was little likelihood of serious injury to the clerk. The district court refused to hear the testimony and ruled that the conviction was a "crime of violence" under § 4B1.1. Despite "grave doubts about the . . . extremely broad definition of 'crime of violence'" that may cover "a crime whose mens rea is no worse than recklessness," the appellate court affirmed.

In the prior state conviction defendant pled guilty to "recklessly engag[ing] in conduct which creates a substantial risk of death to another person." The court held that constituted a crime of violence under the language of § 4B1.2(1)(ii) that encompasses an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." Further, the district court did not err when it refused to "hold a mini-trial on what actually happened." The appellate court held, "where the language of the criminal statute so closely tracks the language of the Guideline that the defendant's conviction necessarily meets the Guideline standard, the district court need look no further than the statute and need not inquire into the underlying conduct charged. . . . [A]lthough a per se approach based on the statute alone is not required in every case, *see U.S. v. John*, 936 F.2d 764 (3d Cir. 1991), such an approach is generally preferable to inquiry into the facts of each case."

Note: This case involved the pre-1991 amendment version of § 4B1.2(1)(ii), comment. (n.2), used in *Johnson, supra*.

U.S. v. Parson, No. 91-3059 (3d Cir. Jan. 31, 1992) (Becker, J.).

Offense Conduct

Calculating Weight of Drugs—Marijuana

U.S. v. Hash, No. 91-5340 (4th Cir. Feb. 3, 1992) (Phillips, J.) (vacating sentence imposed on defendant, convicted of manufacturing and cultivating six marijuana plants, that was based on assigning each plant a weight of 100 grams pursuant to § 2D1.1(c) n.* (at p.82): "For offenders possessing fewer than 50 plants, we believe Congress intended to remain true to the general rule of [21 U.S.C.] § 841, which makes actual weight determinative for purposes of sentencing. Under this interpretation, U.S.S.G. § 2D1.1(c) n.* is invalid insofar as it equates one plant with 100 grams of marijuana in offenses involving fewer than 50 plants. . . . [A]ctual weight, not presumed weight, [must] be the sentencing measure"). *Accord U.S. v. Streeter*, 907 F.2d 781, 790 (8th Cir. 1990).

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Departures

MITIGATING CIRCUMSTANCES

Ninth Circuit holds "incomplete duress" may be considered for downward departure under § 5K2.12, p.s.; also, jury's rejection of duress defense on count of conviction does not preclude that defense for relevant conduct. The cases here arose from the prosecution of a large drug ring, some of whose members were coerced to work for the ring by means of brutal violence and intimidation. At trial several defendants claimed the defense of duress, but the jury returned guilty verdicts. The district court held that, because the jury rejected the duress defense, it could not consider duress for sentencing purposes. The appellate court affirmed the convictions, but remanded for resentencing and explained how duress should be considered.

Like the Eighth Circuit in *Whitetail* below, the court followed the reasoning of *U.S. v. Cheape*, 889 F.2d 477, 480 (3d Cir. 1989) [2 GSU #16], where the Third Circuit held that a jury's rejection of a defense of coercion and duress did not preclude departure under § 5K2.12, p.s. The Ninth Circuit determined that the defense of duress at trial requires an objective analysis, whereas for sentencing purposes subjective elements should be considered: "Evidently the Commission had in mind the showing of duress less than what constitutes a defense to a crime; for if the defense were 'complete,' there would have been no crime requiring a sentence.... Moreover, the Commission emphasizes not only 'the reasonableness of the defendant's actions,' but 'the circumstances as the defendant believed them to be.' U.S.S.G. § 5K2.12."

The court also held that duress should be considered for relevant conduct and could preclude use of that conduct for sentencing; or, departure may be warranted if "incomplete duress" is proved. A defendant convicted of a single distribution count was sentenced on the basis of all drugs she distributed over a two-and-a-half-month period. She admitted the distributions, but claimed they were made under duress. The appellate court held that this defense should be considered: "The jury verdict as to her act on September 14, 1989 does not speak to her state prior to this date. If her contention is correct, she committed no crime prior to this date. The sentencing court cannot hold her responsible without first deciding whether she was in fact under duress. If the court should conclude that [she] has not carried her burden of proving duress because her evidence of duress is not credible, it is still open to the court to consider whether there was duress that did not amount 'to a complete defense.' U.S.S.G. § 5K2.12." The court added that expert testimony regarding battered-woman syndrome was relevant to this defense. Also, evidence of incomplete duress may be presented at sentencing even if a defendant failed to make out a prima facie case of duress during trial.

U.S. v. Johnson, No. 90-30344 (9th Cir. Feb. 11, 1992) (Noonan, J.).

Eighth Circuit holds that evidence of "battered-woman syndrome" may be considered for downward departure under § 5K2.10, p.s., even if jury rejects self-defense claim. Defendant was found guilty of second degree murder of her long-time, live-in boyfriend. She admitted killing him, but contended that at the time of the killing she suffered from battered-woman syndrome, that he was beating her or was about to begin beating her, and that she stabbed him in self-defense. The jury, however, found her guilty and she was sentenced to 108 months. Defendant claimed on appeal that the sentencing court improperly concluded that it could not consider battered-woman syndrome in sentencing once the jury had rejected her claim of self-defense.

The appellate court agreed and remanded for resentencing. The court followed *Cheape, supra*, which reasoned that proof of coercion as a complete defense at trial involves substantially different elements than proof of coercion as a mitigating circumstance in sentencing—otherwise the issue would never arise in sentencing because a defendant who proved the defense would be acquitted.

The Eighth Circuit held that "[t]he same reasoning applies here. Whitetail submitted evidence of battered-woman syndrome, not as a defense in itself, but as the primary component of her claim of self-defense.... If her claim of self-defense had been accepted by the jury, this defense would have resulted in her acquittal. Thus, to the extent that the guidelines permit consideration of the battered-woman syndrome as a mitigating factor at sentencing, we must read them as 'providing a broader standard' for proof of the syndrome than that which is 'required to prove a complete defense at trial.'"

The court stated that § 5K2.10, p.s. "permits the district court to 'reduce the [defendant's] sentence below the guideline range' if it finds that 'the victim's wrongful conduct contributed significantly to provoking the offense behavior.'... Thus, to the extent that U.S.S.G. § 5K2.10, p.s., permits consideration of battered-woman syndrome as a basis for departure from the guidelines, it does not require proof of the same elements necessary to establish a claim of self-defense at trial." The jury's rejection of that defense does not preclude consideration of battered-woman syndrome for departure under § 5K2.10, p.s. *See also Johnson, supra.*

U.S. v. Whitetail, No. 91-1400 (8th Cir. Feb. 12, 1992) (Bowman, J.).

SUBSTANTIAL ASSISTANCE

En banc Eighth Circuit rejects claim that because § 5K1.1 is a policy statement it is not binding. The Eighth Circuit affirmed a district court's holding that it did not have power to depart downward for the defendants' substantial assistance to the government in the absence of either a government motion or a claim that the government's refusal to make such a motion was arbitrary, in bad faith, or in breach of a plea agreement. Defendants' sole argument was that § 5K1.1, as a

policy statement rather than a guideline, is not binding on district courts and can therefore be repudiated on policy grounds.

The circuit court held that § 5K1.1, p.s. is binding. The court found that Congress intended that "policy statements be considered and that the courts' actions be consistent with policy statements." Further, although amendments to policy statements need not be submitted for congressional approval, § 5K1.1, p.s. was submitted to Congress before its enactment. The court also concluded that "[n]othing could be more contrary to Congress' intent in providing for the Sentencing Guidelines that to permit the courts to second-guess the Commission" and reject § 5K1.1, p.s. because its approach is "simply not the best way to handle the problem at hand." The court also noted that holding policy statements to be nonbinding could have a "spill over" effect into the weight of commentary, thus "introduc[ing] the most far-ranging element of uncertainty into the application of the Guidelines."

U.S. v. Kelley, No. 90-1081 (8th Cir. Feb. 5, 1992) (en banc) (Gibson, J.) (Beam, J. concurring in part, dissenting in part, joined by McMillian, J. in dissent) (Lay, C.J., dissenting, joined by McMillian, J.) (Heaney, Sr. J., dissenting, joined by Lay, C.J., McMillian, J., Arnold, J.)

Probation and Supervised Release

Tenth Circuit holds that policy statements in Chapter Seven regarding probation and supervised release are not mandatory, but still must be considered by courts. Defendant violated the terms of his two-year period of supervised release and after revocation was sentenced to two years in prison. On appeal he claimed that he was subject to a 3–9 month term under the Revocation Table in § 7B1.4, p.s., and that the district court erred in sentencing above that range. The government countered that the court was not bound by the policy statements and that the sentence was reasonable.

The appellate court affirmed, and held that "under 18 U.S.C. 3583 and U.S.S.G. Ch. 7 Pt. A1 & A5, the policy statements regarding revocation of supervised release contained in Chapter 7 . . . are advisory rather than mandatory in nature. This holding is specifically limited to U.S.S.G. Ch. 7. Other policy statements in the . . . Guidelines must be examined separately in the context of their statutory basis and their accompanying commentary. We see no conflict between our holding today and our cases applying and interpreting U.S.S.G. 5K1.1, which is also a policy statement. . . . The cases noting the mandatory nature of . . . 5K1.1 recognize that the motion requirement is suggested, if not compelled, by the underlying statute; they do not hold that policy statements are binding as a general rule. A provision set out in a policy statement may be binding because required by the underlying statutes."

"Although we conclude that policy statements generally are not mandatory, they must be considered by the trial court in its deliberations concerning punishment for violation of conditions of supervised release."

In this case, although the sentencing court did not specifically reference § 7B1.4 in its order, its "explanation of the sentence it imposed was sufficiently reasoned to satisfy the requirements of 18 U.S.C. 3553," and "even failure to consider Chapter 7 policy statements . . . is harmless error when the sentence is clearly reasonable and justified." *Accord U.S. v. Fallin*, 946 F.2d 57, 58 (8th Cir. 1991) [4, #10].

U.S. v. Lee, No. 91-6079 (10th Cir. Feb. 19, 1992) (Logan, J.).

Revocation of Probation

U.S. v. Dixon, 952 F.2d 260 (9th Cir. 1991) (Any sentence imposed after revocation of probation is limited to the sentence available at the time defendant was first sentenced to probation. *See* 18 U.S.C. § 3565(a)(2). The revised policy statements at U.S.S.G. Chapter 7 direct courts to consider the probation-violating conduct to calculate a sentencing range after revocation. That conduct may only be considered in selecting the appropriate sentence within the range available pursuant to § 3565(a)(2), and "[t]o the extent that the Guidelines conflict with the statute, we find them invalid." Here, defendant's 15-month sentence, calculated under Chapter 7 and partly based on the bank robbery that led to revocation, must be vacated and remanded for resentencing within the 4–10 month range that was available at his initial sentencing.).

Adjustments

Acceptance of Responsibility

U.S. v. Johnson, No. 90-30344 (9th Cir. Feb. 11, 1992) (Noonan, J.) (The acceptance of responsibility reduction may not be denied on the basis of lack of timeliness for defendants who went to trial and used duress as a defense, which in effect denied their responsibility for the offenses. "The Guidelines make clear that the reduction for acceptance of responsibility is available 'without regard to whether [a] conviction is based upon a guilty plea or a finding of guilt by the court or jury . . . .' U.S.S.G. § 3E1.1." To the extent that the commentary's statements that the reductions should be given after trial only in "rare situations" or that after trial acceptance is not "timely" may conflict with the guideline, "the text of the guideline must prevail." The court also pointed out that defendants here had little choice but to go to trial: "The government refused to consider plea offers from any single defendant unless all of the defendants pleaded guilty. . . . [Under] these circumstances it is inappropriate to deny [the reduction] based solely on the timing of the acceptance."

After conviction "the defendants continued to maintain that at least they had been subjected to incomplete duress. But unlike a claim of complete duress, a claim of incomplete duress does not deny criminal guilt—it merely asks for leniency because of the coercion to which the defendant had been subjected. There is consequently no barrier to getting one reduction for incomplete duress [by departure] and another reduction for acceptance of responsibility."). *Cf. U.S. v. Fleener*, 900 F.2d 914, 918 (6th Cir. 1990) (§ 3E1.1 reduction not automatically precluded for defendant claiming entrapment defense).

Offense Conduct

Co-Conspirator Drug Quantities

U.S. v. Johnson, No. 90-30344 (9th Cir. Feb. 11, 1992) (Noonan, J.) ("As a general rule, the fact that a conspirator is taken into custody does not automatically indicate disavowal of the conspiracy. [Defendant], however, has been found by the court to be a 'minor' participant in the conspiracy . . . . Once in custody, she was in no position to continue her role as a drug distributor. It stretches a legal fiction to the breaking point to hold her accountable for the drugs [other conspirators] distributed after [she was jailed]. Consequently, she can be sentenced only on the basis of drugs distributed by the conspiracy before this date.").

EXHIBIT H

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

Vol. 3, No. 10 | FEDERAL SENTENCING GUIDELINES AND FORFEITURE CASES FROM ALL CIRCUITS. | March 9, 1992

IN THIS ISSUE:

Guideline Sentencing, Generally

1st Circuit affirms enhancement despite "sentencing entrapment" claim. (110)(360) Defendant was caught laundering money in a government sting operation. He contended that the government engaged in "sentencing entrapment" by having an undercover agent advise him that the money was drug proceeds, for the sole purpose of increasing his sentence under 2S1.3(b)(1). Defendant had already conducted three laundering transactions when the agent told him the supposed origin of the funds. The 1st Circuit found that even if under certain extreme circumstances the government's manipulation in a sting operation must be filtered out of the sentencing process, this was not such a case. Defendant was clearly on notice after the undercover agent advised him that the money was criminally derived, yet he continued to launder money for the agent. There was no evidence that the agent threatened defendant into continuing with the operation. *U.S. v. Connell*, __ F.2d __ (1st Cir. Feb. 26, 1992) No. 91-1700.

2nd Circuit holds that sentencing court must consider illegally seized evidence provided it was not seized to enhance sentence. (110)(770) The 2nd Circuit held that a sentencing court must consider evidence seized in violation of the 4th Amendment, provided that the evidence was not seized for the express purpose of enhancing a defendant's sentence. The benefits of providing sentencing judges with reliable information about the defendant outweigh the likelihood that allowing consideration of illegally seized evidence will encourage unlawful police conduct. Absent a showing that officers obtained evidence expressly to enhance a sentence, a district judge may not refuse to consider relevant evidence at sentencing, even if that evidence was seized in violation of the 4th Amendment. *U.S. v. Tejada*, __ F.2d __ (2nd Cir. Feb. 21, 1992) No. 91-1071.

SECTION

100 Pre-Guidelines Sentencing, Generally

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10th Circuit rejects double counting claim to enhancement based upon sexual abuse victim's age. **(125)(215)** Defendant pled no contest to unlawfully engaging in sexual contact with a 10-year old child, in violation of 18 U.S.C. section 2244(a)(1). He received a six-level enhancement under guideline section 2A3.4(b)(1) because the victim was under the age of 12. The 10th Circuit affirmed, rejecting defendant's argument that the age of the victim was already factored into defendant's initial base offense level. A similar double counting argument was rejected by the court in *U.S. v. Ransom*, 942 F.2d 775 (10th Cir. 1991). Under *Ransom*, even if the "under the age of 12" factor is present in determining a defendant's base offense level, this will not preclude a further enhancement where the victim of the sexual act is under the age of 12. *U.S. v. Ward*, __ F.2d __ (10th Cir. Feb. 14, 1992) No. 91-6115.

9th Circuit holds that applying amended restitution statute to defendant would violate the ex post facto clause. **(130)(610)** Nearly a year after defendant's sentencing, Congress added a provision to the Victim and Witness Protection Act allowing courts to order restitution "in any criminal case" pursuant to a plea agreement. 18 U.S.C. section 3663(a)(3)(1990). In a footnote, the 9th Circuit held that applying this amendment to the defendant "would violate the ex post facto clause of the Constitution. *U.S. v. Snider*, __ F.2d __ (9th Cir. Feb. 25, 1992) No. 90-30024, *withdrawing and superseding* 945 F.2d 1108 (9th Cir. 1991).

10th Circuit rejects ex post facto challenge to aggregation of losses from pre-guidelines and post-guidelines offenses. **(132)(220)(300)** Counts 1 through 7 were pre-guidelines offenses and counts 8 through 10 were post-guidelines offenses. The 10th Circuit rejected defendant's claim that it violated the ex post facto clause to calculate the loss caused by his crime under guideline sections 2B1.1 and 2F1.1 based upon the total loss involved in both the pre- and post-guidelines offenses. Enhancement of a guidelines sentence based on losses associated with pre-guidelines offenses does not violate the ex post facto clause. *U.S. v. Haddock*, __ F.2d __ (10th Cir. Feb. 14, 1992) No. 91-3075.

3rd Circuit holds that firearm enhancement does not require knowledge that gun was stolen. **(135)(330)** Defendant was convicted of being a felon in possession of a firearm, and received a two level enhancement under guideline section 2K2.1(b)(2) because the gun was stolen. The 3rd Circuit rejected defendant's claim that an enhancement under section 2K2.1(b)(2) is proper only if defendant knew the weapon was stolen. The language of section 2K2.1(b)(2) is unambiguous, and it is clear that Congress intentionally imposed strict liability. The lack of a scienter requirement does not violate due process by punishing a defendant for conduct for which he was not found guilty. Judge Mansmann dissented, believing that section 2K2.1(b)(2) as applied in this case violated substantive due process by relieving the government from proving criminal intent and meeting a sufficient standard of proof. *U.S. v. Mobley*, __ F.2d __ (3rd Cir. Feb. 14, 1992) No. 90-3832.

Supreme Court rules excessive force against prisoner may constitute cruel and unusual punishment despite lack of serious injury. **(140)** Defendant was beaten by prison guards while he was handcuffed and shackled. A supervisor watched the beating but merely told the officers "not to have too much fun." The inmate suffered minor bruises, facial swelling, loosened teeth, and a cracked dental plate. In a 7-2 opinion written by Justice O'Connor the Supreme Court held that the use of excessive physical force against a prisoner may constitute cruel and unusual punishment even though the inmate does not suffer serious injury. The court said that although "de minimis" uses of physical force are not

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protected by the Eighth Amendment. Constitutional standards "always are violated when prison officials maliciously and sadistically use force to cause harm," regardless of whether that force results in significant injury. Justices Thomas and Scalia dissented, arguing that "a use of force that causes only insignificant harm to a prisoner" is not cruel and unusual punishment. *Hudson v. McMillan*, __ U.S. __, 112 S.Ct. __ (Feb. 25, 1992), No. 90-6531.

