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COMMENDATIONS

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

Verne Armstrong, Thomas Karol, and ***Holly Taft-Sydlow*** (Ohio, Northern District), by Larry Lee Gregg, General Counsel, U.S. Marshals Service, Arlington, Virginia, for their outstanding cooperative efforts in bringing a lawsuit against two Deputy Marshals to a successful conclusion after a two-day trial and less than one hour of jury deliberations.

Leslie Banks and ***Cynthia Thornton*** (Texas, Southern District), by Allen E. Mitchell II, Supervisory Special Agent, FBI, Houston, for their successful efforts in the prosecution of a complex bank fraud case, following an extensive investigation over a period of several years.

Pshon Barrett (Mississippi, Southern District), by Joseph E. Clayton, Staff Officer, Lands and Minerals, U.S. Forest Service, Department of Agriculture, Jackson, for her successful coordination of efforts in a civil action which led to a court decision to grant a motion to dismiss.

Anastasia K. Bartlett (Washington, Western District), by David B. Hopkins, District Counsel, Immigration and Naturalization Service, Seattle, for obtaining outstanding results in the settlement of a significant immigration and Equal Access to Justice Act suit.

Laurie Brecher and ***Randall Bodner*** (New York, Southern District), by Judge Kimba M. Wood, U.S. District Court, New York, for their professionalism and legal skill in the course of a five-month criminal trial.

John J. Brunetti (New York, Northern District), by Charles R. Thomson, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms (BATF), New York, for his professional efforts and valuable assistance to BATF agents in the aftermath of the shooting of a special agent during an undercover operation.

Roger W. Burke, Jr. (District of Columbia), by Robert L. Merriner, Area Administrator, Office of Labor-Management Standards, Department of Labor, Washington, D.C., for his successful prosecution of a union official for embezzling $70,000 in union funds.

Michael A. Cauley (Florida, Middle District) by K.W. Newman, Acting Postal Inspector in Charge, U.S. Postal Service, Miami, for obtaining a favorable settlement in a civil case, and for his skill, competence and professionalism in other matters over the years.

Paul K. Charlton (District of Arizona), by James F. Ahearn, Special Agent in Charge, FBI, Phoenix, for his successful efforts in the prosecution of an interstate transportation of stolen property case involving a jewel thief who burglarized up to 200 homes in the Phoenix and Scottscale, Arizona areas.

Robert Crowe (California, Northern District), by Judge John T. Noonan, Jr., United States Court of Appeals for the Ninth Circuit, San Francisco, for his diligent and comprehensive preparation, fair and candid presentations, and forceful and highly effective arguments in a bank fraud case which included lengthy sentencing proceedings.

Miriam Wansley Duke, Sharon T. Ratley, and ***Charles E. Cox, Jr.*** (Georgia, Middle District), by William S. Sessions, Director, FBI, Washington, D.C., for their successful prosecution of a large drug-trafficking organization which resulted in convictions of all but one of the 17 individuals indicted.

Lawrence D. Finder (Texas, Southern District), and his staff, ***Marianne J. Dombroski*** and ***Laura Mejia,*** by Chellis Neal, Attorney, Branch of Enforcement, Securities and Exchange Commission, Chicago, for their valuable assistance and hospitality during a two-week visit to the city of Houston.

Lawrence D. Finder (Texas, Southern District), by William S. Sessions, Director, FBI, Washington, D.C., for his valuable assistance in the successful completion of the first phase of an investigation into a major drug trafficking organization.

Robert G. Guthrie and ***Linda S. Kaufman*** (District of Colorado), by John G. Freeman, Inspector in Charge, U.S. Postal Service, Denver, for their dedicated efforts in bringing about highly favorable results in a criminal fraud case.

Cynthia R. Hawkins (Florida, Middle District), by C. W. "Jake" Miller, Brevard County Sheriff, Titusville, and the Board of Directors of the Brevard County Drug Task Force, for her successful prosecution of a multi-defendant wire intercept investigation involving over 100 kilograms of crack cocaine.

Yoshinori T. T. Himel (California, Eastern District), by Richard T. Flynn, Attorney, Office of General Counsel, Department of Agriculture, San Francisco, for his successful efforts in obtaining the dismissal of a $184,000 lawsuit against the Forest Service.

Greg Hough (District of Kansas), by Richard J. Whitburn, Chief, Criminal Investigation Division, Internal Revenue Service, Wichita, for his excellent representation and cooperative efforts in bringing a complex case to a successful conclusion.

William Howard (Texas, Southern District), by Charles A. Harwood, Regional Director, Federal Trade Commission, Seattle, for his outstanding assistance and hospitality during the course of a civil case in Houston.

Rick L. Jancha (Florida, Middle District), by the City Commission of the City of Deland, Florida, for his outstanding contribution to the successful planning, coordination, and prosecution of the Spring Hill Drug Operation conducted by the Deland Police Department, and other members of the law enforcement community.

Grant C. Johnson (Wisconsin, Western District), was presented the Department of Health and Human Services' (HHS) Integrity Award by Michael T. Dyer, Regional Inspector General for Investigations, for his outstanding efforts in fighting fraud, waste and abuse in the Department's programs, HHS' highest award for non-departmental employees.

Phyllis S. Kilbreath (District of Arizona), by Derle Rudd, Regional Inspector, Internal Revenue Service (IRS), Dallas, for her valuable assistance and cooperation in a case involving the use of a firearm in an assault on an IRS officer, and the forcible rescue of seized property.

Jack Lacy and ***John Dowdy*** (Mississippi, Southern District), by Eddie Gibson, Director, Terrance M. Parkerson, Criminal Investigator, and Louise Wilson, Child Protection Team Coordinator, Mississippi Band of Choctaw Indians, Philadelphia, for their valuable assistance and support in a difficult and complex criminal litigation involving Indian child abuse.

Jack Lacy (Mississippi, Southern District), by Joseph J. Jackson, Special Agent in Charge, FBI, Jackson, for his professionalism and cooperative efforts in a variety of investigative matters of mutual interest to the FBI and the United States Attorney's office.

Frank A. Libby and ***Gwendolyn R. Tyre*** (District of Massachusetts), by Carl C. Bosland, Attorney, Office of Field Legal Services, U.S. Postal Service, Windsor, Connecticut, for their exceptional efforts in securing summary judgment in favor of the Postal Service in an employment discrimination case.

Samuel G. Longoria (Texas, Southern District), by Douglas C. Payne, District Director, Public Health Service, Food and Drug Administration (FDA), Department of Health and Human Services, Dallas, for obtaining a landmark decision in a mass seizure suit, and for setting case law regarding good manufacturing practices for medical devices.

Steve Mansfield and ***John Potter*** (California, Central District), by John L. Martin, Chief, Internal Security Section, Criminal Division, Department of Justice, Washington, D.C., for their successful litigation of a case involving a myriad of legal issues concerning the viability and extent of U.S. export controls on technical data.

Alejandro Mayorkas (California, Central District), by D. Michael Crites, United States Attorney for the Southern District of Ohio, for his valuable contribution to the success of two cases, one of which involved the forfeiture of $3,388,978.28, a Malibu residence valued at $1,500,000, several expensive cars, and other property.

S. Theodore Merritt (District of Massachusetts), by William S. Sessions, Director, FBI, Washington, D.C., for his outstanding success in obtaining convictions of two individuals in one of the most significant bank fraud investigations to be prosecuted in the District of Massachusetts.

Gary Montilla, John Newcomber, and ***Paul Moriarty*** (Florida, Middle District), by Andrew Grosso, Assistant United States Attorney for the District of Massachusetts, (formerly Special Assistant United States Attorney for the Middle District of Florida) for their valuable assistance and support in bringing a number of cases to a successful conclusion during his transition to Massachusetts.

Ruth Morgan (Mississippi, Southern District), by Lt. Randy Dearman, Narcotics Division, Laurel Police Department, for her outstanding efforts in the successful prosecution of twelve members of a cocaine trafficking ring responsible for thousands of dollars in property losses and numerous assaults on the citizens of Laurel.

Robert E. Mydans (District of Colorado), by Michael M. Baylson, United States Attorney for the Eastern District of Pennsylvania, Philadelphia, for his excellent presentation at a criminal forfeiture training program regarding the integration of criminal forfeiture into the criminal case.

David M. Nissman (District of Virgin Islands), by Richard W. Held, Special Agent in Charge, FBI, San Francisco, for his valuable assistance and cooperative efforts in the coordination of multi-jurisdictional aspects of a complex criminal investigation.

G. Frank Noonan (District of Oregon), received the 1992 Multnomah Bar Association (MBA) Professionalism Award, the MBA's highest honor, for his commitment to the ideals of integrity, honesty, competence, fairness, independence, courage, and devotion to the public interest.

David J. Novak (Texas, Southern District), by John Hensley, Assistant Commissioner, Office of Enforcement, U.S. Customs Service, Washington, D.C., for his valuable assistance in the investigation and subsequent seizure of a substantial investment portfolio associated with the "Choza Rica" case.

Sam Nuchia, Ned Barnett, John P. Smith, and ***Ken Dies*** (Texas, Southern District), by Ruben Monzon, Special Agent in Charge, Drug Enforcement Administration, Washington, D.C., for their successful prosecution of an OCDETF case which targeted Guatemala smuggling organizations linked to Colombian traffickers transporting multi-kilogram quantities of cocaine into the Southern District of Texas.

Sheila Oberto (California, Eastern District), by Ronald E. Stewart, Regional Forester, Forest Service, Department of Agriculture, San Francisco, for her outstanding cooperative efforts in the defense of the Forest Service, and for obtaining a summary judgment in favor of the United States.

Frederick Petti and ***Michael Bidwill*** (District of Arizona), by Robert J. Maguire, Law Enforcement Specialist, Glen Canyon National Recreation Area, National Park Service, Page, Arizona, for providing valuable assistance and legal support to Park Service agents during the course of two separate trials.

Patrick Quinn (Ohio, Southern District), by Brigadier General James C. Roan, Jr., Staff Judge Advocate, Air Force Logistics Command, Wright-Patterson Air Force Base, for his successful efforts in a complex case involving a former Air Force employee. ***Sandra Ellis*** and other administrative staff in the Dayton and Cincinnati offices were also commended.

Howard E. Rose (Texas, Southern District), by F. M. McReaken, Loan Guaranty Officer, Department of Veterans Affairs, Houston, for his excellent representation and professional skill in a difficult and complicated Federal Tort Claims Act lawsuit.

Kimberly A. Selmore (Florida, Middle District), by Manuel A. Rodriguez, Trial Attorney, Office of International Affairs, Criminal Division, Department of Justice, Washington, D.C., for her professional skill in bringing an extradition proceeding to a successful conclusion, and for her valuable assistance provided to the Office of International Affairs and the Government of Australia.

David A. Sierleja (Ohio, Northern District), by Hubert R. Coleman, Resident Agent in Charge, Drug Enforcement Administration, Cleveland, for his successful prosecution of a medical practitioner who was convicted on seven counts of trafficking in Dilaudid.

Edward A. Smith (New York, Southern District), by Arthur J. Rothkopf, General Counsel, Department of Transportation, Washington, D.C., for his valuable assistance and support in a complex bankruptcy reorganization and related proceedings involving a certificated airline.

John Patrick Smith (Texas, Southern District), by William S. Sessions, Director, FBI, Washington, D.C., for his successful prosecution of the Houston cell of a money-laundering organization representing the Colombian Cali drug cartel.

Michael Solis (Georgia, Middle District), by R.J. Harris, Special Agent in Charge, Georgia Bureau of Investigation, Decatur, for his excellent support and assistance in the coordination of numerous investigations involving several agencies.

Diane Tebelius (Washington, Western District), by Arno Reifenberg, Regional Attorney, Office of General Counsel, Department of Agriculture, Portland, Oregon, for her excellent representation of the Farmers Home Administration in securing a favorable settlement in a bankruptcy case.

Betty Vital (Texas, Southern District), by the Honorable Phil Gramm, United States Senator, for providing invaluable assistance at an asset forfeiture check presentation ceremony held recently in Houston.

Stewart Walz and ***Tena Campbell*** (District of Utah), were presented an Assistant Commissioners Award by Robert Zavaglia, Chief, Criminal Division, Internal Revenue Service, for their continued support and cooperation in the financial crime cases in that state.

Dale E. Williams (Ohio, Southern District), by Charles R. Sekerak, Assistant Inspector General for Investigations, Railroad Retirement Board, Chicago, for obtaining the conviction of a Columbus attorney for theft of government funds.

Ronald G. Woods, United States Attorney, and ***Charles Lewis, Assistant United States Attorney*** (Texas, Southern District), by Sam Nunn, Chairman, Permanent Subcommittee on Investigations, Committee on Governmental Affairs, United States Senate, Washington, D.C., for their excellent testimony on law enforcement views and current trends in money laundering.

Ewald Zittlau (Pennsylvania, Eastern District), by Colonel Glenn A. Walp, Commissioner, Pennsylvania State Police, Harrisburg, for his outstanding assistance in a major state and federal investigation of Operation Meth, the illegal manufacture and distribution of methamphetamine.

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SPECIAL COMMENDATION FOR THE CENTRAL DISTRICT OF CALIFORNIA

Patricia Beaman and ***Nick Hanna*** (California, Central District) were presented plaques by Douglas E. Lavin, Acting Assistant Secretary for Export Enforcement, Department of Commerce, for their outstanding success in obtaining guilty pleas in connection with the illegal export of arms to Iran. A federal grand jury had previously returned a 19-count indictment charging an Iranian national and an Orange County resident with illegally exporting U.S. origin electronic test and measurement equipment and oscilloscopes to Iran and with making false statements on Shipper's Export Declarations in connection with the illegal export of commodities to Iran. As a result, the Iranian national faces a maximum possible sentence of 25 years imprisonment and a fine of $1,250,000, and the Orange County resident faces a maximum possible sentence of 20 years imprisonment and a fine of $1,000,000. Mr. Lavin said, "The Secretary of State has designated Iran as a nation that has repeatedly provided support for acts of international terrorism. Therefore, a validated license is required from the Commerce Department to export certain commodities to Iran, including the equipment exported by these two individuals."

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HONORS AND AWARDS

FEDERAL INVESTIGATORS' ASSOCIATION LEGAL AWARD

On May 29, 1992, ***J. William Roberts, United States Attorney,*** and ***Byron G. Cudmore, Assistant United States Attorney, Central District of Illinois,*** were presented the Federal Investigators' Association Legal Award by Attorney General William P. Barr for their organization of "Operation Welcheat," a continuing multi-agency task force of local, state and federal investigative agencies designed to investigate criminal welfare fraud and fraud against the government in the Central District of Illinois. As a result of this task force, over 160 individuals have been indicted by a federal grand jury. ***Mr. Roberts*** stated that this operation will remain a continuing priority because of the negative effect welfare fraud and fraud against the government have on all taxpayers and all lawful recipients of government benefits.

Recipients of the Legal Award were announced in April by the National President of the Federal Investigators' Association, Washington, D.C. and presented at a banquet following the Association's Annual Training Conference which was held in Reston, Virginia.

* * * * *

ENVIRONMENT AND NATURAL RESOURCES AWARDS

On June 2, 1992, at a ceremony in the Great Hall of the Department of Justice, Barry M. Hartman, Acting Assistant Attorney General for the Environment and Natural Resources Division, presented Special Commendation Awards to the following Assistant United States Attorneys for their valuable contributions to the Division's Environmental Enforcement Section:

Debra Cohn (Eastern District of Pennsylvania), in recognition of her exceptional work as lead counsel on U.S. v. Barkman and her considerable skill in discovery and settlement negotiations in such cases as U.S. v. National Rolling Mills and U.S. v. Rohm & Haas.

Arthur Harris (Northern District of Ohio), in recognition of his strong commitment to environmental enforcement, his outstanding abilities as a litigator and manager and his many contributions to the Department's enforcement efforts.

George Henderson (District of Massachusetts), in recognition of his exemplary work as lead counsel in U.S. v. Metropolitan District Commission, et al; U.S. v. City of New Bedford; and U.S. v. City of North Adams.

Peter Hsiao (Central District of California), in recognition of his invaluable advice to Environment Division attorneys and his superb work as lead counsel in such cases as U.S. v. Builders Hardware and U.S. v. Vista Paint. [Note: Vista Paint resulted in the Department's largest Clean Air Act penalties -- more than $3 million in costs and penalties.]

* * * * *

PERSONNEL

On May 20, 1992, ***Roberto Martinez*** was named Interim United States Attorney for the Southern District of Florida. ***Mr. Martinez*** served as Assistant United States Attorney in the Miami office from 1982 until 1987.

On May 18, 1992, ***Douglas N. Frazier*** was named Interim United States Attorney for the District of Nevada. ***Mr. Frazier*** formerly served as Assistant United States Attorney for the Middle District of Florida, Deputy Director of the Executive Office for United States Attorneys, Washington, D.C., and First Assistant United States Attorney for the Southern District of Florida.

On June 1, 1992, ***Jay D. Gardner*** was named Interim United States Attorney for the Southern District of Georgia.

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OPERATION WEED AND SEED AND THE LOS ANGELES RIOTS

Joint Task Force Established To Investigate And Prosecute Los Angeles Riots

On May 5, 1992, Attorney General William P. Barr announced that a joint Federal/State Task Force has been formed to investigate and prosecute riot-related criminal activity in the Los Angeles area.

The Task Force is composed of twenty agents from the FBI, twenty agents from the Bureau of Alcohol, Tobacco and Firearms, ten Drug Enforcement Administration agents, investigators from the Los Angeles Police Department, the Los Angeles County Sheriff's Department, the Compton Police Department, the Inglewood Police Department, the Long Beach Police Department, and other area municipalities which experienced riot-related criminal acts, such as arson and looting. The California Attorney General's office will also participate in the Task Force, and as an initial step, has committed ten Bureau of Investigations Special Agents. Five federal prosecutors from the United States Attorney's office, and the Criminal Division of the Department of Justice will handle the prosecution of federal criminal violations identified by the Task Force.

* * * * *

President Bush Announces Plans For Operation Weed And Seed

President George Bush followed on May 7, 1992 by announcing a $19 million "Weed and Seed" operation designed to help resuscitate blighted and burned Los Angeles communities. Federal funds for this program are broken down as follows:

-- The Department of Justice will provide an additional $1 million in funding to help arrest, prosecute, and incarcerate individuals who tear the fabric of the city's most troubled communities. The individuals include gang leaders, violent criminals, and drug dealers. The funds will be used for community policing, improved security, drug suppression, and coordination among state, local and federal agencies.

-- Approximately $18 million in additional health and social services funding will be made available to the distressed Los Angeles neighborhoods. The Administration will work with the local communities in applying for funding from these competitive grants.

-- $7 million in additional funding from the Department of Health and Human Services for Head Start ($3 million), community health centers ($2 million), and drug treatment ($2 million.)

-- $8 million from the Department of Housing and Urban Development that will be targeted for housing low-income families.

-- $1 million from the Department of Labor for economic dislocation and worker adjustment assistance.

-- $2 million from the Department of Education to improve education services, subject to consultation with the Congress.

A copy of the Fact Sheet issued by the Office of the Press Secretary at the White House is attached at the Appendix of this Bulletin as Exhibit A.

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Attorney General On "Face The Nation"

On May 17, 1992, the Attorney General further discussed the need for tough law enforcement and social programs on the CBS News program "Face The Nation." The following is an excerpt from the transcript of his remarks:

> . . .The message that this Administration has been trying to get across on law enforcement, is first, that we do have to uphold the rule of law. Violent crime is a serious problem in our country, and the rule of law is essential to holding our country together. We're a diverse country. The glue that holds us together is the rule of law, and it's the foundation upon which we hope to build a better society.
>
> Second, that law enforcement alone can't handle the problem of crime and we do have to work with the community. Law enforcement and the community have to work together in a partnership, and where that happens, you see less of the suspicion between the police and the community. And that's the model we've been pushing. Part of that is community policing, which we've been supporting.

And third, that tough law enforcement and social programs to ameliorate the conditions that contribute to crime have to go hand in hand. You can't have one without the other. You can't expect social programs to succeed in the city unless there's some tough law enforcement there because crime is causing poverty these days. It's discouraging investment, discouraging jobs in the inner city. So we have to marry these two approaches, and that's what the President's Weed and Seed program is about. . .

We are helping now, and in fact, even apart from Weed and Seed, over the past two years we've supported community policing with grants of $25 million in the sixteen Weed and Seed cities we have now. Most of the money that we're putting in is for community policing, and of course we'll do all we can to continue to support that.

* * * * *

Attorney General's Testimony On Operation Weed And Seed

On May 20, 1992, the Attorney General appeared before the Select Committee on Narcotics Abuse and Control of the House of Representatives, concerning Operation Weed and Seed. Attorney General Barr's testimony provides a complete, up-to-date status report on the strategy, implementation, and funding of this program.

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

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Weed And Seed Initiative: Transfers Of Real Property

On May 26, 1992, Jeffrey R. Howard, Principal Associate Deputy Attorney General, forwarded a memorandum to all United States Attorneys and other Department and Agency officials describing the Weed and Seed initiative and explaining how federally forfeited real properties may be transferred to state and local public agencies and private non-profit organizations for use in support of the Weed and Seed initiative. The memorandum also sets forth additional guidance to permit the expanded use of federally forfeited real property to support Weed and Seed programs. A copy is attached at the Appendix of this Bulletin as Exhibit C.

If you have any questions regarding this policy and procedure, please call the Executive Office for Asset Forfeiture at (202) 616-8000.

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DEPARTMENT OF JUSTICE HIGHLIGHTS

$290 Million Settlement In A Treasury Securities Case

On May 20, 1992, the Department of Justice and the Securities and Exchange Commission (SEC) announced that Salomon, Inc. and Salomon Brothers, Inc. would pay a total of $290 million in sanctions, forfeitures and restitution to resolve charges arising out of alleged misconduct in Treasury auctions and government securities trading. The settlements were reached following a ten-month multi-agency investigation by the SEC, the United States Attorney's office for the Southern District of New York, and the Antitrust and Civil Divisions of the Department of Justice.

Among the claims being settled by the Justice Department were allegations that Salomon submitted false and unauthorized bids in violation of federal forfeiture laws, the False Claims Act and common law, as well as allegations that Salomon and others entered into unlawful agreements with respect to trading in financing and secondary markets in violation of the Sherman Act. ***Otto Obermaier, United States Attorney for the Southern District of New York,*** and ***Charles A. James, Acting Assistant Attorney General, Antitrust Division,*** announced that the Justice Department would not seek criminal charges against Salomon with respect to these matters although investigations of individuals and other firms will continue.

Under the civil settlement, Salomon will pay $190 million in fines and forfeitures for violations relating to the Treasury auctions and trading practices under investigation, and will establish a $100 million fund for compensating victims of those violations. The SEC will ask the federal court to appoint an administrator to administer the restitution compensation fund, and any unclaimed amounts will revert to the United States Treasury. In addition to the monetary penalties, the settlements will require Salomon to continue its cooperation in various government investigations and to institute procedures to prevent reoccurrence of the violations. With respect to the antitrust settlement, the Antitrust Division filed a complaint and proposed final judgment resolving the matter. The complaint alleges that from June through July 1991, Salomon and certain unnamed co-conspirators engaged in a conspiracy to coordinate their trading activities in May 1993 two-year Treasury notes in order to adversely affect prices and rates for the notes in secondary and financing markets. The final judgment, which includes an asset forfeiture, is for settlement purposes and does not amount to an admission of guilt.

Associate Attorney General Wayne Budd praised the work of the SEC in conducting a significant portion of the investigation, as well as the work of the FBI and the Antitrust and Civil Divisions of the Department of Justice. He said, "The settlements provide a very stiff penalty, and yet still represent a sensible law enforcement resolution that takes appropriate cognizance of Salomon's cooperation."

* * * * *

The Cali Cartel

On May 11, 1992, ***Andrew J. Maloney, United States Attorney for the Eastern District of New York,*** announced that a jury, in a civil forfeiture action, awarded to the United States nearly $10,000,000 in drug proceeds seized in the summer of 1990 as part of a world-wide campaign to freeze assets of the notorious narcotics trafficking organization, the Cali Cartel. Added to other monies previously forfeited to the United States prior to trial, the total amount won by the United States in this lawsuit exceeded $12,000,000.00. ***Mr. Maloney*** said that Jose Santacruz-Londono, the indicted leader of the Cali Cartel, was the mastermind behind this international money laundering conspiracy.

During the summer of 1990, law enforcement authorities in the United States, Luxembourg, United Kingdom, Panama, and numerous other countries combined to seize approximately $60,000,000 in drug proceeds belonging to the Cali Cartel. These drug monies were seized after the arrest of Edgar Garcia-Montilla, Jose Franklin Jurado-Rodriguez, and Ricardo Mahecha-Bustos, who were laundering millions of dollars in Europe on behalf of Santacruz at the time of their arrest. What made this money laundering scheme unique was the detailed and intricate plan devised by Jurado, a graduate of the Harvard Business School employed by Santacruz, to use the international banking system to launder cocaine proceeds. The plan, broken down into several "phases", involved the transfer of drug funds from bank accounts in the names of dummy corporations in Panama to European bank accounts in the names of relatives and associates of Santacruz. After establishing this web of bank accounts, Santacruz's associates intended to wire the laundered drug monies from Europe to Colombia through banks in the United States. The arrest of Jurado, Garcia and Mahecha in Luxembourg brought this scheme to an abrupt halt. Information seized and uncovered in Europe led to the seizure by the United States of approximately $3,400,000 in a Merrill Lynch bank account held in the name of Siracusa Trading Corporation, one of Santacruz' shell companies. The Siracusa account was forfeited to the United States pursuant to the jury verdict. After the seizure of the Siracusa account and related accounts in Europe and Panama, the Cali Cartel began a massive effort to move drug profits to avoid their seizure. Acting under instructions from Santacruz, his associates attempted to move these funds to Colombia via wire transfer through New York area banks. As a result, the United States seized approximately $9,000,000 in wire transfers in late July and early August, 1990. This civil forfeiture action was the first effort by the government to seize and forfeit wire transfers.

According to ***Mr. Maloney,*** narcotics traffickers have increasingly turned to wire transfers to launder their drug profits because wire transfers, which involve nearly same day debits and credits, are an extremely fast and efficient means of moving monies. In addition, the use of wire transfers circumvents various reporting requirements under United States law applicable to large amounts of cash or other monetary instruments. By intercepting these wire transfers before the monies were credited to shell companies in Colombia, the United States effectively foreclosed one of the favored methods used by the Cali Cartel to launder its millions of dollars of drug profits.

The Assistant United States Attorneys who prosecuted the case were: ***Jennifer C. Boal, Gary R. Brown,*** and ***Arthur P. Hui.***

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Third Straight Record Year For Environmental Enforcement

On May 8, 1992, the Department of Justice announced record levels of success in enforcing the nation's environmental laws for the third consecutive year. For FY 1991, the Department recovered over one billion dollars in civil penalties, Superfund cost recoveries, court-ordered hazardous waste cleanups, and natural resource damages. The Department also obtained the highest level of fines ever, a ten percent increase in environmental criminal convictions from FY '90 and the second highest number of such convictions in history. Each convicted felon faced more actual jail time than ever before. In sum, the Department's environmental enforcement efforts achieved a return of nearly $24 for every civil and criminal enforcement dollar provided by Congress. The record levels of enforcement are as follows:

- A record number of civil cases filed (347);

- The first cases filed to enforce prohibitions against ozone depleting chloroflourocarbons (CFCs);

- Record criminal fines of $18,508,732;

- The largest environmental criminal fine ever imposed under the hazardous substance laws - $3 million against United Technologies Corp.;

- The unprecedented use of pre-trial detention for environmental offenses against individuals accused of illegal disposal, witness tampering and conspiracy to defraud EPA;

- Actual jail time averaging over one year for persons convicted of intentional environmental felonies;

- A record amount ordered to be paid back to the Superfund and directed to clean up Superfund sites - $1.125 billion.

In addition, the Department continued its aggressive prosecution for fish and wildlife violations in FY 1991. The record, accomplished in concert with the 94 United States Attorneys' offices, resulted in the following notable achievements: Criminal Indictments or Informations - 1200; Guilty Pleas or Convictions - 900; Prison Sentences Assessed - 60 years; Criminal Fines Imposed - $1 million; and Forfeitures - $3 million.

Barry M. Hartman, Acting Assistant Attorney General for the Environment and Natural Resources Division, said, "These extraordinary results are a tribute to the hard work by our staff attorneys and United States Attorneys, as well as the Federal Bureau of Investigation and the Environmental Protection Agency, which are largely responsible for investigating and referring these cases to us."

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DRUG/CRIME ISSUES

"A Word To The Wise On Drug Diversion"

Michael M. Baylson, United States Attorney for the Eastern District of Pennsylvania, and ***Assistant United States Attorneys Joan L. Markman*** and ***Sonia C. Jaipaul*** prepared an article which appeared in the May, 1992 issue of American Pharmacy, entitled "A Word to the Wise on Drug Diversion." ***Linda Tracy*** provided assistance in preparing the manuscript.

The article concerns a conspiracy by Angelo Milicia, owner of Milicia Pharmacy in South Philadelphia, to illegally distribute controlled substances. The pharmacy owner was sentenced to nine years in prison for unlawfully distributing more than $5 million worth of controlled amphetamines, depressants, and codeine products in a conspiracy that lasted from 1982 through 1987. The court also required that he forfeit more than $1.6 million profit realized from his drug distribution practices -- the largest pharmacy-related forfeiture in history. This article clearly delivers the strong message that courts regard drug diversion for what it is -- drug dealing -- and punish medical professionals as harshly as they punish any other drug dealers.

If you would like a copy of this article, please contact the United States Attorney's office at (215) 597-2556.

* * * * *

The "Miami Boys" Are Indicted

On May 14, 1992, ***Joe D. Whitley, United States Attorney for the Northern District of Georgia,*** together with a number of law enforcement officials, announced the unsealing of a 12-count indictment which identifies a criminal organization dedicated to the distribution of "crack" cocaine and whose members engaged in wholesale acts of violence, including the murder of four men. ***Mr. Whitley*** stated that the indictment charges George Travis Williams with the murders of Jimmy Sims, age 23, and Andre Brennan, age 24, of Miami, who were employees of Williams' illegal drug enterprise. He also said that Williams' participation in the drug-related deaths of two other individuals were overt acts committed by Williams to maintain control over his organization through intimidation and violence and to retaliate against a rival drug gang. The organization is referred to by Atlanta law enforcement officials as the "Miami Boys." Attorney General William P. Barr has authorized United States Attorney Whitley to seek the death penalty against Williams for the drug-related deaths of Sims and Brennan.