1st Circuit remands for district court to consider whether to reduce defendant's sentence in light of amended guideline. (150)(360) Defendant received a five-level enhancement under guideline section 2S1.3(b)(1). After he was sentenced, that section was amended (effective November 1991) to provide for only a four level enhancement. The 1st Circuit remanded the case for the district court to consider whether defendant should receive a one level reduction in offense level. Guideline section 1B1.10(a) provides that where a defendant is serving a term of imprisonment and his guideline range is subsequently lowered as a result of certain referenced amendments, then a reduction of sentence may be considered. The amendment to section 2S1.3(b)(1) was one of the amendments to which section 1B1.10(a) applied. The court found it preferable that the matter of sentence reduction be considered first by the sentencing court, not the appellate court. *U.S. v. Connell*, __ F.2d __ (1st Cir. Feb. 26, 1992) No. 91-1700.

6th Circuit affirms that car thefts involved more than minimal planning. (160)(220) Defendant was convicted of stealing an FBI vehicle and unlawful conversion with intent to steal a second FBI vehicle. The 6th Circuit affirmed that the offenses involved more than minimal planning. Defendant repeatedly asked his brother-in-law, who was working undercover for the FBI, to watch for a Blazer or Cadillac worth stealing. The brother-in-law then notified defendant of an FBI Cadillac located at a motel parting lot. While en route to the motel to steal the vehicle, defendant stole a different Cadillac parked at another motel, which he stated was necessary to avoid using his own car to steal the FBI vehicle. The method of stealing the FBI Cadillac clearly indicated prior planning. *U.S. v. Clark*, __ F.2d __ (6th Cir. Feb. 21, 1992) No. 91-5522.

8th Circuit rules that loss under fraud guideline must be based on all relevant conduct. (170)(300) Defendant pled guilty to three counts of mail fraud in connection with the sale of three cars with altered odometer readings. In exchange for his plea, the government dismissed a conspiracy count involving over 300 cars with altered odometer readings brought to defendant's car auction by other car dealers. The district court determined the amount of loss caused by defendant's offense under guideline section 2F1.1(b) based solely upon the three cars involved in the offense of conviction. The court refused to hear evidence relating to defendant's involvement in the conspiracy. The 8th Circuit ruled that the loss resulting from the conspiracy could be included in the loss calculation if the conspiracy was part of the same course of conduct or common scheme or plan as the mail fraud counts. The case was remanded because it was unclear whether the district court refused to consider the conspiracy evidence because it believed the conspiracy was not relevant conduct, or because it believed that loss under section 2F1.1(b) could only be based upon the offense of conviction. The court rejected the government's contention that the conspiracy was part of the offense of conviction because the mail fraud counts to which defendant pled guilty contained a preamble incorporating by reference assertions contained in the conspiracy count. *U.S. v. Morton*, __ F.2d __ (8th Cir. Feb. 24, 1992) No. 91-2618.

10th Circuit holds that policy statements in Chapter 7 must be considered but are advisory in nature. (180)(800) The 10th Circuit held that the policy statements regarding the revocation of supervised release set forth in Chapter 7 of the sentencing guidelines are advisory rather than mandatory in nature. The holding was specifically limited to Chapter 7, and the court stated that other policy statements in the guidelines must be evaluated separately in the context of their statutory basis and their accompanying commentary. Thus, this holding was not inconsistent with cases interpreting guideline section 5K1.1. In reviewing the specific sentence of imprisonment imposed upon revocation of supervised release, an appellate court will not reverse if it can be determined from the record to have been reasoned and reasonable. Here, although the district court did not specifically reference guideline section 7B1.4 in its order, it was clear that the court considered the provisions of Chapter 7. The court explicitly listed the factors it did consider in sentencing defendant, including defendant's breach of the court's trust, his history of criminal conduct, and the need to follow through with its previous threat if defendant continued to use drugs. This explanation was sufficiently reasoned to satisfy the requirements of 18 U.S.C. section 3553. *U.S. v. Lee*, __ F.2d __ (10th Cir. Feb. 19, 1992) No. 91-6079.

9th Circuit holds that court may consider prior uncounseled misdemeanor convictions in sentenc-

ing within the range. (190)(504) In *Baldasar v. Illinois*, 446 U.S. 222 (1980) the Supreme Court held that uncounseled misdemeanor convictions may not be used to enhance the sentence of a later conviction. And in *U.S. v. Brady*, 928 F.2d 844, 853-54 (9th Cir. 1991), the 9th Circuit held that uncounseled tribal misdemeanor convictions are not grounds for an upward departure. In this case however, the magistrate "did not use the prior convictions to enhance the sentence; he merely considered all relevant factors, including both defendants' prior history before sentencing each to a jail term well within the penalty range" under the Assimilative Crimes Act. The sentence was affirmed. *U.S. v. Hookano*, __ F.2d. __ (9th Cir. Feb. 25, 1992), No. 91-10152.

Offense Conduct, Generally (Chapter 2)

9th Circuit upholds enhancement for bodily injury in sexual abuse case. (215) Defendant was convicted of aggravated sexual abuse under 18 U.S.C. section 2241(c) for repeated sexual assaults on a nine year old girl who he infected with genital Herpes as a result of the assaults. A district court found that the victim had sustained permanent or life threatening bodily injury within the meaning of section 2A3.1(b)(4)(A) and therefore increased the offense level by four levels. On appeal, the 9th Circuit affirmed, noting that Herpes is a permanent sexually transmitted disease which "has obvious and detrimental impacts on a person's lifestyle and relationships." Moreover, as the district court found, "the recurring nature of this particular disease" would be a "constant and recurring reminder of the abusive act itself." *U.S. v. James*, __ F.2d. __ (9th Cir. Feb. 21, 1992), No. 90-10646.

10th Circuit rejects application of guideline section 2D1.1 to listed chemical offenses. (240)(252) Defendant was convicted of conspiring to possess certain listed chemicals with the intent to manufacture methamphetamine, in violation of 21 U.S.C. section 846. Under section 846, he was to be sentenced as if convicted of violating 21 U.S.C. section 841(d), possessing a listed chemical with the intent to manufacture a controlled substance. Accordingly, the district court determined defendant's offense level under guideline section 2D1.1. The 10th Circuit reversed, holding that violations of section 841(d) should not be sentenced under guideline section 2D1.1. The reference in the Statutory Index does not compel application of the referenced guideline. First, the Index was written before the current version of section 841(d) was enacted. In addition, Congress intended to punish listed chemical offenders less severely than persons found guilty of manufacturing the illegal drugs. The government's approach would insure that almost all violators of section 841(d) would be sentenced to the 10-year maximum, thus turning the maximum sentence into a mandatory sentence. The November 1991 amendments, which provide that violators of section 841(d) are to be sentenced under new guideline section 2D1.11, further supported this conclusion. Judge Ebel dissented. *U.S. v. Voss*, __ F.2d __ (10th Cir. Feb. 13, 1992) No. 90-5140.

D.C. Circuit affirms basing offense level on narcotics charges, rather than CCE count. (240) Defendants contended that the district court erroneously determined their offense level on the basis of the narcotics counts rather than the CCE count, since the government prosecuted the case on the theory that the principal offense committed was the CCE and not the drug conspiracy that formed the predicate offense. The D.C. Circuit found no merit to this argument. Only one of the defendants was charged and convicted under the CCE statute, and therefore only he would be entitled to claim that the proper base offense level was based upon the CCE count. When a defendant's drug related convictions are grouped together under guideline section 3D1.2, the guidelines specifically require the use of the highest offense level among those available. Thus, any error in the choice of an offense level is always to the defendant's advantage, because the guidelines require the imposition of the highest available offense level. *U.S. v. Harris*, __ F.2d __ (D.C. Cir. Feb. 19, 1992) No. 89-3205.

10th Circuit upholds mandatory minimum sentence for more than 100 marijuana plants against equal protection challenge. (242)(253) Title 21 U.S.C. section 841(b)(1)(B)(vii) provides for a mandatory five year sentence for 100 kilograms or more of a mixture or substance containing marijuana, or 100 or more marijuana plants, regardless of weight. Defendant was growing 249 marijuana plants. The district court ruled that applying the mandatory minimum sentence to defendant would violate the equal protection clause because there was no rational relationship between 100 marijuana plants and 100 kilograms of marijuana. The 10th Circuit reversed, holding that even if a single marijuana plant cannot produce a kilogram of marijuana substance, and the statute punishes marijuana growers more severely than those who possess harvested marijuana, the sentencing scheme does not violate the equal protection clause. Congress intended to punish growers of marijuana by the scale of potential of their operation

and not just the weight of the plants seized at a given moment. *U.S. v. Lee,* __ F.2d __ (10th Cir. Feb. 24, 1992) No. 91-3194.

Article reviews issues raised by mandatory minimum for firearm use. (245)(280) Under a special enhancement statute, Congress has dictated a five-year mandatory minimum for anyone convicted of using or carrying a firearm "during and in relation to" any crime of violence or drug trafficking crime. In *"Using a Firearm during and in Relation to a Drug Trafficking Crime: Defining the Elements of the Mandatory Sentencing Provision of 18 USC 924(c)(1),"* Michael J. Riordan summarizes the legislative history of the provision and some of the case law construing it. Special attention is devoted to the relationship that must exist between a firearm and a drug offense to support conviction, focusing on the purpose for which the gun is possessed and the question of constructive possession. The author also discussed application of the enhancement to multiple underlying offenses, aiding and abetting theories, and constitutional challenges to the provision, concluding that the statute is likely constitutional. 30 DUQUESNE L. REV. 39-60 (1991).

5th Circuit rules sentencing errors in imposition of mandatory minimum sentence were harmless. (245)(650) Defendant was convicted of a drug offense carrying a mandatory minimum sentence of 60 months. The district court sentenced him to 51 months on this charge. It then imposed a nine-month consecutive sentence under 18 U.S.C. section 3147, because following his pretrial release he was convicted of misdemeanor assault in state court. In its original opinion, the 5th Circuit held that it was error not to impose the mandatory minimum 60 months sentence for the drug charge, for a total 69 month minimum sentence. Here, the 5th Circuit withdrew the prior opinion because it had failed to realize that section 3147 had no applicability to defendant's case. This statute provides for an enhanced sentence for a person who commits a federal crime while on release, and the enhancement applies to the sentence for the new crime committed while on release, not to the original crime for which the defendant is on release. However, despite the two sentencing errors, no remand was necessary. The end result was a sentence of 60 months, the mandatory minimum for defendant's offense. The district court evidenced an intent to sentence defendant to the 60-month minimum, and therefore a remand would serve no purpose. *U.S. v. Pace,* __ F.2d __ (5th Cir. Feb. 24, 1992) No. 90-8543, *withdrawing and superseding* 950 F.2d 961 (5th Cir. 1991).

D.C. Circuit remands for district court to verify correct drug quantity. (250) The district court set defendant's offense level at 36 based on over 500 grams of crack cocaine. In its sentencing memorandum, the court explained that defendant had not challenged the presentence report's finding that he distributed and belonged to a conspiracy that distributed more than 500 grams of crack cocaine. However, the presentence report had found that 500 grams was twice the amount of drugs involved in the conspiracy. The D.C. Circuit remanded for the district court to verify the correct drug amount, since it was unclear the extent to which the district court relied upon the presentence report. *U.S. v. Harris,* __ F.2d __ (D.C. Cir. Feb. 19, 1992) No. 89-3205.

2nd Circuit holds that sentence should be based upon quantity of drugs that conspirators agreed to deliver. (265) The 2nd Circuit reversed the district court's determination that the actual narcotics delivered, rather than the amount the conspirators agreed to deliver, should determine defendant's sentence. Because the agreement defines the conspiracy, the parties' failure to complete the transaction does not shrink the conspiracy's scope. Here, there was no evidence that the conspirators were only "puffing" and were incapable of producing the agreed quantity. They promised to sell two kilograms of cocaine and came quite close, supplying 1.989 kilograms. *U.S. v. Tejada,* __ F.2d __ (2nd Cir. Feb. 21, 1992) No. 91-1071.

11th Circuit affirms that defendant could have foreseen that conspiracy would distribute over 500 grams of cocaine. (275) The 11th Circuit affirmed sentencing two co-defendants on the basis of over 500 grams of cocaine. A government agent estimated that the first defendant, a "runner," sold quarter and half grams on the street every day, but admitted that he did not know how much this defendant sold a day. An informant stated that defendant sold four to five times a day for a year. There was also evidence that the conspiracy distributed eight to 14 ounces a week. A government agent testified that the second defendant was in the constant company of the other members of the conspiracy who distributed a total of six to eight ounces of cocaine a week. An informant testified that he saw the second defendant sell crack in half gram and one gram sizes three to four times a week over a six month period. Thus, defendants could have reasonably foreseen the conspiracy's involvement with 500 grams of cocaine over the entire period of the conspiracy. *U.S. v. Andrews,* __ F.2d __ (11th Cir. Feb. 19, 1992) No. 89-7445.

11th Circuit upholds sentencing leader of drug conspiracy for all drugs distributed by conspiracy. (275) The 11th Circuit affirmed that there was sufficient evidence to sentence defendant on the basis of 10 kilograms of cocaine. The government proved defendant's involvement in the drug conspiracy beyond a reasonable doubt. The same testimony that established defendant's involvement in the conspiracy, which the jury believed, put defendant at the conspiracy's head. The sentencing court was entitled to sentence defendant for all the cocaine described at his trial. *U.S. v. Andrews,* __ F.2d __ (11th Cir. Feb. 19, 1992) No. 89-7445.

D.C. Circuit reverses firearm enhancement where defendant already received consecutive five year sentence for firearm conviction. (286)(330) Defendant was convicted of various drug and weapons offenses, including using or carrying a firearm during the drug conspiracy in violation of 18 U.S.C. section 924(c). The D.C. Circuit reversed an enhancement to his offense level for the drug conspiracy charge under guideline section 2D1.1(b) because defendant had already received a consecutive five year sentence for the section 924(c) conviction. The five year consecutive sentence was imposed pursuant to guideline section 2K2.4. To avoid double counting, application note 2 to section 2K2.4 provides that where a sentence is imposed under section 2K2.4 in conjunction with a sentence for an underlying offense, any specific offense characteristic for the use, possession or discharge of the weapon is not to be applied. Thus, the imposition of the five year sentence for defendant's use of the firearm during the conspiracy precluded the district court from counting defendant's possession of the firearm as a specific offense characteristic for the same conspiracy. *U.S. v. Harris,* __ F.2d __ (D.C. Cir. Feb. 19, 1992) No. 89-3205.

10th Circuit remands for district court to determine whether any actual, intended or probable loss resulted from fraudulent loans. (300) Defendant fraudulently obtained several bank loans. The district court determined that the amount of loss under guideline section 2F1.1 was the amount of the loans. The 10th Circuit remanded for resentencing because the district court did not attempt to determine whether any actual, intended or probable loss was caused by defendant's conduct. Instead, loss was assumed to be the amount of loans defendant obtained as a result of his fraudulent conduct. *U.S. v. Haddock,* __ F.2d __ (10th Cir. Feb. 14, 1992) No. 91-3075.

10th Circuit upholds loss in contractor fraud case as the difference between actual and altered subcontractor bids. (300) Defendant, a government contractor, received bids from his subcontractors on a government project, falsely inflated the bids, and then submitted those falsified bids to the managing contractor of the project. Defendant was convicted of making false statements to the government. The 10th Circuit upheld the calculation of the loss caused by defendant's crime as the difference between the true and altered bids. The court rejected defendant's claim that there was no actual loss because the actual value of the construction services was equal or greater than the altered bids submitted by defendant. Loss is not simply a measure of the net monetary damage to the victim. Its purpose is to gauge the severity of a particular offense. Here, defendant obtained $20,969 more in payments than he was entitled to receive absent the altered bids. This was an appropriate measure of loss. *U.S. v. Lara,* __ F.2d __ (10th Cir. Feb. 13, 1992) No. 90-2176.

8th Circuit rules that minors and adults transported for prostitution purposes cannot be participants under section 3B1.1. (310)(432) Defendant was convicted of knowingly transporting minors and adults in interstate commerce with the intent that they engage in prostitution. The district court imposed a four level enhancement under guideline section 3B1.1 because defendant was the leader of criminal activity involving five or more participants. The 8th Circuit reversed, ruling that the minors and adult women transported by defendant were not "participants" in defendant's offense. Application note 1 to section 3B1.1 requires a participant to be criminally responsible for the commission of the offense. Application note 4 to section 2G1.1, which applies to the transportation of adults, states that the persons transported are participants only if they assisted in the unlawful transportation of others. Although section 2G1.2, which applies to the transportation of minors, contains no such express statement, it does refer to the persons transported as "victims," which is inconsistent with being a participant. *U.S. v. Jarrett,* __ F.2d __ (8th Cir. Feb. 13, 1992) No. 91-2471.

2nd Circuit upholds sentencing defendant under guideline section 2K2.2 rather than 2K2.1. (330) Defendant was convicted of receiving and possessing a sawed-off rifle, in violation of 26 U.S.C. section 5861(d). The 2nd Circuit affirmed the district court's decision to sentence defendant under guideline section 2K2.2, the provision applicable to unlawful trafficking offenses, rather than section 2K2.1, the provision applicable to unlawful possession offenses. The pre-November 1990 version of section 2K2.1(c)(1) directed a court to apply section 2K2.2 if the offense

involved the distribution of a firearm or possession with intent to distribute and the resulting offense level would be higher. Although defendant was only charged with possession of a sawed-off rifle, because defendant sold the rifle to undercover agents, he clearly possessed it with the intent to distribute. Moreover, defendant's base offense level calculated under section 2K2.2 was greater than it would have been under section 2K2.1. *U.S. v. Collins*, __ F.2d __ (2nd Cir. Feb. 25, 1992) No. 91-1471.

5th Circuit rules that attempted burglary is not a violent felony under 18 U.S.C. section 924(e). (330)(520) Defendant was convicted of being a felon in possession of a firearm under 18 U.S.C. section 924(e). He received a mandatory minimum 15 year sentence because the district court determined that he had three previous "violent felonies." The 5th Circuit reversed, holding that defendant's two prior convictions for attempted burglary did not constitute violent felonies within the meaning of section 924(e)(1). The offense did not have as an element the use or threatened use of force. Although burglary is specifically listed as a violent felony, a conviction for attempted burglary is not equivalent to a conviction for burglary. Attempted burglary did not present a serious potential risk of physical injury to another. Burglary is a violent felony because an offender's entry into a building creates the potential for a violent confrontation between the intruder and any occupant or caretaker. However, attempted burglary does not required that the offender enter the building, and thus does not present the same risk of potential harm as burglary. *U.S. v. Martinez*, __ F.2d __ (5th Cir. Feb. 20, 1992) No. 91-5606.

9th Circuit rejects argument that defendant possessed a silencer for legal purposes. (330) Defendant argued that he was entitled to a six level decrease because he intended to use the silencer to exterminate ground squirrels. The 9th Circuit rejected the argument noting that the version of section 2K2.2(b)(3) in effect at the time of sentencing did not provide for a decrease for all lawful uses of a firearm, but only where the firearm was possessed solely for "sport, recreation or collection." The court ruled that "exterminating ground squirrels to protect one's property is neither sport nor recreation." "Further, one rarely possesses a silencer for 'sport, recreation, or collection' or for any other lawful use." *U.S. v. Kayfez*, __ F.2d. __ (9th Cir. Feb. 21, 1992) No. 90-10029.