David Wright and ***Lawrence O. Anderson***, Assistant United States Attorneys, Organized Crime Drug Enforcement Task Force, will prosecute the case.

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Indian Gambling

On May 12, 1992, ***Linda A. Akers, United States Attorney for the District of Arizona,*** announced the seizure of approximately 750 slot and video gaming machines from five Arizona Indian Tribes. The FBI and the United States Marshals Service served search and seizure warrants at gaming centers at the Fort McDowell Mohave-Apache Reservation, Fountain Hills; the Tohono O'Odham Reservation, Tucson; the Yavapai Reservation, Prescott; and the Tonto Apache Reservation, Payson. ***Ms. Akers*** said it is her intent to forfeit the machines to the United States and that criminal prosecution is not contemplated at this time.

The machines were seized pursuant to the Johnson Act, 15 U.S.C. §§1171-78, which regulates the possession of gaming-related machinery and technology. Section 1175 specifically prohibits the recondition, repair, transportation, possession or use of any gambling device within Indian country. Section 1177 authorizes the seizure and forfeiture of any gambling device possessed or used in violation of the Act. The Johnson Act does not cover activities such as bingo and card games.

Since November, 1991, ***Ms. Akers*** has repeatedly asked Arizona Tribes involved in gaming activities to come into compliance with the law. As a result, all gambling facilities on the White Mountain Apache Reservation were closed and non-operational as of January, 1992. Then, on May 6, 1992, the Cocopah Tribe in Yuma voluntarily removed all video gaming machines from the Reservation. The enforcement action brings the remaining Tribes with gambling facilities into compliance with the Johnson Act.

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Project Triggerlock
Summary Report

Cases Indicted From April 10, 1991 Through April 30, 1992

Description	*Count*	*Description*	*Count*
Indictments/Informations	5,330	Prison Sentences	12,383.61 years; 13 life sentences
Defendants Charged	6,768	Sentenced to prison	1,795
Defendants Convicted	3,131	Sentenced w/o prison or suspended	164
Defendants Acquitted	140		

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.]

* * * * *

ASSET FORFEITURE

Letter To USA Today

Attached at the Appendix of this Bulletin as Exhibit D is a letter dated May 20, 1992 from Cary H. Copeland, Director and Chief Counsel, Executive Office for Asset Forfeiture, Office of the Deputy Attorney General, to the Editor of USA Today, responding to May 18 articles and a May 19 editorial on asset seizure and forfeiture. Mr. Copeland had been interviewed by a USA Today reporter on seizure and forfeiture.

Mr. Copeland, in his response, noted that the articles were slanted and inaccurate. He stated that he anticipated an objective report on seizure and forfeiture, but instead he believes USA Today presented a misleading and inaccurate picture of asset forfeiture and has printed as truth the uncorroborated claims of criminals and defense attorneys who have a personal stake in the cases described in the articles. Mr. Copeland said this does a disservice not only to asset forfeiture but to dedicated law enforcement officers and USA Today readers.

* * * * *

DISTRICT OF UTAH

Major Court Decision

On April 22, 1992, a major court decision was rendered in the United States District Court for the District of Utah concerning grand jury subpoenas. ***Assistant United States Attorneys Stewart C. Walz, Edward D. Eliasberg, Karen L. Gable,*** and ***Jesse M. Caplan*** represented the United States.

The court held that government attorneys working with the grand jury may use documents subpoenaed by the grand jury to assist in examining third party witnesses before the grand jury. The government's attorneys may use these documents while conducting pre-testimony interviews with prospective grand jury witnesses and examining actual third party witnesses before the grand jury. The court, however, noted that the government's attorneys bear certain responsibilities in this regard. First, although documents subpoenaed by the grand jury may be shown to third party witnesses, neither the originals nor copies of these documents may be given to the possession of such witnesses. Second, the government, in its thoughtful discretion, should not make unnecessary disclosures of grand jury documents to third party witnesses. Third, the court's holding in the matter should be construed narrowly. The court did not address any other use of grand jury subpoenaed documents than for the purposes of interviewing and examining grand jury witnesses. A copy of the decision is attached at the Appendix of this Bulletin as Exhibit E.

* * * * *

Closed Circuit Television

David J. Jordan, United States Attorney for the District of Utah, has advised that his office recently prosecuted a child abuse case (U.S. v. Farley) involving a sexual assault of a 5-year old girl on an Indian reservation. As part of the case presentation, the entire testimony of the child was conducted by closed circuit television. ***Mr. Jordan*** stated that in having the child testify in this manner, much trauma was spared to the child and she was able to give testimony very damaging to the defendant. The jury was out for only twenty-five minutes before returning a guilty verdict.

This case was prosecuted by ***Barbara Bearnson, Assistant United States Attorney,*** and the coordination of the closed circuit television work was done by ***Cecelia Swainston, Victim Witness Coordinator.*** If the United States Attorney's Office for the District of Utah can be of assistance to any other districts concerning closed circuit television testimony, please call 801/524-5682.

* * * * *

Operation Basin Roundup

The District of Utah has reported that a Joint Task Force carried out a law enforcement operation, code named "Operation Basin Roundup," that resulted in an 80-arrest sweep through the rural area of Uintah and Duchesne counties and the Ute/Ouray Indian Reservation.

This operation, the largest group of arrests ever conducted in rural Utah in the history of the State, included the arrest of 12 individuals on various charges of selling illegal narcotics on the Indian Reservation; the arrest of 8 individuals on firearms violations and on charges of manufacturing and selling pipe bombs; and the arrest of approximately 60 individuals by state and local law enforcement agencies on narcotics charges. It is anticipated that there will be a number of assets seized in connection with the narcotics violations.

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POINTS TO REMEMBER

Foreign Asset Searches In Savings And Loan Cases

The Office of Foreign Litigation (OFL) in the Civil Division has been designated as the Department's official contact point for foreign asset searches in savings and loan cases. OFL will function as a clearinghouse for requests for assistance from federal banking agencies and United States Attorneys' offices handling litigation under FIRREA. OFL has wide experience supervising litigation on behalf of the United States in foreign courts. As contact point, OFL will perform a number of functions where off-shore assets have been identified. These include initiating litigation in appropriate cases to recover diverted assets and generating evidence for use in FIRREA cases in the United States.

Requests for assistance should be in the form of a written memorandum to OFL which sets forth the specific evidence that savings and loan funds have been diverted to foreign countries and all pertinent background information. The notification should describe as fully as possible the identification and location of all such assets. OFL will perform an initial screening of each referral and coordinate the requests with the Office of International Affairs in the Criminal Division and relevant government agencies which may have additional information or leads to contribute to the search. If any additional information is needed in connection with the initial referral, the Assistant United States Attorney handling the case will be contacted. If the case warrants, OFL will forward the file to foreign counsel for further investigation and consultation. OFL will be responsible for making the appropriate arrangements and for paying any necessary foreign litigation expenses.

All referrals should be forwarded to: David Epstein, Director, Office of Foreign Litigation, Civil Division, Department of Justice, 550 11th Street, N.W., Room 8102, Washington, D.C. 20530. The telephone number is: (202) 514-7455; the telefax number is: (202) 514-6584.

* * * * *

Foreign Travel

The Executive Office for United States Attorneys has been receiving an increased number of foreign travel requests at the last minute, or even after-the-fact. As stated in the United States Attorneys' Administrative Procedures Handbook for Financial Management, Section VI, Page 2, "The Executive Office, the State Department, and the Office of International Affairs (OIA) need at least two weeks' notice before the planned departure to a foreign country." In addition, multiple foreign travel authorizations for the same case need to be accompanied by a court order mandating the travel of defendants, counsel, witnesses, etc. Court reporters and interpreters can be requested and obtained through the American Embassy of the host country.

There are instances when two weeks' notice is impossible due to extenuating circumstances. However, the Executive Office for United States Attorneys has advised that the traveler obtain Executive Office approval, host country clearance, and an official government passport/visa, even if the travel is tentative. All foreign travel authorizations are approved by Michael W. Bailie, Acting Deputy Director, Executive Office for United States Attorneys.

Approval is granted in conjunction with the efforts of OIA and the State Department. Although travelers are requested to continue forwarding copies of the questionnaire to OIA simultaneously with their submissions to the Executive Office for United States Attorneys, any calls regarding final approval should be directed to Lydia Ransome of the Financial Management Staff at (202) 219-1042.

Finally, please be advised that the Office of International Affairs of the Criminal Division is not responsible for the approval of foreign travel. The role of OIA is to assure that your efforts in connection with the contemplated travel does not conflict with other ongoing law enforcement initiatives and to assure compliance with treaty requirements. OIA attorneys are available to consult with and assist the district attorneys on foreign travel-related issues that will aid in meeting the objectives of the travel. The telephone number is: 202/514-0000.

* * * * *

Prevention Of Sexual Harassment In The Federal Workplace

In a policy statement dated November 20, 1991, Laurence S. McWhorter, Director, Executive Office for United States Attorneys, advised that each of us has a responsibility to ensure that our employees do not become victims of sexual harassment and that we take a strong, positive leadership role in initiating actions that will ensure a workplace that is free of harassment. (See, United States Attorneys' Bulletin, Vol. 39, No. 12, dated December 15, 1991.)

The Equal Employment Opportunity Staff of the Executive Office for United States Attorneys, under the direction of Yvonne J. Makell, is available to respond to questions or concerns regarding this or any other discrimination matters. This office has several Special Emphasis Programs in effect -- Federal Women, Hispanic Employment, Black Affairs, Selective Placement, Native Americans and Asian/Pacific Americans -- as well as an assortment of literature, brochures, and other informational materials to assist you in the development of programs and presentations suitable for your individual work environment. The Equal Employment Opportunity Staff is located in Room 6010, Patrick Henry Building; the telephone number is: 202/501-6952.

The Equal Employment Opportunity Staff of the Justice Management Division is responsible for providing direction and leadership for the development and implementation of EEO policies and effective affirmative programs throughout the Department. This office is also actively involved in disseminating information and conducting seminars and workshops on the prevention of sexual harassment and other issues arising in the federal workplace. This office, under the direction of Ted McBurrows, Director, and Violet M. Cromartie, Deputy Director, has several Departmental programs in progress as follows: Federal Women's Program Manager - Anna Rosario; Hispanic Employment Program Manager - Doralia Freudiger; Black Affairs Program Manager - Richard Tapscott; Selective Placement Program Manager - Arlene Hudson; Complaint Processing Manager - Cynthia Richardson; and OBD-EEO Complaints Unit - Violet M. Cromartie. This office is located in Room 7022 of the Patrick Henry Building; the telephone number is 202/501-6734.

In addition, the Civil Division is taking a "pro-active" role in training, prevention, and assisting organizations to avoid litigation in this area. Assistant Attorney General Stuart Gerson stated that the issue of sexual harassment in the federal workplace is a matter of great concern to all employees, particularly in light of the passage of the Civil Rights Act of 1991. Managers and supervisors need to develop a particular sensitivity in this area, not only concerning "quid pro quo" harassment, but also the existence of a hostile or offensive working environment. Employees at all levels need to know how to respond to perceived harassment, how to report it, and what remedies are available.

The Civil Division attorneys have substantial experience in dealing with these cases, both informally and in administrative and judicial forums, and are available to assist in developing appropriate standards and training programs to prevent and eradicate sexual harassment in the workplace. If you would like assistance in developing a training or prevention program, or have any questions, please call Anne Gulyassy (202/514-3527); Mary Goetten (202/514-4651); or Brook Hedge (202/514-3501).

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Street Gang Publications

An article on street gang publications, together with an attachment marked "Exhibit E," was included in the April 15, 1992 issue of the United States Attorneys' Bulletin, Vol. 40, No. 4. Please make the following changes:

United States Marshals Service: Publications numbered 3, 4, 8, 9, and 12 are not available. However, various publications are being prepared and streamlined for general use. The library staff is compiling a list of those persons interested in this information and will respond to any requests as soon as possible.

Bureau of Alcohol, Tobacco, and Firearms: Requests for publications from this organization must be cleared by an intelligence officer in the Tactical Intelligence Branch, Intelligence Division of Law Enforcement. The telephone number is: (202) 927-7900.

President's Commission on Organized Crime: The publications listed are not available on loan from the Criminal Division Library in the Bond Building. These publications must be viewed on the library premises and returned to the librarian.

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SENTENCING REFORM

Guidelines Sentencing Update

A copy of the Guideline Sentencing Update, Volume 4, No. 21 dated May 8, 1992, and Volume 4, No. 22, dated May 28, 1992, is attached as Exhibit F at the Appendix of this Bulletin.

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Federal Sentencing And Forfeiture Guide

Attached at the Appendix of this Bulletin as Exhibit G is a copy of the Federal Sentencing and Forfeiture Guide, Volume 3, No. 14, dated May 4, 1992, and Volume 3, No. 15, dated May 18, 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 May 8, 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 April 30, 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

Description	Count	Description	Count
Informations/Indictments	1,298	CEOs, Chairmen, and Presidents:	
Estimated Bank Loss	$2,889,921,686	Charged by Indictments/ Informations	128
Defendants Charged	1,823	Convicted	113
Defendants Convicted	1,454	Acquitted	1
Defendants Acquitted	34		
Prison Sentences	1,905 years		
Sentenced to prison	947		
Awaiting sentence	226	Directors and Other Officers:	
Sentenced w/o prison or suspended	292	Charged by Indictments/ Informations	411
Fines Imposed	$ 6,451,131	Convicted	362
Restitution Ordered	$ 358,178,598	Acquitted	5

Savings And Loan Prosecution Update

Informations/Indictments	678	CEOs, Chairmen, and Presidents:	
Estimated S&L Loss	$8,251,020,243	Charged by Indictments/ Informations	132
Defendants Charged	1,138	Convicted	95
Defendants Convicted	839	Acquitted	10
Defendants Acquitted	65 *		
Prison Sentences	1,657 years		
Sentenced to prison	514		
Awaiting sentence	183	Directors and Other Officers:	
Sentenced w/o prison or suspended	153	Charged by Indictments/ Informations	186
Fines Imposed	$ 15,172,911	Convicted	156
Restitution Ordered	$400,285,481	Acquitted	7

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

Credit Union Prosecution Update

Description	Count	Description	Count
Informations/Indictments...	76	CEOs, Chairmen, and Presidents:	
Estimated Credit Loss.....	$83,897,341	Charged by Indictments/	
Defendants Charged.....	97	Informations.....	9
Defendants Convicted.....	83	Convicted.....	7
Defendants Acquitted.....	1	Acquitted.....	0
Prison Sentences.....	123 years		
Sentenced to prison.....	66		
Awaiting sentence.....	6	Directors and Other Officers:	
Sentenced w/o prison		Charged by Indictments/	
or suspended.....	11	Informations.....	50
Fines Imposed.....	$16,700	Convicted.....	47
Restitution Ordered.....	$12,890,274	Acquitted.....	0

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LEGISLATION

Antitrust Reform Act Of 1992

On May 7, 1992, the Chairman of the House Judiciary Committee introduced the Antitrust Reform Act of 1992, a bill which would alter the consent decree (modification of final judgment (MFJ)) controlling the Bell Operating Companies. The bill would allow the Bell Companies to apply to the Attorney General for authorization to enter into certain business activities prohibited under the MFJ. Upon enactment the bill would allow the Bell Companies to apply immediately for authorization to engage in research and development on telecommunications equipment. The bill, however, delays, except in limited cases, when authorization may be given for Bell Company entry into information service (3 years), manufacturing telecommunications equipment (5 years), and interexchange telecommunications (7 years). Among other provisions, the bill provides for judicial review of an authorization under a strict competition standard, and imposes criminal liability for violations of prohibited activities.

The Administration opposes the bill's prohibition on entry by the Bell Companies into information services and manufacturing as economically harmful and unnecessary. Full Committee action is expected within the next several weeks.

* * * * *

Health Care Fraud

On May 7, 1993, Stuart Gerson, Assistant Attorney General, Civil Division, and Larry Urgenson, Acting Deputy Attorney General, Criminal Division, testified before the House Government Operations Subcommittee on Human Resources and Intergovernmental Relations concerning health care fraud. Each described the Department's efforts in combatting this fraud, which affects both the government and the private sector, costing millions of dollars annually.

The Chairman of the Subcommittee intends to introduce legislation on this subject.

* * * * *

Port-Of-Entry Inspections Improvements

On April 30, 1992, the Department of Justice formally transmitted to Congress proposed legislation which attempts to remedy the increasing immigration problem of aliens entering U.S. ports-of-entry with fraudulent or no documents. Because the Immigration and Naturalization Service (INS) lacks any kind of "summary exclusion" authority, these aliens are not immediately returned and must be detained. Nearly all of these aliens claim asylum, whether these claims have a legitimate basis or not, thus forcing INS to release most on parole. There appears to be some increasing democratic support for such a bill as long as it ensures a fair review of asylum seekers. Representatives of the airport lobby have expressed support for the concept along with other measures such as "pre-inspection" overseas.

* * * * *

Community And Migrant Health Centers

On April 30, 1992, the House Judiciary Committee approved legislation that would extend the coverage of the Federal Tort Claims Act (FTCA) to the Community and Migrant Health Centers, which are private entities that receive approximately 40 percent of their funds in HHS grants. The Department opposes this extension of FTCA liability because the federal government does not control and supervise the day-to-day operations of these Centers. Department representatives are working with congressional staff and representatives of the Centers to explore acceptable alternatives to the pending bill. Meanwhile, the General Accounting Office is in the process of conducting a survey of the Centers' claims histories, which should be helpful in crafting a remedy for the problems they report.

* * * * *

Qui Tam Provisions Of The False Claims Act

On May 21, 1992, Senator Strom Thurmond introduced the Department's proposal to bar qui tam suits that are based upon information derived within the scope of government employment. This legislation would reverse the decisions of several circuit courts of appeal which held that federal employees can use the knowledge they acquire in their employment for personal gain by filing suits under the False Claims Act. It is the Department's contention that the 15 to 30 percent of the government's recovery that can be awarded to a qui tam relator rightfully belongs to the taxpayers who have already compensated federal employees for their efforts in detecting and investigating fraud.

The House version, H.R. 4563, recognizes this principle but only limits the sum that the federal employee relator can receive. The Department's view is that the congressional imprimatur on such suits, regardless of the percentage of recovery, will continue and encourage an unavoidable conflict of interest that will erode efforts in fighting fraud. The straightforward bar against these suits would restore the accountability of federal employees only to their superiors, acknowledge the important role of the Inspectors General if superiors are unresponsive, and resolve the ethical issues that employees have faced since the first of the courts of appeals decisions was handed down a year ago.

The House Judiciary Subcommittee on Administrative Law and Governmental Relations held a hearing on H.R. 4563 on April 1, 1992, but has not taken further action on the bill.

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CASE NOTES

CIVIL DIVISION

Fifth Circuit Calculates Prevailing Market Rate For Award Of Attorney's Fees To Government Counsel At $175 Per Hour

Opposing counsel provided tardy notice of his last-minute dismissal of his appeal, causing government counsel to prepare for oral argument and travel to New Orleans. Since this incident typified the conduct of the entire litigation, we moved for the cost to the government of the travel, as well as for attorney's fees, at the prevailing market rate, for the time spent in preparing for the oral argument after the dismissal motion was sent to the court. The Fifth Circuit granted our motion, and we then prepared a detailed fee application.

The Fifth Circuit (per Politz, J.) has just awarded the government $175 per hour for the time spent preparing for oral argument, and $87.50 per hour for travel time.

Keszler v. HHS, No. 91-4228 (April 15, 1992). DJ # 137-92.

Attorneys: Anthony J. Steinmayer - (202) 514-3388
Marleigh D. Dover - (202) 514-3511

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Third Circuit Holds That The Consumer Price Index, All-Items, Is The Appropriate Index To Use To Calculate The Cost Of Living Adjustment Permitted Under The Equal Access To Justice Act

After obtaining Supplemental Security Income benefits, plaintiff filed an application for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d). The district court, in a published decision, awarded fees of $136.02 per hour based on an increase in the "cost of living" as reflected by the "Legal Services" index, a component of the Consumer Price Index, notwithstanding our argument that the overall index, "CPI-ALL," should be used (which would yield an hourly rate of $105.91).

The Third Circuit has now reversed in a split decision (Hutchinson, C.J., Fullam, D.J.; Becker, dissenting). As we had urged, the court began with the plain language of the statute, and concluded that "Congress obviously did not equate 'cost of living' with 'cost of legal services', or it would have said so." It also stated that "Congress has decreed that the public fisc shall be vulnerable only to the extent of $75 per hour plus 'cost of living' increases since 1981, and we cannot sanction fee awards in excess of that limitation in a quest for the arguable (but probably minimal) greater deterrence a higher award might provide." Finally, the majority noted and specifically agreed with the Fourth Circuit's recent decision in Gennie Sullivan v. Louis W. Sullivan (Feb. 25, 1992), which also dealt with the index issue. In the dissent's view, the Equal Access to Justice Act requires that fees above $75 be based on increases in the cost of legal services rather than increases in the overall cost of living. This decision and the Fourth Circuit's decision in Gennie Sullivan are the only two appellate court decisions which have specifically addressed the cost of living index issue.

Michelle DeWalt v. Louis W. Sullivan, No. 91-5199 (April 24, 1992). DJ # 137-48-926.

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

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Eighth Circuit Reverses For Lack Of Jurisdiction A District Court's Decision That HHS Abused Its Discretion In Rejecting A Defaulting National Health Service Corps Scholarship Recipient's Eve-Of-Trial Offer To Complete Service In His Home Town

The United States sued to recover for a breach of contract by a physician, Dr. Gary, participating in the National Health Service Corps (NHSC) Scholarship Program. After having partially fulfilled his service obligation, Gary had defaulted. On the eve of trial, he offered to complete his service in a medically underserved area of St. Louis, his home town. The Secretary rejected this offer.

The Eighth Circuit (Lay, and Senior Circuit Judges Bright and Henley) has now reversed the district court's holding that the Secretary abused his discretion by refusing the offer. It accepted our position that the district court lacked jurisdiction and that, in any event, the Secretary's determination was valid. As for jurisdiction, the court held that the Secretary's denial of Gary's request involved denial of a settlement offer and therefore was "unreviewable as committed to agency discretion by law," and that "the Secretary's rejection * * * was not a 'final agency action' subject to judicial review * * *." The court pointed out that "once [Gary] defaulted * * * he had no statutory right to have his offer of service considered or accepted * * *, so that the * * * rejection * * * did not in any way impose a new legal relationship * * *." Rather, the court reasoned, his position "was precisely the same," i.e., "[h]e was still many years in default * * * and defending against the government's action * * *."

United States v. Gary, No. 90-2879 (April 29, 1992). DJ # 77-42-614.

Attorneys: William Kanter - (202) 514-4575
Robert D. Kamenshine - (202) 514-2494

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ENVIRONMENT AND NATURAL RESOURCES DIVISION

Government's Suit Contending That Quartz Reduction Mill In National Forest Was Not Maintained In Good Faith Sustained

The government brought this ejectment action against Mr. and Mrs. Bagwell, who claimed to operate a quartz reduction mill in the Angeles National Forest (and who represented themselves throughout these proceedings). The government alleged that the Bagwells did not operate the mill in good faith and that the Bagwells were therefore in trespass in the forest. After a trial, the district court held in the government's favor and ordered the Bagwells out of the forest. The Bagwells moved for a stay and remained in the forest during the pendency of their appeal.

On appeal, the Ninth Circuit affirmed in a published opinion. The court first determined that, in order to prove bad faith occupancy, the government bears the burden of establishing bad faith by clear and convincing evidence. The court rejected the Bagwells' contention that the district court lacked jurisdiction over the case because related mining claims were pending before the Interior Board of Land Appeals. The court held that the government may always sue to protect its possessory interest in public lands, despite the fact that Interior has been given authority to adjudicate mining claims. The Ninth Circuit also held that the government introduced sufficient evidence to support the district court's conclusion that the Bagwells' occupancy was in bad faith whether they characterized their mill as a dependent millsite or an independent millsite. The court rejected the government's contention that a violation of 30 U.S.C. 612(a)--using an unpatented mining claim for purposes other than prospecting, mining, or processing--constitutes per se bad faith occupancy.

United States v. Billy Joe Bagwell, 9th Cir. No. 99-55841 (April 21, 1992) (Canby, Reinhardt, and Wiggins, JJ)

Attorneys: John A. Bryson - (202) 514-2740
E. Anne Peterson - (202) 514-3888

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Denial Of Preliminary Injunction On National Park Service's Interim Management Plan Allowing Shooting Of Disease-Infested Bison Leaving Yellowstone National Park Without Environmental Impact Statement Sustained

Bison herds leaving the Yellowstone National Park boundaries are shot by Montana State Game Wardens (sometimes assisted by National Park Service rangers) because many of the animals carry brucellosis, an infectious disease that may be transmitted from bison to cattle and also because the animals are capable of causing property damage. The Park Service has adopted, with the State's cooperation, an interim management plan that permits the National Park Service to assist the State in taking the animals but also attempts to preserve a core herd should all the bison decide to leave the Park.

The Fund for Animals filed suit claiming that the interim management plan required an Environmental Impact Statement (EIS). The district court declined to issue a preliminary injunction applying the traditional test. The Court of Appeals affirmed concluding the Fund failed to demonstrate the requisite injury or likelihood of success on the merits. The Court also dismissed the Fund's National Environmental Policy Act (NEPA) claims against the State on 11th Amendment grounds and further held that the State could not be enjoined under NEPA because the level of federal involvement in the taking of bison was minor. The only downside to the Court's opinion is that it concluded that the Fund had standing to sue despite the lack of testimony or affidavits from Fund members who claimed harm. The National Director of the Fund testified that members were harmed and the Court held that his testimony was sufficient to establish standing.

Fund for Animals v. Lujan, 9th Cir. No. 91-35283 (April 29, 1992) (Wright, Alarcon, Circuit Judges, and Fong, District Court Judge)

Attorneys: Andrew C. Mergen - (202) 514-2007
Robert L. Klarquist - 202) 514-2731

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TAX DIVISION

District Court Rules That Expenditures By A Utility To Extend Service To New Customers Are Not Currently Deductible

On April 17, 1992, the United States District Court for the Western District of Wisconsin ruled in favor of the Government in United States v. Wisconsin Power and Light Co., dismissing taxpayer's $3.5 million refund claim. The issue presented by this case was whether the taxpayer was entitled to an immediate deduction for amounts it expended to extend electrical service to new customers, i.e., the purchase of cable, conductors and electrical poles. The Government contended, and the District Court agreed, that these expenditures should be treated as a capital expense and not merely an addition to existing property that is currently deductible.

* * * * *

Second Circuit Holds IRS May Enforce Summonses Notwithstanding Pending Tax Court Proceeding

On April 27, 1992, the Second Circuit reversed and remanded the adverse decision of the District Court in PAA Management, Ltd. v. United States. The IRS issued administrative summonses during the days immediately prior to its issuance of a notice of final partnership administrative adjustment (the partnership equivalent of a notice of deficiency), as part of an investigation of Professional Arbitrage Association (PAA) and its partners. On March 5, 1991, prior to the time the information sought by the summonses had been obtained by the Service, a representative of the partners petitioned the Tax Court for review of these determinations. The partnerhip then moved to quash the summonses. The District Court ordered the summonses quashed, holding that the summonses could no longer be enforced once the underlying matter had gone to litigation. The Second Circuit reversed, holding that the IRS's broad summonses authority does not evaporate when Tax Court proceedings begin. Rather, the Service may continue to "rely on its previously issued summons to obtain information it believed necessary to its investigation."

* * * * *

District Court Upholds Jeopardy Assessments Against Mexican National

In three consolidated cases, the United States District Court for the Western District of Texas upheld jeopardy assessments of approximately $5 million made against three corporations owned by Miquel Zaragosa, a Mexican national who ran a series of companies involved in the business of purchasing, transporting and selling liquified petroleum gas. In 1985 and 1986, while the IRS was auditing two corporations owned by Zaragosa, but before an assessment could be made against these corporations, Zaragosa either transferred their assets to Mexico or to new U.S. corporations. The District Court held that the tax liabilities eventually determined with respect to these two corporations could be assessed against the new U.S. corporations.

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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%	05-01-92	4.40%
12-14-89	7.66%	03-08-91	6.46%	05-29-92	4.26%

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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* * * * *

EXHIBIT
A

THE WHITE HOUSE
Office of the Press Secretary

For Immediate Release May 7, 1992

"WEED AND SEED" PROGRAM TO AID NEEDY LOS ANGELES COMMUNITIES

FACT SHEET

The President today announced a $19 million "Weed and Seed" operation designed to help resuscitate blighted and burned Los Angeles communities. "Weed and Seed" is a comprehensive, multi-agency approach to combatting crime and repairing the social fabric in troubled neighborhoods. The goal is to "weed out" crime from targeted neighborhoods and then -- in cooperation with State, local, and private organizations and individuals -- to "seed" the sites with a wide range of crime and drug prevention programs and human service agency resources to prevent crime from reoccurring.

The $19 million "Weed and Seed" program will include funding from the Department of Justice and numerous other Federal agencies. The Department of Justice, in consultation with the other Federal agencies, State and local officials and the private sector, will identify specific hard-hit neighborhoods in Los Angeles for this targeted aid. Targeted Federal funds for this operation include:

Law Enforcement

The Department of Justice will provide an additional $1 million in funding to help arrest, prosecute, and incarcerate individuals who tear the fabric of the city' most troubled communities. These individuals include gang leaders, violent criminals, and drug dealers. The Department's "Weed and Seed" funds will be used for community policing; improved security; drug suppression; and coordination among State, local and Federal agencies.

Social Service and Health Assistance

Approximately $18 million in additional health and social services funding will be made available to the distressed Los Angeles neighborhoods. The Administration will work with the local communities in applying for funding from these competitive grants. The funding will address the numerous problems and concerns facing community residents now and in the future.

-- $7 million in additional funding from the Department of Health and Human Services for Head Start ($3 million), community health centers ($2 million), and drug treatment ($2 million).

MORE

-- $8 million from the Department of Housing and Urban Development that will be targeted for housing low-income families. This will assist approximately 175 families, allowing them to choose where they want to live.

-- $1 million from the Department of Labor for economic dislocation and worker adjustment assistance.

-- $2 million from the Department of Education to improve education services, subject to consultation with the Congress.

A combination of social services and law enforcement, all backed by State, local and strong private sector involvement, is essential for the success of "Weed and Seed" in Los Angeles. A coordinated and extensive social and health investment will follow the law enforcement efforts to address the needs of the blighted areas. Such a coordinated investment of public and private resources will give law abiding citizens the kind of economic and social opportunities that breathe life into neighborhoods.

This "Weed and Seed" operation is in addition to the extensive Federal support already announced for the Los Angeles area.

<u>"WEED AND SEED" Programs Across the Nation</u>

The Administration has proposed "Weed and Seed" legislation to cut through red tape, help coordinate the programs of Federal agencies, and rejuvenate embattled neighborhoods and communities across the United States. In addition, passage of Enterprise Zone legislation, an important part of "Weed and Seed", will go a long way toward achieving "Weed and Seed" goals of restoration. The President has called on the Congress to pass this legislation expeditiously.

Department of Justice

EXHIBIT
B

STATEMENT

OF

WILLIAM P. BARR
ATTORNEY GENERAL

BEFORE

THE

SELECT COMMITTEE ON NARCOTICS
ABUSE AND CONTROL
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

OPERATION WEED AND SEED

ON

MAY 20, 1992

Mr. Chairman, Members of the Select Committee, I am pleased to have this opportunity to discuss Operation Weed and Seed, the Administration's new initiative to combat violent crime and drug trafficking in targeted neighborhoods and to revitalize these areas with social services and economic opportunities.

Weed and Seed is a community-based, comprehensive, multi-agency approach to combatting violent crime, drug use and gang activity in high-crime neighborhoods. The goal of this strategy is to "weed out" crime from targeted neighborhoods and then to "seed" the targeted sites with a wide range of crime and drug prevention programs and human service agency resources to prevent crime from reoccurring.

The ultimate objective is to maximize coordination and involve the entire community in this effort to revitalize crime-ridden neighborhoods. If we are to reclaim America's communities from the terror of violent crime, we must work together on every level of government and with the private sector. Law enforcement alone cannot solve these problems. The coordination of law enforcement and social programs is essential to the revitalization of these communities, and they must work together, mutually reinforcing one another. Law enforcement is not a substitute for social programs, and social programs cannot be pursued instead of -- or at the expense of -- aggressive law enforcement policies. No social program or community activity can flourish in an atmosphere poisoned by violent crime and drug abuse.

Elements of Weed and Seed Strategy

The Weed and Seed strategy involves four basic elements:

1. Law Enforcement: Eliminating Crime and Violence. Building on a partnership among State, local and Federal law enforcement agencies, this element focuses on enforcement, adjudication, prosecution, and offender management activities designed to target, apprehend and incapacitate violent street criminals and criminal organizations that terrorize neighborhoods and account for a disproportionate percentage of criminal activity.

Criminals will be prosecuted under Federal law when possible. Programs such as the Department of Justice's Project Triggerlock target violent armed offenders for prosecution in Federal court to take advantage of tough Federal firearms laws. Between April 1991 and February 1992, Project Triggerlock resulted in approximately 4,500 cases charged and had a 91 percent conviction rate.

Other activities will focus on special cooperative enforcement operations such as repeat or violent offenders, intensified narcotics investigations, targeted prosecutions, victim/witness protection and services, and the elimination of narcotics trafficking organizations operating in targeted areas. Again, it must be emphasized that central to this element is a cooperative partnership between Federal, State and local law enforcement agencies and prosecutors.

Community-Oriented Policing operates in support of the intensive law enforcement suppression activities described above and provides a "bridge" to programs aimed at prevention, intervention and treatment, and neighborhood reclamation and revitalization. Community-oriented policing activities focus increasing police visibility and the development of cooperative relationships between the police and the citizenry in the targeted areas. Techniques such as foot patrols, targeted mobile units, victim referrals to support services and community relations activities will increase positive interaction between the police and the community. The objective is to raise the level of citizen and community involvement in crime prevention activities to solve drug-related problems in neighborhoods and to enhance the level of community security, and to build trust and respect between neighborhood residents and law enforcement.

Community policing is more than simply reacting to crime after it has occurred. As one police chief said recently, "It's getting out front" before a crime is committed. Its citizens and law enforcement working together to solve problems that lead to crime. In areas where community policing has been implemented, residents report increased satisfaction with law enforcement, while law enforcement officials report greater job satisfaction on the part of officers and improved attitudes of the community towards police. New York City has found its community policing demonstration program so successful that it is now working to integrate community policing throughout its police force.

2. Social Services: Providing Hope and Assistance. This element of Weed and Seed is a coordinated set of social programs that will help residents reclaim their lives and their neighborhoods. These programs will include improved access to primary and prenatal health care, drug abuse treatment and prevention, Head Start, job training, after-school and adult education programs, and transportation services to link inner-city workers to suburban jobs.

Central to this strategy is that such services will be visible, on-site, and accessible. This provides our best chance of breaking this cycle of drug use, poverty, and unemployment. By breaking the cycle, we eliminate the demand for drugs, thereby putting drug organizations and dealers out of business.

3. Creating Jobs and Economic Opportunity. This element focuses on creating jobs, wealth, and opportunity in neighborhoods where businesses have been driven out by violent crime and drug trafficking. Up to $400 million of the Weed and Seed money earmarked in the budget will go to neighborhoods designated as Enterprise Zones by the Secretary of Housing and Urban Development. The Administration's Enterprise Zone proposal has been carefully designed to stimulate entrepreneurial activity and job creation. An additional $100 million will go to Weed and Seed neighborhoods that are not designated as Enterprise Zones.

4. Housing and Community Development. Public housing developments in Weed and Seed areas will be eligible for HUD's drug elimination grants and modernization funds. In addition,

housing vouchers, and community development block grant funds for recreational areas, rehabilitation of private housing, and other community infrastructure improvement will be provided.

Implementation of Weed and Seed

Weed and Seed requires six basic steps for implementation:

1. Organize a Weed and Seed Steering Committee, which will be coordinated by the U.S. Attorney and comprised of Federal, State, and local law enforcement including local prosecutors; Federal, State, and local school, housing and other social services officials; private sector foundations and corporations; and most important, representatives from community-based organizations. Depending on the requirements of the local community, a Law Enforcement Task Force could be established to coordinate the "weed" activities and a Neighborhood Revitalization Committee to coordinate the "seed" programs.

2. The Steering Committee selects a target neighborhood. Factors that should be considered in selecting a target neighborhood include: the presence of grass roots community organizations open to the Weed and Seed concept; high incidence of gang-related violence; high rates of homicide, aggravated assault, rape and other violent crime; high number of drug arrests; high dropout rate; high unemployment rate; and the presence of public housing developments, including high-rise apartments.

3. The Steering Committee will conduct a needs assessment of the targeted neighborhood. The type of information developed

in step two will be used to assess the problems and needs of the targeted neighborhood in relationship to the program goals and objectives. The assessment will identify problems in the targeted neighborhood and inventory the available resources to address them.

4. Existing and new resources to meet the objectives selected in step 3 will be identified. These resources include funding, staff for various programs and activities, and materials and equipment.

5. The program activities and human services that will be implemented to achieve each of the objectives will be identified. A plan will be prepared specifying **who** will be responsible for administering the activity, **what** it will involve, **where** the activity will be conducted, **when** it will be done, **how** it will be implemented and **how** much it will cost.

6. An implementation schedule will be developed with target dates for the completion of major activities.

Evaluations

Evaluation is an important component of the Weed and Seed program. Each funded program will be evaluated to determine to what extent the program was implemented as intended and what impact the program had on the stated problem. The evaluation will be organized to allow for a comparison of baseline and post-Weed and Seed quantitative data, such as the number of investigations and arrests, and the rates of high school graduation, infant mortality, poverty, and teen pregnancy. The

evaluation will also measure qualitative data such as offender characteristics, displacement of criminal activity, and level of citizen satisfaction. In addition, the Department of Justice's National Institute of Justice will conduct a national evaluation of Weed and Seed. Results of these evaluations will be crucial as we progress in implementing future sites.

Phase I -- Fiscal Year 1991-- Pilot Sites

Building on programs developed independently in Philadelphia, Pennsylvania, the Department of Justice initiated pilot sites for Weed and Seed in two locations in Fiscal Year 1991. The Weed and Seed strategy is being implemented in Kansas City, Missouri, and Trenton, New Jersey, as described below.

Protype: The Philadelphia Experience.

Several programs in Philadelphia served as catalysts for the Department's Operation Weed and Seed program. The Violent Traffickers Project (VTP) is a joint Federal-State task force organized in August 1988 to address the severe problems of drug trafficking and drug-related violence in neighborhoods in the Philadelphia area. VTP consists of agents and officers of the Drug Enforcement Administration; the Philadelphia Police; the District Attorney's Office; the Bureau of Alcohol, Tobacco and Firearms; the Federal Bureau of Investigation; the Immigration and Naturalization Service; the Pennsylvania Attorney General's Office; the Pennsylvania State Police and the U.S. Attorney's Office. The Violent Traffickers Project is part of the President's Organized Crime Drug Enforcement Task Force Program

(OCDETF). Between November 1988 and July 1991, 551 individuals have been indicted as a result of VTP investigations. The conviction rate is over 99 percent.

As a result of the success of VTP in targeting and removing violent offenders from the community, a number of neighborhood-based revitalization efforts began to flourish. For example, in the Spring Garden neighborhood, following successful law enforcement drug sweeps, residents began and maintained vigils to keep the neighborhood free of drug dealers. These highly successful activities resulted in providing a safe environment in which residents can live and business can develop and flourish. In addition, law enforcement officials, working out of a police mini-station in the neighborhood, and community residents are working together to revitalize the neighborhood, renovating former crack houses, cleaning up playgrounds, and encouraging businesses to open in the area.

Another program that led to the creation of Weed and Seed is Philadelphia's Federal Alternatives to State Trials (F.A.S.T.) Program. In July 1991, the Department's Office of Justice Programs (OJP), through its Bureau of Justice Assistance (BJA), provided funding for this joint effort of the Philadelphia District Attorney's Office and the Office of the United States Attorney for the Eastern District of Pennsylvania.

Under the F.A.S.T. project, selected drug and firearm cases are transferred to Federal jurisdiction through the U.S. Attorney's Office. The transfer from local to Federal

jurisdiction substantially increases the likelihood that accused local drug dealers and other armed career criminals will remain in custody from the moment of arrest forward by holding them in Federal detention facilities pending trial. In addition, defendants receive expedited trials in the Federal district court. If convicted, they are subject to Federal sentencing guidelines and/or Federal mandatory minimums and incarcerated in a Federal facility.

Operation PEARL (Prevention, Education, Action, Rehabilitation and Law Enforcement), a Federal/State/city effort to rehabilitate the Mantua neighborhood was launched in 1990, and resulted in increased law enforcement and social services in the targeted neighborhood. The Bureau of Justice Assistance provided a planning grant to help PEARL get started. President Bush visited Mantua in July 1990, and applauded the joint efforts of government and the neighborhood residents to conquer problems brought on by drug trafficking. A second PEARL program --PEARL II-- began operating in a South Philadelphia neighborhood in October 1991.

Pilot Site: Kansas City, Missouri

In August 1991, the Bureau of Justice Assistance awarded Kansas City, Missouri, $200,000 for a program organized by the U.S. Attorney and the Kansas City Police Department. The Kansas City Weed and Seed program has been expanded, and the working group, comprised of law enforcement, human service agencies and community organizations, has made substantial progress in

developing its implementation plan for both the "weeding" and "seeding" components. A target neighborhood, the Ivanhoe section of the city, has been selected. The "seeding" effort is focusing on demolishing dangerous buildings and creating incentives for development, and it will include forfeiture of houses used for drug trafficking and abandoned property and conversion of those into affordable housing.

In addition, the Kansas City project is rebuilding neighborhood alliances to get residents involved in maintaining the security of their community through neighborhood cleanups, removing abandoned cars, fixing and replacing street lights, and removing or painting over graffiti. The seeding effort also aims to encourage businesses to relocate to the area and has established a "Hub House" in the neighborhood--a one-stop center to provide residents with information on a wide range of programs available to them, including drug treatment and referral, family therapy, education, counseling, child development programs, youth services, housing services, and opportunities available through the Small Business Administration.

Key participants in the Kansas City Weed and Seed program currently involve: Federal, State and local law enforcement agencies and prosecutors; the regional office of the U.S. Department of Housing and Urban Development; the Small Business Administration; the Kansas City Neighborhood Alliance; the Ad Hoc Group Against Crime, a neighborhood-based organization; and other local government and community groups.

Pilot Site: Trenton, New Jersey.

In September 1991, BJA awarded Trenton, New Jersey, $284,000 to further demonstrate the Weed and Seed strategy. This Weed and Seed project is targeted at four neighborhoods and is proceeding with very good results. Under the direction of the State Attorney General, and in close coordination with the United States Attorney, and the City of Trenton, the project has developed a four-pronged approach to fighting the war on drugs and crime in these neighborhoods:

(1) The Violent Offender Removal Program (VORP) is designed to target, apprehend, and incapacitate violent street gang members and disrupt drug trafficking networks in and around the designated Safe Haven Zones. VORP has resulted in the arrest of 69 persons since the beginning of this program.

(2) The Trenton Weed and Seed program was recently awarded an additional $743,142 to fund community policing activities. The Community Policing Program is designed to emphasize the need for police officers and residents within the community to work together in creative ways to address the problems of crime at the neighborhood level. Community policing has been implemented in each of the four targeted neighborhoods and has met with high praise from both residents and local police.

(3) The Safe Haven Program is designed to provide an alternative to the dangers of the streets by bringing together education, community, law enforcement, health, recreation and other groups to provide alternative activities for high-risk

youth and other residents of the community. Three public middle schools in three of the targeted neighborhoods are being used after regular school hours from 3 p.m. to 9 p.m. to house these programs. In addition to programs for high-risk youth, the Safe Haven Project also includes a number of programs that are adult-oriented. The number of community participants at one of the Safe Haven sites has averaged between 85 and 125 per evening, with as many as 200 on several occasions.

(4) The Community Revitalization and Empowerment Program is in the planning stages and should be underway soon. A number of human service agencies have been identified to participate in this "seed" effort, including: the Delaware Valley United Way, Urban League of Greater Trenton, Boys and Girls Clubs, DARE (Drug Abuse Resistance Education) program, and the Trenton School District, among others. In addition, the Mayor of Trenton has held a number of town meetings in the targeted areas to assess community needs and the types of social services to be made available in the "Safe Havens." Project participants also have signed a memorandum of agreement specifying their commitment to the program.

Phase II -- fiscal year 1992 -- Demonstration Program

In Fiscal Year 1992, the Department will expanding the pilot phase of Weed and Seed to additional demonstration sites. This initiative shows great promise, but much work remains to be done to refine the design of the program. Resources are limited in Fiscal Year 1992, so the demonstration program can be expanded to

only 16 cities. The cities participating in Phase II are Atlanta, GA; Chelsea, MA; Charleston, SC; Chicago, IL; Denver, CO; Fort Worth, TX; Santa Ana, CA; Madison, WI; Philadelphia, PA; Pittsburgh, PA; Richmond, VA; San Antonio, TX; San Diego, CA; Seattle, WA; Washington, DC; and Wilmington, DE.

On January 7-8, 1992, United States Attorneys from the 16 cities participated in a Planning Conference hosted by the Department of Justice. At the planning conference, the U.S. Attorneys were fully briefed on the requirements for the Weed and Seed program. In addition, on February 11-12, 1992, the Office of Justice Programs hosted a Weed and Seed Technical Assistance Workshop to assist representatives from the 16 sites in developing their Weed and Seed programs and preparing their applications. The agenda included presentations on organizing and planning Weed and Seed programs, the application of community policing, and the role of prevention. The Workshop also provided participants an opportunity to review application requirements and to discuss the mechanics of preparing the application. All applications from the sites were received by the March 20, 1992 deadline and have been analyzed by impartial peer review panels, composed of law enforcement officers, prosecutors, social service providers, and community planners. All 16 sites met the Weed and Seed criteria have been notified of their selection for funding. These sites will receive approximately $1.1 million from the Department of Justice to begin implementation of the Weed and Seed strategy. An award of about half that amount will be made

this year, and the remainder will be available in Fiscal Year 1993, subject to Congressional appropriations.

Training and technical assistance will also be made available in this fiscal year to other jurisdictions wishing to develop Weed and Seed programs.

Los Angeles Weed and Seed

On May 7, 1992, the President announced a $19 million "Weed and Seed" operation designed to help resuscitate blighted and burned Los Angeles communities.

The $19 million "Weed and Seed" program will include funding from the Department of Justice and numerous other Federal agencies. The Department of Justice, in consultation with the other Federal agencies, State and local officials and the private sector, will identify specific hard-hit neighborhoods in Los Angeles for this targeted aid.

A combination of social service and law enforcement, all backed by State, local and strong private sector involvement, is essential for the success of "Weed and Seed" in Los Angeles. A coordinated and extensive social and health investment will follow the law enforcement efforts to address the needs of the blighted areas. Such a coordinated investment of public and private resources will give law abiding citizens the kind of economic and social opportunities that breathe life into neighborhoods.

President's Fiscal Year 1993 Initiative

Phase III of Operation Weed and Seed is planned for implementation in Fiscal Year 1993. As you know, Mr. Chairman, President Bush has requested (in his Fiscal Year 1993 budget proposal) $500 million to substantially expand Weed and Seed activities. This $500 million has been identified in the budgets of the U.S. Department of Housing and Urban Development to fund programs such as public housing drug elimination grants; the Department of Health and Human Services for community partnership grants, drug treatment, and improved access to health care and to provide Head Start for one year for eligible children; the Department of Labor for Job Training Partnership Act programs that provide job training for high-risk youth and adults; and the Department of Education to increase educational opportunities and drug education and prevention programs.

Some $30 million has been requested in the Fiscal Year 1993 budget of the Department of Justice to support Weed and Seed to expand the number of demonstration sites. An additional one million dollars has been requested in the Department of Transportation fiscal year 1993 budget to support reverse commuter demonstration grants to facilitate movement of inner city residents to suburban jobs.

Notwithstanding the President's substantial request for additional Federal resources, I want to stress, Mr. Chairman, that Weed and Seed is not simply another Federal grant program.

While additional funding will be allocated for this initiative, its success is not dependent upon new Federal dollars. Rather, its success will depend, in large part, on coordinating private sector efforts and existing Federal grants and State formula block grants and redirecting these resources in a comprehensive effort to assist these targeted sites. The Justice Department is working with officials from HUD, HHS, Labor, Education, Agriculture, Transportation, Treasury, and the Office of National Drug Control Policy to coordinate the manner in which Federal resources will be directed to this initiative in Fiscal Years 1992 and 1993, and I am pleased to report that they have been very enthusiastic about this critical effort.

In conclusion, Mr. Chairman, by implementing this Weed and Seed strategy, Federal, State, and local governments, law enforcement and human service agencies, the private sector and community residents can form a partnership which will give neighborhoods the best chance to significantly affect the problems of violent crime, drug trafficking, and gang activity that terrorizes law-abiding Americans. I appreciate your support and look forward to working with Congress to further this critical effort.

Thank you, Mr. Chairman. I would now be happy to answer any questions you may have.

EXHIBIT C

Office of the Deputy Attorney General

Washington, D.C. 20530

May 26, 1992

MEMORANDUM

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

FROM: Jeffrey R. Howard
Principal Associate Deputy
Attorney General

SUBJECT: Weed and Seed Initiative; Transfers of Real Property

Executive Summary: This memorandum describes the Weed and Seed Initiative and explains how federally forfeited real properties may be transferred to State and local public agencies and private non-profit organizations for use in support of the Weed and Seed Initiative. Importantly, this memorandum sets forth additional guidance to permit the expanded use of federally forfeited real property to support Weed and Seed programs.

The memorandum reviews the legal authority for this change in the sharing program. It then describes the procedure by which Weed and Seed transfers are to be accomplished. In summary, the process parallels the current sharing procedure including use of Form DAG-71, consultation among Federal, State, and local law enforcement authorities, and final approval of real property transfers by the Office of the Deputy Attorney General. Where there is a legal impediment to a Weed and Seed transfer through the participating State or local law enforcement agency, the transfer can still be accomplished through the U.S. Department of Housing and Urban Development (HUD). HUD will also play a consultant role in transfers made through State and local law enforcement agencies.

Recipients will be expected to pay any mortgages and qualified third party interests against the real property transferred. Other costs will be paid from the Assets Forfeiture Fund. No transfer will be made over the objection of a State or local law enforcement agency which is entitled to an equitable share of the net proceeds from the sale of the property to be transferred.

Background: Weed and Seed is a new initiative designed to reclaim and rejuvenate embattled neighborhoods and communities. Weed and Seed uses a neighborhood focused, two-part strategy to control violent crime and to provide social and economic support to communities where high crime rates and social ills are prevalent. The initiative first removes or "weeds" violent criminals and drug dealers from the neighborhoods. Second, the initiative prevents a reinfestation of criminal activity by "seeding" the neighborhoods with public and private services, community-based policing, and incentives for new businesses. Weed and Seed is founded on the premise that community organizations, social service providers, and criminal justice agencies must work together with community residents to regain control and revitalize crime-ridden and drug-plagued neighborhoods. Weed and Seed includes both specifically funded projects, as well as cooperative initiatives not receiving targeted federal funding.

This Memorandum establishes guidelines and authorizes the transfer of seized and forfeited real property, in appropriate cases, to States, political subdivisions and private non-profit organizations in support of the Weed and Seed Initiative.

A. General Authorization

1) 18 U.S.C. § 981(e)(2) and 21 U.S.C. § 881(e)(1)(A) authorize the Attorney General to transfer forfeited property to any federal agency, or to any State or local law enforcement agency that participated in the seizure or forfeiture of property.

2) Transfers made pursuant to 21 U.S.C. § 881(e)(1)(A) must serve to encourage cooperation between the recipient State or local agency and federal enforcement agencies. Limitations and conditions respecting permissible uses of transferred property are set forth in The Attorney General's Guidelines on Seized and Forfeited Property. Pursuant to Part III, C of the Guidelines, this memorandum constitutes supplementary guidance regarding the meaning of Part V, A, 3 of the Guidelines.

B. Identification and Use of Forfeited Real Property

1) United States Attorneys, assisted by the United States Marshals Service, are authorized to identify seized or forfeited properties for potential transfer in support of the Weed and Seed initiative. Where appropriate, they shall consult with the U.S. Department of Housing and Urban Development. As properties are forfeited, appropriate Weed and Seed transfers will be made pursuant to the policies and procedures set out herein.

2) The proposed uses of any property to be so transferred must be in accordance with the Weed and Seed initiative, focusing on support of community-based drug abuse treatment, prevention, education, housing, job skills and other activities that will substantially further Weed and Seed goals. United States Attorneys are encouraged to consult with the Executive Office for Asset Forfeiture for guidance in particular cases. The property must also be suited to the proposed use and the use must be consistent with all applicable Federal, State and local laws and ordinances.

3) Any proposed transfer must have the potential for significant benefits to a particular community and these benefits must outweigh any financial loss or adverse effects to the Department of Justice Assets Forfeiture Fund.

C. Transfer of Forfeited Real Property Pursuant to Weed and Seed Initiative

1. Sharing Requests

a) All requests for sharing of real property pursuant to the Weed and Seed Initiative shall be in a Form DAG-71 and must follow the established sharing procedures as outlined in the Attorney General's Guidelines on Seized and Forfeited Property. The appropriate official of the seizing Federal investigative agency must recommend the transfer, as well as the United States Attorney in the particular judicial district where the property is located. Approval by the Office of the Deputy Attorney General is required for transfers of forfeited real property.

2. Transfers to State and Local Agencies

The participating State or local law enforcement agency, or other governmental entity permitted by applicable laws to hold property for the benefit of the law enforcement agency, will receive the initial transfer of the real property. The State or local agency will then, pursuant to prior agreement, transfer the property to the appropriate public or private non-profit organization for use in support of one of the programs described above.

The authority of the participating State or local investigative agency to transfer forfeited real property to other State or local public agencies may vary from jurisdiction to jurisdiction. In each case, the issue must be addressed in the submitted DAG-71 prior to the sharing transfer to the State or local agency. See section 3 below for cases where there is an impediment to a transfer under this section.

3. U.S. Department of Housing and Urban Development Transfers

Transfer of forfeited real property under the Weed and Seed Initiative may, alternatively, be accomplished through the U.S. Department of Housing and Urban Development (HUD). In this regard, the Department of Justice has statutory authority to transfer forfeited property to another federal agency. Under this option, after a property is identified as a suitable Weed and Seed transfer and is forfeited, title to the property will be transferred to HUD. After the initial transfer, HUD will then retransfer the property to the pre-selected recipient, consistent with understandings reached in consultation with Federal, State and local agencies and the pertinent United States Attorney's Office.

D. Mortgages and Ownership Interests in Weed and Seed Transferred Real Property

1. Mortgages

Mortgages on real property transferred pursuant to the Weed and Seed initiative are not payable from the DOJ Assets Forfeiture Fund. Liens and mortgages shall be the responsibility of the recipient State or local community-based organization.

2. Qualified Third Party Interests

Any secured debts or other qualified interests owed to creditors are not payable from the DOJ Assets Forfeiture Fund. The payments of these interests are the responsibility of the recipient State or local agency or non-profit organization.

E. Asset Seizure, Management and Case-Related Expenses

Expenses incurred in connection with the seizure, appraisal, or security of the property are payable from the Assets Forfeiture Fund. Case-related expenses incurred in connection with normal proceedings undertaken to protect the United States' interest in seized property through forfeiture, are also payable from the Assets Forfeiture Fund.

F. Law Enforcement Concurrence

Any State or local law enforcement agency that would otherwise receive an equitable share of proceeds from the sale of a forfeited property must voluntarily agree to forego its share before a Weed and Seed transfer will be authorized.

G. Contact Point

Questions regarding this policy and procedure may be directed to the Executive Office for Asset Forfeiture, (202) 616-8000.

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

EXHIBIT D

May 20, 1992

Mr. Peter S. Prichard
Editor
USA TODAY
Washington, D. C.

Dear Mr. Prichard:

I was most disappointed by your May 18, 1992 articles on asset seizure and forfeiture and your May 19 editorial. After spending considerable time with your reporter, Dennis Cauchon, I had hoped for an objective report on seizure and forfeiture, not the slanted and inaccurate stories you published.

The factual errors are numerous, but it is particularly unfortunate that your description of the eight specific cases does not clearly distinguish Federal from State cases. As for the Federal cases, your account of the Jack Johnson case suggests that he is an innocent man whose $12,248 was seized without reason. Contrast your account of the seizure with the description of the seizure given by the U.S. Circuit Court of Appeals (957 F.2d 1515):

> "During the course of the search, the officers found over five pounds of marijuana, 1.2 grams of cocaine, seven tabs of L.S.D., five scales, marijuana and cocaine packaging paraphernalia, three handguns, four shotguns, a rifle, and the subject $12,248 in U.S. currency. The State of California filed a criminal complaint against Johnson . . . [he] pleaded guilty to possession of cocaine on September 13, 1985."

Regarding the Weaver case, Mr. Weaver is scheduled for trial on drug trafficking charges this Summer so I cannot comment further at this time but invite you to follow up on this case. In the Apfelbaum case, you failed to note that Mr. Apfelbaum's luggage contained marijuana residue or that $30,000 in U.S. currency was seized from his travelling companion on the same occasion. (The $30,000 was later found to have been stolen and was returned to the victim of the theft.)

In sum, USA TODAY has presented a misleading picture of asset forfeiture and has printed as truth the uncorroborated

claims of criminals and defense attorneys who have a personal stake in the cases described. This does a disservice not only to asset forfeiture but to dedicated law enforcement officers -- and to your readers.

Sincerely,

Cary H. Copeland
Director and Chief Counsel

EXHIBIT
E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:	SEALED CASE
GRAND JURY SUBPOENAS DATED AUGUST 22, 1991	MEMORANDUM DECISION AND ORDER
	Case No. 92-M-26

This matter is before the court on the Motion for a Protective Order or an Order to Modify or Quash Subpoenas of [redacted]. A hearing on [redacted] motion was held on March 25, 1992. At the hearing, [redacted] represented [redacted] Stewart C. Waltz, Edward D. Eliasberg, Karen L. Gable and Jesse M. Caplan represented the United States. Before the hearing, the court carefully considered the memoranda and other materials submitted by the parties. After taking the matter under advisement, the court has further considered the law and facts relating to [redacted] motion. Now being fully advised, the court renders the following memorandum decision and order.

I. BACKGROUND

This dispute arises from an ongoing grand jury investigation of possible criminal violations of United States

antitrust laws in the Utah health care industry. In connection with this investigation, on August 22, 1991, the grand jury issued a subpoena duces tecum to [redacted] This subpoena directs [redacted] to provide the United States Department of Justice ("DOJ") with a substantial number of [redacted] original business records relating to a range of subjects. Although [redacted] does not contest its obligation to respond to this subpoena, [redacted] is concerned that disclosure of these documents to the public and [redacted] competitors may have an adverse impact on [redacted] business, as well as its public image. [redacted] is particularly concerned about approximately 200 of these documents, which [redacted] claims contain trade secrets. Despite [redacted] requests, DOJ has refused to agree not to disclose these documents to third party witnesses before the grand jury who are not under the obligation of secrecy imposed by Federal Rule of Criminal Procedure 6(e).

In an attempt to safeguard against disclosure of these sensitive documents, [redacted] has moved this court for a "protective order." Specifically, [redacted] requests that this court order DOJ to refrain from disclosing any document produced in response to the August 22, 1991 subpoena to any third party who is not under the obligation of secrecy imposed by rule 6(e). In the alternative,

[redacted] requests that the court enter an order prohibiting DOJ from disclosing to third parties those [redacted] documents that contain trade secrets.[1] [redacted] primary interest is in preventing DOJ from revealing [redacted] confidential documents to third party witnesses who testify before the grand jury. [redacted] is not seeking to prevent DOJ from disclosing documents to government personnel, including specially retained consultants and experts, who are necessary to assist DOJ in pursuing the grand jury's investigation, even though they may testify before the grand jury. Nor is [redacted] attempting to bar DOJ from disclosing documents that are otherwise publicly available or that DOJ has obtained independently.

II. DISCUSSION

[redacted] presents three arguments in support of its request that this court issue a protective order governing DOJ's use of

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[1] At least, this is the position that [redacted] has articulated in its motion. At the hearing on this matter, counsel for [redacted] suggested a procedure whereby these documents could be shown to third party witnesses with the court's permission. (R. at 33-34.) Under this scheme, [redacted] would designate those documents that contain trade secrets. If the government sought to release these documents to third parties witnesses, [redacted] would be given an opportunity to brief the court as to why the documents should be kept secret. The government would then respond ex parte to the court as to how and why the documents need to be released.