5th Circuit affirms that one turtle captured by defendants was a "substantial" quantity. (355) Defendants fished for shrimp without a turtle excluder, and were found by the Coast Guard to be in possession of one mature female Kemp's ridley sea turtle, an endangered species. The 5th Circuit affirmed a four-level enhancement under guideline section 2Q2.1(b)(3)(B) which applies if the quantity of the endangered species involved in an offense is "substantial" in relation to the overall population. The government's failure to present evidence of the total number of existing turtles did not render the enhancement inapplicable. The government's experts presented extensive evidence explaining that the turtle was extremely endangered and might already be biologically extinct. Based on this testimony the district court found that the turtle was one of the 10 most endangered species in the world and near extinction; fewer than 400 female turtles nested in 1990; only one turtle per 1000 eggs survives to adulthood; the survival of each female turtle is significant to the survival of the species; and that the turtle in question was a young adult female with developing eggs in its reproductive tract. The district court found there was no "good way" of estimating the population of these turtles. Under such circumstances, such a requirement would effectively nullify the guideline enhancement. *U.S. v. Nguyen*, __ F.2d __ (5th Cir. Feb. 25, 1992) No. 91-2572.

1st Circuit reviews determination that defendant knew laundered money was criminally derived for clear error. (360)(870) The 1st Circuit reviewed the district court's determination under guideline section 2S1.3 that defendant knew laundered money was criminally derived for clear error. *U.S. v. Connell*, __ F.2d __ (1st Cir. Feb. 26, 1992) No. 91-1700.

1st Circuit rules that stockbroker's special skill was not specific offense characteristic of structuring charge. (360)(450) Defendant, a stockbroker, was convicted of structuring financial transactions to avoid currency reporting requirements. He received an enhancement under guideline section 3B1.3 for using a special skill to significantly facilitate his crime. The 1st Circuit rejected the argument that the enhancement was improper because the skill was already included in the base offense level or a specific offense characteristic. The essence of illegally structuring monetary transactions is a defendant's ability to convert large sums of cash into smaller sums, thereafter passing the smaller sums through a bank account or investment medium in a way that avoids the need to file a currency report. In its simplest form, the crime does not need any detailed knowledge or specialized skill of financial markets. Defendant's use of his special skill was not a prerequisite to committing the crime; it merely facilitated the

crime. *U.S. v. Connell,* __ F.2d __ (1st Cir. Feb. 26, 1992) No. 91-1700.

Adjustments (Chapter 3)

9th Circuit holds that defendant must know that victim is vulnerable, for adjustment to apply. (410) Commentary note 1 to the vulnerable victim section, 3A1.1, provides that the adjustment applies to offenses where an unusually vulnerable victim is made a target of criminal activity. The 9th Circuit ruled that the adjustment does not apply "where defendants do not know they are dealing with a vulnerable person." Here the district judge found that the appellants knew or should have known of their victims' vulnerability, and therefore the vulnerable victim enhancement was properly applied. The appellants used "the telephone to get behind the defenses" of old people who "don't have the ability to protect themselves." *U.S. v. Caterino,* __ F.2d. __ (9th Cir. Feb. 21, 1992) No 90-50049.

9th Circuit reverses multiple vulnerable victim enhancements for single fraud. (410)(470) The defendants were convicted of mail fraud. The court increased each defendant's offense level by four points, two points for each of two vulnerable victims. On appeal the 9th Circuit reversed, noting that under the guidelines, fraud is an offense for which multiple counts are aggregated into one group for sentencing purposes. The introductory commentary to the multiple count section of the guidelines, Chapter 3, Part D, provides that any specific offense characteristics must be applied to the conduct "taken as a whole." That is they must be applied to the overall scheme rather than by reference to individual counts or victims. Thus, the court held that the vulnerable victim adjustment may be counted only once for convictions arising out of a single fraudulent scheme. The court found it unnecessary to determine whether exploitation of numerous vulnerable victims could support an upward departure under section 5K2.0. *U.S. v. Caterino,* __ F.2d. __ (9th Cir. Feb. 21, 1992) No. 90-50049.

D.C. Circuit affirms enhancement for restraint of victim based upon drug conspirators' conduct. (410) Defendant was the member of a drug conspiracy that assaulted a seller who owed the conspiracy money. After the assault, the seller was restrained for seven days in an apartment by some of the conspirators. Defendant, who was acquitted of beating the seller, received an enhancement under guideline section 3A1.3 for physically restraining the victim during the course of the crime. The D.C. Circuit affirmed the enhancement, since the government proved by a preponderance of the evidence that the restraint of the seller was in furtherance of the conspiracy and reasonably foreseeable to defendant. Although defendant was acquitted of beating the seller, the jury did not address whether he was involved in the restraint of the victim. Therefore, it was unnecessary for the appellate court to decide whether a sentence may be enhanced for conduct for which a defendant has been acquitted. *U.S. v. Harris,* __ F.2d __ (D.C. Cir. Feb. 19, 1992) No. 89-3205.

7th Circuit upholds leadership enhancement for defendant who initiated drug conspiracy. (431) The 7th Circuit upheld a four level enhancement under guideline section 3B1.1(a) based upon defendant's role as leader of a drug conspiracy. Defendant initiated the conspiracy, obtained its source of supply, and retained a leadership role throughout its existence. *U.S. v. Robinson,* __ F.2d __ (7th Cir. Feb. 27, 1992) No. 89-3680.

7th Circuit upholds managerial enhancement even though defendant only controlled three of seven participants. (431) Defendant received a three level enhancement under guideline section 3B1.1(b) for managing a criminal activity involving five or more participants. The district court found that defendant managed seven participants in the drug conspiracy. The 7th Circuit affirmed the enhancement, even though it found that defendant actually managed only three of the seven participants. Two individuals gave defendant money to purchase cocaine in amounts too large for personal consumption. Although it was reasonable to infer that these individuals were reselling the cocaine on the street and were probably co-conspirators with defendant, there was no evidence that they were defendant's employees or subordinates. However, even though defendant did not control all of the participants, the enhancement was still proper. The plain language of section 3B1.1(b) requires only that a defendant be a manager and that the criminal activity involved five or more participants. A defendant need not manage or control the five or more participants. *U.S. v. McGuire,* __ F.2d __ (7th Cir. Feb. 18, 1992) No. 90-1422.

9th Circuit upholds organizer enhancement for defendant who provided substantial sum of cash to purchase marijuana. (431) The district court increased defendant's base offense level by two points under section 3B1.1(c) for being an "organizer" because he provided a business associate with a substantial sum of cash with which to purchase marijuana. The 9th Circuit upheld the enhancement, despite defendant's contention that this was merely a

"loan." The district court's contrary determination was not clearly erroneous. *U.S. v. Schubert*, __ F.2d. __ (9th Cir. Feb. 24, 1992) No. 91-10165.

D.C. Circuit upholds managerial enhancement for drug conspirator. (431) The D.C. Circuit affirmed a three level enhancement under guideline section 3B1.1(b) based upon defendant's managerial role in a drug conspiracy that involved five or more participants. The district court found that defendant supervised a co- defendant as well as unindicted co-conspirators and juveniles, that defendant controlled the cocaine flow to several workers, collected money and was major participant in all the activities of the conspiracy, including the distribution of 100 to 200 kilos of crack in the District of Columbia. He admitted to the probation officer that he paid salesmen as much as $1,000 to $2,000 a week, and that he himself made as much as $5000 a day from the drug trade. *U.S. v. Harris*, __ F.2d __ (D.C. Cir. Feb. 19, 1992) No. 89-3205.

11th Circuit vacates leadership enhancement where there was no evidence that defendant was involved with five or more participants. (432) Defendant received a four level enhancement under guideline section 3B1.1(a) based upon his leadership role in criminal activity involving five or more participants. The 5th Circuit vacated the enhancement, since there was no evidence in the record to prove that defendant was involved with five or more participants. *U.S. v. Baggett*, __ F.2d __ (11th Cir. Feb. 27, 1992) No. 91-7124.

1st Circuit rejects claim that the district court failed to consider defendant's mitigating role in the offense. (445) In defendant's first appeal, the 1st Circuit remanded because the district court improperly imposed a four level leadership enhancement. On remand, the district court found that defendant did not act in any supervisory capacity, but rather was the "in between man," "the messenger." Accordingly, the court did not apply any enhancement under guideline section 3B1.1. The 1st Circuit rejected defendant's claim that the district court failed to consider his minimal role in the offense. The court specifically found defendant to be a messenger, and then determined his total offense level without any reduction for a mitigating role under section 3B1.2. The district court's finding did not inevitably lead to the conclusion that defendant played a minor or minimal role in the offense. *U.S. v. McDowell*, __ F.2d __ (1st Cir. Feb. 20, 1992) No. 91-1457.

1st Circuit reviews special skill determination under both de novo and clear error standards. (450)(870) The 1st Circuit held that it would review de novo the meaning of the term "special skill" under guideline section 3B1.3. Thereafter, since a district court's application of section 3B1.3 to a given set of facts was likely to involve drawing sophisticated inferences from a web of interconnected facts, the district court's findings would only be reviewed for clear error. *U.S. v. Connell*, __ F.2d __ (1st Cir. Feb. 26, 1992) No. 91-1700.

1st Circuit upholds special skill enhancement for stockbroker who laundered money through money market account. (450) Defendant was convicted of structuring financial transactions to avoid currency reporting requirements. The 1st Circuit affirmed an enhancement under guideline section 3B1.3 for using a special skill to significantly facilitate his crime. Defendant was a registered stockbroker. The specialized knowledge required of a stockbroker, when combined with the ability to access financial markets directly, can qualify as a special skill under section 3B1.3. Defendant's special skill did significantly facilitate the commission of his crimes. His opening of multiple bank accounts, the division of the initial sums into smaller increments, their subsequent deposit into accounts, and the opening of a money market account required no special skill. However, defendant's ability to make and process deposits to the money market account without having to explain the origin of the funds to a third party did qualify as a special skill. Defendant was also able to buy stock in a way that shielded the identity of the true owner. *U.S. v. Connell*, __ F.2d __ (1st Cir. Feb. 26, 1992) No. 91-1700.

8th Circuit affirms obstruction enhancement for defendant who produced cancelled checks with altered VINs. (461) Defendant pled guilty to three counts of mail fraud in connection with the sale of three cars with altered odometer readings. The 8th Circuit affirmed an enhancement for obstruction of justice based upon the fact that during the investigation, defendant produced cancelled checks with altered or eliminated vehicle identification numbers. Application note 3(c) to section 3C1.1 authorizes an enhancement when a defendant produces an altered document during an official investigation. *U.S. v. Morton*, __ F.2d __ (8th Cir. Feb. 24, 1992) No. 91-2618.

9th Circuit holds that possession of counterfeit notes and unregistered silencer were not groupable. (470) The district court correctly ruled that possession of counterfeit notes and possession of an unregistered silencer were not groupable under guideline section 3D1.2, which requires that the two

counts involve "substantially the same harm." The 9th Circuit found that the societal interest invaded by each offense was very different. "Counterfeiting undermines the integrity of the nation's currency and perpetrates a fraud on the merchants who receive counterfeit notes. Possession of an unregistered silencer threatens personal safety." *U.S. v. Kayfez,* __ F.2d. __ (9th Cir. Feb. 21, 1992) No. 90-10029.

Article supports constitutionality of considering conduct unrelated to offense of conviction under 3E1.1. (482) In *Section 3E1.1 Contrition and Fifth Amendment Incrimination: Is There an Iron Fist Beneath the Sentencing Guidelines' Velvet Glove?,* a student author describes the various approaches that courts have taken in considering whether a court may condition a downward adjustment for acceptance of responsibility on the defendant's acceptance of responsibility for conduct not included in the count of conviction. The author discusses the courts' various interpretations of 3E1.1, as well as the arguments that have been offered regarding whether the provision unconstitutionally burdens the defendant's fifth amendment right to silence, concluding that the constitution is not violated by permitting consideration of conduct not included in the offense of conviction. 65 ST. JOHN'S L. REV. 1077-1103 (1991).

7th Circuit rejects acceptance of responsibility reduction to defendant who "waffled" in his cooperation with authorities. (486) The 7th Circuit found no clear error in the district court's denial of a reduction for acceptance of responsibility to a defendant who "waffled" in his dealings with the police. The district court found that defendant would cooperate and then dissemble; he made statements about his drug activities and then he recanted those statements. *U.S. v. McGuire,* __ F.2d __ (7th Cir. Feb. 18, 1992) No. 90-1422.

6th Circuit upholds denial of acceptance of responsibility reduction to defendant who made outburst in court. (488) Defendant contended that he was entitled to a reduction for acceptance of responsibility because he freely admitted to having committed the offenses charged. However, at the pretrial hearing, defendant stated to the court: "Take me out. I don't want to be in here and hear these damn lies. The FBI needs to be all hung . . . Hope you all die and go to hell." Defendant contended that this outburst merely expressed his frustration at being denied bond prior to trial. However, the 6th Circuit affirmed the denial of the reduction, finding the district court was in a much better position to evaluate the true meaning of defendant's remarks. *U.S. v. Clark,* __ F.2d __ (6th Cir. Feb. 21, 1992) No. 91-5522.

D.C. Circuit denies acceptance of responsibility reduction to defendant who made excuses for his conduct. (488) Defendant was convicted of being a felon in possession of a firearm, and complained that he should have received a reduction for acceptance of responsibility. The D.C. Circuit affirmed the denial of the reduction based upon defendant's excuses for his conduct (he claimed he was merely returning the guns to his brother). There is a difference between admitting the acts and accepting responsibility for the crimes. *U.S. v. Cutchin,* __ F.2d __ (D.C. Cir. Feb. 28, 1992) No. 91-3202.

10th Circuit affirms denial of acceptance of responsibility reduction to defendant who pled no contest. (490) The 10th Circuit affirmed the district court's denial of a reduction for acceptance of responsibility to a defendant who pled no contest to charges of sexually abusing a 10-year old child. The district court did not rely solely upon defendant's no contest plea. The probation officer reported that defendant had been somewhat evasive in his interview with her, and in his initial meeting with the FBI, had denied any wrongdoing. In petitioning the court to accept his plea of no contest, defendant was primarily concerned with defending against a possible civil suit in which an outright guilty plea would possible constitute prima facie evidence of civil liability. *U.S. v. Ward,* __ F.2d __ (10th Cir. Feb. 14, 1992) No. 91-6115.

8th Circuit upholds denial of acceptance of responsibility reduction where defendant also obstructed justice. (492) The 8th Circuit rejected defendant's claim that the district court failed to exercise its discretion on defendant's request for an acceptance of responsibility reduction. Because the district court enhanced defendant's sentence for obstruction of justice, the district court properly denied defendant a reduction for acceptance of responsibility. *U.S. v. Morton,* __ F.2d __ (8th Cir. Feb. 24, 1992) No. 91-2618.

Criminal History (§4A)

8th Circuit affirms sentencing defendant on the basis of additional prior convictions discovered after plea agreement. (500)(780) Before defendant executed his plea agreement, the government provided him with an FBI rap sheet listing three prior convictions. The government also provided defendant with preliminary sentencing calculation in which

it estimated that defendant's criminal history category was II. Defendant's criminal history was ultimately determined to be VI, based upon four additional offense which the probation department discovered after the plea agreement was executed. The 8th Circuit rejected defendant's claim that his sentence should be reduced to reflect the range suggested by the government's erroneous criminal history estimate. Defendant was not entitled to be sentenced based upon incorrect information. The government did not breach the plea agreement, and the government's incorrect estimate of defendant's criminal history did not render his guilty plea invalid. Given defendant's extensive criminal history (seven convictions between 1978 and 1990), he was not misled by the FBI rap sheet which revealed only three prior convictions. *U.S. v. Fortney,* __ F.2d __ (8th Cir. Feb. 27, 1992) No. 91-3040.

8th Circuit affirms that defendant was still under criminal justice sentence after revocation of probation and issuance of bench warrant. (500) Defendant contended that he was not under a criminal justice sentence under guideline section 4A1.1(d) at the time he committed the instant federal offense because his one year probation for a state crime expired two days before the date of the instant offense. The 8th Circuit affirmed the district court's conclusion that defendant was under a criminal justice sentence, because his probation had been revoked and there was an outstanding bench warrant for his arrest when he committed the instant offense. The fact that under state law a probationary period may not be extended beyond the statutory maximum, and that one year was the maximum period for defendant's offense, did not change the analysis. Because the state court had revoked defendant's probation and issued a warrant for his arrest pursuant to state law, he was still subject to the court's jurisdiction for his state conviction and was therefore "under" that criminal justice sentence on the day he committed the instant federal offense. *U.S. v. Renfrew,* __ F.2d __ (8th Cir. Feb. 19, 1992) No. 91-1559.

9th Circuit upholds criminal history points for possessing counterfeit notes while on supervised release within two years of release from prison. (500) The district court assessed two criminal history points under 4B1.1(d) for possessing counterfeit notes while on mandatory supervised release, and added one additional point under section 4A1.1(e) for possessing the notes within two years of defendant's release from prison. The 9th Circuit upheld all three criminal history points, noting that possession of counterfeit notes is a continuing offense and that defendant possessed them continuously from the time he apparently made them until they were seized on October 26, 1988. The fact that the indictment charged him with possessing the notes "on or about October 26, 1988" did not change the result, since the record showed that he was in possession of the notes earlier during the critical period. *U.S. v. Kayfez,* __ F.2d. __ (9th Cir. Feb. 21, 1992) No. 90-10029.

6th Circuit rules that appeal of prior state conviction does not preclude its inclusion in criminal history. (504) The 6th Circuit rejected defendant's claim that his prior state conviction should not have been included in his criminal history because it was on appeal in state court. Under guideline section 4A1.2(a)(1), there is no requirement that a prior sentence be upheld on appeal prior to its inclusion in a defendant's criminal history. *U.S. v. Beddow,* __ F.2d __ (6th Cir. Feb. 28, 1992) No. 91-1006.

6th Circuit rejects claim that prior case and instant case can be related cases under section 4A1.2(a)(2). (504) The 6th Circuit rejected defendant's claim that his prior state case and the present case were "related cases" under section 4A1.2(a)(2) and that therefore the state case should not have been included in his criminal history. Defendant's argument displayed a misunderstanding of the term "related cases". The question of related cases applies to the relationship between prior sentences, not to the relationship between prior sentence and the present offense. Section 4A1.2(a)(2) requires counting two or more prior related sentences as one sentence in a defendant's criminal history when the prior sentences were related to each other. The section does not apply where, as here, there is only one prior sentence. *U.S. v. Beddow,* __ F.2d __ (6th Cir. Feb. 28, 1992) No. 91-1006.