[redacted] documents. First, [redacted] submits that DOJ is barred by Federal Rule of Criminal Procedure 6(e) from disclosing any of [redacted] documents to third party witnesses who are not subject to that rule's obligation of secrecy. Second, [redacted] argues that DOJ is prevented by the Trade Secrets Act, 18 U.S.C.A. § 1905 (West 1984), from disclosing to third party witnesses any [redacted] documents that contain trade secrets. Third, [redacted] claims that DOJ is under an obligation not to disclose those documents that contain trade secrets by virtue of the takings clause of the Fifth Amendment of the United States Constitution. Each of these arguments are addressed separately below.

A. Federal Rule of Criminal Procedure 6(e).

Federal Rule of Criminal Procedure 6(e)(2) sets forth a general requirement that, other than witnesses, those persons associated with the grand jury "shall not disclose matters occurring before the grand jury."[2] Among the few exceptions to

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[2] Federal Rule of Criminal Procedure 6(e)(2) provides:

> **General Rule of Secrecy.** A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as

this rule are those that permit disclosure of matters occurring before the grand jury by "(i) an attorney for the government for use in the performance of such attorney's duty; and (ii) such government personnel . . . as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." Fed. R. Crim. Proc. 6(e)(3)(A). Rule 6(e) also permits disclosure of "matters occurring before the grand jury . . . when so directed by a court preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(C)(i). There is no exception that expressly permits the government to disclose secret matters to witnesses, other than government personnel and specially-retained experts, who are testifying before the grand jury.

1. The Parties' Positions.

[redacted] argues that the documents it provides in response to the grand jury subpoena are "matters occurring before the grand jury" and, therefore, are subject to the secrecy

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otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

requirements or rule 6(e).[3] According to [redacted], the only exception to the secrecy requirement that could apply in this case, the rule 6(e)(3)(C)(i) exception for "judicial proceedings", does not apply because the United States Court of Appeals for the Tenth Circuit has held the exception inapplicable to the same grand jury proceeding from which disclosure is sought.[4] Thus, [redacted] contends, the government cannot disclose [redacted] documents to third party witnesses either in preparation for or during the witnesses' testimony before the grand jury.

In response, DOJ asserts that the "[t]he public's interest in a full, uninhibited grand jury investigation clearly outweighs any interest [redacted] may have in the confidentiality of its

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[3] Although there apparently are no decisions expressly adopting [redacted] Federal Rule of Criminal Procedure 6(e) argument, [redacted] cites several opinions that support its contention that confidential documents supplied in response to a grand jury subpoena are subject to rule 6(e)'s secrecy requirement. Generally, these decisions hold that documents provided in response to grand jury subpoenas are considered "matters occurring before the grand jury" if disclosure of the documents would tend to reveal some secret aspect of the grand jury's investigation. See In re Grand Jury Proceedings, 851 F.2d 860, 866-67 (6th Cir. 1988); In re Grand Jury Proceedings, Miller Brewing Co., 687 F.2d 1079, 1090 (7th Cir. 1982), on reh'g, 717 F.2d 1136 (7th Cir. 1983); Fund for Constitutional Gov't v. National Archives & Record Serv., 656 F.2d 856 (D.C. Cir. 1981).

[4] See United States v. Tager, 638 F.2d 167 (10th Cir. 1980).

documents."[5] (Mem. Supp. Resp. at 4.) DOJ argues that under rule 6(e), [redacted] is not entitled to a protective order.[6] DOJ also argues that granting [redacted] motion in this case would not further the policies embodied in rule 6(e). In fact, DOJ argues, the court's granting of [redacted] motion would actually subvert rule 6(e) by requiring the government to explain the basis for each grand jury subpoena in an endless series of hearings. DOJ, however, does not offer any direct rebuttal to [redacted] argument that there is no exception to rule 6(e)'s secrecy requirement that pertains to the facts of this case. Nor does DOJ attempt to show how, under rule 6(e), this court may permit the type of disclosure

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[5] DOJ directs the court to a litany of prominent decisions articulating the general principal that the grand jury enjoys broad and unobstructed investigatory powers. See United States v. Calandra, 414 U.S. 338 (1974); United States v. Morton Salt Co., 338 U.S. 632 (1950). DOJ also cites a number of cases in which courts have refused to quash grand jury subpoenas even though the subpoenas would require disclosure of trade secrets. See, e.g., Covey Oil Co. v. Continental Oil Co., 340 F.2d 993 (10th Cir. 1965) (no privilege protects documents containing trade secrets from grand jury subpoena). See also Branzburg v. Hayes, 408 U.S. 665, 700 (1972) (reporter may be called to provide testimony to grand jury, even if testimony requires disclosure of confidential sources).

[6] In support of this claim, DOJ cites In the Matter of Grand Jury Subpoenas to Midland Asphalt, 616 F. Supp. 223 (W.D.N.Y. 1985), in which the United States District Court for the Western District of New York summarily denied a motion for a protective order similar to the one requested by [redacted] in this case.

that [redacted] is seeking to avoid.

2. The Court's View.

a. Subpoenaed Documents as Matters Occurring Before the Grand Jury

This court agrees with [redacted] that the documents requested by the grand jury in this case are "matters occurring before the grand jury," and, therefore, are subject to the secrecy requirements of rule 6(e). "[T]he test of whether disclosure of information will violate Rule 6(e) depends upon 'whether revelation in the particular context would in fact reveal what was before the grand jury.'" Anaya v. United States, 815 F.2d 1373, 1379 (10th Cir. 1987) (quoting Fund for Constitutional Government v. National Archives & Records Serv., 656 F.2d 856, 871 (D.C. 1981)). In applying this test, the court must be mindful of the purpose of rule 6(e), which is "to protect the sanctity of the proceeding and to protect the participants from detrimental publicity." Id. at 1378-79.

In this case, where the grand jury investigation is still underway and no indictments have been returned, dissemination of [redacted] documents subpoenaed by the grand jury clearly would reveal something of the nature of the grand jury's investigation. At a minimum, disclosure of [redacted] secret

documents would reveal "the direction of the grand jury's investigation and the names of the persons involved." In re Sealed Case, 801 F.2d 1379 (D.C. Cir. 1986) (Scalia, J.). In fact, given the nature of the documents at issue in this case, even greater revelations would likely occur if the documents were not generally subject to rule 6(e)'s secrecy requirements. For example, some of the documents are strategic plans for individual subsidiaries of [redacted]. Familiarity with these documents would give persons holding such knowledge a good sense of the types of [redacted] business activities that are being examined by the grand jury for possible anti-competitive effects. Moreover, these documents are not the type that otherwise are publicly available. Cf. United States v. Anderson, 778 F.2d 602, 605 (10th Cir. 1985) (materials allegedly disclosed in violation of rule 6(e) were promotional materials previously distributed to the public by defendants). Consequently, [redacted] documents are protected by rule 6(e)'s obligation of secrecy, unless specifically exempted under one of the exceptions contained in that rule.

b. Disclosure of the Documents Under Rule 6(e)(3)(C)(i)

This court also agrees with [redacted] that the rule 6(e)(3)(C)(i) exception to rule 6(e)'s general rule of secrecy is

not available to permit disclosure of the documents subpoenaed in this case. Rule 6(e)(3)(C)(i) permits the court to allow grand jury materials to be disclosed "preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. Proc. 6(e)(3)(C)(i). As [redacted] points out, however, the Tenth Circuit has held that the term "judicial proceeding" does not include the same, ongoing grand jury investigation from which disclosure is sought. United States v. Tager, 638 F.2d 167 (10th Cir. 1980). In United States v. Tager, the Tenth Circuit concluded that rule 6(e)(3)(C)(i) "'is not designed nor has it been used in the past as a source of authority for a court to order disclosure to assist with the present grand jury proceedings.'" Id. at 170 (citation omitted).

c. Disclosure of the Documents Under Rule 6(e)(3)(A)(i)

The court, however, disagrees with [redacted] that the judicial proceedings exception is the only possible exception to the general rule of secrecy that can apply in this case. Under rule 6(e)(3)(A)(i), matters occurring before the grand jury may be disclosed to "an attorney for the government for use in the performance of such attorney's duty." Fed. R. Crim. P. 6(e)(3)(A)(i). The court concludes that pursuant to this rule, government attorneys who are working with the grand jury may

disclose [redacted] documents that are before the grand jury to third-party grand jury witnesses. The government may make these disclosures either in the course of conducting pre-testimony interviews of the witnesses or while examining the witnesses before the grand jury.

Although these activities are not expressly authorized by the rule, they are undeniably fundamental to the performance of government attorneys' duties in presenting the government's case before the grand jury.[7] To prevent government attorneys

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[7] According to one authority:

> It would appear likely that the "performance of duties" clause [of rule 6(e)(3)(A)(i)] may permit limited disclosures that are directly incidental to the preparation and presentation of the criminal case, such as disclosures made in the course of preparing witnesses, disclosures during discovery proceedings, and disclosures during trial. To require separate court orders before each of those kinds of routine disclosures would be enormously cumbersome, without adding much by way of protection for grand jury materials.

2 Sara S. Beale & William C. Bryson, Grand Jury Law and Practice § 7:07, at 7-38 (1986). This authority also notes, "As a matter of practice, federal prosecutors have generally regarded [rule 6(e)(3)(A)(i)] as granting them the authority to make any use of the grand jury materials that is consistent with the investigation, preparation, and prosecution of criminal cases." Id. § 7:07, at 7-36.

from using evidence before the grand jury incident to interviewing and examining grand jury witnesses on the grounds that such uses are not necessary to "the performance of such attorney's duties" would severely hamper the effectiveness of the grand jury. If the government were not permitted to disclose the documents to third party witnesses, the result in many cases would be a complete loss of valuable evidence. At the least, witnesses would be unable to explain or interpret documents before the grand jury. These limitations might force the grand jury to limit the scope of its investigation or compromise its ability to conduct a fair investigation. Furthermore, if the rule 6(e) were interpreted to bar government attorney's from disclosing subpoenaed documents in the course of interrogating grand jury witnesses, it would necessarily follow that a government attorney would be barred from making such use of any evidence before the grand jury. That result would surely be contrary to the Tenth Circuit's admonition that "[r]ule 6(e) is not intended to deter the government from a legitimate investigation, so long as that investigation does not reveal what took place in the grand jury room." Anaya, 815 F.2d at 1379.

Moreover, any marginal benefits to upholding the secrecy of the grand jury process that would be gained if the

government were prohibited from disclosing these documents to grand jury witnesses would be outweighed by the burdens placed on the grand jury's investigation. As the United States Supreme Court has stated, two primary objectives of maintaining the secrecy of grand jury proceedings are to encourage prospective witnesses to come forward and to encourage actual witnesses to testify "fully and frankly."[8] Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219 (1979). As the government points out, granting [redacted] motion is not likely to discourage potential witnesses from coming forward. It could, however, have the effect of inhibiting actual witnesses from testifying "fully and frankly" about evidence before the grand jury.

This court's conclusion that rule 6(e)(3)(A)(i) permits the government to disclose documents before the grand jury to third party witnesses is consistent with the opinions expressed by the few courts that have endeavored to define the scope of that provision. In a decision on point, the United States

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[8] In addition to these policies, the United States Supreme Court has stated that rule 6(e)'s secrecy requirement reduces "the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment." Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219 (1979) (footnote omitted). It also helps "assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule." Id.

District Court for the Western District of Pennsylvania determined that "[i]nterviewing prospective witnesses and reviewing their testimony with them is an appropriate part of the duties of an attorney for the United States," and, therefore, within the scope of rule 6(e)(3)(A)(i). United States v. American Radiator & Standard Sanitary Corp., 45 F.R.D. 477 (W.D. Penn. 1968). The United States Court of Appeals for the Third Circuit implicitly reached the same conclusion when it determined that an agent of an Assistant United States Attorney acted improperly when he disclosed to a witness the grand jury testimony of another witness in an attempt to shape the former witness' testimony at a criminal trial. United States v. Bazzano, 570 F.2d 1120, 1125-26 (3rd Cir. 1977), cert. denied, 436 U.S. 917 (1970). In articulating proper uses of grand jury testimony, the Third Circuit observed that "such a pre-trial interview may simply serve to refresh a witness' memory rather than improperly to influence his testimony."[9] Id. at 1125.

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[9] Apparently, in both Bazzano and American Radiator the government's attorneys sought to use grand jury materials preliminary to or in connection with a trial occurring after cessation of the grand jury investigation. This fact alone does not weaken the application of these cases in the instant situation. As the United States Supreme Court has noted, the policies served by grand jury secrecy prevail beyond the closure of a grand jury investigation. See Douglas Oil Co. v. Petrol

Similarly, the United States Courts of Appeals for the Fourth Circuit has held that rule 6(e)(3)(A)(i) permits government attorneys to disclose grand jury testimony without prior court approval during a Federal Rule of Criminal Procedure 11 hearing. United States v. Maglitz, 773 F.2d 1463, 1467 (4th Cir. 1985). And, the United States Court of Appeals for the Second Circuit has concluded that this exception permitted an attorney for the government to disclose testimony made before a grand jury to a different grand jury for the purpose of

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Stops Northwest, 441 U.S. 211, 222 (1979).

One authority has suggested that the interpretation of rule 6(e)(3)(A)(i) adopted by this court may be inconsistent with the structure of rules 6(e)(3)(A), -(B), which contain a specific exemption for disclosures made to government personnel and requires that such disclosures be reported to the court. 2 Sara S. Beale & William C. Bryson, Grand Jury Law and Practice § 7:07, at 7-37 (1986). According to that authority, if rule 6(e)(3)(A)(i) is interpreted to permit disclosures deemed useful to prosecutors, it would render subsections (A)(ii) and (B) of rule 6(e) unnecessary. Id. At least two rejoinders to this argument are possible. First, this court is not ruling that prosecutors may make any disclosure that they deem necessary but, only disclosures to third party witnesses before the grand jury. Second, government personnel are generally subject to rule 6(e), whereas third party witnesses are not. Therefore, it makes sense for the court to monitor which government personnel have information about matters occurring before the grand jury so as to discourage potential disclosures in violation of rule 6(e).

prosecuting a witness for perjury.[10] United States v. Garcia, 420 F.2d 309, 311 (2nd Cir. 1980).

Based on the forgoing discussion, this court holds that government attorneys working with the grand jury may use documents subpoenaed by the grand jury to assist in examining third party witnesses before the grand jury. The government's attorneys may use these documents while conducting pre-testimony interviews with prospective grand jury witnesses and examining actual third party witnesses before the grand jury. The court, however, notes that the government's attorneys bear certain responsibilities in this regard. First, although documents subpoenaed by the grand jury may be shown to third party witnesses, neither the originals nor copies of these documents

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[10] According to the Garcia court, "There has never been any question of the right of government attorneys to use grand jury minutes, without court approval, in preparation for trial and even to make them public at trial to the extent of referring to such minutes during the examination of witnesses." United States v. Garcia, 420 F.2d 309, 311 (2nd Cir. 1980). The court's decision in Garcia was rendered prior to the adoption of rule 6(e)(3)(C)(iii), which permits an attorney for the government to disclose matters occurring before a grand jury to a different federal grand jury.

It is also notable that prior to the adoption of rule 6(e), the government's attorneys historically had wide discretion in using grand jury materials for the purposes of impeachment and refreshing witnesses' recollections. See Lester R. Orfield, "The Federal Grand Jury," 22 F.R.D. 343, 409-10 (1959) (citing cases).

may be given to the possession of such witnesses. Second, the government, in its thoughtful discretion, should not make unnecessary disclosures of grand jury documents to third party witnesses. Third, the court's holding in this matter should be construed narrowly. The court has not addressed any other use of grand jury subpoenaed documents than for the purposes of interviewing and examining grand jury witnesses.[11]

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[11] In reaching this conclusion, the court declines to adopt the scheme proposed by counsel for [redacted] at the hearing in this matter. See supra note 1. The court agrees with DOJ that this scheme would potentially compromise the secrecy of the grand jury in ways much more serious than the government's use of [redacted] documents in interviewing and examining third party witnesses. See United States v. R. Enter., Inc., 111 S. Ct. 722, 728 (1991) ("Requiring the Government to explain in too much detail the particular reasons underlying a subpoena threatens to compromise 'the indispensable secrecy of grand jury proceedings.'") (citation omitted). Moreover, this process would likely create a cumbersome and unnatural role for this court in overseeing the grand jury's investigation. See id. at 726 ("Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws.").

This is not to say that the court is insensitive to the interests of [redacted] in its documents. The court, however, believes that these interests will be protected to the maximum extent consistent with the interests of the grand jury in conducting its investigation by the admonitions articulated above. In any event, as counsel for [redacted] stated at the hearing in this matter, it would make little sense for DOJ to make extensive disclosures of [redacted] competitively-sensitive documents to [redacted] competitors. (R. at 37).

B. Trade Secrets Act.

[redacted] also asserts that any disclosure of documents supplied by it to the grand jury in response to a subpoena is prohibited by the Trade Secrets Act, 18 U.S.C.A. § 1905 (West 1984). The Trade Secrets Act generally provides that no employee of the United States, including agents of the Department of Justice, shall publicly disclose any competitively-sensitive documents obtained in the course of their official duties, unless such disclosure is "authorized by law." 18 U.S.C.A. § 1905 (West 1984). In support of its argument, [redacted] cites the United States Supreme Court's decision in Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

This court finds that the Trade Secrets Act does not prevent the government's attorneys from disclosing documents supplied by [redacted] in response to a grand jury subpoena to third party witnesses because rule 6(e) permits such disclosure and, therefore, falls within the "authorized by law" exception to the Act.

C. Fifth Amendment Takings Clause.

[redacted] final argument against disclosure of documents supplied by it to the grand jury asserts that disclosure of its proprietary information to third party witnesses would constitute

a taking in violation of the Fifth Amendment to the United States Constitution. This court believes that an analysis under the takings clause is unnecessary because the takings clause does not require compensation for the production and use of evidence in a criminal proceeding.

"[T]he Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed." United States v. Hurtado, 410 U.S. 578, 588 (1973). The duty to provide evidence to a court or grand jury is well settled. See id; United State v. Calandra, 414 U.S. 338, 345 (1974); Branzburg v. Hayes, 408 U.S. 665, 688 (1972); United States v. Bryan, 339 U.S. 323, 331 (1950); Blair v. United States, 250 U.S. 273, 281 (1919). Absent a claim of a constitutional, common-law or statutory privilege, [redacted] can not legitimately argue that it is not required to produce evidence for the grand jury. See Branzburg, 408 U.S. at 688; Bryan, 339 U.S. at 331.

[redacted] argues, however, that it is not the production of the evidence that results in an impermissible taking, but the disclosure to third persons of competitively-sensitive information contained in that evidence that violates the Fifth Amendment. Consequently, [redacted] takings claim focuses on whether

DOJ may disclose to third party witnesses evidence obtained from [redacted] under subpoena, even though the evidence may contain trade secrets. In In the Matter of Grand Jury Subpoenas to Midland Asphalt, 616 F. Supp. 223 (W.D.N.Y. 1985), the court considered a motion very similar to the one presented by [redacted] in the instant case. As in this case, the movants sought protection of trade secrets contained in information required by a grand jury subpoena. The court denied the motion for a protective order, noting that movants were under an obligation to provide evidence to the grand jury. Id. at 226. According to the court, this obligation is "'usually paramount over any private interests that may be affected.'" Id. (quoting In Re Morgan, 377 F. Supp. 281, 285 (S.D.N.Y. 1974)). The court held that absent a claim of privilege, the movants were not entitled "to modify . . . or limit the grand jury's use of summoned documents despite the potential damage to their business upon their disclosure." Id. Instead, the movants were under an obligation to provide the subpoenaed evidence even if the proprietary information contained therein might be disclosed and its value diminished or

destroyed.[12]

Whether the use of property during a judicial proceeding constitutes a taking under the constitution has also been addressed in other contexts. For example, in United States v. Hurtado, 410 U.S. at 578, the United States Supreme Court held that the pretrial detention of material witnesses did not constitute a taking. Id. at 588-89. The Court did not reach the question of the adequacy of the compensation provided under the relevant statute, because it found that the witnesses were under a public duty to provide testimony, regardless of the resulting financial burden they were thereby required to bear. Consequently, the detention did not result in a compensable

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[12] [redacted] relies heavily on language in Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984), for its assertion that the disclosure of trade secrets to third parties during the grand jury proceedings would constitute an impermissible taking. This court believes that Monsanto is readily distinguishable from this case. Monsanto dealt with the release of health and safety data in connection with the approval of pesticides by the Environmental Protection Agency pursuant to a administrative regulatory scheme. The regulatory scheme imposed on Monsanto was a theretofore unknown burden on the company, giving rise to a new requirement that the manufacturer provide information it was not otherwise under an obligation to provide. In contrast, any possible disclosure of trade secrets in this case will be in connection with [redacted] preexisting public obligation to provide evidence in a criminal proceeding.

taking.[13] Id. at 589.

[redacted] is under obligation to produce the documents and other information covered by the subpoena. This obligation persists, regardless of the possibility of some limited disclosures. Because the obligation to produce this information is owed to the government in the context of the grand jury proceedings, the lawful use and possible disclosure of the information by the grand jury does not constitute a taking in violation of the Fifth Amendment.

III. CONCLUSION

The court concludes that under rule 6(e), DOJ may make use of documents supplied by [redacted] in response to the grand jury's subpoena, including those containing competitively-sensitive information, for the purposes of interviewing and examining grand jury witnesses. On the facts before the court, these uses do not violate the Trade Secrets Act nor do they constitute a compensable taking under the Fifth Amendment.

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[13] The Supreme Court of New Hampshire applied Hurtado to find that a court order prohibiting repair of a building in order to preserve evidence for an arson trial did not constitute a taking under the Fifth Amendment. Soucy v. State, 506 A.2d 288, 294 (N.H. 1985). As in Hurtado, the New Hampshire Supreme Court held that because the owner of the building had a public obligation to provide evidence in a criminal proceeding, no taking occurred. Id.

Based on the foregoing, IT IS HEREBY ORDERED that [redacted] Motion for a Protective Order or an Order to Modify or Quash Subpoenas is denied.

Dated this 22nd day of April, 1992.

David K. Winder
United States District Judge

Mailed a copy of the foregoing to the following named counsel this 22nd day of April, 1992.

[redacted]

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Guideline Sentencing Update

FEDERA

EXHIBIT F

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

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VOLUME 4 • NUMBER 22 • MAY 28, 1992

Departures

SUBSTANTIAL ASSISTANCE

Supreme Court holds that district courts have authority to review for unconstitutional motives government's refusals to file substantial assistance motions. Defendant faced a 10-year mandatory minimum sentence on a drug charge. He provided information to the government that led to the arrest of another drug dealer, but the government refused to move for a substantial assistance departure under 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1, p.s. The Fourth Circuit affirmed, holding that defendants "may not inquire into the government's reasons and motives." *U.S. v. Wade*, 936 F.2d 169, 172 (4th Cir. 1991) [4 *GSU* #5].

The Supreme Court affirmed the decision because defendant had failed to raise and support a claim of improper motive, but held that district courts may review for constitutional violations the government's refusal to move for a substantial assistance departure. While recognizing that "in both § 3553(e) and § 5K1.1 the condition limiting the court's authority gives the Government a power, not a duty, to file a motion when a defendant has substantially assisted," the Court agreed with defendant that "a prosecutor's discretion when exercising that power is subject to constitutional limitations that district courts can enforce. Because we see no reason why courts should treat a prosecutor's refusal to file a substantial-assistance motion differently from a prosecutor's other decisions, . . . we hold that federal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive. Thus, a defendant would be entitled to relief if a prosecutor refused to file a substantial-assistance motion, say, because of the defendant's race or religion." *Accord U.S. v. Drown*, 942 F.2d 55, 59–60 (1st Cir. 1991) [4 *GSU* #8]; *U.S. v. Doe*, 934 F.2d 353, 358 (D.C. Cir. 1991) [4 *GSU* #4]; *U.S. v. Bayles*, 923 F.2d 70, 72 (7th Cir. 1991) (dicta). *Cf. U.S. v. Smitherman*, 889 F.2d 189, 191 (8th Cir. 1989) (indicating question of prosecutorial bad faith or arbitrariness may present due process issue), *cert. denied*, 110 S. Ct. 1493 (1990).

Defendant sought a remand "to allow him to develop a claim that the Government violated his constitutional rights by withholding a substantial-assistance motion 'arbitrarily' or 'in bad faith.' . . . As the Government concedes, . . . Wade would be entitled to relief if the prosecutor's refusal to move was not rationally related to any legitimate Government end." However, defendant failed to adequately raise and support such a claim, and "a claim that a defendant merely provided substantial assistance will not entitle a defendant to a remedy or even to discovery or an evidentiary hearing. Nor would additional but generalized allegations of improper motive. . . . [A] defendant has no right to discovery or an evidentiary hearing unless he makes a 'substantial threshold showing.'"

Wade v. U.S., No. 91-5771 (U.S. May 18, 1992) (Souter, J.).

NOTICE REQUIRED BEFORE DEPARTURE

U.S. v. Andruska, No. 91-2748 (7th Cir. May 18, 1992) (Flaum, J.) (holding that government must receive notice before district court may depart downward on ground not raised by either party, following reasoning of *Burns v. U.S.*, 111 S. Ct. 2182 (1991), which held that defendant must receive "reasonable notice" before district court may depart upward on ground not previously identified). *Accord U.S. v. Jagmohan*, 909 F.2d 61, 64 (2d Cir. 1990); U.S.S.G. § 6A1.2, p.s., comment. (n.1) (Nov. 1991).

MITIGATING CIRCUMSTANCES

District court holds departure warranted because government agent delayed arrest to trigger mandatory minimum and discover source of drugs. Defendant was convicted on distribution of cocaine base charges. The government argued that 50.4 grams were involved in the eight counts of conviction, but the district court found there were 49.8 grams. Fifty or more grams would have required a ten-year minimum term by statute. The guideline range was 97–121 months, but the court departed downward to 72 months.

The court reasoned departure was warranted because the Sentencing Commission "has failed to adequately consider the terrifying capacity for escalation of a defendant's sentence based on the investigating officer's determination of when to make an arrest. The agent in this case was undoubtedly aware that defendant's sentence would be increased two-fold if he continued to transact business until over 50 grams of cocaine base were sold. The court finds it not at all fortuitous that the agent arrested the defendant only after he had arranged enough successive buys to reach the magic number."

"For drug offenses, one factor dominates the . . . guideline sentence—'the grade of the offense' as evidenced by the quantity of drugs involved. . . . [However,] the circumstances under which the offense was committed should be considered, especially where undercover agents persevere in their transactions until a suspect provides the aggregate amount of drugs to trigger a mandatory minimum sentence or where the undercover agent's investigation shifts from the identified-seller to the undiscovered 'source.' Both of these circumstances occurred in this offense." The court noted Eighth Circuit dicta alluding to "'sentencing entrapment' as a potential mitigating circumstance which could warrant departure." *See U.S. v. Lenfesty*, 923 F.2d 1293, 1300 (8th Cir. 1991).

U.S. v. Barth, No. 4-91-103 (D.Minn. Apr. 9, 1992) (Rosenbaum, J.).

Criminal History

CALCULATION

Fifth and Eleventh Circuits hold that district court has discretion to allow defendant to challenge validity of prior conviction at the sentencing hearing. In the Fifth Circuit, the district court had included a 1982 Texas conviction in defendant's criminal history score, and indicated that it did not have discretion to consider defendant's claim that the convic-

tion was constitutionally invalid. Between defendant's instant offense and sentencing, Application Note 6 to § 4A1.2 was amended. The original note excluded from the criminal history score convictions "which the defendant shows to have been constitutionally invalid." The amendment excludes "convictions that a defendant shows to have been *previously ruled* constitutionally invalid" (Nov. 1990) (emphasis added). At the same time background commentary to § 4A1.2 was added, which stated in part: "The Commission leaves for court determination the issue of whether a defendant may collaterally attack at sentencing a prior conviction."

The Fifth Circuit held that the 1990 amendments applied and note 6 does not prohibit a challenge to a prior conviction. The court read note 6 and the background commentary as complementary, rather than conflicting, and concluded that "a court is only required to exclude a prior conviction . . . if the defendant shows it to 'have been previously ruled constitutionally invalid'; otherwise, the district court has discretion as to whether or not to allow the defendant to challenge the prior conviction at sentencing." *Accord U.S. v. Jakobetz*, 955 F.2d 786, 805 (2d Cir. 1992). *Contra U.S. v. Hewitt*, 942 F.2d 1270, 1276 (8th Cir. 1991) (holding, without discussing the background commentary, that under amended note 6 defendants may no longer collaterally attack prior convictions).

The appellate court remanded because it was unsure if the district court simply refused to let defendant challenge the 1982 conviction or allowed the challenge and ruled against it. The court set forth factors the district court may consider "in deciding whether to entertain the challenge to the prior conviction. These include 'the scope of the inquiry that would be needed to determine the validity of the conviction,' . . . comity, . . . [and] whether the defendant has a remedy other than the sentencing proceeding through which to attack the prior conviction." As to the last, the court stated that "a district court should ordinarily entertain a challenge to a prior conviction in a sentencing hearing if it does not appear that the defendant has an alternative remedy through which to challenge the conviction." The court added that "[i]f the challenged prior conviction is one which the district court determines will not affect its sentencing decision in any event, it may so state on the record and decline to hear the challenge on that basis."

U.S. v. Canales, No. 91-5644 (5th Cir. May 7, 1992) (Garwood, J.)

In the Eleventh Circuit, defendant was convicted of conspiracy to possess with intent to distribute cocaine. As in *Canales* above, he was sentenced after the 1990 amendment to § 4A1.2's notes. He contended that a prior state burglary conviction, although facially valid, was based on an unconstitutional guilty plea and should not be factored into his criminal history score. The district court refused to hold an evidentiary hearing on the matter and factored in the prior conviction.

The Eleventh Circuit held that amended note 6 applied to defendant and observed that the new language "seems clearly to indicate that the Sentencing Commission did not intend to provide for collateral attack of a prior conviction at sentencing." However, the court also recognized that "this suggestion is clouded by the 'Background' section" added at the same time, which leaves collateral attack to the discretion of the district court. Relying on *U.S. v. Cornog*, 945 F.2d 1504, 1510–11 (11th Cir. 1991), which held that under the amended notes a defendant could attack the validity of a prior parole revocation, the court held that "the rule in this circuit is that district courts have the discretion to collaterally examine the constitutionality of facially valid prior convictions when determining whether to consider them in computing a defendant's criminal history score." The case was remanded because "the district court abused its discretion in failing to properly determine whether to consider Roman's challenge and hold an evidentiary hearing."

U.S. v. Roman, 960 F.2d 130 (11th Cir. 1992) (per curiam).

Sentencing Procedure

U.S. v. Canada, No. 91-1691 (1st Cir. Apr. 2, 1992) (Campbell, Sr. J.) (Affirming § 3B1.1(b) adjustment for role in offense even though presentence report did not recommend it and government did not request it. *Burns v. U.S.*, 111 S. Ct. 2182 (1991), which required notice to defendant prior to sua sponte departure by district court, does not apply: "We do not read *Burns* to require special notice where, as here, a court decides that an upward adjustment is warranted based on offense or offender characteristics delineated within the Sentencing Guidelines themselves, at least where the facts relevant to the adjustment are already known to the defendant. . . . [T]he guidelines themselves provide notice to the defendant of the issues about which he may be called upon to comment."). *See also U.S. v. McLean*, 951 F.2d 1300, 1302 (D.C. Cir. 1991) (*Burns* does not require advance notice of denial of § 3E1.1 reduction that was recommended in PSR); *U.S. v. Palmer*, 946 F.2d 97, 100 (9th Cir. 1991) (same but not citing *Burns*); *U.S. v. White*, 875 F.2d 427, 431–32 (4th Cir. 1989) (defendant was on notice that evidence surrounding obstruction of justice might be introduced).

Adjustments

Obstruction of Justice

U.S. v. Thompson, No. 91-3091 (D.C. Cir. May 8, 1992) (D.H. Ginsburg, J.) (Wald, J., dissenting) (Affirmed obstruction of justice enhancement where jury did not believe defendant's testimony—although it was "not implausible" and was corroborated by witnesses—and district court specifically found defendant testified untruthfully at trial. The appellate court stated: "On its face, § 3C1.1 does not require that a defendant's false testimony be implausible or particularly flagrant. Rather, . . . the sentencing court must determine whether the defendant testified (1) falsely, (2) as to a material fact, and (3) willfully in order to obstruct justice, not merely inaccurately as the result of confusion or a faulty memory." The court also noted that "[t]he admonition in Application Note 1 [to § 3C1.1] to evaluate the defendant's testimony 'in a light most favorable to the defendant' apparently raises the standard of proof—above the 'preponderance of the evidence' standard that applies to most other sentencing determinations . . . —but it does not require proof of something more than ordinary perjury.").

Probation and Supervised Release

Revocation of Supervised Release

U.S. v. Cohen, No. 91-1786 (6th Cir. May 22, 1992) (Siler, J.) (Affirmed sentence of 2 years, rather than the 6–12 months called for by § 7B1.4, p.s., after revocation of probation: "we hold that policy statements in § 7B1.4 of the Guidelines are not binding upon the district court, but must be considered by it in rendering a sentence for a violation of supervised release. . . . Therefore, as the district court in this case considered (and declined to follow) the provisions of § 7B1.4 . . . its judgment is affirmed."). *Accord U.S. v. Lee*, 957 F.2d 770, 773 (10th Cir. 1992) [4 *GSU* #16]; *U.S. v. Blackston*, 940 F.2d 877, 893 (3d Cir.), *cert. denied*, 112 S. Ct. 611 (1991).

Guideline Sentencing Update

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VOLUME 4 • NUMBER 21 • MAY 8, 1992

Probation and Supervised Release

REVOCATION OF PROBATION

Third Circuit holds that when probation is revoked for drug possession, "not less than one-third of the original sentence" in 18 U.S.C. § 3565(a) refers to the original guideline range, not the term of probation imposed. Defendant's guideline range for her original offense was 0–4 months and she was sentenced to three years on probation. Her probation was later revoked, partly because she failed two drug tests. She was sentenced to prison for one year, in accordance with the 1988 amendment to 18 U.S.C. 3565(a), which states: "Notwithstanding any other provision of this section, if a defendant is found by the court to be in possession of a controlled substance . . . the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence." The district court interpreted the term "original sentence" to mean the three year probation term rather than the 0–4 month range for the original offense.

The appellate court disagreed and held that, consistent with circuit court interpretation of "initial sentencing" in § 3565(a)(2) (see case summaries below), "original sentence" means the guideline range for the original offense of conviction. The court explicitly disagreed with *U.S. v. Corpuz*, 953 F.2d 526 (9th Cir. 1992), which held that "original sentence" means the term of probation (*see* 4 *GSU* #15). "The Ninth Circuit attempted to resolve the conflict between the 1988 drug amendment and section 3565(a)(2) by noting that the two provisions are alternative means of sentencing, since only the former applies when the possession of a controlled substance is involved. . . . [W]e conclude that a better reading of the 'notwithstanding' clause is that it establishes a 'floor' below which the district court cannot resentence despite section 3565(a)(2) otherwise allowing the imposition of any sentence within the original sentencing range. In the case now before us, that 'floor' would be one and one-third month imprisonment since the original range was zero to four months."

In *Corpuz* the Ninth Circuit noted that "[p]enologically and semantically, probation is a sentence under the Sentencing Reform Act [of 1984]. It is no longer an alternative to sentencing; it is a sentence in and of itself." The Third Circuit disagreed, finding that "[a]lthough the statutory provisions enacted as part of the 1984 act refer to the 'sentence of probation,' . . . this is merely a change in form, rather than substance. The fundamental nature of probation remains unaltered." The court added that if it followed "the Ninth Circuit's reasoning that probation is a type of sentence, we would be forced to conclude that one-third of three years probation is one year probation, not one year imprisonment."

The court remanded, stating that "the proper way to resentence [after] a probation violation for possession of drugs is to revoke probation and impose a sentence not less than one-third of the maximum sentence for the original offense."

U.S. v. Gordon, No. 91-3605 (3d Cir. Apr. 13, 1992) (Cowen, J.) (Greenberg, J., concurring in result only).

Third Circuit holds statute, rather than Chapter 7 policy statements, controls revocation sentence, which is limited by guideline range for original offense. Defendant was sentenced to probation and then had probation revoked, both after the Nov. 1990 amendments to U.S.S.G. Chapter 7 took effect. Defendant's original guideline range was 0–6 months, but in sentencing him after revocation the district court followed the Revocation Table at § 7B1.4, p.s., which called for 3–9 months. The court departed upward, however, and imposed a 12-month term.

The appellate court held that the "plain wording" of 18 U.S.C. § 3565(a)(2) controls. The "sentence that was available . . . at the time of the initial sentencing" refers to the guideline range applicable to a defendant's original offense, and the revocation sentence is limited to that range. Every other circuit to rule on this issue has held the same, although those cases involved revocations that occurred before Nov. 1990. *See U.S. v. Alli*, 929 F.2d 995, 998 (4th Cir. 1991); *U.S. v. White*, 925 F.2d 284, 286–87 (9th Cir. 1991); *U.S. v. Von Washington*, 915 F.2d 390, 391–92 (8th Cir. 1990) (per curiam); *U.S. v. Smith*, 907 F.2d 133, 135 (11th Cir. 1990).

The court then held that, to the extent § 7B1.4 conflicts with the statute, "the two standards must be reconciled with the statute always prevailing. . . . Therefore, the appropriate resentencing range in this case following revocation of probation was three to six months, representing a revocation table minimum of three months and a statutory maximum of six months." The Ninth Circuit has held that "[t]o the extent that the Guidelines conflict with [§ 3565(a)(2)], we find them invalid." *U.S. v. Dixon*, 952 F.2d 260, 261 (9th Cir. 1991) (revocation sentence within 12–18 month range called for by § 7B1.4, p.s. must be vacated and sentence reimposed within original guideline range of 4–10 months) [4 *GSU* #16].

Because the sentence was remanded the court did not rule whether departure was appropriate, but stated that the notice requirements set forth in *Burns v. U.S.*, 111 S. Ct. 2182 (1991) "would apply in this case had a departure been permissible."

U.S. v. Boyd, No. 91-3597 (3d Cir. Apr. 13, 1992) (Cowen, J.).

U.S. v. Maltais, No. 91-8060 (10th Cir. Apr. 15, 1992) (Brorby, J.) (Defendant sentenced to probation before the Nov. 1990 amendments to § 7B1, p.s., but whose probation was revoked after that date, should be sentenced within guideline range that applied to his original offense, not under the "Revocation Table" at § 7B1.4, p.s. "Taking the law which recognizes probation as a sentence itself . . . a sentencing court must impose a sentence as calculated at the time of the initial sentencing to fix the applicable guideline range. Obviously, a sentencing court could still depart up or down from the Guideline range if the proper circumstances exist. Thus, as the policy statements concerning probation revocation were not in effect at the time Mr. Maltais was originally sentenced to a term of probation, they are inapplicable."). Where the revocation sentence was imposed before § 7B1.4 became effective, other circuits have held the same. See citations in *Boyd, supra*.

General Application Principles

Amendments

Second Circuit holds that whether to apply amendment to commentary that could benefit defendant—but was adopted after sentencing—should be considered in district, not appellate court. Defendant pled guilty to drug charges and was sentenced on the basis of the heroin involved in the offenses of conviction as well as drug amounts from two prior state convictions that involved related conduct. After he was sentenced the commentary to § 1B1.3 was amended (effective Nov. 1, 1991) by the addition of application note 7, which states that offense conduct for which a sentence was imposed prior to the conduct in the instant offense is not to be considered related conduct. The drug amounts from the state offenses would likely have been excluded had the amended commentary been in effect at sentencing.

The issue on appeal was "whether guideline amendments that are adopted after imposition of a sentence and that might benefit defendants are to be applied retroactively by a court of appeals to cases pending on direct review." Generally an appellate court should "apply the law in effect at the time it renders its decision . . . [but] there exists sufficient statutory direction 'to the contrary' to preclude appellate courts, in the first instance, from entertaining requests to apply post-sentence guideline amendments retroactively to cases pending on direct review. Our conclusion, however, would not preclude the application to pending cases of amendments that merely clarify."

The court concluded that by imposing upon the Sentencing Commission, in 18 U.S.C. § 3582(c)(2), "a continuing duty to revise the guidelines, and by authorizing, but not requiring, sentencing courts to reduce sentences in light of guideline revisions, Congress appears to have expressed a preference for discretionary district court action in response to Commission changes, rather than mandatory appellate court application of all post-sentence Commission changes to pending appeals. We need not decide at this point whether section 3582(c)(2) applies broadly . . . or whether it applies more narrowly only to those changes that precisely reduce an actual sentencing range." The court noted that the amendment here is not listed in § 1B1.10(d), p.s., but left "the effect of this policy statement, . . . its relationship to section 3582(c)(2)," and the extent and exercise of the district court's discretion under either section, for the district court to determine on application of the defendant or sua sponte.

U.S. v. Colon, No. 91-1360 (2d Cir. Apr. 6, 1992) (Newman, J.).

Adjustments

Obstruction of Justice

U.S. v. Benson, No. 91-2732 (8th Cir. Apr. 7, 1992) (Larson, Sr. Dist. J.) (Remanded: § 3C1.1 enhancement for obstruction of justice "may not be based solely upon [defendant's] failure to convince the jury of his innocence, [but] it may be 'based on the experienced trial judge's express finding, based on the judge's personal observations, that [defendant] lied to the jury.' . . . [T]he analysis does not call for the specific fact finding and statements of particularity urged by Benson, but does call for an independent evaluation and determination by the court that Benson's testimony was false." Here, the district court simply stated that the jury verdict demonstrated that defendant gave perjured testimony.). *But cf. U.S. v. Dunnigan*, 944 F.2d 178, 183–85 (4th Cir. 1991) (to apply enhancement because defendant's testimony was disbelieved by jury unconstitutionally places "an intolerable burden upon the defendant's right to testify in his own behalf").

U.S. v. Gardiner, 955 F.2d 1492, 1499 (11th Cir.1992) (Reversed: "We conclude as a matter of law that the defendant's assertions do not justify [§ 3C1.1] enhancement because a pre-sentence assertion cannot be material to sentencing if the assertion's truth requires the jury's verdict to be in error. . . . Clearly, the probation officer would have to disregard the jury's determination, that the defendant agreed to and did possess cocaine with intent to distribute, in order to believe the defendant's assertion to him that he knew nothing about the cocaine." The appellate court considered notes 4(c) and 5 of the commentary even though they were amended Nov. 1990, after defendant was sentenced, because they "serve merely to clarify the meaning of the 1989 and current versions of section 3C1.1."). *See also U.S. v. Tabares*, 951 F.2d 405, 410 (1st Cir. 1991) (enhancement reversed because no evidence giving false social security number to probation officer materially impeded presentence investigation); *U.S. v. DeFelippis*, 950 F.2d 444, 447 (7th Cir. 1991) (enhancement reversed because misstatements to probation officer about employment history were immaterial and could not influence sentence). *See* 4 *GSU* #13.

Acceptance of Responsibility

U.S. v. Valencia, 957 F.2d 153, 156 (5th Cir. 1992) (Remanded: District judge, who was "about halfway convinced" defendant had accepted responsibility, could not reduce offense level by one for "partially accepting" responsibility. "U.S.S.G. § 3E1.1 does not contemplate either a defendant's mere partial acceptance of responsibility or a district court's being halfway convinced that a defendant accepted responsibility. The plain language of § 3E1.1 indicates that a district court *must* reduce the offense level by *two* levels if it finds that the defendant has *clearly* accepted responsibility for his criminal conduct. . . . To allow . . . a one-level reduction permits the district court to straddle the fence in close cases without explicitly finding whether the defendant did or did not accept responsibility." The appellate court noted that if the § 3E1.1 reduction is denied, "partial acceptance" may be considered in determining the sentence within the guideline range.).

Criminal History

Career Offender Provision

U.S. v. Garrett, No. 90-3210 (D.C. Cir. Mar. 17, 1992) (Henderson, J.) (Affirmed: In the § 4B1.1 offense level table, "Offense Statutory Maximum" includes any applicable statutory sentencing enhancements that increase the maximum sentence. Under 21 U.S.C. § 841(b)(1)(B)(iii), the maximum sentence is 40 years for first offenders but life for those, like defendant, with certain prior drug convictions. Thus, for this defendant the "Offense Statutory Maximum" is life.). *Accord U.S. v. Amis*, 926 F.2d 328, 329–30 (3d Cir. 1991); *U.S. v. Sanchez-Lopez*, 879 F.2d 541, 559–60 (9th Cir. 1989).

Amendment and Correction:

U.S. v. Valente, No. 91-10256 (9th Cir. Apr. 1, 1992) (Thompson, J.), reported in 4 *GSU* #20 (April 21, 1992), was amended on April 29. Please make the following changes to your copy of that *GSU*: (1) end the quotation in the first paragraph on p.2 with "Valente's aberrant behavior" by deleting the remaining language of that quote; (2) delete the first sentence of the next paragraph (note: the rest of the paragraph is correct but no longer relevant to *Valente*).

EXHIBIT G

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

Vol. 3, No. 15 | FEDERAL SENTENCING GUIDELINES AND FORFEITURE CASES FROM ALL CIRCUITS. | May 18, 1992

IN THIS ISSUE:

Guideline Sentencing, Generally

10th Circuit reverses *Williams* and upholds referral for federal prosecution. (110)(135) Defendants were arrested by a multi-agency strike force and referred to federal authorities for prosecution. The district court refused to impose federal mandatory minimum sentences or the guidelines, because the strike force had no written policy or guidelines for referring cases for federal prosecution. Therefore the referral could have been for improper purposes. *U.S. v. Williams*, 746 F.Supp. 1076 (D. Utah 1990). The 10th Circuit reversed. In the absence of proof that the choice of a forum was improperly motivated, prosecution in a federal rather than a state court does not violate due process despite the absence of guidelines for such referral. Here, there was no evidence that the referral was based on race or other impermissible reasons. *U.S. v. Williams*, __ F.2d __ (10th Cir. May 5, 1992) No. 90-4135.

11th Circuit upholds drug quantity despite claim that amount was dictated by government agent. (110)(260) Defendant claimed that it was error for the district court to base his sentence on the one kilogram of cocaine involved in the transaction because the quantity involved was dictated by the special agent with whom defendant planned the drug transaction. The 11th Circuit rejected this argument, since there was sufficient evidence at trial to convict defendant of knowingly and voluntarily entering into an agreement to purchase one kilogram of cocaine. *U.S. v. Brokemond*, __ F.2d __ (11th Cir. April 24, 1992) No. 90-9176.

2nd Circuit affirms denial of reduction in sentence for positive adjustment in prison. (115) In a pre-guidelines case, defendant brought a Rule 35 motion to reduce his sentence based upon his family situation and his positive adjustment in prison. The

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900 Forfeitures, Generally
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2nd Circuit affirmed the denial of the motion. Because the district court already considered at sentencing most of the mitigating factors relied on in the Rule 35 motion, there was no abuse of discretion in denying the motion. Although commendable prison deportment has been included among factors meriting consideration on a motion to reduce, the judge was entitled to decline to give defendant the requested reduction. *U.S. v. Feigenbaum,* __ F.2d __ (2nd Cir. April 29, 1992) No. 91-1564.

2nd Circuit rules that government's opposition to Rule 35 motion did not breach promise not to make sentencing recommendations. (115)(790) The 2nd Circuit rejected defendant's claim that the government's opposition to his Rule 35 motion to reduce his sentence constituted a breach of its promise in his plea agreement not to make any recommendation at sentencing. The plea agreement committed the government to make no recommendation "at the time of sentencing." That commitment could not reasonably be understood to preclude the government from opposing an attempt to have the sentence reduced after it had been imposed. *U.S. v. Feigenbaum,* __ F.2d __ (2nd Cir. April 29, 1992) No. 91-1564.

9th Circuit says denial of Rule 35 motion without explanation did not indicate that discretion was not exercised. (115). In this pre-Guidelines case, defendant filed a Rule 35 motion to reduce his sentence arguing that (1) he was a "model prisoner" and (2) his sentence was more severe than that of other inmates who had committed allegedly more serious crimes. The 9th Circuit held that the trial judge was in the best position to evaluate whether a Rule 35 request for leniency is warranted based on the seriousness of defendant's crimes. Neither the defendant's prison demeanor nor the comparison of his sentence to the sentences of others is relevant to mitigate the seriousness of his original offense. Hence, denial of the motion without comment was not error. *U.S. v. Smith,* __ F.2d __ (9th Cir. May 5, 1992) No. 91-30049.

5th Circuit upholds sentence based upon revised presentence report prepared after trial. (120)(760) Defendant contended that he was penalized for having exercised his right to a trial based upon differences between the presentence report prepared at the time of his plea agreement, which was rejected by the district court, and the presentence report prepared after his trial. The initial presentence report characterized him as a minor participant and deducted points for acceptance of responsibility. The post-trial report characterized him as an average participant, recommended no reduction for acceptance of responsibility and added two points for obstruction of justice. The 5th Circuit rejected defendant's argument as frivolous. Each of the changes in the presentence report was proper because it reflected testimony and evidence adduced at trial. The trial judge was familiar with defendant's case, and his findings were not clearly erroneous. *U.S. v. Walker,* __ F.2d __ (5th Cir. April 24, 1992) No. 91-8396.

9th Circuit finds no equal protection violation in disparity between guidelines sentence and coconspirators' "old law" sentence. (120)(716) Defendant argued that his guideline sentence should be reduced to produce uniformity with his codefendants' sentences, which were imposed during the time the guidelines were held unconstitutional in the 9th Circuit. The court held that circuit precedent prevented review of a properly imposed sentence. Thus, because the defendant's sentence was lawfully imposed, the panel did not entertain his equal protection claim. *U.S. v. Kohl,* __ F.2d __ (9th Cir. April 30, 1992) No. 91-30119.

5th Circuit upholds enhancement for discharge without a permit despite proposed amendment to guideline. (131)(355) The 5th Circuit upheld an

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enhancement under guideline section 2Q1.2(b)(4) for discharge without a permit, even though the offense of conviction, discharge of industrial waste, involved discharge without a permit. The district court followed section 2Q1.2(b)(4) "to the letter" when it added four levels because the offense involved a discharge without a permit. That the sentencing commission was considering an amendment to this guideline did not alter the propriety of the enhancement. *U.S. v. Goldfaden*, __ F.2d __ (5th Cir. April 22, 1992) No. 91-1781.

Minnesota District Court departs downward where agent's repeated cocaine buys raised sentence. (135)(715) The district court found that the Commission failed adequately to consider an agent's "terrifying capacity" to escalate a defendant's sentence by delaying an arrest until repeated cocaine buys raise the sentence to new guideline levels. The court found it unnecessary to consider whether this constituted "sentencing entrapment," holding that a departure is warranted where undercover officers persevere in these transactions until a suspect provides the aggregate amount of drugs to trigger a mandatory minimum sentence or where the undercover agent's investigation shifts from the identified seller to the undiscovered "source." Since both of these circumstances occurred here, the court departed downward from 97 to 72 months. *U.S. v. Barth*, __ F.Supp. __ (D. Minn. April 9, 1992), Crim. No. 4-91-103.

7th Circuit holds that applying amended section 924(c) violated ex post facto clause. (131)(330)(855) In August, 1988, when defendant committed the instant robberies, section 924(c) carried a ten-year mandatory sentence for a second firearms offense. That provision was amended November 1988 to provide for a 20-year sentence, and defendant was sentenced under this amended provision. On appeal, the 7th Circuit reversed, holding that applying the amended statute to defendant violated the ex post facto clause. The amended statute clearly disadvantaged defendant by doubling the mandatory portion of his sentence. Dicta in *U.S. v. Bader*, __ F.2d __ (7th Cir. Feb. 12, 1992) No. 90-3656, suggesting that retroactive application of the guidelines may not violate the ex post facto clause, was not relevant to this case. *U.S. v. Wilson*, __ F.2d __ (7th Cir. May 1, 1992) No. 90-1270.

2nd Circuit holds that failure to appear for sentencing is a continuing offense. (132) Defendant failed to appear for sentencing on May 27, 1987. On February 24, 1990, he was arrested on unrelated charges, and eventually pled guilty to failing to appear for sentencing. He argued that his offense was completed on May 27, 1987, before the guidelines' effective date, November 1, 1987. The 2nd Circuit held that failure to appear is a continuing offense, and thus the guidelines were applicable. Although the explicit language of the statute does not indicate whether failure to appear is a continuing offense, the nature of the offense is continuing. Each day that the defendant is absent enhances the dangers of delay in processing the case. Furthermore, no statute of limitations applies to the crime of failure to appear. *U.S. v. Lopez*, __ F.2d __ (2nd Cir. April 13, 1992) No. 91-1641.

9th Circuit finds no ex post facto violation where conduct continued past guidelines' effective date. (132) Defendant was in a drug conspiracy that began before and continued after the guidelines took effect (a "straddle offense"). He pleaded guilty to the overt acts that took place after the guidelines became effective and was sentenced under the guidelines. The 9th Circuit found no ex post facto problem because the offense of conviction took place after the guidelines' effective date. It was irrelevant that the offense began before the guidelines' effective date. *U.S. v. Kohl*, __ F.2d __ (9th Cir. April 30, 1992) No. 91-30119.

Application Principles, Generally (Chapter 1)

8th Circuit affirms increase in offense level where defendant conspired to rob two banks. (150)(380) The 8th Circuit held that defendant's offense level was properly increased to reflect the fact that the conspiracy of which he was a member conspired to rob two banks, not just one. Although defendant was only convicted of one count of conspiracy, guideline section 1B1.2(d) states that a conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit. *U.S. v. Johnson*, __ F.2d __ (8th Cir. May 1, 1992) No. 91-2500.

5th Circuit rejects consideration of relevant conduct in determining applicable guideline. (170)(200)(355) Defendant pled guilty to discharging industrial waste in violation of 33 U.S.C. section 1319(c)(2)(A). Relying on defendant's relevant conduct, the district court sentenced defendant under section 2Q1.2 (mishandling hazardous or toxic substances), rather than section 2Q1.3 (mishandling other environmental pollutants). The 5th Circuit

held that it was error for the district court to consider relevant conduct in choosing the applicable guideline. A court should examine relevant conduct in choosing a base offense level where the guideline specifies more than one base offense level. But neither of the guidelines here provided for more than one base offense level. The district court should have relied solely on the defendant's offense of conviction, i.e., discharge of industrial waste, to determine his base offense level. The most applicable guideline was section 2Q1.3. *U.S. v. Goldfaden*, __ F.2d __ (5th Cir. April 22, 1992) No. 91-1781.

9th Circuit grants rehearing on whether counts dismissed in plea bargain can be considered as relevant conduct. (175)(300)(480)(504)(780) Pursuant to a plea bargain, defendant pled guilty to one count of mail fraud and one count of use of a fictitious name. The government agreed to drop other counts which referred to similar fraudulent transactions that occurred on different dates. At sentencing, the district court relied on the losses in the dismissed counts in establishing the base offense level, as required by the "relevant conduct" guideline, 1B1.3(a)(2). The 9th Circuit reversed, relying on *U.S. v. Castro-Cervantes*, 927 F.2d 1079 (9th Cir. 1991), which "held that a court may not rely on dismissed charges in calculating the defendant's sentence." On May 6, 1992, the full court agreed to rehear the case en banc. *U.S. v. Fine*, 946 F.2d 650 (9th Cir. 1991) *rehearing en banc granted*, ___ F.2d ___, 92 D.A.R. 6241 (9th Cir. May 6, 1992) No. 90-50280.

Offense Conduct, Generally (Chapter 2)

8th Circuit affirms enhancement for use of a dangerous weapon despite acquittal on similar charge. (224)(755) The 8th Circuit held that defendant's acquittal for use of a firearm did not prohibit an enhancement under section 2B3.1(b)(2) for use of a dangerous weapon. Particular facts for sentencing purposes need only be proven by a preponderance of the evidence, which is a lower standard than required for a criminal conviction. *U.S. v. Johnson*, __ F.2d __ (8th Cir. May 1, 1992) No. 91-2500.

6th Circuit holds that crack is cocaine base. (240) Relying upon *U.S. v. Metcalf*, 898 F.2d 43 (5th Cir. 1990), defendant argued that crack is not cocaine base. The 6th Circuit rejected this argument, noting that the 5th Circuit in *Metcalf* determined that crack cocaine is one type of cocaine base. *U.S. v. Williams*, __ F.2d __ (6th Cir. May 1, 1992) No. 91-1025.

6th Circuit upholds treating cocaine base 100 times more harshly than cocaine powder. (242) The 6th Circuit held that the penalty scheme in 21 U.S.C section 841(b), which treats one gram of cocaine base as equivalent to 100 grams of cocaine, did not violate the equal protection clause. The ratio is reasonably related to a legitimate end. First, crack is a purer drug than cocaine and speed with which it progresses increases the likelihood of addiction. Second, because crack is sold in small doses and at cheap prices, it is easier to transport and use, and is affordable to children. *U.S. v. Williams*, __ F.2d __ (6th Cir. May 1, 1992) No. 91-1025.

6th Circuit affirms that definition of "cocaine base" is not unconstitutionally vague. (242) The 6th Circuit rejected defendant's claim that the failure of Congress to define "cocaine base" in 21 U.S.C. section 841(b)(1)(B)(iii) rendered the statute void for vagueness. In *U.S. v. Levy*, 904 F.2d 1026 (6th Cir. 1990), the court held that section 841(b)(1)(B), which provides penalties for offenses involving 500 grams of more of cocaine or five grams of more of cocaine base, was not unconstitutionally vague. *U.S. v. Williams*, __ F.2d __ (6th Cir. May 1, 1992) No. 91-1025.

5th Circuit holds mandatory sentence for child pornography offense is not subject to negotiation in plea agreement. (245)(310)(650)(780) Defendant pled guilty to his second offense of possessing child pornography in violation of 18 U.S.C. section 2252(a)(2), which carries a mandatory minimum sentence of five years. However, pursuant to the plea agreement, the district court sentenced defendant to 39 months. Defendant argued that the U.S. Attorney's promise not to seek the sentencing enhancement under section 2252(b)(2) obliged the trial court to refrain from imposing the minimum penalty of five years. The 5th Circuit rejected this argument, since guideline section 5G1.1(b) states that where a statutory minimum sentence exceeds the guideline range, that minimum sentence shall be the guideline sentence. The U.S. Attorney was wholly without authority to ignore the minimum sentence. "That the government actually urged the court to sentence below the statutory minimum is, in our view, a serious breach of its duty to enforce the law Congress wrote." *U.S. v. Schmeltzer*, __ F.2d __ (5th Cir. April 23, 1992) No. 91-8338.

5th Circuit rejects use of Drug Equivalency Tables to determine quantity of methamphetamine from precursor chemicals. (250) Defendant was arrested in a methamphetamine laboratory with various quantities of chemicals. The 5th Circuit held that it was

error to use the Drug Equivalency Tables in section 2D1.1(c) to determine the quantity of methamphetamine from the "equivalent" chemicals. The Tables are not manufacturing ratios, but simply a way of equating different controlled substances to obtain a single offense level. Methamphetamine is listed in the Drug Quantity Table, and therefore this should have been used. The misapplication of the guidelines, however, did not require resentencing. Based upon the most conservative government estimate, the precursor chemicals possessed by defendant would convert to 627 grams of methamphetamine. The base offense level for this was 28, which happened to be the offense level used by the district court. *U.S. v. Salazar,* __ F.2d __ (5th Cir. May 1, 1992) No. 91-5632.

5th Circuit uses weight of liquid waste containing methamphetamine to calculate offense level. (251) At defendants' methamphetamine laboratory, police seized a quantity of a toxic liquid substance containing methamphetamine. At trial, a chemist testified that the liquid was probably a waste product left over from the manufacturing process. The government stipulated that over 95 percent of the volume or weight of the liquid was solvents. Relying on *U.S. v. Baker,* 883 F.2d 13 (5th Cir.), *cert. denied,* 493 U.S. 983 (1989), the 5th Circuit upheld the use of total weight of the liquid waste containing methamphetamine to determine the base offense level. The Supreme Court's decision in *Chapman v. United States,* 111 S. Ct. 1919 (1991) did not involve methamphetamine nor a liquid, and did not address the propriety of using the weight of liquid waste containing methamphetamine as a basis for computing a defendant's base offense level. *U.S. v. Walker,* __ F.2d __ (5th Cir. April 24, 1992) No. 91-8396.

7th Circuit holds defendant accountable for quantity of cocaine he agreed to broker. (265) Defendant contended for the first time on appeal that the government failed to demonstrate that he conspired to distribute 20 kilograms of cocaine, since the transaction in question involved only nine kilograms of cocaine. The 7th Circuit affirmed, since defendant initially negotiated for the sale of 20 kilograms of cocaine. Although at his arrest defendant was not in a position to buy all 20 kilograms, and only arranged for the sale of nine, he did agree to act as a "broker" for the sale of all 20 kilograms and was planning to sell all of them. *U.S. v. Caban,* __ F.2d __ (7th Cir. May 4, 1992) No. 91-1150.