6th Circuit rules that prior sentence is not part of the present offense if the two are severable into two distinct offenses. (504) Defendant argued that his prior state firearm sentence was part of his instant money laundering offense under application note 1 to guideline section 4A1.2(a), and therefore it should have been excluded from his criminal history calculation. The 6th Circuit rejected this argument, holding that the appropriate inquiry is whether the prior sentence and the present offense involve conduct that is severable into two distinct offenses. Here, defendant's carrying a concealed weapon was severable from his money laundering offenses. The crimes involved different criminal conduct that harmed different societal interests. Moreover, the offense occurred at different times and places. Defendant transported gems into the country in April

and May 1988 in order to launder drug proceeds. Six months later he carried a gun when he attempted to sell the gems. Although defendant may have carried the gun the protect the gems, such an "incidental act" did not fall under the definition of "conduct that is part of the instant offense." *U.S. v. Beddow*, __ F.2d __ (6th Cir. Feb. 28, 1992) No. 91-1006.

5th Circuit affirms upward criminal history departure based upon commission of similar offenses which were never prosecuted. (510) Defendant fell within criminal history category V and had an applicable guideline range of 21 to 27 months. The district court sentenced defendant to 60 months, justifying the upward departure upon defendant's commission of other similar offense which were not prosecuted to conviction as well as defendant's bond status on numerous pending charges at the time of the instant offense. In addition, the presentence report listed a series of convictions for assault, disorderly conduct and criminal mischief which were punished by fine only. The 5th Circuit affirmed, ruling that guideline sections 4A1.3(d) and (e), and the commentary to guideline section 4A1.3 authorized the upward departure on these grounds. Given the extensiveness of defendant's criminal history, the extent of the departure was not unreasonable. *U.S. v. Lee*, __ F.2d __ (5th Cir. Feb. 18, 1992) No. 91-8171.

8th Circuit affirms upward departure based upon defendant's propensity to use a firearm. (510) Defendant was convicted of being a felon in possession of a firearm. The 8th Circuit affirmed a departure from a guideline range of 21 to 27 months to a sentence of 60 months. The departure was based upon the failure of criminal history category V to adequately represent the seriousness of defendant's criminal history, defendant's willingness to use firearms in the commission of crimes in the past, and defendant's failure to be deterred in the use of possession of firearms. The sentencing guidelines expressly recognize that a criminal history category may not adequately reflect the seriousness of a defendant's past criminal conduct or the likelihood that defendant will commit other crimes. Additionally neither defendant's offense level or criminal history fully took into consideration his propensity to use a firearm -- defendant had previously fired a gun at two individuals, and was apprehended because he entered a convenience store with a loaded weapon. The 60 month sentence was reasonable. *U.S. v. Lloyd*, __ F.2d __ (8th Cir. Feb. 28, 1992) No. 91-2464.

9th Circuit says upward departure was justified by drug trafficking activity for which defendant had not been convicted. (510)(718)(738) The district court had reliable information, in the form of case reports and testimony by a business associate, that the defendant had engaged in a wide range of drug trafficking activity for which he had not been convicted. Relying on *U.S. v. Lira-Barraza*, 941 F.2d 745, 746 (9th Cir. 1991) (*en banc*), the 9th Circuit held that this authorized the district court to depart upward because defendant's criminal history assessment did not adequately reflect his past criminal conduct. However the court reversed the *extent* of the departure. *U.S. v. Schubert*, __ F.2d. __ (9th Cir. Feb. 24, 1992) No. 91-10165.

9th Circuit forbids basing extent of departure on analogy to career offender guideline. (514) The sole justification given by the district court for the extent of its upward departure was that if defendant "had not had that one sentence set aside or he had been convicted on any of the criminal conduct that I have found him to be involved in, he would be a career criminal now." The 9th Circuit reversed, noting that *U.S. v. Faulkner*, 934 F.2d 190 (9th Cir. 1991), *as amended* December 24, 1991, forbids precisely this kind of analogy. The court noted that under section 4A1.3 "the proper approach is to seek guidance by analogy to the criminal history categories." *U.S. v. Schubert*, __ F.2d. __ (9th Cir. Feb. 24, 1992) No. 91-10165.

5th Circuit withdraws prior opinion and holds that felon's possession of a firearm is not a crime of violence. (520) Defendant was convicted of being a felon in possession of a firearm. In its original opinion in this case, the 5th Circuit examined the underlying facts and determined that defendant's offense was a crime of violence for career offender purposes. Here, the court withdrew this prior opinion. Following its recent decision in *U.S. v. Fitzhugh*, __ F.2d __ (5th Cir. Jan 28, 1992) No. 91-8211, it held that in light of the 1991 amendments to guideline section 4B1.2, courts should not consider the facts underlying the offense of conviction in determining whether that offense is a crime of violence. The amendments make clear that only the charged conduct can be considered in assessing whether an offense is a crime of violence, and expressly state that possession of a firearm by a felon is not a crime of violence. *U.S. v. Shano*, __ F.2d __ (5th Cir. Feb. 26, 1992) No. 91-4102, *withdrawing and superseding U.S. v. Shano*, 947 F.2d 1263 (5th Cir. 1991).

8th Circuit holds that robbery is per se a crime of violence. (520) The 8th Circuit affirmed that defendant's unarmed bank robbery was a crime of violence under guideline section 4B1.2(1)(i). To obtain a con-

viction for robbery, the government must show that defendant took property by force and violence, or by intimidation. Intimidation means the threat of force. Because the offense had as an element the threatened use of force, it was a crime of violence under subsection (i), and a court may not inquire into the facts underlying the offense. In contrast, when deciding whether an offense "involves conduct that presents a serious potential risk of physical injury to another" under subsection (ii), courts may examine the facts underlying the defendant's conviction to determine whether the offense is a crime of violence. *U.S. v. Wright*, __ F.2d __ (8th Cir. Feb. 18, 1992) No. 91-2780.

Determining the Sentence (Chapter 5)

9th Circuit holds that time spent on probation in residential drug treatment program must be credited toward sentence. (600) One of the special conditions of defendant's probation was that he enroll in and successfully complete a residential drug treatment program. He was transferred from the county jail to the residential treatment program and remained there for a period of 88 days until he violated the conditions of his probation and was transferred back to the county jail. Relying on *Brown v. Rison*, 895 F.2d 533 (9th Cir. 1990), Judges Canby, Norris and Levy held that "a defendant who is released on bond to a community treatment center, under conditions of confinement approaching those of incarceration, is considered to have been in custody and is entitled to credit toward his sentence under 18 U.S.C. section 3568 [now section 3551]." *Grady v. Crabtree*, __ F.2d. __ (9th Cir. March 5, 1992) No. 91-35783.

District Court holds California murderer has equal protection right to same custody credits as other prisoners. (600) In 1987, the California Attorney General issued an advisory opinion ruling that state prisoners convicted under California Penal Code section 190 (murder) were ineligible for custody credits that were available to other state prisoners. This ruling was upheld by the California courts. *In re Montgold*, 205 Cal.App.3d 1224 (1988); *In re Oluwa*, 207 Cal.App.3d 439, 446-47 (1989). District Judge Thelton Henderson held that this violated the Equal Protection Clause. Noting that habitual offenders who had committed murder were eligible for the custody credits, the court ruled that "allowing the hardened first degree murderer to earn . . . credits while denying them to his callow counterpart, is irrational." The court granted the writ of habeas corpus, and directed the state to credit the petitioner with appropriate worktime credits. *Brodheim v. Rowland*, __ F.Supp. __ (N.D. Cal. November 6, 1991) No. C90-2892-TEH.

6th Circuit reverses restitution order which included amounts for uncharged stolen cars. (610) Defendant was convicted of stealing an FBI vehicle and unlawfully converting a second FBI vehicle. While en route to steal one of the vehicles, defendant also stole several other vehicles. The 6th Circuit reversed a restitution order based on all of the vehicles. Under *Hughey v. United States*, 110 S.Ct. 1979 (1990), the Victim and Witness Protection Act authorizes restitution only for the offense of conviction. The indictment was limited to the two FBI vehicles, under 18 U.S.C. section 641. The FBI was the only "victim" entitled to restitution. That defendant may have been involved in a pattern of stealing vehicles was irrelevant. The court also held that because the FBI recovered its stolen vehicles, it was only entitled to recover the value of the damage to the vehicles. It was unclear whether the district court's order was based on the full value of the vehicles or the damage to the vehicles. *U.S. v. Clark*, __ F.2d __ (6th Cir. Feb. 21, 1992) No. 91-5522.

9th Circuit holds that prior to 1990 Amendment restitution could not be ordered for Title 31 violations. (610) Defendant pled guilty to "structuring" a financial transaction in violation of 31 U.S.C. sections 5322(a) and 5324. Pursuant to a plea agreement, the district court imposed restitution totaling $183,250. On appeal, the 9th Circuit reversed, holding that the restitution could not have been imposed under the Federal Probation Act, 18 U.S.C. section 3651, repealed in 1987, because the Act authorizes restitution only as a condition of probation. Nor could restitution be upheld under the Victim and Witness Protection Act of 1982, 18 U.S.C. section 3663-64 because, at the time of the plea and sentencing, that Act provided restitution only for Title 18 offenses and Title 49 U.S.C. section 1472. Although the Act was amended in 1990 to permit restitution "in any criminal case," the amendment did not apply to defendant. Moreover, charging "aiding and abetting" under 18 U.S.C. section 2 did not make the restitution valid because that section does not establish "an offense." The restitution order was reversed. *U.S. v. Snider*, __ F.2d __ (9th Cir. Feb. 25, 1992) No. 90-30024, *withdrawing and superseding* 945 F.2d 1108 (9th Cir. 1991).

9th Circuit holds that plea agreement cannot authorize restitution in absence of statutory authority. (610)(780) The government argued that even in

the absence of any statutory authority, the restitution order could be upheld on the basis of the plea agreement. The argument was based on the assumption that pleas are governed by the dictates of contract law and that a restitution order is in the nature of a settlement for civil damages. The 9th Circuit rejected the argument, ruling that restitution "is a criminal penalty, not a civil remedy." *U.S. v. Snider,* __ F.2d __ (9th Cir. Feb. 25, 1992) No. 90-30024, *withdrawing and superseding* 945 F.2d 1108 (9th Cir. 1991).

1st Circuit rules it lacks jurisdiction to review fine within guideline range. (630)(860) In defendant's first appeal, the 1st Circuit remanded because the district court improperly imposed a four level leadership enhancement. On remand, the district court reduced defendant's offense level accordingly, and imposed a reduced term of imprisonment and the same $150,000 fine as before. On defendant's second appeal, he claimed that the fine was excessive in light of the fact that he was not found to have a leadership role in the offense. The 1st Circuit held that because the fine was within the appropriate guideline range, it had no jurisdiction to review the appropriateness of the fine. *U.S. v. McDowell,* __ F.2d __ (1st Cir. Feb. 20, 1992) No. 91-1457.

9th Circuit upholds $25,000 fine based on substantial undisclosed funds. (630) Although the presentence report suggested that defendant had a negative net worth, it also contained information that defendant had access to substantial undisclosed funds. The defendant challenged this information, but the 9th Circuit held that the "fact that the district court resolved the conflicting information against [defendant] does not mean that the district court improperly refused to consider evidence of his indigency." The court upheld the fine. *U.S. v. Schubert,* __ F.2d. __ (9th Cir. Feb. 24, 1992) No. 91-10165.

D.C. Circuit upholds consecutive sentences for federal offense and violation of D.C. Code. (650) Defendant was convicted of one federal firearms charge and one firearm violation under the D.C. Code. He received a 21 month sentence under the sentencing guidelines for the federal offense, and a consecutive 6 to 18 month sentence for the D.C. Code offense. The D.C. Circuit rejected defendant's claim that the district court should have applied the guidelines to the D.C. Code violation as if it were a federal offense. The sentencing guidelines apply only to federal offenses. Because the guidelines are silent on the issue of how a court is to relate a guidelines sentence to a non-guidelines sentence, the issue is a matter of discretion. There was no abuse of discretion in ordering consecutive sentences. *U.S. v. Cutchin,* __ F.2d __ (D.C. Cir. Feb. 28, 1992) No. 91-3202.

Article notes possible reasons for expanding factors considered under guidelines. (660) In a book review entitled *Federal Sentencing: Looking Back to Move Forward,* Deborah Young suggests reform of the guidelines based on a study of preguidelines sentencing, S. Wheeler, K. Mann & A. Sarat, *Sitting in Judgment: The Sentencing of White-Collar Criminals* (1988). According to the study, preguidelines sentencing was not as unprincipled as is commonly depicted; indeed, judges tended to agree on the factors that were important in determining sentence. Among those factors were specific characteristics of the offender's situation that, Young notes, are often difficult to consider under the guidelines system. Further development of the guidelines system to accommodate such factors might be warranted, Young concludes. 60 CINN. L. REV. 135-51 (1991).

Departures Generally (§5K)

District court departs downward for substantial assistance in congressional investigation. (715) The defendant pled guilty to violating munitions export laws. The Chief Counsel of the House Foreign Affairs Committee advised the district court that the defendant had provided the committee with substantial assistance in its investigation of whether 52 Americans taken hostage in Iran were held past the 1980 election in violation of any U.S. laws. District Judge Weinstein ruled that although a 5K1.1 departure was not available, section 5K2.0 authorized a downward departure for cooperation with Congress. The court relied on *U.S. v. Garcia,* 926 F.2d 125 (2d Cir. 1991) which approved a downward departure for "facilitating the proper administration of justice." The court departed downward by three levels. *U.S. v. Stoffberg,* __ F.Supp. __ (E.D.N.Y. Jan. 15, 1992) No. CR 91-524.

Sentencing Hearing (§6A)

8th Circuit affirms that district court applied proper standard of proof. (755) The 8th Circuit rejected defendant's claim that the district court misconstrued the government's burden of proof at sentencing as being "some evidence" rather than "a preponderance of the evidence." In an effort to save time, the district court told the government it only needed to introduce evidence of defendant's involvement with enough other people to support the presentence report's role in the offense enhancement.

After hearing testimony about several people, the district court found "sufficient evidence" supported enhancement of defendant's offense level for his organizational role. Although the district court did not state the standard it was applying, the appellate court was satisfied that it applied the preponderance standard. Even if it was not, the court's result would have been the same under the preponderance standard. *U.S. v. Morton*, __ F.2d __ (8th Cir. Feb. 24, 1992) No. 91-2618.

1st Circuit finds no error in failure to order new presentence report prior to resentencing. (760) In defendant's first appeal, the 1st Circuit remanded because the district court improperly imposed a four level leadership enhancement. On remand, the district court found that defendant did not act in any supervisory capacity, and reduced his offense level and guideline range accordingly. The 1st Circuit found no error in the district court's failure to order an updated presentence report prior to resentencing. The original presentence report was available to the court at the resentencing hearing. *U.S. v. McDowell*, __ F.2d __ (1st Cir. Feb. 20, 1992) No. 91-1457.

8th Circuit affirms compliance with Rule 32 where defendant failed to identify factual disputes unresolved by the court. (765) The 8th Circuit rejected defendant's claim that the district court failed to make findings on asserted factual inaccuracies as required by Fed. R. Crim. P. 32(c)(3)(D). Defendant did not identify the factual inaccuracies unresolved by the district court. In addition, during the sentencing hearing, the district court made findings on defendant's objections to the presentence report. *U.S. v. Morton*, __ F.2d __ (8th Cir. Feb. 24, 1992) No. 91-2618.

9th Circuit remands for statement of reasons to be attached to presentence report. (765) By an addendum attached to the final presentence report, the probation service responded to each of defendant's challenges to the report's factual assertions. The district court adopted these responses in a Statement of Reasons for Imposing Sentence filed March 8, 1991. However, the record did not indicate that the Statement of Reasons had been attached to the presentence report. The case was remanded so that the district court could append a copy of the Statement of Reasons to the presentence reports or by any other means make it clear that the court had adopted the probation service's responses. *U.S. v. Schubert*, __ F.2d. __ (9th Cir. Feb. 24, 1992) No. 91-10165.

4th Circuit rules that guidelines do not create reduced standard for withdrawal of guilty pleas. (780) Defendant argued that since guidelines section 6B1.1 through 6B1.3 prevent a sentencing court from accepting a plea agreement until the court has reviewed the presentence report, the rule should be the same for a guilty plea. Until then, a defendant should be able to withdraw his plea upon some showing of cause less demanding that the current fair and just reason standard. The 4th Circuit rejected this argument because it failed to acknowledge the distinction between a plea of guilty and a plea agreement. Here, the district court explicitly accepted defendant's guilty plea immediately following the Rule 11 colloquy, and announced its intention to defer acceptance of the plea agreement until it had the opportunity to review the presentence report. Once a guilty plea is accepted by the court, the defendant is bound by his choice and may withdraw his plea only by showing a fair and just reason under Rule 11, or by withdrawing under Rule 11(e)(4) after a rejected plea agreement. The sentencing guidelines do not alter this. *U.S. v. Ewing*, __ F.2d __ (4th Cir. Feb. 20, 1992) No. 91-5250.

11th Circuit vacates sentence because defendant was not advised that he could not withdraw his guilty plea if the court rejected the government's sentencing recommendation. (790) Defendant's plea agreement contained certain sentencing recommendations, and stipulated that, while the court was not bound by the agreement, defendant would be given the opportunity to withdraw his guilty plea if the court rejected these sentencing recommendations. The district court accepted the plea agreement, and sentenced defendant in accordance with all but one of the government's recommendations. The court then denied defendant's motion to withdraw his plea and vacate the sentence. The 11th Circuit ruled that the court's failure to advise defendant that he was not entitled to withdraw his guilty plea if the court rejected the government's sentencing recommendations, as required by Fed. R. Crim. P. 11(e)(2), was not harmless error. The district court's omission deprived defendant of the knowledge of the direct consequences of his plea, thus affecting his substantial rights under Rule 11. The sentence was vacated and defendant was granted the opportunity to plead anew. *U.S. v. Zickert*, __ F.2d __ (11th Cir. Feb. 24, 1992) No. 90-3729.

Appeal of Sentence (18 U.S.C. §3742)

9th Circuit considers claim raised for first time in petition for rehearing where the error was plain. (855) The question of the applicability of the Victim and Witness Protection Act to the defendant's convic-

tion was raised for the first time in the government's petition for rehearing. The 9th Circuit said that ordinarily "we will not consider claims not presented to the trial court. We may make an exception, however if plain error has occurred and injustice might otherwise result." The court found such an exception appropriate in this case, and withdrew its prior opinion. *U.S. v. Snider,* __ F.2d __ (9th Cir. Feb. 25, 1992) No. 90-30024, *withdrawing and superseding* 945 F.2d 1108 (9th Cir. 1991).

5th Circuit finds district court adequately considered mitigating factors by sentencing at bottom of guideline range. (860) The 5th Circuit rejected defendants' contention that the district court failed to adequately consider their mitigating circumstances. The district court sentenced defendants within the guideline range, and the sentences were not imposed in violation of law. The district court took into account defendants' minor roles in the offenses and sentenced defendants at the bottom of their guideline ranges. *U.S. v. Nguyen,* __ F.2d __ (5th Cir. Feb. 25, 1992) No. 91-2572.

8th Circuit refuses to consider in habeas action issues resolved against defendant on direct appeal. (880) On appeal from the district court's denial of his motion under 28 U.S.C. section 2255, petitioner raised several sentencing guidelines issues which he had previously raised in his direct appeal. The 8th Circuit refused to consider these issues, since issues which were raised and decided on direct appeal cannot be relitigated on a motion to vacate under 28 U.S.C. section 2255. *Dall v. United States,* __ F.2d __ (8th Cir. Feb. 24, 1992) No. 91-2887.

Forfeiture Cases

1st Circuit affirms denial of relief from forfeiture judgment under Rule 60(b). (900) The 1st Circuit rejected claimant's argument that he was improperly denied post-judgment relief under Fed. R. Civ. P. 60(b)(3) and (6) based upon the government's "fraud on the court" and its misstatements, and under Rule 60(b)(1) based upon his counsel's excusable neglect. Claimant did not establish a fraud upon the court. Claimant failed to show that the government's misstatements or his counsel's failure to file a verified affidavit in opposition to the government's motion for summary judgment was material to the government's demonstration or probable cause or to claimant's deficient defense of innocent ownership. *U.S. v. Parcel of Land and Residence at 18 Oakwood Street,* Dorchester, Massachusetts, __ F.2d __ (1st Cir. Feb. 21, 1992) No. 91-1967.

1st Circuit rules that claimant's failure to furnish cross-statement of facts constituted admission of government's assertions. (920)(960) The 1st Circuit rejected claimant's contention that he was an innocent owner. The burden of proving the defense of innocent ownership rests with the claimant. Claimant's initial opposition to the government's motion for summary judgment included no affidavits, only a general denial of some allegations in the forfeiture complaint and a "weasel-worded challenge" to the thrust of the detailed affidavits supporting the forfeiture complaint. Moreover, claimant failed to furnish the required cross-statement of facts. Thus, his unexcused omissions had the legal effect of admitting the government's factual assertions. *U.S. v. Parcel of Land and Residence at 18 Oakwood Street,* Dorchester, Massachusetts, __ F.2d __ (1st Cir. Feb. 21, 1992) No. 91-1967.

1st Circuit upholds forfeiture action brought one year after last drug arrest at defendant property. (930) The government instituted a forfeiture action against claimant's real property based upon 29 drug-related arrests which took place at the property over a four year period. The 1st Circuit rejected claimant's argument that evidence supporting the forfeiture was "stale" since all of the alleged drug activity took place more than a year prior to the forfeiture action. Claimant did not indicate how the timing of the action prejudiced him or adversely affected the reliability of the evidence. Absent some showing of prejudice, claimant was not entitled to exclude competent evidence in an action commenced well within the five year limitation period. *U.S. v. Parcel of Land and Residence at 18 Oakwood Street,* Dorchester, Massachusetts, __ F.2d __ (1st Cir. Feb. 21, 1992) No. 91-1967.

1st Circuit upholds probable cause determination based upon DEA agent's affidavit detailing drug arrests on property. (950) The district court determined that there was probable cause to forfeit claimant's real property based upon a DEA's agent affidavit stating that over a four-year period, the property was the site or more than 29 drug-related arrests. The 1st Circuit rejected claimant's contention that the affidavit contained unreliable hearsay. The reliability of the affidavit was substantiated by its supporting documentation pertaining to extensive illegal activity at the property and by the accompanying affidavits of two police officers, attesting to the accuracy of the representations made in the DEA affidavit. *U.S. v. Parcel of Land and Residence at 18 Oakwood Street,* Dorchester, Massachusetts, __ F.2d __ (1st Cir. Feb. 21, 1992) No. 91-1967.

6th Circuit rules that probable cause determination is to be made on the basis of evidence available at forfeiture hearing. (950) The district court held that probable cause must be measured at the time of the seizure of the defendant property. The 6th Circuit noted that although this approach has been adopted by at least one other district court, it was following the 2nd Circuit in holding that a district court must assess probable cause at the time of the forfeiture hearing. "Of course a government cannot start a forfeiture proceeding in bad faith with wild allegations based on the hope that something will turn up to justify its suit. . . . Once a forfeiture proceeding is brought, if further evidence is legally obtained to justify the government's belief, there is no persuasive reason to bar its use." *U.S. v. $67,220.00 in United States Currency*, __ F.2d __ (6th Cir. Feb. 28, 1992) No. 91-5645.

6th Circuit rules that government established probable cause to forfeit cash carried by Miami-bound traveller. (950) The 6th Circuit reversed the district court's determination that the government failed to establish probable cause to forfeit money seized from claimant at the airport. First, claimant had bought a one-way airline ticket to Miami, a well-known source city, acted nervous while checking his bag and arrived at the airport late. On the other hand, he did buy the ticket in advance with his own credit card, travelled under his own name, and checked luggage. Second, claimant was carrying a large amount of cash concealed on his person. On the other hand, the fact that the police officer could see cash protruding from his pocket suggested that claimant did little to conceal the money. Third, a drug-sniffing dog allegedly reacted positively to the money. But the government's evidence on this point was weak. Fourth, claimant twice misstated to police officers the amount of money he was carrying, and misrepresented the source of the funds. Finally, a government agent testified that he had reason to believe that claimant had sold cocaine in the area. But because the agent refused to offer any basis for that belief, the court refused to attach any probative weight to that testimony. Nonetheless, despite the weaknesses of the government's proof, the evidence did support a reasonable belief that the seized currency was substantially connected to illegal drug transactions. *U.S. v. $67,220.00 in United States Currency*, __ F.2d __ (6th Cir. Feb. 28, 1992) No. 91-5645.

Opinions Withdrawn and Superseded

(245)(650) *U.S. v. Pace*, 950 F.2d 961 (5th Cir. 1991) *withdrawn and Superseded, U.S. v. Pace*, __ F.2d __ (5th Cir. Feb. 24, 1992) No. 90-8543.

(520) *U.S. v. Shano*, 947 F.2d 1263 (5th Cir. 1991), *withdrawn and superseded, U.S. v. Shano*, __ F.2d __ (5th Cir. Feb. 26, 1992) No. 91-4102.

(610) *U.S. v. Snider*, 945 F.2d 1108 (9th Cir. 1991), *withdrawn and superseded*, __ F.2d __ (9th Cir. Feb. 25, 1992) No. 90-30024.

Correction

(490) *U.S. v. Tallman*, the correct citation on page 54 of the Dec. 21, 1991 supplement is *U.S. v. Furlow*, 952 F.2d 171 (8th Cir. 1991).

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Federal Sentencing and Forfeiture Guide NEWSLETTER

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

Vol. 3, No. 9 | FEDERAL SENTENCING GUIDELINES AND FORFEITURE CASES FROM ALL CIRCUITS. | February 24, 1992

IN THIS ISSUE:

Attorney General directs prosecutors to seek upward departures for semi-automatic weapons and gang involvement. In a memorandum dated January 31, 1992, Attorney General William P. Barr directed federal prosecutors to seek enhanced sentencing for semi-automatic weapons and gang involvement. Specifically, for firearms covered by U.S.S.G. 2K2.1, prosecutors are "to seek a two-level upward departure for the possession of a semi-automatic weapon by felons, fugitives, and prohibited persons." An additional two-level departure is to be sought in 2K2.1 cases for firearms offenses involving gang members.

Department of Justice adopts policies on charging, plea bargaining, and departures from the sentencing guidelines. On February 7, 1992, a new section 9-27.451 was added to the U.S. Attorney's Manual, requiring written plea agreements in all felony cases and misdemeaners negotiated from felonies. All pleas must be approved by supervisory attorneys "who will have the responsibility of assessing the appropriateness of the plea agreement under . . . the Thornburgh memos. Likewise, supervisory authority is required to file a motion for a downward departure for substantial assistance under U.S.S.G. section 5K1.1, and each office is required to "maintain documentation of the facts behind and justification for each substantial assistance pleading." Rule 35(b) motions are treated the same. Moreover, "[j]ust as a prosecutor must file a readily provable charge, he or she must file an information under 21 U.S.C. section 851 regarding prior convictions that are readily provable." The new policy also reminds prosecutors that when the defendant commits an armed robbery or other crime of violence or drug trafficking crime, "appropriate charges include Title 18, U.S.C. section 924(c)."

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Article argues that Commission's critique of mandatory minimums applies equally to guidelines themselves. (110)(245) The Sentencing Commission's Report, *"Mandatory Minimum Penalties in the Federal Criminal Justice System,"* criticizes mandatory minimum sentencing statutes for shifting discretion from judges to prosecutors, increasing judicial workload, punishing less culpable offenders as seriously as more culpable offenders, and providing incentives for judges and prosecutors to avoid the mandatory sentences. In *"Mandatory Minimum Penalties and the U.S. Sentencing Commission's 'Mandatory Guidelines,'"* Professor Michael Tonry lauds the Commission's research design and critique of the effect of mandatory minimum sentences. But Tonry disputes the Commission's claim that the guidelines themselves escape identical criticism. He argues that limitations on departures and other factors have led the guidelines to have the same vices and suggests that key features of the guidelines be reconsidered with an eye toward greater flexibility. 4 *Fed. Sent. R.* 129-33 (1991).

Article applies administrative law notions to sentencing issues. (110) In *"The United States Sentencing Commission as an Administrative Agency,"* Ronald F. Wright summarizes his earlier article about how principles of administrative law should inform assessment of the Sentencing Commission's work. Wright argues that the administrative law focus helps clarify what kinds of justification are necessary before a guideline should preclude departure, what level of deference should be given to the Commission's reading of a sentencing statute, and what kinds of procedures should be followed by the Commission. In a response, Kevin Cole takes issue with Wright's apparent preference for guidelines justified by empirical evidence. 4 *Fed. Sent. R.* 134-36, 140-41 (1991).

Article argues guidelines' failures and due process concerns. (110) In *"The Reality of Guidelines Sentencing: No End to Disparity,"* Judge Gerald W. Heaney summarizes his earlier article claiming that the guidelines have failed to decrease sentencing disparity, have led to sentences that vary with the race of the offender, and have raised serious due process concerns by pegging sentences to facts not alleged in the indictment, not subject to the requirements of proof beyond a reasonable doubt by a jury, and not governed by the confrontation protections applicable at trial. In a response, Judge William W. Wilkins, Jr., argues that Heaney's conclusions are based on skewed case samples and that guideline procedures are more protective of defendants than were preguideline procedures. 4 *Fed. Sent. R.* 142-50 (1991).

Article finds increased disparity after guidelines. (110) In *"Aggregate Inter-Judge Disparity in Federal Sentencing: Evidence from Three Districts (D.Ct., S.D.N.Y., N.D.Cal.),"* Joel Waldfogel attempts a new approach to measuring sentencing disparity. Rather than controlling for the circumstances of particular offenses and offenders, the author studies the average sentences imposed by individual judges within particular judicial districts, relying on sample size and random case assignment to distribute evenly types of cases and offenders. The author concludes that disparity has increased since implementation of the guidelines in two districts and has remained the same in the other district studied. 4 *Fed. Sent. R.* 151-54 (1991).

Article critiques guidelines' emphasis on harms. (110) In *"The Failure of Sentencing Guidelines: A Plea for Less Aggregation,"* Albert W. Alschuler summarizes his earlier article challenging the emphasis on resulting harm in computing guidelines

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sentences. He argues that the nature of the guidelines system is likely to produce such emphases, because it is easy to write guidelines in terms of harm but difficult to describe "the appropriate influence of situational and personal characteristics on punishment." In a response, Judge Morris E. Lasker and Katherine Oberlies disagree with the conclusion that situational and personal characteristics cannot be captured in sentencing guidelines and argue that Alschuler's criticisms about the guidelines' severity could be accomodated within the guidelines system. 4 *Fed. Sent. R.* 161-68 (1991).

7th Circuit orders defendant to be resentenced by different judge. (110)(850) Defendant's original sentence was reversed by the 7th Circuit in an unpublished order because it found the district judge did not adequately explain his reasons for an upward departure. The district judge resentenced defendant, and on his second appeal, the 7th Circuit again reversed and remanded because it found that the extent of the departure was unjustified. In remanding, the appellate court ordered defendant to be sentenced by a different judge. At the first resentencing, the district judge said he was in a foul mood because he did not like to redo sentences, did not like the appellate court's handling of defendant's first appeal, and did not like the guidelines. Given this, the 7th Circuit thought it would be "exceedingly difficult to convince [defendant] that he [could] receive justice in sentencing at the hands of this judge." *U.S. v. Thomas,* __ F.2d __ (7th Cir. Feb. 6, 1992) No. 91-1699.

5th Circuit affirms upward departure and abuse of trust enhancement for prison guard who introduced drugs into prison. (125)(350)(450) (715) Defendant, a prison guard, was involved with drug offenses at the prison. He contended an upward departure for placing prison security at risk was improper because he had already received an enhancement under guideline section 3B1.3 for abuse of trust. The 5th Circuit affirmed the grounds for departure, ruling that the specific offense characteristic of using one's role as a prison guard to commit the offense was not taken into account by the abuse of trust enhancement. The analogy to section 2P1.2 was not apt because defendant was sentenced under section 2D1.1 for unlawful drug trafficking. Defendant was more than a mere law enforcement officer who engaged in a prohibited transaction; he was prison guard who engaged in a prohibited transaction while charged with maintaining prison security. It was not improper for the district court to depart three levels, rather than the two, as defendant argued based upon an analogy to section 2P1.2. A sentencing court need not resort to analogies when departing under section 5K2.0. *U.S. v. Siciliano,* __ F.2d __ (5th Cir. Feb. 5, 1992) No. 91-3811.

1st Circuit says amendment permitting consideration of relevant conduct in role in offense was mere clarification. (131)(170)(420) The Introductory Commentary to Chapter 3 of the guidelines in effect on the date defendant was sentenced provided that a defendant's role in the offense is to be based upon all relevant conduct. This provision was added to the guidelines by Amendment 345, which the sentencing commission explained was a "clarification" of the law. Defendant contended that Amendment 345 was a substantive change, and that it violated the ex post facto clause to determine his role in the offense based upon other relevant conduct. The 1st Circuit agreed that the law prior to the amendment was unclear, and that the Sentencing Commission could not, merely by labeling an amendment a clarification, change a meaning retroactively. Nonetheless, the court affirmed the district court's determination. *U.S. v. Ruiz-Batista,* __ F.2d __ (1st Cir. Feb. 7, 1992) No. 91-1322.

7th Circuit suggests that applying amended guideline increasing range would not violate ex post facto clause. (131) The district court sentenced defendant under the guidelines in effect on the date he committed the offense, rather than on the date he was sentenced. The 7th Circuit did not determine whether this was proper because the government did not appeal this issue. However, the court stated its belief that an amendment to the guidelines which increases a defendant's guideline sentence does not violate the ex post facto clause, since it does not change the statutory punishment that a defendant faces as a result of his crime. "[A] change in the sentencing guidelines is no different from . . . the institution of a get-tough policy under which the prosecutor no longer accepts pleas to lesser offenses, or the appointment of a new judge who favors longer sentences, or a change in the guidelines for parole . . . or a decision by the President to cease commuting the sentences of a class of felons. All of these may increase the time a criminal spends in prison without transgressing the ban on ex post facto laws." *U.S. v. Bader,* __ F.2d __ (7th Cir. Feb. 12, 1992) No. 90-3656.

10th Circuit rejects characterizing amendment to criminal history as merely a clarification. (131)(504) Section 4A1.2(c)(1), in effect at the time defendant committed his offense, provided that local ordinance violations are excluded from a defendant's

criminal history except under certain limited circumstances. Effective November 1990 this provision was amended to provide that local ordinance violations which are also criminal offenses under state law are not excluded from a defendant's criminal history. The 10th Circuit rejected the sentencing commission's characterization of this amendment as merely clarification. An amendment which changes the language of a guideline is substantive unless it does no more than "clarify a meaning that was fairly to be drawn from the original version." Given the plain meaning of the pre-amendment version under which all municipal ordinance violations were excluded, the amendment made a substantive change in the law and was not a clarification of pre-existing law. Since it would violate the ex post facto clause to sentence defendant under the amended guideline, the previous version of the guideline was applicable. *U.S. v. Mondaine*, __ F.2d __ (10th Cir. Feb. 10, 1992) No. 90-3282.

2nd Circuit affirms application of guidelines to defendant who failed to withdraw from conspiracy prior to effective date. (132)(380) The 2nd Circuit upheld the application of the guidelines to defendant because he failed to establish that he affirmatively withdrew from a RICC enterprise prior to the effective date of the guidelines. The evidence established that while defendant and a co-conspirator had a "serious falling out" prior to the effective date of the guidelines, they were ordered by the enterprise boss to settle their differences. Although defendant and the co-conspirator remained on less than friendly terms, there was evidence that defendant maintained his connection with the enterprise. In January 1988, defendant asked another conspirator for 9 mm. bullets, although they were never supplied to him. In April 1988, defendant told the conspirator to warn the enterprise boss that "there's something [expletive] coming down." *U.S. v. Minicone*, __ F.2d __ (2nd Cir. Jan. 23, 1992) No. 91-1014.

Application Principles, Generally (Chapter 1)

1st Circuit affirms that 11 fraudulent loan applications involved more than minimal planning. (160)(300) Defendant, a real estate broker, pled guilty to 11 counts of filing false residential mortgage loan documents. The 1st Circuit affirmed that defendant's conduct involved more than minimal planning. Application note 1(f) to guideline section 1B1.1 provides that more than minimal planning is present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune. The court rejected defendant's claim that his repeated preparation and submission of false statements constituted "spur of the moment" conduct. Each of the 11 loan transactions involved several steps: arranging for the mortgage financing, concealing the second mortgage financing in the first mortgage loan documents, and submitting the loan documents to the bank. *U.S. v. Gregorio*, __ F.2d __ (1st Cir. Feb. 7, 1992) No. 91-1393.

8th Circuit affirms basing "more than minimal planning" enhancement on the offense, rather than defendant's role. (160)(300) Defendant contended that an enhancement for more than minimal planning under guideline section 2F1.1(b)(2) was improper because he only took instructions from another co-conspirator. The 8th Circuit rejected this argument, because it improperly focused on the nature of defendant's role in the offense, rather than the nature of the offense itself. The government presented evidence that the pattern of fraudulent activity extended over a period of at least eight months, and involved a significant amount of planning. *U.S. v. Earles*, __ F.2d __ (8th Cir. Feb. 3, 1992) No. 91-1345.