5th Circuit remands to determine whether amount distributed by conspiracy was foreseeable. (275)(765) Defendants challenged the district court's determination that they were responsible for two kilograms of cocaine distributed by both of them over the course of their conspiracy. The 5th Circuit remanded for resentencing because the district court failed to determine whether either defendant knew or reasonably should have foreseen the total amount distributed by the conspiracy. The presentence report's attribution of more than two kilograms of cocaine to each defendant was based on drug sales made by both defendants. Although defendants objected to this conclusion, the district court adopted the presentence report's conclusion. Neither the judge nor the presentence report addressed whether each defendant knew or could have reasonably foreseen the amount of drugs involved in the conspiracy. *U.S. v. Webster,* __ F.2d __ (5th Cir. May 5, 1992) No. 91-1487.

6th Circuit upholds sentencing defendant on the basis of all drugs in the conspiracy. (275) Defendant argued that the district court erred in determining that he was responsible for 50 kilograms of cocaine and 500 kilograms of cocaine base. Sufficient evidence existed to show that defendant was involved in a conspiracy which acquired over 400 to 500 kilograms of cocaine, 90 percent of which was distributed as crack. Under section 1B1.3, the district court must consider all quantities of drugs involved in the same conspiracy. *U.S. v. Williams,* __ F.2d __ (6th Cir. May 1, 1992) No. 91-1025.

8th Circuit says defendant who delivered glassware was not responsible for lab's potential yield. (275)(855) Defendant received a 30-year sentence for his involvement in a methamphetamine conspiracy. Although he did not appeal his sentence, the 8th Circuit decided to suspend the normal requirements of Fed. R. App. P. 28(a) and consider the issue because the sentence would result in "manifest injustice." The court then reversed the determination that defendant was responsible for all 37.5 kilograms of methamphetamine that the laboratory was capable of producing. For activities of a co-conspirator to be reasonably foreseeable, they must fall within the scope of the agreement. Here, defendant merely agreed to deliver glassware to the conspirators. Although the evidence indicated that defendant knew that he was aiding an illegal conspiracy, there was no evidence that he knew how much methamphetamine his co-conspirators would produce. A 30-year sentence for a simple delivery of glassware constituted a gross miscarriage of justice. *U.S. v. Montanye,* __ F.2d __ (8th Cir. May 6, 1992) No. 91-1703.

5th Circuit upholds firearm enhancement despite evidence that weapon was held as collateral for loan. (284) Defendant received an enhancement under guideline section 2D1.1(b(1) based upon a gun that was found at the restaurant from which he sold drugs. Defendant offered testimony at the sentencing hearing that the .22 caliber firearm was located on a shelf behind a stack of dinner plates in the kitchen area, and that in order to retrieve the gun, one would have to reach behind the stacked plates and possibly knock them over. The testimony also indicated that defendant was holding the weapon as collateral for a loan he made to the owner of the firearm. Nonetheless, the 5th Circuit upheld the enhancement. Once it is established that a firearm was present during the offense, the district court should apply the enhancement unless it is clearly improbable that the weapon was connected with the offense. Possession need only be established by a preponderance of the evidence. *U.S. v. Webster*, __ F.2d __ (5th Cir. May 5, 1992) No. 91-1487.

8th Circuit says defendant exercised dominion over shed in which weapons were found. (284) Defendant received an enhancement under section 2D1.1(b)(1) based on various firearms and ammunition and several jugs and jars filled with precursor chemicals and glassware found in a storage shed. The storage unit was leased to defendant's former girlfriend. Defendant visited the storage unit with various members of the conspiracy five times between July and November. The FBI found the glassware that another conspirator delivered to defendant in the same storage unit. It was not clearly improbable that the weapons were connected to defendant's methamphetamine conspiracy. Both guns were semi-automatic weapons with large magazines. An expert testified at sentencing that only drug traffickers use these paramilitary weapons. *U.S. v. Montanye*, __ F.2d __ (8th Cir. May 6, 1992) No. 91-1703.

1st Circuit affirms denial of evidentiary hearing on determination of victim loss. (300)(765) The 1st Circuit held that defendant did not demonstrate that an evidentiary hearing under 6A1.3 would be the only reliable way to resolve the victim loss calculation under section 2F1.1, or that one would be useful. The sentencing judge, having presided at trial, was intimately familiar with the only relevant evidence to which defendant alluded in his hearing request. At no time did defendant identify any evidence which would be presented at a hearing so as to enable the district court to evaluate the usefulness of an evidentiary hearing. Although defendant made the conclusory assertion that he had figures which would establish his entitlement to a victim loss set-off, none were ever submitted, either below or on appeal. *U.S. v. Shattuck*, __ F.2d __ (1st Cir. April 22, 1992) No. 91-1833.

1st Circuit rules that multiple causes of victim loss may only be considered as grounds for downward departure. (300)(855) Defendant contended that the victim loss caused by his fraud had been distorted by real estate market conditions. The 1st Circuit ruled that defendant waived this issue by failing to request a downward departure on this basis. Although the victim loss table in section 2F1.1 presumes that the defendant alone is responsible for the entire amount of the loss, any portion of the total loss extraneous to the defendant's criminal conduct is not deducted from total victim loss prior to the determination of the applicable guideline range. Rather, as explained in note 10 to section 2F1.1, a downward departure may be warranted where extraneous causes distort the victim loss calculation. Since defendant did not request a downward departure based on multiple causation, he waived this claim. *U.S. v. Shattuck*, __ F.2d __ (1st Cir. April 22, 1992) No. 91-1833.

1st Circuit calculates victim loss on total amount of unsecured fraudulent loans. (300) Defendant, a bank officer, was convicted of bank fraud and embezzlement in connection with the misapplication of bank funds in five commercial real estate transactions. Defendant challenged the calculation of victim loss under section 2F1.1, contending that it should not be based upon the total amount fraudulently disbursed. The 1st Circuit rejected this argument, since the fraud cases cited by defendant all dealt with fraudulent loans for which the defendant pledged valuable collateral to secure their repayment. Here, when defendant misapplied bank funds to unauthorized persons or purposes, he did not provide the bank with collateral to secure repayment of the unauthorized advances. Thus, the full amount of the loans was the proper measure of the loss. *U.S. v. Shattuck*, __ F.2d __ (1st Cir. April 22, 1992) No. 91-1833.

1st Circuit upholds sentence where possible error in victim loss calculation would not change offense level. (300)(865) The district court set the total victim loss from defendant's bank fraud at $721,000, which under section 2F1.1(b)(1) triggered an eight level enhancement. Defendant argued that amounts which were misapplied by defendant but remained with the bank should not be included in the calculation because they were never "taken." The 1st Circuit declined to determine whether this argu-

ment had merit since even if correct, the net victim loss would be still be over $522,000. This would still justify the eight level enhancement under section 2F1.1. *U.S. v. Shattuck*, __ F.2d __ (1st Cir. April 22, 1992) No. 91-1833.

7th Circuit says 2S1.3(a) applies to defendant who lied to customs officer about currency. (300)(360) While boarding a flight out of the United States, defendant misrepresented to a customs officer that he was only carrying $6-7,000 in cash, when in fact he was carrying $24,000. Defendant was convicted of making false statements, in violation of 18 U.S.C. section 1001. The 7th Circuit affirmed that defendant was properly sentenced under the currency reporting guideline section 2S1.3, rather than 2F1.1, the guideline applicable to false statements. Although section 2F1.1 normally applies to false statements under section 2F1.1, application note 13 states that if the indictment establishes an offense more aptly covered by another guideline, apply that guideline. The government tried defendant on the theory that he lied to the customs officer to evade the currency reporting requirements. *U.S. v. Obiuwevbi*, __ F.2d __ (7th Cir. April 27, 1992) No. 91-2070.

10th Circuit affirms reliance on probable loss estimate in presentence report. (300)(770)(765) The 10th Circuit rejected defendant's argument that the loss caused by his fraud under section 2F1.1 should be based solely upon the actual loss of the victims. Guideline commentary indicates that if the probable or intended loss can be determined, that figure should be used if it is larger than the actual loss. At sentencing, the district court adopted the probable and intentional monetary loss figures in the presentence report. Although this information was hearsay, it had sufficient indicia of reliability to support its probable accuracy. As an officer of the court, the probation officer may be considered a reliable source. Also, bankers who furnished information as to possible or probable loss which defendant was attempting to inflict by fraudulent loan applications could be considered reliable sources. In addition, the trial judge was entitled to use the knowledge acquired while presiding over defendant's trial. *U.S. v. Hershberger*, __ F.2d __ (10th Cir. May 6, 1992) No. 90-3150.

11th Circuit rejects enhancement where no intention to receive pornographic material of children under 12. (310) Guideline section 2G2.2(b)(1) provides for a two level enhancement if the pornographic material involved a prepubescent minor or a minor under 12 years old. The 11th Circuit upheld the district court's refusal to apply this enhancement to a defendant who received videotapes involving such young children, but had sought to receive videotapes of children older than 12 years. The government's contention that defendant's state of mind is irrelevant to this enhancement would permit the government to obtain enhancement by delivering material with the depiction necessary for enhancement to a person who did not intend to receive it and who had clearly ordered videotapes of older children. This proposition would be out of step with the obvious intended purpose of the enhancement provision: to afford additional protection against the exploitation of children under 12 by giving enhanced penalties to those who provide a market for such material. *U.S. v. Saylor*, __ F.2d __ (11th Cir. April 24, 1992) No. 90-5788.

9th Circuit holds enhancement for deportation after conviction does not require deportation to be in response to conviction. (340) The defendant had suffered a conviction for second degree assault, a felony. Thereafter, he was convicted of misdemeanor firearm possession, and deported. In this case, his sentence for being in the United States after deportation was enhanced by four levels for the prior felony conviction. The panel rejected the defendant's claim that the enhancement was improper because his deportation was not a response to his felony conviction. The phrase "deported after conviction" does not require a cause and effect relationship between the felony conviction and the deportation. *U.S. v. Brito-Acosta*, __ F.2d __ (9th Cir. May 7, 1992) No. 91-30271.

9th Circuit upholds two level upward departure for "sophistication" of alien smuggling organization. (340)(715) The district court stated that its upward departure was based on the length of time the conspiracy lasted, its sophistication and the large number of aliens. The 9th Circuit held that these were proper reasons for an upward departure of two levels. Contrary to the defendant's argument, a district court is not required to find both a large number of aliens *and* dangerous and inhumane treatment of aliens in order to depart upward. Moreover, at least 146 illegal aliens were transported in a ten week period. This constituted "large numbers of aliens" for the purpose of upward departure under 2L1.1. In reviewing the reasonableness of the extent of the departure, the court found a useful analogy in the two levels for "more than minimal planning" provided in several other guidelines. *U.S. v. Martinez-Gonzalez*, __ F.2d __ (9th Cir. April 20, 1992) *amended* May 5, 1992 No. 90-50561.

5th Circuit says enhancement for repetitive discharge does not require actual environmental contamination. (355) The 5th Circuit held that an enhancement for repetitive discharge of hazardous waste under guideline section 2Q2.1(b)(1)(A) does not require proof of actual environmental contamination. Application note 5 to section 2Q2.1 should be interpreted to mean that subsection (b)(1) takes environmental contamination as a given, but allows for upward or downward departures depending on the potency, size or duration of the contamination. *U.S. v. Goldfaden*, __ F.2d __ (5th Cir. April 22, 1992) No. 91-1781.

9th Circuit says market value of "specially protected" and "ordinary" animals is based on "the price of the hunt." (355) The market value formula (1) determines the defendant's standard outfitting fee and (2) multiplies that fee by the number of animals taken. Here, the defendant's standard fee was $1500 and 14 animals were taken. Thus, the total market value of the animals was $21,000. Based on the table in section 2F1.1 the defendant's offense level was increased by four levels. *U.S. v. Atkinson*, __ F.2d __ (9th Cir. Apr. 27, 1992) No. 91-30084.

6th Circuit affirms enhancement for believing government sting funds were proceeds of an unlawful activity. (360) Defendant received an enhancement under guideline section 2S1.1 for believing the funds involved in a money laundering operation were the proceeds of an unlawful activity. He contended that the enhancement was improper because he was convicted in a sting operation and the money was not actually drug proceeds. The 6th Circuit held that as long as the defendant believes that the funds were the proceeds of an unlawful activity, the enhancement applies, regardless of the actual source of the money. *U.S. v. Payne*, __ F.2d __ (6th Cir. May 5, 1992) No. 91-3417.

8th Circuit affirms that defendant was not entitled to reduction for uncompleted conspiracy. (380) Guideline section 2X1.1(b)(2) provides that for conspiracies not covered by a specific offense guideline, a three level reduction should be given unless the circumstances demonstrate that the conspirators were about to complete all necessary acts but for apprehension or interruption by some similar event beyond their control. The 8th Circuit held that defendant was not entitled to this reduction because his intended bank robberies would have been completed but for the intervention of law enforcement officials. *U.S. v. Johnson*, __ F.2d __ (8th Cir. May 1, 1992) No. 91-2500.

Adjustments (Chapter 3)

9th Circuit upholds vulnerable victim enhancement where defendants targeted persons who had bad credit. (410) The defendants, husband and wife, sent solicitation letters offering to supply credit cards for a $35.00 fee to a target group of people with suspected poor credit ratings. The defendants knew or should have known that their victims' poor credit made them particularly susceptible to this fraud scheme. Thus, both defendants' offense levels were properly enhanced by two points under U.S.S.G. section 3A1.1. *U.S. v. Peters*, __ F.2d __ (9th Cir. May 5, 1992) No. 91-50097.

9th Circuit says absence of specific finding that defendant was organizer did not invalidate enhancement. (430) The district court accepted the government's argument that the defendant did not submit any rebuttal evidence and the record supported the conclusion that the defendant designed and led the scheme. Accordingly, the enhancement under U.S.S.G. Section 3B1.1 for being an "organizer" was not clearly erroneous. *U.S. v. Peters*, __ F.2d __ (9th Cir. May 5, 1992) No. 91-50097.

5th Circuit affirms that defendant was manager of "green" card conspiracy. (431) The 5th Circuit affirmed that defendant was a manager of a conspiracy to obtain and sell illegal immigration "green" cards. The success of the conspiracy was based on customers willing to engage in an illicit transaction. Defendant had the credentials, the contacts and the reputation to find accomplices. He produced seven customers, administered the application process, provided a sense of safety and solace to his fellow conspirators, and stood to gain a green card for himself at little cost. *U.S. v. Liu*, __ F.2d __ (5th Cir. April 30, 1992) No. 90-2976.

8th Circuit affirms that defendant was a manager of methamphetamine conspiracy. (431) The 8th Circuit affirmed a three level enhancement under section 3B1.1(b) for being a manager in a criminal activity involving five or more people. The record revealed that defendant participated extensively in the conspiracy and gave orders to at least one conspirator. The leader of the conspiracy referred to defendant as his "partner" on several occasions in conversations with others. Defendant called another conspirator to tell him when the purchases would take place and how much would be purchased. At two different times, the leader of the conspiracy would ask defendant about these drug purchases and defendant would tell him when they would be ready.

U.S. v. Montanye, __ F.2d __ (8th Cir. May 6, 1992) No. 91-1703.

9th Circuit upholds organizer enhancement for defendant who shared economic reward equally with codefendant wife. (431) The district court found that codefendants were co-equal partners, but not for all purposes. The record showed that the defendant designed and led the criminal scheme. Thus, the enhancement for his role as organizer and leader of the offense was proper under U.S.S.G. section 3B1.1(c). *U.S. v. Peters,* __ F.2d __ (9th Cir. May 5, 1992) No. 91-50097.

9th Circuit holds that, although not prosecuted, two associates and twelve unlicensed hunters were "participants" in crime. (431) Defendant organized four illegal hunt groups involving himself, two guides/ranch owners and twelve individual hunters. Thus, each of the four hunts consisted of defendant, the two guides/ranch owners and at least two hunters (at least five participants) and there were fifteen "participants" total. Consequently, defendant had organized a criminal activity that involved five or more participants and the court properly enhanced defendant's sentence by four levels under U.S.S.G. section 3B1.1(a). *U.S. v. Atkinson,* __ F.2d __ (9th Cir. Apr. 27, 1992) No. 91-30084.

6th Circuit rejects minimal role despite defendant's acquittal of money laundering charge. (445) The 6th Circuit affirmed that defendant did not hold a minimal role in a money laundering operation despite his acquittal of substantive money laundering charges. Defendant was convicted of conspiracy, and thus the court could find that defendant did not have a minor role. He was recorded telling an undercover agent that he could quickly set up a transaction which would launder the agent's money for a 20 percent fee, and that he would set up a fictitious business to do so. *U.S. v. Payne,* __ F.2d __ (6th Cir. May 5, 1992) No. 91-3417.

9th Circuit denies minimal participant status to defendant who was co-equal partner in fraud scheme. (445) The district court found that defendant's claims of ignorance and non-involvement were implausible, and that she was a co-equal partner with her husband because both shared equally the economic reward from the fraud scheme. These findings supported the district court's conclusion that the wife was not a minimal participant. *U.S. v. Peters,* __ F.2d __, 92 D.A.R. 6017 (9th Cir. May 5, 1992) No. 91-50097.

5th Circuit rules perjury alone justified obstruction enhancement. (461) The district court based a two-level enhancement for obstruction of justice upon defendant's concealment of records in relation to one of the counts of his indictment and his perjurious testimony. The 5th Circuit found that the perjury ruling was supported by the record, and that this alone supported the enhancement. Therefore, it declined to address whether the act of concealing records relating to one count could constitute obstruction of justice in the instant offense. *U.S. v. Goldfaden,* __ F.2d __ (5th Cir. April 22, 1992) No. 91-1781.

8th Circuit affirms obstruction enhancement based upon perjury at trial. (461) The 8th Circuit affirmed an obstruction of justice enhancement under section 3C1.1, finding no clear error in the district court's determination that defendant's testimony was "blatantly untruthful" and that he deserved the enhancement. *U.S. v. Johnson,* __ F.2d __ (8th Cir. May 1, 1992) No. 91-2500.

9th Circuit finds defendant obstructed justice by helping fabricate a story and instructing others to lie to agents. (461) The defendant obstructed justice under U.S.S.G. section 3C1.1 because he "attempted to obstruct or impede the administration of justice during the investigation" by helping concoct a story for suspects to tell investigating authorities if forced to discuss the illegal hunting of game, and instructing two suspects not to speak to police about the illegal hunt. Hence, his offense level was properly adjusted upward by two levels. *U.S. v. Atkinson,* ___ F.2d __ (9th Cir. Apr. 27, 1992) No. 91-30084.

11th Circuit finds that court wrongly balanced acceptance of responsibility against exercise of rights. (484) The 11th Circuit held that the district court impermissibly balanced evidence of defendants' acceptance of responsibility against their exercise of their 5th Amendment right against self incrimination and their right to an appeal. A sentencing court is justified in considering a defendant's conduct prior to, during, and after trial to determine if the defendant has shown any remorse through his actions or statements. If the defendant has exercised all of his rights during the entire process, the chances of his receiving the two level reduction may well be diminished. But this is simply because it is likely there is less evidence of acceptance to weigh in his favor. However, if a defendant has shown some sign of remorse but has also exercised constitutional or statutory rights, the sentencing judge may not balance the exercise of those rights against the defendant's remorse to determine whether the "acceptance" is adequate. *U.S. v. Rodriguez,* __ F.2d __ (11th Cir. April 24, 1992) No. 90-5041.

8th Circuit denies acceptance of responsibility to defendant who admitted assault but claimed it was in self-defense. (488) The 8th Circuit rejected defendant's claim that his admission that he assaulted his victim entitled him to a reduction for acceptance of responsibility. Defendant never admitted criminal responsibility, contending he committed the assault in self-defense. He never admitted his guilt or demonstrated sincere remorse for his conduct. Despite the jury's rejection of the self-defense claim, he continued to press it on appeal. *U.S. v. Waloke,* __ F.2d __ (8th Cir. April 27, 1992) No. 91-2493.

9th Circuit denies acceptance of responsibility where defendant's story was "truly incredible." (488)(870) The district court found defendant's version of the facts to the probation officer to be "truly incredible." First, the appellant only admitted to smuggling aliens between January and March of 1990. She also stated that she only became involved because of a favor to a friend and the undercover agents' encouragement. The court found that this contradicted her earlier statements to the agents that she had been involved in alien smuggling for twelve years. Moreover, the district court found it difficult to believe that she could have organized a large load of aliens to transport within twenty-four hours of the agents' first contact with her. The 9th Circuit held that because the sentencing judge is "in a unique position to evaluate a defendant's acceptance of responsibility," her determination is entitled to "great deference." *U.S. v. Martinez-Gonzalez,* __ F.2d __ (9th Cir. April 20, 1992) *amended* May 5, 1992 No. 90-50561.

8th Circuit upholds denial of acceptance of responsibility reduction to defendant who pled guilty. (490) The 8th Circuit affirmed the district court's decision to deny defendant a reduction for acceptance of responsibility. Although defendant pled guilty, stipulated to the facts of his offense and did not deny the offense, he also fled from authorities, attempted to hide an express mail package, and consistently refused to expound on the facts of the offense. *U.S. v. Kloor,* __ F.2d __ (8th Cir. April 23, 1992) No. 91-2312.

5th Circuit denies acceptance of responsibility because defendant received obstruction enhancement for perjury. (492) The 5th Circuit upheld the denial of a reduction for acceptance of responsibility where the defendant also received an enhancement for obstruction of justice based upon his perjury. Application note 4 to section 3E1.1 indicates that conduct resulting in an enhancement for obstruction of justice ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. *U.S. v. Goldfaden,* __ F.2d __ (5th Cir. April 22, 1992) No. 91-1781.

6th Circuit denies acceptance of responsibility where defendant untruthfully testified that he withdrew from conspiracy. (492) Defendant contended that he did not receive an acceptance of responsibility reduction because he decided to testify on his own behalf at trial and stated that he withdrew from the conspiracy. The 6th Circuit upheld the denial of the reduction based upon the district court's determination that defendant had not withdrawn from the conspiracy as he testified. Because it found that defendant had testified untruthfully, the court was warranted in refusing to give him the reduction. *U.S. v. Payne,* __ F.2d __ (6th Cir. May 5, 1992) No. 91-3417.

Criminal History (§4A)

8th Circuit says juvenile sentence of "intensive supervision" was a criminal justice sentence. (500) Guideline section 4A1.1(d) requires an addition of two points to a defendant's criminal history if the defendant committed the instant offense while under any "criminal justice sentence." Defendant was given this increase because at the time of the instant offense he was under "intensive supervision" as a result of a juvenile court adjudication. The 8th Circuit held that the juvenile court's sentence of "intensive supervision" was a criminal justice sentence under section 4A1.1(d). There is nothing in section 4A1.2, which defines the terms in section 4A1.1, to indicate that a juvenile court sentence of "intensive supervision" should not be considered a criminal justice sentence. Defendant did not dispute that the adjudication included a finding of guilt nor that it was to be counted as a criminal justice sentence pursuant to section 4A1.2. *U.S. v. Johnson,* __ F.2d __ (8th Cir. May 1, 1992) No. 91-2500.

6th Circuit holds that detention in a halfway house on revocation of parole constitutes incarceration. (504) Guideline section 4A1.2(e)(1) requires that certain sentences that result in the defendant's incarceration during the 15-year period prior to the instant offense be counted in the defendant's criminal history. While serving a sentence in a halfway house for a separate offense, defendant violated the terms of his parole under a 1971 sentence. As a result of the parole violation, defendant remained at the halfway house beyond his expected release date of July 8, 1980 and was not released until October 24, 1980.

Only the period of July 8 through October 24 fell within the 15-year period in section 4A1.2(e)(1). The 6th Circuit held that defendant's detention in the halfway house after revocation of his parole constituted a sentence of incarceration, and thus the 1971 conviction was properly counted in his criminal history. Section 4A1.2(k) provides that a sentence imposed upon revocation of parole and the original term of imprisonment are to be treated as a single sentence for criminal history purposes. Thus, the sentencing court is required to count an otherwise untimely conviction or sentence where the defendant serves the sentence imposed upon revocation of parole within the time limits set forth in section 4A1.2(e). *U.S. v. Rasco*, __ F.2d __ (6th Cir. May 1, 1992) No. 91-6004.

8th Circuit holds that prior sentence was not suspended or stayed. (504) Defendant argued that the district court improperly added two points to his criminal history for a state court conviction and sentence which had been suspended or stayed. Under sections 4A1.2(a)(3) and 4A1.1(c), a defendant receives a one point reduction for such a sentence. The 8th Circuit ruled that defendant's sentence was not totally suspended or stayed because the record showed that he was sentenced to 90 days imprisonment, fined $150, and remanded to the sheriff to be incarcerated in jail. *U.S. v. Waloke*, __ F.2d __ (8th Cir. April 27, 1992) No. 91-2493.

11th Circuit says court has discretion to permit collateral review of validity of prior conviction. (504) Defendant argued that the district court erred in failing to hold an evidentiary hearing on the constitutional validity of a prior state conviction. The district court believed that it was without authority to collaterally review the validity of the conviction. Following its decision in *U.S. v. Cornog*, 945 F.2d 1504 (11th Cir. 1991), the 11th Circuit reversed. The language of application note 6 and the background commentary to section 4A1.2 as revised November, 1991, demonstrate only that courts must exclude from a defendant's criminal history convictions that have been previously held invalid. The Sentencing Commission did not limit the court's discretion to collaterally review the validity of prior convictions that the defendant had not previously challenged. Because the district court failed to exercise its discretion in denying defendant the requested evidentiary hearing, the case was remanded. *U.S. v. Roman*, __ F.2d __ (11th Cir. May 7, 1992) No. 90-9084.

9th Circuit finds no plain error where defendant's use of aliases when arrested resulted in underrepresented criminal history. (510) The 9th Circuit said that in the case of previous similar arrests in which aliases were used, the extent of upward departure could be measured by the change that would have occurred in the criminal history category because of convictions that would likely have occurred in the absence of the use of aliases. Here the defendant admitted that she had used aliases when arrested to avoid criminal prosecution. The record was unclear whether the district court induced these alien smuggling arrests to improperly increase the criminal history category, or to properly depart upward. However, either way, the sentence would have been the same. Accordingly, the 9th Circuit found no plain error. *U.S. v. Martinez-Gonzalez*, __ F.2d __ (9th Cir. April 20, 1992) *amended* May 5, 1992 No. 90-50561.

Determining the Sentence (Chapter 5)

10th Circuit reverses fine for costs of incarceration where no punitive fine was imposed. (630) The 10th Circuit ruled that the district court erred in imposing a fine for the costs of incarceration and supervised release under guideline section 5E1.2(i) because no punitive fine was imposed. In *U.S. v. Labat*, 915 F.2d 603 (10th Cir. 1990), the court held that an additional fine under section 5E1.2(i) cannot be imposed unless the court first imposes a punitive fine under section 5E1.2(a). *U.S. v. Edmondson*, __ F.2d __ (10th Cir. May 6, 1992) No. 90-3189.

California District Court modifies monetary award while case is on appeal. (630)(850) Defendants were convicted of bank robbery. The district court believed the guideline sentences were too lenient and therefore ordered the defendants to reimburse the government for the cost of their incarceration. While the case was on appeal, the district court granted the parties' request for an explanation and to modify the money damages order to conform to the Guidelines. The district court assumed *arguendo* that the defendants had established their present inability to pay fines, but that they might have the ability to pay fines in the future. Thus, the court set conditions of supervised release that required them to pay a monetary fine or perform community service or both. The failure to satisfy these conditions would be deemed a violation of supervised release. *U.S. v. Bogan*, __ F.Supp. __ (N.D.Cal. April 27, 1992) No. CR-91-551-VRW

10th Circuit says consecutive pre-guidelines and guidelines sentence was not an upward departure. (650) Defendant was convicted of 20 pre-guidelines

counts and five guidelines counts. He was sentenced to concurrent 5-year sentences on each of the pre-guidelines counts, and concurrent 57-month sentences on the guideline counts, consecutive to the pre-guidelines counts. The 10th Circuit rejected defendant's claim that the consecutive sentence constituted an upward departure from the guidelines. Adopting the 4th Circuit's decision in *U.S. v. Waterford*, 894 F.2d 665 (4th Cir. 1990), the court held that a sentencing court has unfettered discretion to impose sentences on the pre-guidelines counts that run consecutively or concurrently. Nothing in the guidelines precludes a court from ordering that a sentence imposed on a pre-guidelines count be served consecutively to a sentence imposed on a guidelines count. The district court could be reversed only if the guidelines sentence was imposed improperly. *U.S. v. Hershberger*, __ F.2d __ (10th Cir. May 6, 1992) No. 90-3150.

1st Circuit rejects further downward departure for single mother of three children. (690)(710)(860) The district court granted the government's motion for a downward departure under section 5K1.1 based on defendant's substantial assistance, and denied defendant's request for a downward departure based upon her family responsibilities as a single mother of small children. Notwithstanding guideline section 5H1.6, defendant argued that the district court could consider her status as a single parent in determining the extent of the departure. According to defendant, once the government moved for departure under section 5K1.1, it opened the door for the court to consider factors unrelated to her assistance to the government in determining the extent of the departure, even if those factors were listed elsewhere as irrelevant in determining the appropriateness of a departure. The 1st Circuit held that even if a court could base the extent of a departure under section 5K1.1 on factors not listed in section 5K1.1, any additional non-listed factors would have to relate to the defendant's substantial assistance to authorities. Moreover, defendant's status as a single mother of three young children was not an unusual family circumstance. The sentencing commission was aware that some convicted felons are single parents of small children. *U.S. v. Chestna*, __ F.2d __ (1st Cir. April 21, 1992) No. 91-1785.

Departures Generally (§5K)

8th Circuit holds that defendant waived objection to 25-year sentence by agreeing that it was minimum statutory sentence. (710)(780)(855) Defendant's plea agreement calculated his sentencing range as 30 years to life on a drug charge plus a five year mandatory penalty for a firearm charge. Defendant acknowledged that a 20 year mandatory minimum penalty applied to the drug charge and the combined minimum was 25 years imprisonment. The government moved for a downward departure under guideline section 5K1.1, and although defendant sought a 15-year sentence, the district court concluded that it lacked authority to depart below the statutory mandatory minimum without a separate motion by the government under 18 U.S.C. section 3553(e). The 8th Circuit held that defendant waived any objection to the 25-year sentence by agreeing it was the minimum sentence mandated by statute, and by accepting the benefit of the plea agreement. Moreover, the district court did not have the authority to depart below the statutory minimum absent a separate motion by the government under 18 U.S.C. section 3553(e). *U.S. v. Durham*, __ F.2d __ (8th Cir. April 29, 1992) No. 91-3311.