9th Circuit holds that minor participant was not accountable for drugs distributed after arrest. (170)(275)(440) Application note 1 to U.S.S.G. section 1B1.3 notes that "relevant conduct is not necessarily the same for every participant." Thus even though as a general rule, the fact that a conspirator is taken into custody does not automatically indicate disavowal of the conspiracy, the defendant here was only a "minor" participant. "Once in custody, she was in no position to continue her role as a drug distributor. Thus the 9th Circuit held that it "stretches a legal fiction to the breaking point to hold her accountable for the drugs ... distributed after May 20, 1989." *U.S. v. Johnson*, __ F.2d __ (9th Cir. Feb. 11, 1992) 90-30344.

5th Circuit upholds firearm enhancement despite acquittal on 924(c) charges. (175)(280) The 5th Circuit upheld an enhancement under guideline section 2D1.1(b)(1) for possessing a firearm in connection with a drug trafficking offense, despite defendant's acquittal on charges of carrying a firearm in connection with a drug trafficking offense under 18 U.S.C. section 924(c)(1). *U.S. v. Juarez-Ortega*, 886 F.2d 747 (5th Cir. 1989), which upheld an enhancement in such a situation, was controlling. Defendant never contested the reliability of the government's evidence regarding the weapon. *U.S. v. Carter*, __ F.2d __ (5th Cir. Feb. 12, 1992) No. 90-1903.

8th Circuit, en banc, upholds government motion requirement for substantial assistance departures. (180)(712) Defendants argued that because guideline section 5K1.1 is a policy statement, rather than a guideline, it is not binding on the courts and therefore a court can reject the provision on policy grounds and depart downward in the absence of a government motion. The 8th Circuit, in a divided en banc decision, rejected this argument. Legislative history indicates that the distinction between guidelines and policy statements is meaningful: policy statements are more general in nature than the guidelines. However, the directive to courts to "consider" policy statements does not mean that a court can reject a policy statement if it pleases, but only shows that Congress anticipated that the more general material to be included in a policy statement would frequently be of a nature to illuminate, rather than determine, a proper outcome. Legislative history might support an argument that a certain policy statement was too general to follow or was not drafted to foresee special circumstances in a particular case, but it does not suggest a court may ignore a policy statement simply because it disagrees with the statement. Judge Beam dissented in part, and Chief Judge Lay and Judges McMillian, Heaney and Arnold dissented separately. *U.S. v. Kelley*, __ F.2d __ (8th Cir. Feb. 5, 1992) No. 90-1027 (*en banc*).

Offense Conduct, Generally (Chapter 2)

2nd Circuit upholds first degree murder as most analogous offense even though crime was second degree murder under state law. (210)(290)(390) Defendant was convicted of conspiring to participate in a racketeering enterprise based in part upon his involvement in a murder. The 2nd Circuit upheld the district court's use of the first degree murder guideline to establish defendant's base offense level, even though New York law would have categorized the murder as only second degree murder. The district court's task under guideline section 2E1.1 was to find the offense level corresponding to the most analogous federal offense. A person is guilty of second degree murder under New York law when, with intent to cause the death of another, he causes the death of such person or third person. First degree murder is defined under federal law, 18 U.S.C. section 1111, as a "willful, deliberate, malicious and premeditated killing." *U.S. v. Minicone*, __ F.2d __ (2nd Cir. Jan. 23, 1992) No. 91-1014.

5th Circuit affirms that offense most analogous to possessing flask for methamphetamine production was 21 U.S.C. 841(d). (240)(390) Defendant pled guilty to possessing a three-neck round bottom flask with intent to manufacture a controlled substance, in violation of 21 U.S.C. section 843(a)(6). The guidelines do not contain a specific reference for this felony, and therefore the district court was required to determine the most analogous guideline. The 5th Circuit affirmed the district court's determination that the most analogous guideline was that applicable to violations of 21 U.S.C. section 841(d), which applies to the possession of a chemical with the intent to manufacture a controlled substance. The court rejected defendant's contention that the most analogous guideline was that applicable to violations of 21 U.S.C. section 863, which applies to the use, sale, or trafficking of drug paraphernalia. Section 863 applies to things used to experience or consume a controlled substance, while section 841(d) applies to things used to create controlled substances. *U.S. v. Smertneck*, __ F.2d __ (5th Cir. Feb. 10, 1992) No. 91-4481.

9th Circuit upholds equating one marijuana plant to one kilogram of marijuana. (240)(253) Defendant argued that U.S.S.G. section 2D1.1, which equates one marijuana plant to one kilogram of marijuana had no rational basis and thus violated the due process clause. Specifically, defendant argued that the plant-kilogram equation is irrational because mature plants in his grow operation produced about 56 grams of marijuana, nowhere near one kilogram. Relying on the 7th Circuit's opinion in *U.S. v. Webb*, 945 F.2d 967 (7th Cir. 1991), the 9th Circuit found no due process violation. The court said that "the section's rationality lies in recognition of a higher level of culpability for marijuana growers compared to those who merely possess the harvested product." *U.S. v. Belden*, __ F.2d. __ (9th Cir. Feb. 20, 1992) No. 91-30022.

4th Circuit strikes down guideline equating one marijuana plant to 100 grams of marijuana. (242)(253) Guideline section 2D1.1(c) provides that for offenses involving possession of fewer than 50 marijuana plants, each plant is to be treated as equivalent to 100 grams of marijuana. The 4th Circuit held that this provision is inconsistent with Congressional intent, as expressed in 21 U.S.C. section 841(b)(1)(D), to consider actual weight as the sentencing measure for offenses involving fewer than 50 plants. In 21 U.S.C. section 841, Congress directed that except in certain specific instances, the actual weight of the illegal substance is used to assess the penalty. One exception is found in section 841(b)(1)(D), which states that "in the case of less than 50 kilograms of marihuana, except in the case of

50 or more marihuana plants regardless of weight . . . such person shall . . . be sentenced to a term of imprisonment of not more than five years." Congress intended with this language to refer only to cases involving possession of 50 or more plants. For cases involving less than 50 plants, Congress intended to follow the general rule of section 841, which makes actual weight determinative for sentencing purposes. *U.S. v. Hash,* __ F.2d __ (4th Cir. Feb. 3, 1992) No. 91-5340.

9th Circuit upholds mandatory minimum sentence for marijuana plants against constitutional challenge. (242)(253) The 9th Circuit held that the mandatory minimum sentencing provisions of 21 U.S.C. section 841(b)(1)(B)(vii) are not ambiguous. "Congress intended live marijuana plants to be measured by number and processed marijuana by weight." The court also ruled that the meaning of the word "plant" is clear, and includes small cuttings. Defendant's argument that the government caused the plants to deteriorate so that it was impossible to determine whether they were Cannabis Sativa L. or Cannabis Sativa I, was rejected on the ground that Congress intended to outlaw all plants popularly known as marijuana to the extent that those plants possess THC. The court also rejected defendant's due process and equal protection arguments. District Judge Vaughn Walker, sitting by designation dissented. *U.S. v. DeLeon,* __ F.2d. __ (9th Cir. Feb. 7, 1992).

5th Circuit rules incorrect citation in information was harmless error. (245) The day before defendant's trial on drug charges, the government filed an Information of Prior Convictions alleging that defendant's two prior convictions made him eligible for an enhanced sentence under 21 U.S.C. section 962. This citation was in error, and should have been to 21 U.S.C. section 851. The 5th Circuit ruled that the incorrect citation was harmless error under Fed. R. Crim. P. 7(c)(3), since defendant was not misled to his prejudice. Prior to accepting defendant's guilty plea, the district judge explained to defendant that he was subject to an enhanced sentence for the prior convictions listed in the information. Clearly defendant and his counsel were aware that the government intended to exercise its discretion to request an enhanced sentence, and they were aware of the specific convictions. *U.S. v. Garcia,* __ F.2d __ (5th Cir. Feb. 12, 1992) No. 91-2597.

5th Circuit rules judge's failure to comply with section 851(b) was harmless error. (245) Under 21 U.S.C. section 851(b), when the government files an information seeking an enhanced sentence based upon a defendant's prior convictions, the district court must ask the defendant whether he affirms or denies the prior conviction, and inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence. The judge did question defendant about his prior convictions but never advised defendant of the proper timing of a challenge to the convictions. The 5th Circuit ruled that this failure was harmless error. Defendant failed to comply with section 851(c), which requires a defendant who wishes to challenge prior convictions to give advance notice to the court and the government of the basis for his challenge. Moreover, defendant failed to suggest that the judge's omission precluded him from presenting a specific challenge to one or both of the prior convictions. *U.S. v. Garcia,* __ F.2d __ (5th Cir. Feb. 12, 1992) No. 91-2597.

D.C. Circuit upholds use of state conviction committed at age 17 to increase mandatory minimum sentence. (245) The D.C. Circuit upheld the district court's determination that defendant's prior state drug conviction, committed when he was 17 years old, qualified as a "felony" for purposes of increasing defendant's mandatory minimum sentence under section 841. Since under applicable state law defendant's age did not preclude his conviction as a felon, he retained that status for purposes of section 841. Application note 3 to guideline section 4B1.2, which defines a prior felony conviction as a prior adult conviction, was not applicable, since this is not a guidelines calculation issue. The mandatory minimum is 10 years without reference to the guidelines. *U.S. v. Clark,* __ F.2d __ (D.C. Cir. Feb. 14, 1992) No. 91-3036.

7th Circuit affirms that kilogram under negotiation was part of same course of conduct as earlier drug sale. (265) Defendant sold four ounces of cocaine to a DEA agent. Several times during the next month the agent met with defendant to negotiate the purchase of a kilogram of cocaine. On the date of the proposed kilogram transaction, defendant attacked the agent and attempted to steal his money. The 7th Circuit affirmed the inclusion in defendant's base offense level of the kilogram which defendant promised to supply the DEA agent. Defendant admitted that he planned to deliver the kilogram to the agent, but was unsuccessful in finding his source. A confidential informant told the agent that defendant could obtain kilogram quantities of cocaine. Defendant's attempt to sell the kilogram of cocaine grew out of the earlier four ounce sale, and thus was part of the same course of conduct or common scheme or plan as the

four ounce sale. *U.S. v. Baldwin,* __ F.2d __ (7th Cir. Feb. 7, 1992) No. 89-2173.

10th Circuit affirms additional delivery of ephedrine as relevant conduct. (270) Defendant was convicted of possessing Ephedrine with intent to produce methamphetamine. The 10th Circuit affirmed the inclusion as relevant conduct of five pounds of Ephedrine that were delivered to defendant several months prior to his arrest. Contrary to defendant's assertion, the government did prove that such a delivery took place. Two friends of defendant testified that defendant, using an alias, called a chemical company in Florida and placed an order for five pounds of Ephedrine to be shipped to defendant's house. A chemical company partner testified that five pounds of the chemical was shipped via UPS to defendant's address, and UPS records confirmed delivery. Defendant's girlfriend testified that when delivery was made, she signed for the shipment and paid the UPS driver with $1,000 in cash that defendant gave to her. *U.S. v. Hershberger,* __ F.2d __ (10th Cir. Feb. 11, 1992) No. 91-8017.

7th Circuit affirms that object of conspiracy was distribution of three kilograms of cocaine. (275) The 7th Circuit affirmed calculating defendants' base offense level based upon three kilograms of cocaine rather than the one kilogram and one ounce actually delivered by the conspirators. The district court had sufficient evidence from which to conclude that the object of the conspiracy was to distribute three kilograms of cocaine. There were numerous conversations addressing efforts to obtain three kilos of cocaine, and one defendant speculated that he could obtain the next two kilos within a few days after the one kilo delivery. The district court's finding was also based upon defendants' facile use of drug terminology and the ease with which they obtained the one kilogram that they actually delivered. *U.S. v. Cochran,* __ F.2d __ (7th Cir. Feb. 3, 1992) No. 90-2114.

7th Circuit reverses weapon enhancement because defendant did not possess weapon during the offense of conviction. (286) Defendant sold four ounces of cocaine to a DEA agent. Over a month after the initial sale, defendant met with the agent to sell him a kilogram of cocaine, but rather than provide the kilogram, defendant attacked the agent with a meat cleaver and attempted to steal the agent's money. Defendant pled guilty to the four ounce cocaine sale. The 7th Circuit reversed an enhancement under guideline section 2D1.1(b)(1) for possessing a dangerous weapon during the offense. Under the version of section 2D1.1(b)(1) in effect at the time defendant was sentenced, the weapon must be possessed "during the commission of the offense," which means the offense of conviction. Defendant plead guilty only to selling the four ounces of cocaine to the agent, while the attack on the agent took place over a month later. *U.S. v. Baldwin,* __ F.2d __ (7th Cir. Feb. 7, 1992) No. 89-2173.

2nd Circuit affirms that conduct underlying previous sentence should not be used to calculate RICO base offense level. (290) One of the predicate acts for defendant's instant RICO offense was his involvement in a murder. Defendant had previously been convicted of solicitation of murder as a result of his involvement in that murder. Relying upon application note 4 to guideline section 2E1.1, the district court did not use the murder to calculate defendant's base offense level under the RICO guideline. The government appealed, contending that since defendant was only previously sentenced for soliciting a murder, note 4 did not bar using the conduct charged and proved in this case: the actual murder and activities leading up to that murder. Although the 2nd Circuit thought the government's argument held some merit, it affirmed the district court's decision. It was reasonable to construe note 4 to mean that the conduct underlying the previously imposed sentence should not be used to calculate the base offense level for the instant offense. *U.S. v. Minicone,* __ F.2d __ (2nd Cir. Jan. 23, 1992) No. 91-1014.

8th Circuit upholds calculation of fraud loss to include amount of stopped check. (300) Defendant and others were involved in a mail order fraud conspiracy in which they received down payments on goods and equipment never delivered to the victims. The 8th Circuit affirmed the addition of six points for victim loss between $100,000 and $200,000, rejecting defendant's claim that only one $5,000 check endorsed by him could be used to establish victim loss. The government presented evidence that the conspiracy in which defendant participated defrauded victims of over $100,000. Following application note 7 to guideline section 2F1.1, the district court properly included the amount of one check which did not result in actual loss because the victim was able to stop payment on the check. *U.S. v. Earles,* __ F.2d __ (8th Cir. Feb. 3, 1992) No. 91-1345.

1st Circuit upholds unguided downward departure for multiple causation of loss. (300)(715) Defendant received a six-level enhancement under guideline section 2F1.1(b)(1) for causing victim loss of between $100,000 and $200,000. The district court departed downward from defendant's guideline range, relying upon application note 10 to section

2F1.1, which authorizes a departure where there are multiple causes of the victim's loss. The 1st Circuit affirmed, rejecting defendant's contention that defendant's share of the loss should have been determined as part of the process of determining defendant's offense level. The Sentencing Commission's identification of multiple causation as a grounds for a downward departure left the structure and dimension of the departure to the discretion of the sentencing court. *U.S. v. Gregorio,* __ F.2d __ (1st Cir. Feb. 7, 1992) No. 91-1393.

7th Circuit affirms that defendant who placed pipe bombs at occupied house knowingly created substantial risk of death. (330) Defendant taped two pipe bombs to the front picture window of a occupied house, and another to the house's back door. The 7th Circuit affirmed an 18 level increase in offense level under the pre-November 1990 version of guideline section 2K1.4 for knowingly creating a substantial risk of death or serious injury. The court agreed with defendant that the term "knowingly" did not mean "should have known," but meant actual consciousness. However, the evidence established that defendant knew the residents were home when the bombs exploded. One who detonates three bombs at a place he knows is occupied knowingly creates a substantial risk of death or serious bodily injury. *U.S. v. Bader,* __ F.2d __ (7th Cir. Feb. 12, 1992) No. 90-3656.

9th Circuit upholds higher offense level because defendant knew laundered money was criminally derived. (360) The district court increased defendant's offense level by five points pursuant to U.S.G. section 2S1.3(b)(1), finding that he "knew or believed the money was criminally derived." Reviewing this factual finding for clear error, the 9th Circuit ruled that the following evidence supported the judge's conclusion that defendant was involved in money laundering: (1) ledger sheets reflecting large quantitites of currency exchanged for monetary instruments; (2) the use of runners to obtain these instruments; and (3) the manner in which defendant used pagers. Law enforcement officers also seized from defendant's hotel room a counterfeit currency detector and a coded ledger. *U.S. v. Gomez-Osorio,* __ F.2d. __ (9th Cir. Feb. 18, 1992) No. 89-50280.

6th Circuit rules "tax loss" may not be based on unknown civil tax liabilities. (370) Defendant failed to file federal tax returns for the years 1982 to 1987, resulting in a criminal tax liability for the years 1985 through 1987 in the amount of $40,969. The 6th Circuit reverses a determination of "tax loss" under guideline section 2T1.1 based upon defendant's criminal tax deficiency and his unknown liability for tax years 1982 to 1984. The court agreed that "all conduct violating the tax laws" refers to all relevant criminal conduct underlying the charged offense. However, defendant's unknown liability for tax years 1982 to 1984 was a civil tax liability and was not part of the underlying criminal conviction. *U.S. v. Daniel,* __ F.2d __ (6th Cir. Feb. 10, 1992) No. 91-5318.

Adjustments (Chapter 3)

7th Circuit upholds organizer enhancement for defendant who linked drug supplier to undercover purchasers. (431) The 7th Circuit affirmed a two level enhancement under guideline section 3B1.1(c) for a defendant who played a central role in coordinating the five individuals who worked together to supply cocaine. The evidence showed that defendant was the key figure linking the supplier with the undercover purchasers. Defendant was at each of the meetings where the drug deals were planned, his home was the contact location, and he was present at each transaction. *U.S. v. Cochran,* __ F.2d __ (7th Cir. Feb. 3, 1992) No. 90-2114.

9th Circuit affirms downward departure for "mules" who smuggled drugs across border. (440) (715)(738) The district court departed downward in these two separate cases because it believed the Guidelines overestimated the seriousness of the defendants' conduct as mere "mules" in the drug trade along the Arizona-Mexico border. The court could not give them a downward adjustment for minor role, because they were the sole participants in the offenses to which they pleaded guilty. *See, U.S. v. Zweber,* 913 F.2d 705, 708-09 (9th Cir. 1990). Relying on the reasoning in *U.S. v. Bierley,* 922 F.2d 1061 (3rd Cir. 1990) which upheld a downward departure in a child pornography case, the 9th Circuit agreed with the district court that "the role in the drug trade played by 'mules' may constitute a mitigating circumstance of a kind or degree that the Sentencing Commission did not take into account." Judge Fernandez dissented. *U.S. v. Valdez-Gonzalez,* __ F.2d __ (9th Cir. Feb. 7, 1992) No. 89-10274.

1st Circuit rejects minor role reduction for architect of fraudulent loan transactions. (445) Defendant, a real estate broker, pled guilty to 11 counts of filing false residential mortgage loan documents. The 1st Circuit upheld the district court's decision to deny defendant a reduction for playing a minor role in the offense. Defendant incorrectly attempted to direct attention to "an extensive web of fraud" which led

to the bank's demise, rather than his own role in the offense of conviction. With respect to all eleven offenses, defendant was the "architect" of the false statements. He was the direct beneficiary of the two of the loans, and brokered the other nine. His criminal activity represented an important contribution to the criminal enterprise. *U.S. v. Gregorio,* __ F.2d __ (1st Cir. Feb. 7, 1992) No. 91-1393.

6th Circuit rejects minimal role for defendant who failed to present any evidence. (445) The district court denied defendant's request for a four point reduction under section 3B1.2 as a minimal participant because she had knowledge of the scope of the drug enterprise and the activities of others. The court did, however, grant defendant a two level reduction for being a minor participant. The 6th Circuit affirmed the denial of the minimal participant reduction because defendant bore the burden of proving the existence of a mitigating factor, and presented no evidence. She actually was given the two point reduction for being a minor participant without presenting any evidence. *U.S. v. Warner,* __ F.2d __ (6th Cir. Jan. 31, 1992) No. 90-3753.

9th Circuit agrees that defendant who installed and maintained generator was not a minor participant. (445) Defendant argued that he "was not involved with the cultivation of the marijuana or its harvesting, record keeping, or distribution," and that his only participation in the operation was "the installation and maintenance of a generator." The district court accepted these claims as true, but found that his role was significant in that the operation could not have suceeded without him. Moreover, the record showed that the profits were to be equally shared. On appeal, the 9th Circuit held this finding to be not clearly erroneous. *U.S. v. Belden,* __ F.2d. __ (9th Cir. Feb. 20, 1992) No. 91-30022.

1st Circuit reviews obstruction enhancement de novo. (460)(870) The 1st Circuit reviewed de novo whether defendant's conduct was encompassed with the scope of guideline section 3C1.1. *U.S. v. Manning,* __ F.2d __ (1st Cir. Jan. 29, 1992) No. 91-1545.

7th Circuit upholds obstruction enhancement based upon judge's independent determination of defendant's perjury. (461) Defendant contended that the district court improperly imposed an obstruction of justice enhancement based upon the jury's guilty verdict. The 7th Circuit disagreed, holding that the district judge made an independent determination that defendant lied at trial on three different issues. Other witnesses' testimony conflicted with defendant's testimony on each point, and the district court was in the best position to determine whether defendant was lying. The court concluded that defendant lied about how he was holding the beer bottle which he used to strike his victim, the sequence of events leading up to the confrontation, and whether the victim was holding a shiny item in his hand. Defendant's fabrication about how he was holding the bottle was particularly material, since if defendant's story were true, defendant would have hurt his own hand rather than cutting out his victim's eye. *U.S. v. Corn,* __ F.2d __ (7th Cir. Feb. 3, 1992) No. 91-2187.

7th Circuit affirms obstruction enhancement for lying on essential evidentiary matters at trial. (461) The 7th Circuit affirmed an enhancement for obstruction of justice where the district court concluded that defendant lied about essential evidentiary matters at trial. *U.S. v. Cochran,* __ F.2d __ (7th Cir. Feb. 3, 1992) No. 90-2114.

10th Circuit upholds obstruction enhancement based upon threats to witnesses. (461) At defendant's trial several witnesses testified that defendant threatened to harm them if they testified against him or cooperated with authorities in their investigation of defendant. At the sentencing hearing, defendant denied making any threats. The 10th Circuit upheld an enhancement for obstruction of justice. Threatening a witness either before the witness testifies and prior to conviction or sentencing, or after the witness testifies, but prior to sentencing, is clearly within the scope of guidelines section 3C1.1. *U.S. v. Hershberger,* __ F.2d __ (10th Cir. Feb. 11, 1992) No. 91-8017.

1st Circuit reverses obstruction enhancement based upon giving false name to police. (462) Defendant received an enhancement for obstruction of justice because he gave a false name to police officers upon his arrest. The 1st Circuit reversed, since defendant's conduct did not, as required by application note 4 to guideline section 3C1.1, result in a "significant hinderance" to the investigation. Prior to arresting defendant, authorities were aware that defendant was using a false name, and had probable cause to believe that he was using false social security numbers. One day after his arrest, authorities searched defendant's apartment and found several documents under defendant's real name. At this point, they did a criminal records search which revealed defendant's outstanding bench warrants and his fingerprints. Thus, by the time of his detention hearing five days after his arrest, police were reasonably certain of defendant's true identity. Moreover, even if defendant had given his true name, under the circumstances police would still have to proceed in a

similar manner to confirm his true identity. *U.S. v. Manning,* __ F.2d __ (1st Cir. Jan. 29, 1992) No. 91-1545.

4th Circuit reverses obstruction enhancement for ludicrous and perjurious statements at trial. (462) Defendant was charged with being a felon in possession of a firearm. During his arrest, he admitted ownership of the firearm found in the car in which he and his cousin were sitting. At trial, however, defendant contended that the weapon belonged to his cousin, and that he had initially lied to protect his cousin from being arrested for possession of a stolen gun, which he believed would jeopardize the cousin's position as administrator of his parent's estate. The district court imposed an enhancement for obstruction of justice, finding defendant's explanation that he was concerned for his cousin's position as administrator of his parent's estate to be "ludicrous and perjurious." The 4th Circuit agreed that the evidence supported this determination, but nonetheless vacated the enhancement. *U.S. v. Dunnigan,* 944 F.2d 178 (4th Cir. 1991) does not permit a court to impose an obstruction enhancement under section 3C1.1 for false testimony by a defendant in denial of the charges against him because that guideline is an intolerable burden on the defendant's right to testify. *U.S. v. Craigo,* __ F.2d __ (4th Cir. Feb. 3, 1992) No. 90-5351.

1st Circuit rules court did not deny acceptance of responsibility reduction based upon uncharged conduct. (482) The 1st Circuit rejected defendant's claim that the district court improperly denied defendant a reduction for acceptance of responsibility based upon his failure to accept responsibility for uncharged criminal conduct. The Rule 11 hearing did not indicate that the judge believed that defendant was charged with bank fraud rather than making false statements to a bank. The two "fraud" references the judge made during the sentencing hearing could not be considered error in a case involving the making of false statements. *U.S. v. Gregorio,* __ F.2d __ (1st Cir. Feb. 7, 1992) No. 91-1393.

5th Circuit rejects reduction where defendant only acknowledged what was already known to government. (486) The 5th Circuit found that there was sufficient support in the record for the district court's denial of a reduction for acceptance of responsibility. In addition to the false statements defendant made to IRS agents, the presentence report showed a continued failure by defendant to disclose the source of his cash deposits, attempts to excuse his acts based on tragic family difficulties, an attempt to cover up the fact that certain pipe was stolen, his continuation of a lifestyle beyond his financial means, and less than full cooperation in supplying financial information to the probation officer. Defendant was willing to acknowledge only what was known to the government through its own investigation and did not provide any further information. *U.S. v. Brigman,* __ F.2d __ (5th Cir. Feb. 3, 1992) No. 91-1432.

6th Circuit affirms denial of acceptance of responsibility reduction for defendant who maintained shooting was an accident. (488) Defendant was convicted of assault and wanton endangerment for shooting a woman. The 6th Circuit affirmed the district court's denial of a reduction for acceptance of responsibility, since defendant admitted shooting the woman, but maintained that it was an accident. *U.S. v. Christopher,* __ F.2d __ (6th Cir. Dec. 10, 1991) No. 90-6512.

9th Circuit holds that ending association with drug ring was relevant to acceptance of responsibility. (488) The 9th Circuit noted that the same commentary that makes timeliness a factor in acceptance of responsibility says that the court should also consider whether the defendant withdrew from the criminal conduct or association. Here the record was clear that Emelio voluntarily terminated his association at least three months before the drug ring was "busted." Moreover, the district court appeared to accept Emelio's personal statement of remorse, but then denied the reduction based on timeliness. The case was remanded for the district court to redetermine acceptance of responsibility. *U.S. v. Johnson,* __ F.2d __ (9th Cir. Feb. 11, 1992) 90-30344.

9th Circuit holds that reduction for incomplete duress does not bar reduction for acceptance of reponsibility. (488) The district judge denied credit for acceptance of responsibility on the ground that defendants did not accept responsbility in a timely fashion. On appeal, the 9th Circuit remanded for resentencing, noting that the commentary to U.S.S.G. section 3E1.1 "seemingly contradicts the text by stating the reduction should rarely be given to a defendant who proceeds to trial." In this case, the trial was a foregone conclusion, because the government refused to consider offers from any defendant unless all defendants pleaded guilty. After conviction, the defendants continued to maintain that they had been subjected to incomplete duress. Such a claim does not deny guilt, it merely asks for leniency. Accordingly the 9th Circuit found "no barrier to getting one reduction for incomplete duress and another reduction for acceptance of responsibility. Noting that the guidelines appear to require an

expression of remorse, the court remanded for resentencing "in light of all the relevant factors." *U.S. v. Johnson,* __ F.2d __ (9th Cir. Feb. 11, 1992) 90-30344.

5th Circuit holds amendment did not create rebuttable presumption of acceptance of responsibility for defendants who plead guilty. (490)(870) The 5th Circuit rejected defendant's claim that the November 1990 amendments to the commentary and application notes on guideline section 3E1.1 created a "rebuttable presumption" in favor of an acceptance of responsibility reduction for a defendant who pleads guilty and acknowledges involvement in the offense and related conduct. The amendments were intended by the Sentencing Commission to clarify the operation of section 3E1.1 rather than enact substantive changes. If the sentencing commission intended to create a rebuttable presumption it would have amended the guideline itself rather than the commentary. The amendments also did not alter the appellate court's standard of review. There is no practical difference between granting a trial judge's determination "great deference" and reviewing whether the trial court's decision was "utterly lacking in foundation." *U.S. v. Brigman,* __ F.2d __ (5th Cir. Feb. 3, 1992) No. 91-1432.

7th Circuit upholds denial of acceptance of responsibility reduction where defendant lied at trial. (492) Defendant contended that he accepted responsibility for his acts by voluntarily terminating his criminal conduct after striking his victim, voluntarily surrendering to an FBI agent for questioning, admitting his involvement in the incident, and expressing remorse at the sentencing hearing. The 7th Circuit affirmed the denial of the reduction, since the district court found that defendant's lies to the jury at trial outweighed the merit of these factors. Application note 4 to guideline section 3E1.1 supported this determination. This was not an extraordinary case in which adjustments for obstruction of justice and acceptance of responsibility were applicable. *U.S. v. Corn,* __ F.2d __ (7th Cir. Feb. 3, 1992) No. 91-2187.

Criminal History (§4A)

9th Circuit holds two points for petty theft was not "plain error" where it would not have affected criminal history category. (500) Criminal history category VI includes defendant with "13 or more" criminal history points. Even if one point were subtracted from appellant's score of 15, he would still fall in category VI. Since the appellant did not raise the issue below, the 9th Circuit reviewed it only for "plain error" and ruled that "even if the district court had erred, it could not have been a 'highly prejudicial error affecting substantial rights.'" *U.S. v. Martinez,* __ F.2d __ (9th Cir. Feb. 11, 1992) No. 90-50702.

9th Circuit holds offense of being under influence of controlled substance is not like "public intoxication." (504) U.S.S.G. section 4A1.2(c)(2) states that prior convictions for "public intoxication" are never counted in criminal history. Defendant argued that therefore it was improper to count his prior misdemeanor conviction for being under the influence of a controlled substance in violation of California H&S Code section 11550(a). The 9th Circuit rejected the argument. In contrast to public intoxication, "[b]eing under the influence of a controlled substance is almost universally regarded as culpable, is widely criminalized, and offers a substantial basis for predicting future significant criminal activity." *U.S. v. Martinez,* __ F.2d __ (9th Cir. Feb. 11, 1992) No. 90-50702.

5th Circuit affirms upward departure based upon concurrent sentences for independent crimes. (510) The district court departed upward from criminal history category IV to category VI because defendant's prior three year term actually represented concurrent sentences for five convictions for possession of controlled substances arising from several independent occasions. Had each of these offenses been counted separately, defendant probably would have fallen within category VI. The 5th Circuit affirmed, ruling that the district court's primary reason for the departure was sanctioned by guideline section 4A1.3(b). *U.S. v. Carter,* __ F.2d __ (5th Cir. Feb. 12, 1992) No. 90-1903.

2nd Circuit holds that attempted third-degree robbery constituted crime of violence. (520) The 2nd Circuit affirmed the district court's determination that defendant's New York state conviction for attempted robbery in the third degree was a conviction for a crime of violence. Application note 2 to guideline section 4B1.2 indicates that a crime of violence includes the offense of attempting to commit such an offense. Under applicable New York law, robbery in the third degree is defined as forcibly stealing property. This comfortably fits within the definition of crime of violence in section 4B1.2. *U.S. v. Spencer,* __ F.2d __ (2nd Cir. Jan. 28, 1992) No. 91-1185.

3rd Circuit rules reckless endangering constitutes crime of violence for career offender purposes. (520) Defendant was classified as a career offender based in part upon a prior Delaware state conviction for reckless endangering. Delaware law defines this

offense as recklessly engaging in conduct that creates a substantial risk of death to another person. The 3rd Circuit "reluctantly" held that the reckless endangering offense constituted a crime of violence for career offender purposes. The original guidelines definition of crime of violence, derived from 18 U.S.C. section 16, appeared to include only crimes requiring a specific intent to use force. The present version of the guidelines, effective November 1989, expands the definition of crime of violence to include actions that merely risk causing physical injury. Under the expanded definition, reckless endangering constitutes a crime of violence. Because the language of the Delaware statute so closely tracked the definition of crime of violence, the district court was not required to examine the facts underlying the offense. The appellate court urged the Sentencing Commission to reconsider its career offender guidelines to the extent that they cover crimes involving "pure recklessness." "The term 'career offender' implies an ongoing intent to make a living through crime, and it is doubtful that one can make a career out of recklessness." *U.S. v. Parson,* __ F.2d __ (3rd Cir. Jan. 31, 1992) No. 91-3059.

5th Circuit rules amended guidelines prohibit considering underlying circumstances to determine whether instant offense is a crime of violence. (520) Defendant pled guilty to being a felon in possession of a firearm. Based upon the circumstances surrounding defendant's possession of the weapon, the district court determined that defendant had committed a crime of violence and sentenced defendant as a career offender. The 5th Circuit reversed, ruling that the 1989 amendments to the guidelines prohibit a court from considering underlying conduct in determining whether an offense is a crime of violence. Amended section 4B1.2 makes it clear that only conduct "set forth in the count of which the defendant was convicted" may be considered in determining whether the offense is a crime of violence. Cases such as *U.S. v. Goodman,* 914 F.2d 696 (5th Cir. 1990), which upheld the examination of underlying circumstances, have been expressly repudiated by the Sentencing Commission. This interpretation is also supported by the 1991 amendments, which although not applicable, are intended to clarify the guidelines' application. *U.S. v. Fitzhugh,* __ F.2d __ (5th Cir. Jan. 28, 1992) No. 91-8211.

5th Circuit prohibits examining underlying circumstances to determine whether prior offense is a controlled substance offense. (520) A controlled substance offense is defined under guideline section 4B1.2(2) as an offense under state or federal law prohibiting the manufacture, import, export or distribution of a controlled substance, or possession with the intent to manufacture, import, export or distribute. Defendants each had a prior state offense for possession of a controlled substance. In each case, the district court examined the conduct underlying the drug possession offense and determined that, based on the large quantity of drugs involved, the defendant had the intent to distribute the drugs and therefore the offense was a controlled substance offense under the guidelines. The 5th Circuit ruled that a court may not consider the underlying circumstances in determining whether a prior conviction constitutes a controlled substance offense. Therefore, the district court erred in considering the conduct underlying defendant's state drug possession conviction to determine it was a controlled substance offense. *U.S. v. Gaitan,* __ F.2d __ (5th Cir. Feb. 11, 1992) No. 91-5524.

5th Circuit rejects defendant's right to withdraw guilty plea based on ignorance of career offender status. (520)(790) The 5th Circuit rejected defendant's claim that the district court should have permitted him to withdraw his guilty plea because he was unaware of the possible application of the career offender enhancement. As long as a defendant understands the length of time he could receive, he is fully aware of his plea's consequences. The district court informed defendant, prior to accepting his plea, that he faced a maximum of 20 years' imprisonment and a $1 million fine. Defendant acknowledged that he understood this admonishment. He received a 14 year sentence and a $1,000 fine. Thus, he was fully aware of the consequences of his plea. *U.S. v. Gaitan,* __ F.2d __ (5th Cir. Feb. 11, 1992) No. 91-5524.

Determining the Sentence (Chapter 5)

8th Circuit, en banc, holds that house arrest does not constitute "official detention." (600) The 8th Circuit, en banc, upheld the denial of credit for time defendant spent under pre-trial house arrest. Defendant's house arrest restrictions did not constitute "official detention" within the meaning of 18 U.S.C. section 3585(b). Chief Judge Lay, joined by Judge McMillian, dissented, believing that detention in one's home does constitute official detention under section 3585(b). *U.S. v. Wickman,* __ F.2d __ (8th Cir. Jan. 31, 1992) No. 90-2958 (*en banc*).

6th Circuit reverses restitution order which included amounts for additional civil liabilities. (610) Defendant failed to file federal tax returns for the years 1982 to 1987, resulting in a criminal tax li-

ability for the years 1985 through 1987 in the amount of $40,969. The 6th Circuit reversed a $154,353 restitution order which included defendant's criminal tax liability plus defendant's total civil liability including statutory penalties. The appropriate restitution was $40,969, and restitution above this amount for additional "civil liabilities" was improper. *U.S. v. Daniel,* __ F.2d __ (6th Cir. Feb. 10, 1992) No. 91-5318.

9th Circuit vacates restitution award where court delegated its authority to the probation office. (610) At sentencing, the court said it was unable to set the exact amount of restitution, but was going to accept the probation officer's estimate of $1,008,000 as the loss. "The restitution will be that figure minus the recovery, the value of all properties recovered." Although this order did not delegate "unlimited discretion" to the probation office, the 9th Circuit noted that it was "apparent at the time of sentencing that the restitution award would be substantially reduced. The government had recovered and valued a considerable amount of stolen property." The district court commited plain error in not determining the value of this recovered property and deducting it from the restitution amount. In a footnote, the court noted that it was not presented with a situation involving how much credit a defendant should receive for property recovered *after* restitution is ordered. *U.S. v. Clack,* __ F.2d __ (9th Cir. Feb. 20, 1992) No. 90-10531.

9th Circuit rejects downward departure, but suggests "youthful lack of guidance departure" on remand. (660)(715)(719)(736) **The** 9th Circuit reaffirmed its ruling in *U.S. v. Martin,* 938 F.2d 162 (9th Cir. 1991) that "a defendant's post-arrest drug rehabilitation efforts afford no basis for downward departure." Moreover, although *U.S. v. Cook,* 938 F.2d 149, 153 (9th Cir. 1991) held that a "unique combination of factors "may constitute a mitigating circumstance justifying a downward departure, the other factors relied on here could not justify a departure, i.e. (1) defendant's age of 46 years, (2) his reduced mental capacity due to drug abuse, (3) his drug dependence, (4) his ability to maintain full-time employment until crack abuse took over his life, and (5) his lack of family ties at an early age. However, the 9th Circuit suggested that on remand, the district court "may wish to consider" a departure under *U.S. v. Floyd,* 945 F.2d 1096 (9th Cir. 1991) for "youthful lack of guidance." *U.S. v. Anders,* __ F.2d __ (9th Cir. Feb. 12, 1992) No. 90-10558.