1st Circuit rules government was not required to advise court of defendant's cooperation because defendant never requested it. (712)(790) Defendant's plea agreement provided that at the request of defendant, the U.S. Attorney's office would advise any entity or person of defendant's cooperation. The 1st Circuit ruled that the government failure to advise the sentencing court of defendant's cooperation was not a breach of promise because defendant never requested the government to so advise the court. The agreement clearly limited the government's obligation to offer its views about defendant's cooperation to those instances where the defendant made a request. Moreover, even if the government had so advised the court, it would not have changed defendant's sentence. Defendant already received a sentence at the bottom of his guideline range. A sentencing court may not depart downward below the guideline range based upon a defendant's cooperation in the absence of a government motion under section 5K1.1. *U.S. v. Atwood*, __ F.2d __ (1st Cir. May 6, 1992) No. 91-2276.

5th Circuit holds that sentencing disparity does not justify downward departure. (716) The 5th Circuit rejected defendant's claim that the district court failed to consider the need to avoid unwarranted sentence disparities among defendants with similar records who had been found guilty of similar conduct. Although defendant showed that his sentence differed from those of three other defendants convicted of similar crimes, he failed to convince the court that these disparities were unwarranted. Absent a violation of law, an appellate court will uphold a district court's refusal to depart from the guide-

lines. A district court has no duty to consider the sentences imposed on other defendants. *U.S. v. Goldfaden*, __ F.2d __ (5th Cir. April 22, 1992) No. 91-1781.

8th Circuit upholds refusal to depart based upon victim's conduct. (730) Defendant argued that the district court should have departed downward under guideline section 5K2.10, which authorizes a downward departure where the victim's wrongful conduct contributed significantly to the provoking the offense. The 8th Circuit rejected this argument, since the evidence did not establish that the assault victim's misconduct, if there was any, substantially provoked or led to defendant's attack. The district court has broad discretion whether to reduce a sentence under section 5K2.10. *U.S. v. Waloke*, __ F.2d __ (8th Cir. April 27, 1992) No. 91-2493.

Sentencing Hearing (§6A)

11th Circuit rules district court satisfied requirement that it elicit objections after sentence. (750) *U.S. v. Jones*, 899 F.2d 1097 (11th Cir.) *cert. denied*, 111 S.Ct. 275 (1990), requires a district court to elicit fully articulated objections following the sentence to enable the district court to correct potential errors immediately and to sharpen the issues for appeal. Here, in announcing defendant's offense level, criminal history category and applicable guideline range, the judge advised the attorneys "I will hear from you." Defendant's attorney requested that the court sentence defendant at the bottom of the guideline range and asked the judge to consider mitigating circumstances. Defendant then received a sentence at the bottom of the applicable guideline range. The 11th Circuit ruled that this procedure satisfied the Jones requirement. Although the opportunity to raise objections was offered prior to rather than following the imposition of sentence, all relevant sentencing considerations were announced in open court and were known to the parties. The opportunity for objections to be presented, passed on and cured by the district court was adequate to satisfy Jones. *U.S. v. Brokemond*, __ F.2d __ (11th Cir. April 24, 1992) No. 90-9176.

9th Circuit reverses where counsel absent from first presentence interview and probation officer refused to modify report. (760) Defendant failed to disclose fully his three prior convictions to the probation officer at the presentence interview conducted without counsel. The probation officer concluded that the nondisclosure constituted obstruction of justice. Before sentencing, the 9th Circuit filed its opinion in *Herrera-Figueroa*, 918 F.2d 1430 (9th Cir 1990), holding that counsel must be permitted to be present at the presentence interview. The district court ordered another interview with defense counsel present. The probation officer began the second interview by announcing that the original recommendation for an obstruction adjustment would remain, regardless what was said during this interview. Defense counsel terminated the meeting. A second presentence report was not prepared. The probation officer's inflexibility undermined the district court's order for a second interview, rendered meaningless counsel's presence and canceled any effect counsel's advice might have had for the defendant. The sentence was reversed. *U.S. v. Rodriquez-Razo*, __ F.2d __ (9th Cir. May 6, 1992) No. 91-50147.

9th Circuit says court need not give reasons for imposing sentence at top of range where range was only six months. (755) Title 18 U.S.C. section 3553(c) requires the court to state its reasons for imposing a sentence at a particular point within the applicable range if that range exceeds twenty-four months. Here, however, the range was only six months, from twenty-one to twenty-seven months. Accordingly the court found no error. *U.S. v. Martinez-Gonzalez*, __ F.2d __ (9th Cir. April 20, 1992) *amended* May 5, 1992 No. 90-50561.

9th Circuit says reliance on improper sentencing factor is not harmless unless it had no effect on the sentence. (755) The probation officer used information obtained at presentence interview conducted without counsel to conclude that the obstruction adjustment was proper. The probation officer adamantly refused to reconsider the obstruction recommendation, regardless the results of the second interview with counsel present. The sentencing court adopted the probation officer's report and its attendant tainted information. On appeal, the 9th Circuit held that the government failed to carry its burden to demonstrate that the reliance on this improper information had no effect on the sentence selected. Nor were the errors rendered harmless by the district court's compromise sentence, ordering defendant to serve the lowest term in the adjusted range which was the same as the highest term in the non-adjusted range. The sentence was vacated, and the court ordered a new presentence interview with counsel present and a different probation officer. The district court was instructed not to consider the first presentence interview in determining the appropriateness of an obstruction adjustment. *U.S. v. Rodriquez-Razo*, __ F.2d __ (9th Cir. May 6, 1992) No. 91-50147.

9th Circuit holds that government's opposition to PSR provided adequate notice of criminal history departure. (761) In its opposition to the presentence report, the government argued that category II more accurately reflected the appellant's past criminal conduct than the presentence report's recommendation category I. This opposition was filed ten days prior to sentencing. A PSR addendum recommending the increase was filed three days prior to sentencing. The appellant failed to raise any objections in the district court. Accordingly, the 9th Circuit found that the appellant had sufficient notice of the possible departure. *U.S. v. Martinez-Gonzalez*, __ F.2d __ (9th Cir. April 20, 1992) *amended* May 5, 1992 No. 90-50561.

2nd Circuit rules that district judge properly resolved all disputes about presentence report. (765)(855) In a pre-guidelines case, defendant brought a Rule 35 motion to vacate his sentence, claiming that the district court failed to resolve factual disputes. The 2nd Circuit found that the court properly complied with Fed. R. Crim. P. 32(c)(3)(D). Defendant raised only two issues at sentencing and they were fully resolved. However, defendant was entitled to have the presentence report corrected to reflect a more limited time period of his criminal activity, which the government did not oppose. Although defendant challenged other matters in the presentence report, the appellate court refused to consider them since defendant failed to raise them below. *U.S. v. Feigenbaum*, __ F.2d __ (2nd Cir. April 29, 1992) No. 91-1564.

10th Circuit rules that adversary hearing on factual disputes is not mandatory in a sentencing hearing. (765) The 10th Circuit rejected defendant's claim that the district court violated Fed. F. Crim. P. 32(c)(3)(D) by failing to conduct an adversary hearing to resolve certain factual disputes. Rule 32(c)(3)(A), not Rule 32(c)(3)(D), pertained to this issue. Under this Rule, it is discretionary with the court, rather than mandatory, to receive testimony or other information relating to an alleged factual inaccuracy in the presentence report. In this case the court offered defendant the opportunity to present testimony and further information in addition to his written objections to the presentence report, but defendant declined this offer and chose to stand on his written objections. *U.S. v. Hershberger*, __ F.2d __ (10th Cir. May 6, 1992) No. 90-3150.

5th Circuit upholds reliance upon hearsay. (770) The district court imposed an enhancement under section 2Q1.2(b)(1)(A) for a repetitive discharge of hazardous waste. The enhancement was based upon testimony by an EPA agent who observed defendant's illegal dumping activities and conducted interviews with 12 of defendant's drivers. Several of the drivers told the agent that it was accepted company policy to illegally dump hazardous and industrial waste into the sewer system, and that defendant had specifically advised them to dump waste water into the sewers. The district court did not credit defendant's testimony to the contrary because it was inconsistent and conflicted with the agent's testimony and information contained in the presentence report of one of his co-defendant's. The 5th Circuit found that the district court's reliance on the agent's hearsay did not violate defendant's 6th Amendment rights. With respect to the consideration of information in a co-defendant's presentence report, the appellate court noted that when a court intends to rely on information not contained in a defendant's presentence report, Fed. R. Crim. P. 32 requires that defense counsel be given an opportunity to address the court on the issue. *U.S. v. Goldfaden*, __ F.2d __ (5th Cir. April 22, 1992) No. 91-1781.

10th Circuit reaffirms that confrontation clause analysis does not apply to sentencing hearing. (770) The 10th Circuit, declining to following the 8th and 6th Circuits, reaffirmed that it did not believe that constitutional provisions regarding the confrontation clause are required to be applied during sentencing proceedings. To hold otherwise would be contrary to the wording of the guidelines and its commentary, and would be an unwarranted and unnecessary burden on the trial court. Reliable hearsay evidence may be used during the sentencing phase without the right of confrontation and cross-examination. *U.S. v. Hershberger*, __ F.2d __ (10th Cir. May 6, 1992) No. 90-3150.

Plea Agreements (§6B)

1st Circuit upholds its jurisdiction to review whether government breached plea agreement. (790)(860) Defendant argued that the government breached the terms of his plea agreement when it failed to advise the sentencing court of the nature and extent of his cooperation. Had the government done so, the sentencing court might have departed downward. The 1st Circuit upheld its jurisdiction to consider this issue. This was not an appeal of a district court's failure to depart, but rather a claim that the government breached a material term of defendant's plea agreement. An appellate court has jurisdiction, on direct review, to consider an appeal that seeks to determine whether the government satisfactorily complied with the terms of a plea bargain. *U.S. v.*

Atwood, __ F.2d __ (1st Cir. May 6, 1992) No. 91-2276.

5th Circuit rules that government breached its promise to make no sentencing recommendation. (790)(855) Defendant contended for the first time on appeal that the government's submission of four memoranda to the probation officer advocating the use of different guideline sections violated its promise to "make no recommendation" as to his sentence. The 5th Circuit held that a prosecutor's breach of a plea agreement can amount to plain error, thus making the issue reviewable even though defendant failed to raise the issue below. In this case, the government did breach its promise. To the extent that the government merely corrected factual misstatements in defendant's presentence report, its conduct was permissible. However, the government did more than that, suggesting a base offense level, advocating a ten level enhancement, arguing for a specific minimum offense level, and recommending an upward departure. Even though the comments referred to guideline levels rather than months or years, this did not alter the fact that the government suggested a term of imprisonment for defendant. Unlike general descriptions of a defendant's culpability or cooperation, "suggestions" or "positions" on the applicability of certain guidelines, enhancements, and departures translate directly into a range of numerical figures representing lengths of prison stay. *U.S. v. Goldfaden*, __ F.2d __ (5th Cir. April 22, 1992) No. 91-1781.

Violations of Probation and Supervised Release (Chapter 7)

8th Circuit holds that probationer who possesses controlled substance must receive sentence of at least 1/3 of original term of probation. (800) Defendant's original guideline range was zero to six months and he was sentenced to two years' probation. After defendant was found to have possessed a controlled substance, the district court revoked defendant's probation and imposed an eight month sentence. The 8th Circuit affirmed. 18 U.S.C. section 3565(a)(2) states that upon violation of a condition of probation, a district court has discretion to revoke probation and sentence the violator to a term of imprisonment within the guideline range applicable at the time of the initial sentencing. However, as part of the Anti-Drug Abuse Act of 1988, the last sentence of section 3565(a) was amended to state that where the probationer violates the conditions of his probation by possessing a controlled substance, a court must revoke the probation and sentence the violator to at least 1/3 of "the original sentence." Agreeing with the 9th Circuit, the 8th Circuit held that the term "original sentence" referred to the original term of probation and not the guideline range of imprisonment applicable at the time of the initial sentencing. Thus, defendant's eight-month sentence, although exceeding his original guideline range, was proper. *U.S. v. Byrkett*, __ F.2d __ (8th Cir. April 24, 1992) No. 91-3808.

4th Circuit holds that district court may not reimpose, after revoking, a term of supervised release. (800) The 4th Circuit, following the 9th and 5th Circuits, held that under 18 U.S.C. section 3583(e), after revoking a term of supervised release, a district court has no authority to impose a new term of supervised release but may only order incarceration. The court found it significant that the list of sentencing options in section 3583(e) is written in the disjunctive, authorizing a court to modify a term of supervised release or revoke the term of supervised release and impose imprisonment. Because the statute is unambiguous, it was improper to rely, as the 10th Circuit did, on other interpretative aids such as legislative intent. The court agreed that more flexible sentencing options would better serve the public, but found that it must await congressional action in the matter. *U.S. v. Cooper*, __ F.2d __ (4th Cir. April 24, 1992) No. 91-5455.

7th Circuit rules that district court exercised its discretion in revoking probation and imposing three year term of imprisonment. (800) In a pre-guidelines case, defendant was sentenced to five years probation for two mail fraud convictions. She subsequently pled guilty to a state charges for writing a bad check. The district court revoked defendant's probation and imposed two concurrent three-year terms of imprisonment. The 7th Circuit rejected defendant's argument that the district court abused its discretion by failing to consider the mitigating evidence she offered at the sentencing hearing. The court found that her employer's testimony established that defendant was not dumb, which made the resulting probation violation even more aggravating. This was not a case where the district court failed to exercise any discretion at all. When initially sentencing defendant to probation, the judge warned her that further offenses would result in imprisonment. He was entitled to carry through. Judge Pell dissented. *U.S. v. Barnett*, __ F.2d __ (7th Cir. April 22, 1992) No. 91-2309.

Appeal of Sentence (18 U.S.C. §3742)

9th Circuit holds that failure to object to departure in the district court limits appellate review to "plain error." (855) The 9th Circuit held that because the appellant failed to raise the issue of the departure in her criminal history category in the district court, the court's decision is reviewed only for "plain error." The court found no plain error. *U.S. v. Martinez-Gonzalez*, __ F.2d __ (9th Cir. April 20, 1992) *amended* May 5, 1992 No. 90-50561.

11th Circuit rules defendant waived acceptance of responsibility challenge by failing to raise it below. (855) The presentence report recommended that defendant not receive a reduction for acceptance of responsibility. Defendant did not file an objection to the sentencing report and did not object at sentencing when no reduction was given. Consequently, the 11th Circuit held that defendant was precluded from raising the issue of his acceptance of responsibility on appeal. *U.S. v. Brokemond*, __ F.2d __ (11th Cir. April 24, 1992) No. 90-9176.

8th Circuit reviews adjustment even though sentence would be within new guideline range. (865) The government contended that the district court's refusal to grant a reduction for acceptance of responsibility was not reviewable on appeal because defendant's sentence would still be within the guideline range that would be applicable if defendant received the reduction. Defendant received a 21 month sentence, and if he had received the acceptance of responsibility reduction his guideline range would have been 15 to 21 months. The 8th Circuit found the issue was appealable because there was no certainty that the trial judge would have imposed the same sentence if defendant had received the reduction. *U.S. v. Kloor*, __ F.2d __ (8th Cir. April 23, 1992) No. 91-2312.

1st Circuit holds that denial of evidentiary hearing on a sentencing guideline issue is reviewable only for abuse of discretion. (870) The 1st Circuit held that a district court's denial of an evidentiary hearing on a sentencing guideline issue is reviewable only for clear error. *U.S. v. Shattuck*, __ F.2d __ (1st Cir. April 22, 1992) No. 91-1833.

11th Circuit reviews acceptance of responsibility determination under clearly erroneous standard. (870) The 11th Circuit held that a district court's determination of whether a defendant has accepted responsibility is a finding of fact which is entitled to great deference on appeal, and will be affirmed unless clearly erroneous. However, the district court's application of the sentencing guidelines is reviewed de novo. *U.S. v. Rodriguez*, __ F.2d __ (11th Cir. April 24, 1992) No. 90-5041.

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

11th Circuit holds that prisoner whose presumptive parole date has passed must still exhaust administrative remedies prior to habeas corpus action. (880) In a pre-guidelines case, petitioner brought a habeas corpus action because his presumptive parole date set by the U.S. Parole Commission had passed and he remained incarcerated. The 11th Circuit found that even though the presumptive release date had passed, petitioner was still required to exhaust his administrative remedies before seeking relief from the district court. The Bureau of Prisons has established regulations that set forth the procedures that a prisoner must follow before seeking relief from the district court. Exhaustion of administrative remedies is jurisdictional. *Gonzalez v. U.S.*, __ F.2d __ (11th Cir. April 27, 1992) No. 91-5738.

Forfeiture Cases

6th Circuit holds that DEA's adoption of state police officer's seizure of funds did not retroactively cloak officer with federal authority at time of seizure. (900) Defendant, an Ohio State Highway Patrol Officer (OSHP) seized $12,000 from a vehicle during a routine traffic stop. Pursuant to OSHP regulations, the money was eventually delivered to the DEA, and the DEA then "adopted" the seizure for the purpose of initiating federal forfeiture proceedings. After the occupants of the vehicle moved in state court for the return of the seized funds, the state court ordered the OSHP to deposit the funds with the court. After OSHP failed to meet the state court deadline, defendant was held in contempt of court. A federal district court then denied defendant's motion under 28 U.S.C. section 1442(a)(1) to remove the action to federal court. Section 1442(a)(1) authorizes the removal to federal court of any criminal prosecution brought in state court against "any officer of the United States or any agency thereof, or any person acting under him, for any act under color of such office . . ." The 6th Circuit affirmed, holding that the DEA's adoption of the seizure did not act to retroactively cloak defendant with federal authority at the time of the seizure. The federal statute which authorizes seizures and forfeitures, 21 U.S.C. section 881(d), applies only to officers, agents and other persons designated by the Attorney General. While DEA agents certainly possess this authority, state patrol,

officers do not. Defendant also was not acting at the direction of the DEA. He seized the money during a routine traffic stop. Pursuant to OSHP regulations, he turned the money over to the OSHP's liaison officer with the DEA. Only then was the money delivered to the DEA. At all times defendant was acting as a state patrol officer, acting within the dictates of that position. *Miami County Municipal Court v. Wright,* __ F.2d __ (6th Cir. May 8, 1992) No. 91-3615.

11th Circuit holds that failure to respond to requests for admissions in civil forfeiture action established that claimant used the property to facilitate drug transactions. **(920)** Claimant was convicted of drug charges in state court based in part upon wiretap evidence which the state court refused to suppress. In a subsequent federal civil forfeiture action brought against property owned by claimant, the government moved for summary judgment after claimant failed to respond to the government's requests for admissions. Claimant contended that the district court could not entertain the government's motion until it held a hearing regarding the wiretap evidence. The district court granted summary judgment because (a) claimant did not challenge the facts the government presented, and (b) claimant was collaterally estopped from raising the lawfulness of the wiretap. The state supreme court then granted certiorari to consider the state court's resolution of the suppression issue. The 11th Circuit upheld the summary judgment in the forfeiture action, finding that the state court's resolution of the wiretap issue was not necessary. Claimant's failure to respond to the government's requests for admissions conclusively established that he had used the property to facilitate drug transactions. Fed. R. Civ. P. 36 expressly provides that requests for admissions are automatically deemed admitted if not answered within 30 days and the matters therein are "conclusively established" unless the court permits withdrawal or amendment of the admissions. Even if the wiretap was invalid, the summary judgment would stand, since the order was not based on the "fruit" of any "poisonous tree" but rather on defendant's own admissions. *U.S. v. 2204 Barbara Lane,* __ F.2d __ (11th Cir. May 4, 1992) No. 91-8639.

5th Circuit refuses to intervene in administrative forfeiture process to compel return of non-pornographic materials. **(940)** After various pornographic materials were seized from defendant, defendant challenged the government's failure to return certain other items of property including non-pornographic photographs of his children and family. The 5th Circuit refused to invoke its mandamus power to compel the district court to order the immediate return of those items. The government was in the process of administratively forfeiting the non-contraband materials, and the remaining property would be returned to defendant at the conclusion of that process. An intervention into the administrative process would be premature. *U.S. v. Schmeltzer,* __ F.2d __ (5th Cir. April 23, 1992) No. 91-8338.

Amended Opinion

(590) *Fassler v. U.S. Parole Comm,* 950 F.2d 583 (9th Cir. 1991) *amended,* ___ F.2d ___, 92 D.A.R. 6021 (9th Cir. May 5, 1992) No. 90-50561.

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

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COMMISSION SENDS 1992 AMENDMENTS TO CONGRESS. This newsletter summarizes the most important amendments the Sentencing Commission sent to Congress on May 1, 1992. The amendments become effective on November 1, 1992 unless Congress acts before that time. The amendments will be published in the Federal Register by May 1, 1992.

Pre-Guideline Sentencing, Generally

2nd Circuit rules lengthy pre-guidelines sentence was not based on bias against defendant. (100) In this pre-guidelines case, the 2nd Circuit rejected defendant's claim that the sentencing judge imposed a lengthy sentence out of personal spite and in retaliation for defendant's assertion of certain statutory rights. The judge reasonably indulged defendant's assertion of rights under the tax code and the Federal Rules of Evidence. While the record was replete with evidence that defendant was contentious, the judge's response to defendant's behavior never rose to a level where his impartiality could be questioned. The judge could not be faulted for "frankly chastising" the defendant for his conduct. Defendant was shown at trial to be a fraud and a liar. The 2nd Circuit said that the sentence, and the court's admonitions in imposing it, serve the important function of deterring like conduct. *U.S. v. Droge*, __ F.2d __ (2nd Cir. April 7, 1992) No. 91-1222.

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9th Circuit says preguideline appeal is limited to challenging unreliable information. (100) The 9th Circuit noted that in a preguideline case, the defendant cannot appeal the sentence imposed. "His only ground for appeal is the court's alleged abuse of discretion in resolving the controverted matters in the presentence report." The defendant bears the burden of first showing that "the disputed information is . . . false or unreliable." Here, the joint plea memorandum was a full admission by the defendant of participation in a conspiracy to smuggle a large quantity of marijuana into the U.S. The court did not abuse its discretion in so finding. *U.S. v. Kimball,* __ F.2d __ (9th Cir. April 27, 1992) No. 91-10207.

Guideline Sentencing, Generally

4th Circuit rules mandate precluded court from considering new downward departure on remand. (115)(850) The 4th Circuit originally remanded this case because the court failed to made adequate factual findings to support its enhancement for use of a firearm during a drug trafficking offense. At resentencing, defendant asked the district court to depart downward for mitigating and rehabilitative conduct since the original sentencing. The 4th Circuit held that its limited mandate and Fed. R. Crim. P. 35 precluded the district court from considering these new grounds for departure. Under Rule 35, a sentencing court may correct a sentence that is determined on appeal to be an incorrect application of the guidelines. The remand instructions concerned only the propriety of an enhancement for weapon possession. To the extent defendant's sentence was incorrect, it was only with respect to this enhancement. Moreover, revised Rule 35 no longer permits a court to reduce a sentence except under certain specified instances. *U.S. v. Apple,* __ F.2d __ (4th Cir. April 21, 1992) No. 91-5329.

D.C. Circuit finds resentencing to same sentence after successful appeal was not vindictive. (120) Defendant, the former Mayor of the District of Columbia, originally received a two level enhancement for obstruction of justice, resulting in a guideline range of two to eight months. Citing defendant's rehabilitative efforts, the judge imposed a six month sentence. The case was remanded by the D.C. Circuit for reconsideration of the obstruction of justice enhancement. At resentencing, the court found the obstruction enhancement improper. This resulted in a guideline range of zero to six months. The judge imposed the same six month sentence, finding that the maximum guideline sentence was justified by defendant's position as Mayor and his attempted obstruction of justice. On appeal, the D.C. Circuit found no vindictivness. The judge did not ignore defendant's rehabilitative efforts, but found that although they warranted a reduction in sentence from eight months to six, the other aggravating factors precluded a further reduction. *U.S. v. Barry,* __ F.2d __ (D.C. Cir. April 17, 1992) No. 91-3258.

2nd Circuit affirms official victim enhancement for defendant convicted of assaulting a federal officer. (125)(210)(410) Defendant was convicted of assaulting federal officers in violation of 18 U.S.C. section 111 and was sentenced under U.S.S.G. 2A2.2. The 2nd Circuit rejected defendant's argument that an official victim enhancement under section 3A1.2 was impermissible double counting, even though the offense of conviction required the government to prove that defendant assaulted a government official. First, the guideline, unlike the statute, required the defendant to know he was assaulting an official victim. Thus, the guideline enhances for an additional factor that will not be present in every conviction under section 111. Second, the guidelines clearly contemplate an official victim adjustment under section 2A2.2. Application note 1 to section 2A2.4 instructs the court not to apply the enhancement unless subsection (c) requires the offense level to be determined under section 2A2.2. Here, defendant's offense level

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was determined under section 2A2.2. *U.S. v. Padilla*, __ F.2d __ (2nd Cir. April 6, 1992) No. 91-1501.

Iowa District Court rules that guidelines are "laws" for ex post facto purposes. (130) Re-evaluating its earlier position, the Justice Department authorized its attorneys to ask the Iowa District Court to follow 18 U.S.C. 3553(a)(4), which requires the sentencing judge to apply the guidelines "in effect on the date the defendant is sentenced." The government, joined by the Sentencing Commission as amicus, argued that the guidelines were not "laws" and therefore they were not subject to the ex post facto clause. The District Court rejected these arguments, ruling that under the Supreme Court's analysis in *Miller v. Florida*, 482 U.S. 423 (1987), the guidelines are "laws," to which the ex post facto clause applies. Accordingly, the defendant, who pled guilty to being a felon in possession of a firearm, was sentenced under the guidelines in effect at the time of the offense, rather than those in effect when she was sentenced. *U.S. v. Bell*, __ F.Supp. __ (N.D. Iowa, March 30, 1992) No. CR 91-2016.

2nd Circuit permits district court to determine whether to apply amendments adopted during appeal. (131)(170) After defendant was sentenced and while his appeal was pending, the commentary to section 1B1.3 was amended to provide that conduct "associated with" a prior sentence should *not* be considered relevant conduct. This amendment would have reduced the quantity of drugs for which defendant was held accountable. The 2nd Circuit remanded for the district court to determine whether it had the authority to apply the amendment retroactively, and if it did, whether it wished to exercise its discretion to do so. In 18 U.S.C. section 3582(c)(2), Congress conferred authority on a sentencing court to reduce the term of imprisonment for a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission. By authorizing, but not requiring, sentencing courts to reduce sentences in light of guideline revisions, Congress expressed a preference for discretionary district court action in response to amendments, rather than for mandatory appellate court application of all post-sentence amendments to pending appeals. *U.S. v. Colon*, __ F.2d __ (2nd Cir. April 6, 1992) No. 91-1360.

Commission adopts new section 1B1.11 stating that guideline in effect at date of sentencing governs. (131) Title 18 U.S.C. section 3553 requires the court to apply the guideline in effect at the time of sentencing. Nevertheless, to avoid ex post facto concerns, the Commission, in a proposed amendment effective November 1, 1992, adopted a new policy statement, section 1B1.11. That section provides that the court should use the guidelines manual in effect on the date of sentencing unless the court determines that this would violate the ex post facto clause, in which case the court should use the guideline manual in effect on the date the offense was committed.

8th Circuit affirms that defendant did not withdraw from conspiracy prior to guidelines' effective date. (132) The 8th Circuit upheld the application of the guidelines to a defendant convicted of drug conspiracy, ruling that defendant did not prove that he withdrew from the conspiracy prior to the guidelines' effective date. Moreover, the government presented evidence showing defendant's involvement in the conspiracy after the guidelines' effective date. On November 1, 1987, defendant called the co-conspirator's sister and asked when the co-conspirator would be returning from California. Since California was the source of the conspiracy's cocaine, and the co-conspirator did return from California with cocaine, it was reasonable to assume that the telephone call was in furtherance of the conspiracy. In addition, testimony by another conspirator linked defendant to the conspiracy as late as October, 1988. *U.S. v. Granados*, __ F.2d __ (8th Cir. April 15, 1992) No. 90-3012.

10th Circuit rules defendant did not withdraw from conspiracy prior to effective date of amended guidelines. (132) The 10th Circuit found sufficient evidence that defendant was part of a drug conspiracy after November 1, 1989, the date the offense level for conspiracy was increased. In 1988, a co-conspirator told an undercover agent that his source of methamphetamine was in California and that he sometimes received as much as two pounds from California. A package sent to the co-conspirator in August, 1990 contained one pound of methamphetamine and had been mailed from California. In addition, the items seized from the co-conspirator in 1990 were the same items used by the co-conspirator in 1988 in defendant's presence to conceal, package and distribute methamphetamine. This evidence was sufficient for the district court to conclude that the conspiracy continued until August, 1990. *U.S. v. Russell*, __ F.2d __ (10th Cir. April 21, 1992) No. 91-7020.

10th Circuit applies guidelines in effect when conspiracy ended rather than when it began. (132)(380) The offense level specified in the 1988

guidelines was four levels lower than the offense level effective November 1, 1989. The 10th Circuit upheld the district court's decision to apply the 1989 guidelines, which were in effect when the conspiracy ended, rather than the 1988 guidelines, which were in effect when the conspiracy began. There is no violation of the ex post facto clause in applying the guidelines in effect at the time of the last act of the conspiracy. *U.S. v. Stanberry*, __ F.2d __ (10th Cir. April 21, 1992) No. 91-7021.

9th Circuit upholds referral for federal prosecution despite harsher sentence. (135) Relying on *U.S. v. Williams*, 746 F.Supp. 1076 (D. Utah 1990), defendant argued that his due process rights were violated when the task force referred his case for federal rather than state prosecution without the benefit of a neutral, written policy governing such referrals. The 9th Circuit rejected the argument, noting that *Williams* had been rejected by the 10th Circuit in *U.S. v. Andersen*, 940 F.2d 593 (10th Cir. 1991). The court agreed with the 10th Circuit that unless a defendant can prove that federal prosecutors act as "rubber stamps" for charging decisions made by the task force, there is no due process violation, "even where the motive for federal prosecution is that harsher sentences are possible." *U.S. v. Nance*, __ F.2d __, 92 D.A.R. 5145 (9th Cir. April 16, 1992) No. 91-30193.