Departures Generally (§5K)

Supreme Court asks for supplemental briefing on appealability of departures. (700) On March 18, 1991, the Supreme Court granted certiorari to review the 7th Circuit's affirmance of an upward departure in this case. On January 27, 1992, the Supreme court asked for supplemental briefing on three questions: (1) when a district court departs from a properly constructed sentencing guideline range, and it relies on a factor disapproved by a policy statement that guides departures, has the district court for that reason or otherwise made an "incorrect application of the Sentencing Guidelines" within the meaning of 18 U.S.C. section 3742(e)(2) and (f)(1)? (2) are the appellate court "decision and disposition" provisions, subsection (f)(1) and (f)(2) of 18 U.S.C. section 3742, which group the separate considerations of section 3742(e), mutually exclusive? (3) when a district court bases a departure decision on an aggravating or mitigating circumstance that the court of appeals later determines is improper under 18 U.S.C. section 3553(b), has the district court imposed a sentence "in violation of law" within the meaning of section 3742(e)(1) and (f)(1)? *U.S. v. Williams,* 910 F.2d 1574 (7th Cir. 1990) *cert. granted,* __ U.S. __, 111 S.Ct. 1305 (1991).

5th Circuit rejects claim that departure must be stated in terms of offense level rather than months. (700) The 5th Circuit rejected defendant's claim that the district court erroneously departed to a particular sentence rather than a particular number of offense levels. At sentencing, the district court made it clear that the four month departure was equivalent to three offense levels. Moreover, it is not determinative whether the sentencing court articulates its departure in terms of offense levels or the number of months involved, so long as the departure itself is reasonable. *U.S. v. Siciliano,* __ F.2d __ (5th Cir. Feb. 5, 1992) No. 91-3811.

9th Circuit reaffirms that relying on both proper and improper reasons for departure requires reversal. (700) Reaffirming its decision in *U.S. v. Montenegro-Rojo,* 908 F.2d 425, 428 (9th Cir. 1990), the 9th Circuit held that when a sentencing court considers both proper and improper bases for departure, the sentence must be vacated and the case remanded for resentencing. *U.S. v. Anders,* __ F.2d __ (9th Cir. Feb. 12, 1992) No. 90-10558.

8th Circuit, en banc, upholds its jurisdiction to review government motion requirement. (712)(870) The 8th Circuit, en banc, upheld its jurisdiction to

review the district court's determination that it lacked jurisdiction to depart for substantial assistance in the absence of a government motion. This case did not present an unreviewable refusal to depart, but a determination of whether the district court was correct in its opinion that it had no power to depart. The standard of review was de novo, because the district court's decision that it had no power to depart was a pure question of law. *U.S. v. Kelley,* __ F.2d __ (8th Cir. Feb. 5, 1992) No. 90-1027 (*en banc*).

Article supports downward departures for rehabilitated addicts. (715) In *"Sentencing the Reformed Addict: Departure Under the Federal Sentencing Guidelines adn the Problem of Drug Rehabilitation,"* a student author notes a division of authority on whether a drug addict's presentence rehabilitation can support a downward departure. The author concludes that such departures should be permitted, concluding that neither section 5H1.4 (precluding departure based on drug dependance) nor section 3E1.1 (reduction for acceptance of responsibility) address the issue of drug rehabilitation and, alternatively, that even if the cited sections do address rehabilitation, they do not constitute adequate consideration. 91 *Colum. L. Rev.* 2051-73 (1991).

5th Circuit rules district court adequately stated grounds for upward departure. (715)(775) The 5th Circuit rejected defendant's claim that the district court failed to state reasons for his sentence and for the extent of an upward departure. The district court did state specific reasons for the departure, emphasizing that the guideline range was based on the small quantity of marijuana involved and did not take into account that defendant committed his offense as deputy and guardian of a prison's security. These articulated reasons satisfied the requirements of 18 U.S.C. section 3553(c). Under 5th Circuit law, the judge was not required to state the reasons for the extent of the departure. *U.S. v. Siciliano,* __ F.2d __ (5th Cir. Feb. 5, 1992) No. 91-3811.

2nd Circuit reverses downward departure designed to eliminate disparity among co-defendants. (716) The district court departed downward because of a desire to avoid the unfairness that would result from the "grave disparity" between defendant's sentence and that of his co-defendants. The 2nd Circuit reversed because disparity between the sentences of individual co-defendants is not a proper basis for a downward departure. *U.S. v. Minicone,* __ F.2d __ (2nd Cir. Jan. 23, 1992) No. 91-1014.

7th Circuit rejects sentencing drug-house guard who facilitated management of drug house as severely as one who maintained drug house. (725) Defendant was convicted of being a felon in possession of a firearm and of possessing six grams of a controlled substance. The district court departed upward from a guideline range of 18 to 24 months and sentenced defendant to 48 months. The departure was based upon guideline section 5K2.9, which authorizes a departure where the offense of conviction was committed in order to facilitate another offense. The district judge found that defendant had carried the firearm in order to facilitate the maintenance of a drug house. The 7th Circuit ruled that although a departure might be warranted under section 5K2.9, in this case the departure was too extreme because it punished defendant as severely as a manager convicted of maintaining a drug house. The drug house statute is aimed at persons who occupy a supervisory, managerial or entrepreneurial role in a drug enterprise. Defendant only served as a guard, which would not justify sentencing him as if he had been convicted of the more serious offense. *U.S. v. Thomas,* __ F.2d __ (7th Cir. Feb. 6, 1992) No. 91-1699.

5th Circuit upholds district court's authority to determine whether defendant's mental condition was a contributing cause of crime. (730) Defendant argued that the district court erred in failing to depart downward under guideline section 5K2.13 based upon his depressed mental state at the time of the offense. He argued that the district court was bound by the definition of "significantly reduced mental capacity" provided by the testifying psychologist and psychiatrist, and was required to give deference to his experts' evaluation of the effect of depression upon his judgment. The 5th Circuit declined to grant such deference, ruling that the sentencing court had the power and duty to determine whether defendant's mental condition described by the witnesses was a contributing cause of the crime. Here the district court specifically found that the mental condition described by defendant's witnesses did not contribute to the commission of his crime, and that he was not suffering from a significantly reduced mental capacity. *U.S. v. Soliman,* __ F.2d __ (5th Cir. Feb. 13, 1992) No. 91-2732.

8th Circuit rules jury's rejection of self-defense claim did not prohibit downward departure for battered woman syndrome. (730) Defendant was convicted of the second degree murder of her longtime, live-in boyfriend. At trial, she claimed she was suffering from battered woman syndrome, and that she stabbed her boyfriend in self-defense. The district court refused to depart downward under guideline section 5K2.10 based upon the battered woman

syndrome, ruling that by finding defendant guilty, the jury rejected defendant's claim of battered woman syndrome. The 8th Circuit ruled that the jury's rejection of defendant's self-defense claim did not preclude a downward departure based upon the battered woman syndrome. Defendant submitted evidence of battered woman syndrome, not as a defense in itself, but as the primary component of her claim of self-defense. If her claim of self-defense had been accepted by the jury, she would have been acquitted. Thus, to the extent that section 5K2.10 permits consideration of battered woman syndrome as a basis for departure, it does not require proof of the same elements necessary to establish a claim of self-defense at trial. *U.S. v. Whitetail,* __ F.2d __ (8th Cir. Feb. 12, 1992) No. 91-1400.

9th Circuit approves "incomplete duress" as basis for downward departure in drug case. (730)(738)) U.S.S.G. section 5K2.12 authorizes downward departures for "incomplete duress." The 9th Circuit held that "the incomplete defense of duress supposes a voluntary crime carried out by a person whose personal characteristics and personal perception of the circumstances of the situation made her succeptable to the threat of force." In this case, the women defendants had been subject to "savage" treatment and had been involved with "a manipulative, violent, brutal drug lord." On these facts the district court had disretion to depart downward if it found that a defendant "had been subject to coercion, even though with effort she could have escaped." Since the district court failed to make adequate findings, and it was unclear whether it knew it could depart, the case was remanded for resentencing. *U.S. v. Johnson,* __ F.2d __ (9th Cir. Feb. 11, 1992) 90-30344.

5th Circuit rules district court exercised discretion in refusing to depart based upon drug purity. (738)(860) The district court refused to depart downward based upon the low purity of the methamphetamine mixture in defendant's possession. The 5th Circuit rejected defendant's claim that the district court mistakenly believed it lacked authority to depart from the guidelines. The district court stated that it did not think that this was a case warranting a downward departure. This comment suggested that the district court chose not to depart from the guidelines because it did not think the circumstances warranted a departure, not that it believed its hands were tied. *U.S. v. McKnight,* __ F.2d __ (5th Cir. Jan. 31, 1992) No. 91-2215.

Sentencing Hearing (§6A)

5th Circuit rules lack of allocution was cured by permitting defendant to speak after sentencing. (760) Defendant contended that the district court erred in denying him allocution as required by Fed. R. Crim. P. 32(a). The 5th Circuit found remand unnecessary, since the district judge had cured the problem by giving defendant the opportunity to speak after sentencing. After defendant apologized and his attorney thanked the court, the judge then reimposed the same sentence. While defendant would be entitled to resentencing if the court had never allowed allocution, he already received the remedy he would receive if the appellate court remanded for resentencing: reimposition of sentence following allocution. *U.S. v. Siciliano,* __ F.2d __ (5th Cir. Feb. 5, 1992) No. 91-3811.

Plea Agreements (§6B)

4th Circuit upholds plea agreement's waiver of right to appeal. (780)(850) Defendant was convicted of mail fraud and interstate travel in aid of racketeering. Defendant subsequently pled guilty to a severed count of the same indictment, which charged conspiracy to murder an IRS agent. After the district court denied defendant's motion to withdraw his guilty plea, defendant appealed, challenging the validity of a provision of his plea agreement in which he waived his right to appeal his earlier convictions. The 4th Circuit upheld the waiver of appellate rights contained in the plea agreement. Such waivers are not per se improper, even though defendant attempted to waive his appellate rights in an entirely different case from the one for which the plea agreement was being negotiated. Defendant's waiver was based on a "knowing and intelligent decision." Although the trial judge did not specifically question defendant on the waiver provision, defendant was well educated and had engaged in extensive discussions with his attorney concerning the two page agreement. *U.S. v. Davis,* __ F.2d __ (4th Cir. Jan. 9, 1992) No. 90-5859.

8th Circuit holds that plea agreement may contain valid waiver of right to appeal sentence. (780)(850) The 8th Circuit held that a plea agreement's knowing and voluntary waiver of the right to appeal a sentence under 18 U.S.C. section 3742 is enforceable. If defendants can waive fundamental constitutional rights, they are not precluded from waiving procedural rights granted by statute. An illegal sentence can still be challenged under 28 U.S.C. section 2255 for habeas corpus relief, so a defendant is not entirely without recourse from an erroneous

sentence. Also, a waiver of the right to appeal would not prevent an appeal where the sentence imposed was not in accordance with the plea agreement. Here, defendant fully understood the consequences of the waiver. Although he expressed an intent to appeal regardless of the waiver, the court interpreted this as an intent to appeal only the issue of the validity of the waiver. Defendant's assertion that he could not waive an unknown right was baseless. While he may not have known the exact dimensions of his sentence, he knew he had a right to appeal his sentence, that he was giving up that right, and that he was subject to a maximum sentence of 20 years. *U.S. v. Rutan,* __ F.2d __ (8th Cir. Feb. 12, 1992) No. 91-1154.

Violations of Probation and Supervised Release (Chapter 7)

5th Circuit rules that a court may not impose second term of supervised release after revocation of original term. (800) The 5th Circuit held that when a district court revokes a term of supervised release, it may not follow the prison sentence with a second term of supervised release. Although following a different analysis, the court agreed with the 9th Circuit's conclusion that 18 U.S.C. section 3583(e) does not authorize recommencement of supervised release after revocation. Section 3583(e)(3) authorizes a district court to "revoke" a term of supervised release. Once a term has been revoked, there is nothing left to extend, modify, reduce or enlarge under section 3583(e)(2). Even though section 3583(e)(3) permits a court to require imprisonment for "part of the term of supervised release," the other part of the term of release cannot survive revocation. There is no partial revocation. The policy statement in guideline section 7B1.3(g)(2) which appears to authorize the recommencement of supervised release, states that recommencement is allowed only "to the extent permitted by law." *U.S. v. Holmes,* __ F.2d __ (5th Cir. Feb. 12, 1992) No. 91-3624.

Appeals (18 U.S.C. 3742)

9th Circuit says appeal of sentence was not moot even though it had been completely served. (850) Defendants had completely served their sentences and had been deported to Mexico. Their wherabouts were unknown. However, they were still on supervised release, and if they were rearrested in this country, their supervised release time would be converted to incarceration. Therefore, the 9th Circuit held that their appeals were not moot, and affirmed the district court's downward departure based on the defendants' role as "mules" in smuggling drugs across the border. *U.S. v. Valdez-Gonzalez,* __ F.2d __ (9th Cir. Feb. 7, 1992) No. 89-10274.

9th Circuit holds that defendant's failure to object in the district court waived the issue. (855) Defendant argued that he should have been sentenced based on marijuana plants that actually would have been harvested rather than the number of plants taken from the grow. However, he did not make this argument in the district court, either as an objection to the presentence report or elsewhere. Accordingly, the 9th Circuit held that the argument "was not preserved for appellate review." *U.S. v. Belden,* __ F.2d __ (9th Cir. Feb. 20, 1992) No. 91-30022.

9th Circuit finds statements demonstrated that court's refusal to depart downward was discretionary. (860) The district judge stated at the sentencing hearing that he was "not inclined to depart" and that, even though the sentence was harsh and he sympathized with the defendant, there was "no basis for departure." The 9th Circuit ruled that the court's decision not to depart "did not appear to rest on the judge's belief that departure was prevented as a matter of law." Therefore the court declined to review the decision. *U.S. v. Belden,* __ F.2d __ (9th Cir. Feb. 20, 1992) No. 91-30022.

Forfeiture Cases

8th Circuit upholds its jurisdiction over cash transferred to Asset Forfeiture Fund and local police department. (905) Following the 1st, 2nd and 4th Circuits, the 8th Circuit upheld its appellate jurisdiction over cash transferred by the federal government to its Asset Forfeiture Fund and distributed to the local police department. By initiating the forfeiture action, the government subjected itself the court's in personam jurisdiction. Thus, despite the government's distribution of the res, the court retained jurisdiction over the parties throughout the case. Unlike admiralty cases, the property was in the possession of the government and was not in any danger of disappearing. Bank of New Orleans v. Marine Credit Corp., 583 F.2d 1063 (8th Cir. 1978) was inapplicable, since the money was easily accessible to the government. The local police department which received a portion of the funds was not an innocent purchaser, since it participated in the initial seizure of the money. Moreover, even under traditional in rem jurisdictional analysis the appellate court had jurisdiction, since the removal of the res from the ju-

risdiction of the court was improper. The government transferred the money one day after entry of judgment, in violation of the 10-day automatic stay under Fed. F. Civ. P. 62(a). *U.S. v. Twelve Thousand, Three Hundred Ninety Dollars ($12,390.00),* __ F.2d __ (8th Cir. Feb. 10, 1992) No. 90-2071.

8th Circuit rejects claim that state court acquired jurisdiction over seized cash. **(905)** Local police seized cash from claimants' residence. Five days after the seizure, the money was turned over to the DEA and federal forfeiture proceedings were begun. The 8th Circuit rejected claimants' argument that the district court should have dismissed the action because the state court had already acquired jurisdiction over the money. Local authorities voluntarily transferred the money to the DEA, and no state forfeiture proceeding was ever commenced. The federal government took possession of the money and initiated the requisite paperwork for an administrative forfeiture. It was true that after the money had been delivered to the DEA the state court directed the local police to return the money to claimants. However, the money was no longer in state custody. The court could have ordered the police to pay to claimants an equivalent sum of money, but never took such action. The state court denied claimants' request to hold the DEA agent who took the money in contempt. Thus, the state court itself did not consider that any affront had occurred. *U.S. v. Twelve Thousand, Three Hundred Ninety Dollars ($12,390.00),* __ F.2d __ (8th Cir. Feb. 10, 1992) No. 90-2071.

D.C. Circuit affirms dismissal of forfeiture action where property was seized after an illegal search. **(910)** The D.C. Circuit affirmed the district court's dismissal of the government's civil forfeiture action against cash seized from defendant's suitcase. The district court correctly granted claimant's motion to suppress the cash on the grounds that the officers conducting the search and seizure violated the 4th Amendment. The fact that the cash was seized after an illegal search did not immunize it from forfeiture, and other evidence, legally obtained, could be introduced to establish that the property should be forfeited to the government. In this case, however, the government had no such other evidence and for that reason, the district court dismissed the action after ordering the cash suppressed. *U.S. v. Six Hundred Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars ($639,558),* __ F.2d __ (D.C. Cir. Feb. 7, 1992) No. 91-5063.

8th Circuit upholds use of facts outside initial complaint to establish probable cause. **(950)** The 8th Circuit upheld the district court's decision to allow the government to introduce evidence of facts which were not alleged in the initial complaint to establish probable cause. The judge "took pains" to ensure that claimants were not confronted with any unfair or prejudicial information of which they were previously unaware. Such action was within the judge's discretion. *U.S. v. Twelve Thousand, Three Hundred Ninety Dollars ($12,390.00),* __ F.2d __ (8th Cir. Feb. 10, 1992) No. 90-2071.

8th Circuit upholds probable cause to forfeit cash seized from house identified by informants as location of drug transactions. **(950)** The 8th Circuit affirmed that there was probable cause to forfeit cash seized from claimants' residence. At least two confidential informants identified the residence as a location for drug transactions. Police surveillance of the residence, coupled with prior activity on the block, revealed a high volume of traffic entering and leaving the residence. The money seized from the residence was wrapped in rubber bands, which a narcotics officer testified was characteristic of the way drug money is stored. Finally, two months after the search, a DEA agent purchased cocaine from one of the claimant's daughters in front of the residence. The district court could properly reject claimants' "inherently incredible" testimony. Judge Beam dissented, believing that a statute that permits an owner of noncontraband property to be divested of title by a mere showing of probable cause for the institution of forfeiture proceedings violates due process. *U.S. v. Twelve Thousand, Three Hundred Ninety Dollars ($12,390.00),* __ F.2d __ (8th Cir. Feb. 10, 1992) No. 90-2071.

AMENDED OPINION

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