10th Circuit upholds sentencing where local police referred the case to federal prosecutors. (135) The 10th Circuit rejected defend-ant's contention that he should have been sentenced under state law because his arrest, the search of his house, and the subsequent investigation were carried out by local law enforcement authorities. Regardless of what authorities perform the arrest, search or investigation, the ultimate decision whether to charge a defendant, and what charges to file, rests solely with state and federal prosecutors. The court rejected defendant's claim that this case did not involve the exercise of prosecutorial discretion because local police, rather than the local prosecutor, referred the case to federal officers. Absent convincing evidence to the contrary, the court would not assume that prosecutors were acting as rubber stamps for charging decisions made by the police. *U.S. v. Kay*, __ F.2d __ (10th Cir. April 17, 1992) No. 91-4060.

10th Circuit rejects 8th Amendment challenge to disparate sentences where defendant failed to supply details of record. (140)(716) Defendant contended that the vast disparity between his 380-month sentence and the 60-month that his co-conspirator received constituted an 8th Amendment violation. The 10th Circuit rejected this contention because defendant failed to designate a record which would have enabled the court to evaluate the appropriateness of his sentence. Disparate sentences are allowed where the disparity is explained by the facts on the record. The court had virtually no information regarding the sentencing of the co-conspirator, including the charges contained in his indictment, his criminal history, or the sentencing court's assessment of his cooperation or acceptance of responsibility. *U.S. v. Abreu*, __ F.2d __ (10th Cir. April 13, 1992) No. 89-4145.

Application Principles, Generally (Chapter 1)

8th Circuit affirms more than minimal planning enhancement for offense involving "simple book entry." (160)(300) In order to disguise the fact that defendant's bank was violating a bank regulator's order by loaning $40,000 to a related company, defendant falsely entered in the bank records that the $40,000 payment was to purchase furniture and fixtures from the company. The 8th Circuit affirmed enhancements for the $40,000 loss under 2F1.1(b)(1)(E), for more than minimal planning under 2F1.1(b)(2)(A), for abuse of trust under section 3B1.1. Although the court was concerned about the more than minimal planning enhancement for an offense which was committed by a "simple book entry," the district court's findings were not clearly erroneous. *U.S. v. Pooler*, __ F.2d __ (8th Cir. April 15, 1992) No. 91-3035.

Commission amends relevant conduct section to clarify that not all conduct is relevant. (170) In a proposed amendment effective November 1, 1992, the Commission extensively modified section 1B1.3, the "relevant conduct" section. The Commission stated that the "jointly undertaken criminal activity" is not necessarily the same as the scope of the entire conspiracy, and hence "relevant conduct is not necessarily the same for every participant." The Commission included numerous illustrations of conduct for which as defendant is or is not accountable. For example, a girlfriend who participates in her boyfriend's drug trafficking activity on only one occasion is not accountable for the other drug sales made by her boyfriend "because those sales were not in furtherance of her jointly undertaken criminal activity."

9th Circuit reverses drug amounts in relevant conduct for lack of finding of reasonable foreseeability. (170)(275)(765) Under the "relevant conduct" section, 1B1.3(a)(2), a defendant is responsible

for amounts of drugs that he could have "reasonably foreseen" in furtherance of a joint agreement. Here, there was nothing in the presentence report to indicate that defendant aided and abetted any drug sales before June 28, 1990 or was a member of a conspiracy prior to that date. The district court apparently thought that relevant conduct should include the amounts in all of the counts of the indictment. Since the court made no factual findings as to defendant's involvement in the distribution of cocaine prior to June 28, 1990, the sentence was reversed and the case was remanded for express findings. *U.S. v. Chavez-Gutierrez*, __ F.2d __ (9th Cir. April 24, 1992) No. 91-30025.

Commission says dismissed counts in plea agreement are not excluded from relevant conduct. (175)(270)(718)(780) In a proposed amendment effective November 1, 1992, the Commission amended section 6B1.2(a) to state that "a plea agreement that includes the dismissal of a charge or a plea agreement not to pursue a potential charge shall not preclude the conduct underlying such charge from being considered under the provisions of section 1B1.3 (relevant conduct) in connection with the count(s) of which the defendant is convicted." This amendment appears to disapprove the 9th Circuit's contrary opinion in *U.S. v. Fine*, 946 F.2d 659 (9th Cir. 1991).

8th Circuit upholds use of information contained in co-defendant's cooperation agreement. (185)(770) The 8th Circuit rejected the contention that in sentencing defendant it was improper for the district court to rely upon statements his co-defendant made to the government in the co-defendant's cooperation agreement. Although defendant's agreement with the government provided that the government could not use defendant's statements against him in certain circumstances, nothing in the agreement or the 5th Amendment prevented the government from using a co-defendant's statements against him. Moreover, the consideration of such information did not change defendant's offense level and therefore any error was harmless. *U.S. v. Summerfield*, __ F.2d __ (8th Cir. April 13, 1992) No. 91-2386.

Commission amends 1B1.8 to authorize use of cooperation information to depart downward. (185)(710) In a proposed amendment effective November 1, 1992, the Commission amended U.S.S.G. section 1B1.8 to provide that information obtained during a cooperation agreement may be considered in determining whether to depart downward from the guidelines pursuant to a government motion for substantial assistance under section 5K1.1.

Offense Conduct, Generally (Chapter 2)

2nd Circuit applies assault guideline rather than obstructing officers guideline. (210) For attempting to hit three DEA agents with a van, defendant was convicted of assaulting federal officers in violation of 18 U.S.C. section 111. The 2nd Circuit rejected defendant's contention that the district court should have sentenced him under 2A2.4, for obstructing or impeding officers, rather than section 2A2.2, for aggravated assault. Even though the indictment did not allege that defendant intended to injure the agents, there was no question that the underlying conduct fit the definition of aggravated assault. The court distinguished *U.S. v. McCall*, 915 F.2d 811 (2nd Cir. 1990), which held that the guideline must be selected only on the conduct charged in the indictment rather than a defendant's relevant conduct. A cross-reference in section 2A2.4(c) states that if a defendant is convicted under 18 U.S.C. section 111 and the conduct constitutes aggravated assault, section 2A2.2 applies. The word "conduct" refers to a defendant's actual conduct, not the conduct charged in the indictment. *U.S. v. Padilla*, __ F.2d __ (2nd Cir. April 6, 1992) No. 91-1501.

6th Circuit upholds equating one marijuana plant to one kilogram of marijuana. (242) Defendants claimed that 21 U.S.C. section 841(b)(1)(A)(vii) and guideline section 2D1.1(c) violate due process because in offenses involving 50 or more marijuana plants, they equate one marijuana plant to one kilogram of marijuana, even though marijuana plants are not capable of producing one kilogram of marijuana. The 6th Circuit rejected the challenge, since the purpose of this provision was not to declare that mature marijuana plants would yield an average of one kilogram of marijuana, but to state that a person who grows 1000 marijuana plants is as culpable as a person who harvests over 1000 kilograms of marijuana. The court also rejected defendants' equal protection challenge to the provision's enhanced penalties for offenses involving 50 or more plants. The 50-plant cutoff is simply a legislative judgment that individuals cultivating 50 or more plants are likely to be major drug dealers and hence, a bigger threat to society than those who grow fewer marijuana plants. *U.S. v. Holmes*, __ F.2d __ (6th Cir. April 13, 1992) No. 91-3735.

8th Circuit affirms basing sentence on the number of marijuana plants. (242) The 8th Circuit upheld the constitutionality of 21 U.S.C. section

841(b)(1)(A)(vii) and guideline section 2D1.1(c), which provide for sentencing based on the number of plants (if 50 or more) rather than the weight of the plants or the amount of net marketable proceeds. Congress intended to account for the heightened culpability of growers because of their primacy in the distribution chain, rather than to punish them based on the predictable yield of their plants. *U.S. v. Smith,* __ F.2d __ (8th Cir. April 20, 1992) No. 91-3466.

5th Circuit holds that 2-1/2 year old drug trafficking charge was not part of instant offense for mandatory minimum sentencing purposes. (245) (275) Defendant was convicted of drug charges after smuggling cocaine on an aircraft. Under 21 U.S.C. section 960(b)(1), the mandatory minimum sentence of 10 years is doubled if a defendant has a prior drug trafficking conviction. The 5th Circuit rejected defendant's claim that her 1988 Kansas conviction for conspiracy to sell cocaine and her present conviction were all one episode of an ongoing conspiracy. The time between the two crimes was more than 2-1/2 years, the statutory offenses charged were completely different, and the offenses took place in geographically distant locations. *U.S. v. De Veal,* __ F.2d __ (5th Cir. April 15, 1992) No. 91-3786.

7th Circuit adds different types of drugs for defendant who possessed but did not sell them. (250) Defendant argued that the district court erred in adding together the amounts of cocaine and marijuana a drug dealer sold or stored in defendant's home. She claimed that since application note 10 to section 2D1.1 uses examples of defendants convicted of selling different types of drugs, adding different types of drugs is proper only for sales and not for possession. The 7th Circuit rejected this argument. Application note 6 to section 2D1.1 provides that where there are "multiple transactions or multiples drug types," the quantities are to be added. There is no distinction between sales and possession. The sentencing commission's use of examples of drug sales to illustrate how the addition of different drugs works did not change the clear language of application note 6. *U.S. v. Trussel,* __ F.2d __ (7th Cir. April 14, 1992) No. 91-1220.

8th Circuit upholds use of precursor chemicals to calculate methamphetamine quantity. (252) The 8th Circuit held that the district court correctly approximated the amount of methamphetamine defendant's laboratory could have produced using the quantity of precursor chemicals and the size of the laboratory. A DEA chemist who inspected the lab testified that defendant could have produced 400 grams of methamphetamine using the precursor chemicals that were present. The presentence report determined that defendants had sufficient chemicals to produce 226.8 grams, and this was the figure used by the district court. The DEA chemist also testified that defendants had a valid recipe to "cook" methamphetamine. The fact that one of the necessary precursor chemicals was missing did not change the analysis. An approximation does not require that every precursor chemical be present. *U.S. v. Beshore,* __ F.2d __ (8th Cir. April 20, 1992) No. 91-2434.

2nd Circuit affirms estimation of drug quantity based on defendant's admissions. (254) The 2nd Circuit held that the evidence was sufficient to establish the quantity of heroin defendant sold in uncharged sales. Defendant admitted to the probation officer that he had sold 80 glassine envelopes every two or three days for a few years to support his drug and alcohol addictions. The judge found that defendant had engaged in these heroin sales over at least a two-year period. He adopted a conservative 300-day period and estimated sales during that period at a rate of 80 glassine envelopes every three days. The judge then multiplied the resulting 8,000 bags by .05 grams, to arrive at 400 grams. This was corroborated by the quantities of heroin that defendant sold to undercover officers and possessed at the time of his arrest. Defendant sold 60 glassine envelopes of heroin to undercover officers over a four-day period, and was arrested one week later in possession of 89 additional envelopes. All of these envelopes contained approximately .05 grams of heroin. *U.S. v. Colon,* __ F.2d __ (2nd Cir. April 6, 1992) No. 91-1360.

Commission amends 2D1.8 to reduce sentence for person who merely allows use of the premises. (260) In a proposed amendment effective November 1, 1992, the Commission amended section 2D1.8 to provide that if the defendant "had no participation in the underlying controlled substance offense other than allowing use of the premises, the offense level shall be four levels less than the offense level from section 2D1.1 applicable to the underlying controlled substance offense, but not greater than level 16."

1st Circuit affirms that negotiated quantity was five kilograms. (265) An undercover agent sought to purchase five kilograms of cocaine from defendant's co-conspirator. The co-conspirator initially stated that he had access to five kilograms but would not release them all at once. He then offered to sell the agent two kilograms. When the agent refused, the co-conspirator set up a meeting with the agent. At this meeting, the co-conspirator stated that his supplier

was coming with five kilograms. Defendant attended a subsequent meeting, after which the agents were shown one kilogram. When asked where the other four kilograms were, the agents were told they would not be available until the next day. The 1st Circuit affirmed that the object of the conspiracy was five kilograms of cocaine, and that defendant properly received a base offense level of 32 under section 2D1.1 and 2D1.4. *U.S. v. McCarthy*, __ F.2d __ (1st Cir. April 15, 1992) No. 91-1617.

2nd Circuit affirms including two kilograms under negotiation despite contrary stipulation. (265) (795) The government stipulated that between 2 and 3.4 kilograms of cocaine were involved. The stipulation further stated that two additional kilograms were under negotiation and paid for when defendant was arrested. The district court added the two kilograms to the stipulated quantity, and found defendant accountable for over five kilograms of cocaine. The 2nd Circuit affirmed. The commentary to guideline section 6B1.4 states that a stipulation must fully and accurately disclose all factors relevant to a determination of sentence. The inaccurate statement here did not prejudice defendant, however. The agreement did not purport to guarantee a sentencing range based on 2 to 3.4 kilograms. Before accepting the plea, the judge took great pains to inform defendant that it would not be bound by the stipulation. The judge was thus free, and in fact obligated, to consider the additional two kilograms under negotiation when defendant was arrested. *U.S. v. Telesco*, __ F.2d __ (2nd Cir. April 20, 1992) No. 91-1566.

2nd Circuit upholds consideration of uncharged sales and cocaine possessed by supplier. (270) The 2nd Circuit upheld the attribution to defendant of between 500 and 2000 grams of cocaine, even though defendant sold only 5-1/2 ounces of cocaine to an undercover agent. It was proper to consider sales defendant made prior to the undercover agent's contact with defendant. Defendant admitted to the agent that he sold approximately 2 ounces a week, and a confidential informant stated that he saw 8 to 10 ounces of cocaine in defendant's possession before the investigation began. It was also proper to attribute to defendant 6 additional ounces found in his apartment and on his supplier's person when he and the supplier were arrested. Finally, the court could consider defendant's promises to supply the agent with greater quantities of cocaine in the future. The court reasonably inferred that such promises were more than just "puffing." *U.S. v. Deaulieau*, __ F.2d __ (2nd Cir. March 5, 1992) No. 91-1290.

10th Circuit upholds consideration of uncharged drugs in offense level. (270) The 10th Circuit upheld the district court's determination that defendant brought into Utah in excess of five kilograms of cocaine to sell or distribute. A sentencing court may look beyond the charges alleged in the indictment in imposing a sentence, and here the trial testimony adequately supported the court's determination. *U.S. v. Abreu*, __ F.2d __ (10th Cir. April 13, 1992) No. 89-4145.

8th Circuit affirms that co-conspirator's sale of five to 15 kilograms of cocaine was foreseeable. (275) The 8th Circuit affirmed that it was reasonably foreseeable to defendant that his co-conspirator would distribute between 5 and 15 kilograms of cocaine. Defendant admitted to participating in the conspiracy, was aware of the nature and scope of the conspiracy, and knowingly joined in the overall common scheme. The facts of the case established that a "close working relationship" existed among the conspirators. *U.S. v. Granados*, __ F.2d __ (8th Cir. April 15, 1992) No. 90-3012.

4th Circuit upholds firearm enhancement for weapon found in apartment. (284) The 4th Circuit upheld an enhancement under 2D1.1(b)(1) for a firearm in defendant's apartment. An undercover agent purchased and arranged for the distribution of narcotics at meetings held in the apartment. A loaded .32 caliber handgun was found in open view during a subsequent search of the apartment. The court rejected defendant's claim that enhancement was improper because there was no evidence linking the gun to the conspiracy. Possession of the weapon during the commission of the offense is all that is needed to support the enhancement. The evidence here showed that the apartment was used as a base of operations for the conspiracy. *U.S. v. Apple*, __ F.2d __ (4th Cir. April 21, 1992) No. 91-5329.

8th Circuit affirms firearm enhancement for defendant who threatened co-conspirator with a gun. (284) The 8th Circuit affirmed that defendant possessed a gun during a drug conspiracy. The presentence report indicated that defendant threatened to shoot a co-conspirator's foot off if he did not pay a drug debt, even though the coconspirator later denied this. Moreover, defendant himself admitted that he owned a nine-millimeter semi-automatic handgun and collected guns during the conspiracy. He stated that, on one occasion when the co-conspirator came to his house to purchase cocaine, he noticed defendant's gun collection. The mere presence and ready availability of a firearm where drugs are dealt constitutes the use of a gun during a narcotics offense.

U.S. v. Granados, __ F.2d __ (8th Cir. April 15, 1992) No. 90-3012.

10th Circuit, en banc, holds that 924(c) firearms enhancement is proper only if second offense took place after previous firearms conviction. (330) Title 18 U.S.C. section 924(c) provides for a five year sentence for carrying a firearm during certain felonies. In the case of any "second or subsequent conviction" under this section, the penalty is increased to 20 years. The 10th Circuit, *en banc*, held that a defendant may not receive an enhanced sentence under section 924(c) for a second or subsequent conviction unless the offense underlying this conviction took place after a judgment of conviction had been entered on the prior offense. The court acknowledged that its decision was at odds with the decisions of most other circuits, but found that a statute designed to punish a second offender more severely when he has not learned from the penalty imposed for his prior offense should not be construed to apply before that penalty has had the chance to have the desired effect on the offender. Judges Brorby, Tacha and Baldock dissented. *U.S. v. Abreu*, __ F.2d __ (10th Cir. April 13, 1992) No. 89-4145 (*en banc*).

10th Circuit upholds multiple section 924(c) sentences related to separate crimes but part of single episode. (330) Defendant was convicted of one count of possession with intent to distribute cocaine, one count of conspiracy to possess cocaine with intent to distribute, and two counts for use of a firearm during a drug trafficking crime. He argued that it was error to charge and sentence him separately when all the counts arose from the same criminal episode. The 10th Circuit rejected this contention, holding that the possession and conspiracy charges were separate offenses, each requiring an element the other does not. Therefore they were separate "drug trafficking crimes" within the meaning of section 924(c). Two consecutive sentences under section 924(c) may be applied where a defendant has been convicted of two drug trafficking offenses which arise out of the same criminal episode or operative facts and where a different gun is paired with each drug trafficking offense. *U.S. v. Abreu*, __ F.2d __ (10th Cir. April 13, 1992) No. 89-4145.

Commission amends immigration guideline to delete prior convictions and add levels for number of aliens. (340) In a proposed amendment effective November 1, 1992, the Commission amended section 2L1.1 to delete the increase in offense level for prior convictions. The Commission also provided for increases in offense levels depending on the number of aliens smuggled, and the number of false documents or passports involved in other immigration cases.

Commission amends environmental guidelines to define "pecuniary gain." (355) In a proposed amendment effective November 1, 1992, the Commission amended section 2Q2.1 by deleting "involved a commercial purposes" and inserting "(A) was committed for pecuniary gain or otherwise involved a commercial purpose; or (B) involved a pattern of similar violations." A new application note defines the phrase "pecuniary gain."

7th Circuit holds that tax loss should be based on tax deficiency and not value of hidden assets. (370) For the years 1975 through 1981 the IRS assessed deficiencies in income tax of over $7 million against defendant and her husband based on millions of dollars they fraudulently diverted for their own use. During an enforcement action, defendant misrepresented to the IRS that she had no assets when in fact, she possessed $77,000 worth of jewelry and property. Defendant was found guilty of making a false statement to the IRS concerning her assets and of income tax evasion. The 7th Circuit affirmed that the "tax loss" under guideline sections 2R1.1 and 2T1.3 should be based on the previously assessed tax deficiency of $7 million, rather than the $77,000. Defendant could not dispute that the attempted evasion of taxes for 1975 through 1981 was part of the same course of conduct and therefore relevant conduct in this case. *U.S. v. Brimberry*, __ F.2d __ (7th Cir. April 17, 1992) No. 90-3754.

Adjustments (Chapter 3)

Commission amends application note to state that bank teller is not a vulnerable victim. (410) In a proposed amendment effective November 1, 1992, the Commission amended application note 1 to section 3A1.1 to state that "a bank teller is not an unusually vulnerable victim solely by virtue of the teller's position in a bank."

2nd Circuit affirms that supplier held leadership role over drug distributor. (431) The 2nd Circuit affirmed that defendant was the organizer of a conspiracy to sell cocaine to an undercover agent, even though defendant never sold cocaine directly to the agent. Defendant was the supplier for a distributor who sold cocaine to the agent. At one point the agent was unable to purchase cocaine from the distributor because defendant chose to sell the cocaine to other buyers instead. The amount of cocaine available for sale to the agent directly depended on the timing of

defendant's trips to New York. Defendant set the price for the cocaine sold to the agent. Defendant approved alternate arrangements when the agent refused to "front" the distributor the money for a large purchase. Defendant was responsible for weighing and packaging the cocaine, including those packages sold to the undercover agent. *U.S. v. Deaulieau*, __ F.2d __ (2nd Cir. March 5, 1992) No. 91-1290.

8th Circuit affirms that defendant was leader of stolen book ring. (431) The 8th Circuit affirmed the district court's determination that defendant led and organized an organization which stole $5 million worth of books over a 15-year period from over 150 institutions throughout the United States. The offense involved five or more participants and was an "otherwise extensive" criminal activity. Although defendant usually stole the books himself, two others participated in the thefts on a few occasions. These participants also guarded the house where the books were kept and helped defendant move the books over state lines. Others helped transport the books interstate. Another participant received several shipments of stolen books, and two co-defendants helped move the stolen books from Minnesota to Iowa. *U.S. v. Blumberg*, __ F.2d __ (8th Cir. April 13, 1992) No. 91-2794.

8th Circuit rules district court stated adequate basis for leadership enhancement. (431) The 8th Circuit rejected defendant's contention that the district court failed to adequately state the factual and legal bases for its imposition of a leadership enhancement under section 3B1.1. After both parties argued the role in the offense issue at sentencing, the court asked the prosecutor to identify the participants and to specifically address their criminal responsibility for defendant's offense. The prosecution named six persons and described their involvement, and defense counsel responded. The court then summarily found defendant was the leader of criminal activity that involved at least five other participants and the activity was otherwise extensive. Although the court did not explain its reasoning, it was clear that the court adopted the prosecutor's explanation. *U.S. v. Blumberg*, __ F.2d __ (8th Cir. April 13, 1992) No. 91-2794.

7th Circuit rejects minimal role for defendant who allowed drug dealer to use her home to store marijuana. (445) The 7th Circuit rejected defendant's claim that she should have received a three or four level reduction under guideline section 3B1.2 for being either a minimal or between a minor and minimal participant in a drug conspiracy. Defendant knowingly allowed a drug dealer to use her home to store marijuana and cocaine and to conduct at least one drug sale. On four or five other occasions, defendant sold cocaine from her home for the dealer. *U.S. v. Trussel*, __ F.2d __ (7th Cir. April 14, 1992) No. 91-1220.

1st Circuit affirms that defendant used special skill to rob ATM. (450) The 1st Circuit affirmed the district court's determination that as a trained service repairman for certain types of ATMs, defendant possessed and used a special skill to rob an ATM. There could have been no robbery unless defendant knew how to cause a malfunction that would bring ATM service people to the machine, thus enabling defendant to enter the ATM. Once inside he used his special skill to see to it that the alarms were deactivated. Once this was done, he used his knowledge of ATMs to locate and obtain the money. Defendant's work on other ATMs from this bank gave him inside knowledge of when a large cash haul would be likely. Moreover, in addition to his training, defendant held an alarm license and was licensed as an electrician. *U.S. v. Aubin*, __ F.2d __ (1st Cir. April 15, 1992) No. 91-1870.

9th Circuit holds that would-be counterfeiter had no special skill. (450) The 9th Circuit agreed with the 5th Circuit that a pre-existing skill in printing does not facilitate the crime of photographing federal reserve notes. The defendant was not a professional photographer, nor did the record indicate that he possessed any greater photography skills than most individuals. "The fact that the negatives seized from him were allegedly skillfully produced does not support imposition of the special skill enhancement." Accordingly, defendant's sentence was vacated and the case was remanded for resentencing. *U.S. v. Green*, __ F.2d __ (9th Cir. April 24, 1992) No. 91-50325.

11th Circuit upholds abuse of trust enhancement for postal clerk. (450) Defendant was employed as a post office window clerk. Each clerk was assigned an automated Integrated Retail Terminal (IRT) disk, which replaced manual accounting. Defendant reported that his disk was malfunctioning, and he was issued a second disk. He then was able to use his first disk, which was still operable, to issue receipts which did not appear on the accounting form generated by the computer. The 11th Circuit affirmed that defendant occupied a position of trust, under section 3B1.3. He was subject to an audit only every four months. He had specialized knowledge and unsupervised access to the IRT. This infrequent monitoring, combined with his access to the computer system and the additional disk, indicated that signifi-

cantly more trust was given him than to an ordinary bank teller. *U.S. v. Milligan*, __ F.2d __ (11th Cir. April 16, 1992) No. 91-8092.

Pennsylvania District Court applies abuse of trust adjustment to Western Union tellers. (450) Two Western Union tellers were among 12 indicted for conspiracy. Before the tellers joined the credit card fraud conspiracy, it was difficult for the other conspirators to obtain credit card information. When the tellers joined, the other defendants no longer had to go through the tedious effort of obtaining credit card numbers and false identifications. The district court found that, unlike cases involving ordinary bank tellers, this conspiracy was almost impossible to audit. Thus, although Application Note 1 to section 3B1.3 says that the adjustment for abuse of trust would not apply to an ordinary bank teller, the district court found the adjustment applicable here. *U.S. v. Craddock*, __ F.Supp. __ (E.D. Pa. March 24, 1992) No. 91-00424-10.

Commission amends "reckless flight" commentary to permit departures for risk of bodily injury to more than one person. (460) In a proposed amendment effective November 1, 1992, the Commission amended the Commentary to section 3C1.2 to add an application note 5 stating that "[i]f death or bodily injury results or the conduct posed a substantial risk of death or bodily injury to more than one person, an upward departure may be warranted."

1st Circuit affirms that flight prior to sentencing constituted obstruction of justice under 1989 guidelines. (461) The 1st Circuit held that flight after conviction but prior to sentencing constituted obstruction of justice under the 1989 version of the guidelines. There was no merit to defendant's contention that he lacked notice that his flight would cause an adjustment under section 3C1.1. Failing to appear at a sentencing hearing and disappearing for six months clearly impedes the administration of justice. Defendant was fully aware that he was delaying his sentencing by fleeing. *U.S. v. McCarthy*, __ F.2d __ (1st Cir. April 15, 1992) No. 91-1617.

6th Circuit remands for court to explain reasons for five level increase for obstruction of justice. (462) The presentence report recommended a base offense level of 12 plus two points for obstruction of justice, i.e., level 14. The government, however, sought an increase to level 17 based on three separate acts of obstruction. The district court, without stating its reasons, set the offense level at 17. The 6th Circuit remanded with directions for the court to clarify its rationale. In addition, it asked the district court to reconsider whether it should impose more than two obstruction of justice points in any one case. The court noted that it had been unable to find any authority to support the aggregation of points simply because the defendant committed more than one act of obstruction in a single case. *Fields v. U.S.*, __ F.2d __ (6th Cir. April 22, 1992) No. 91-3939.

Commission increases acceptance of responsibility adjustment to three levels in certain cases. (480) In a proposed amendment effective November 1, 1992, the Commission amended section 3E1.1 to provide an additional reduction of one level for certain defendants whose acceptance of responsibility includes assistance to the government in the investigation of prosecution of their own misconduct. The new reduction applies only to a defendant whose offense level is level 16 or greater who has timely provided information concerning his own involvement, or timely notified authorities of his intention to enter a guilty plea thereby permitting the government to avoid preparing for trial. In addition, the amendment replaces the term "offense and related conduct," with the term "offense."

7th Circuit upholds denial of acceptance of responsibility reduction for attempt to withdraw guilty plea. (490) The 7th Circuit upheld the district court's denial of an acceptance of responsibility reduction based upon defendant's attempt to withdraw his guilty plea and his refusal to admit the extent of his involvement in the conspiracy. The court's consideration of his motion to withdraw his guilty plea did not penalize defendant for insisting on his right to trial. The district court found that defendant's attempt to withdraw his plea was nothing more than "prevarication" and an attempt to "manipulate" and "whipsaw" the court. It was rational to conclude that someone who does this has not accepted responsibility for his offense. Moreover, the judge found that defendant was not candid about his involvement in the conspiracy for which he was convicted. *U.S. v. Trussel*, __ F.2d __ (7th Cir. April 14, 1992) No. 91-1220.

D.C. Circuit denies credit for acceptance of responsibility despite willingness to plead guilty to misdemeanors. (490) Defendant was charged with various felony and misdemeanor drug counts, and was convicted by a jury of only one misdemeanor. He contended that he should have received an acceptance of responsibility reduction because he was willing to plead guilty to four misdemeanor drug possession counts before trial. The D.C. Circuit found that while this was relevant, it was not sufficient to

justify the reduction. A defendant who enters a guilty plea is not entitled to a reduction as a matter of right. The district court had ample reason to conclude that defendant had not accepted personal responsibility. Defendant, the former Mayor of Washington, D.C., stated to the press that being a poor role model was not a crime, that the worst government witnesses could say was that he used cocaine, and that he had not robbed or shot anybody. Moreover, following his conviction, defendant denied to his probation officer that he committed the offense of conviction. *U.S. v. Barry*, __ F.2d __ (D.C. Cir. April 17, 1992) No. 91-3258.

Criminal History (§4A)

8th Circuit rules that burglary which occurred prior to conspiracy was not part of offense. (500) Defendant argued that it was improper to include in his criminal history a 1973 burglary conviction because the burglary was part of the same course of conduct as the instant offense. The 8th Circuit rejected the argument because the burglary occurred before the conduct in the indictment, targeted a different victim and involved a different accomplice. The 1973 burglary involved defendant's removal of doorknobs and stained glass windows from an empty dwelling in Minneapolis. The instant conspiracy and transportation counts related to stained glass window hangings stolen from a natural food store and musical equipment stolen from a rock band. The indictment charged the conspiracy began in January, 1990 and that the thefts and transportation occurred in 1990. *U.S. v. Blumberg*, __ F.2d __ (8th Cir. April 13, 1992) No. 91-2794.

2nd Circuit reverses consideration of juvenile burglary which had been sealed. (504) The 2nd Circuit ruled that the district court improperly considered defendant's prior burglary conviction which had been sealed pursuant to a Vermont juvenile statute. Under that statute, after a file is sealed, the proceedings in the matter are considered never to have occurred, all index references to the matter are to be deleted, and law enforcement officials are to reply to any inquiry that no record exists. Thus, the process of sealing is intended to wholly eliminate any trace of the past proceedings, and but for a clerical error, neither the probation officer nor the court would have learned of defendant's conviction. Guideline section 4A1.2(j) expressly excludes from the calculation of a defendant's criminal history a sentence for an expunged conviction. In view of the intent of the legislature to wholly erase defendant's prior conviction from Vermont's criminal records, the Vermont conviction should be deemed expunged. *U.S. v. Deaulieau*, __ F.2d __ (2nd Cir. March 5, 1992) No. 91-1290.

2nd Circuit holds that concurrent sentences at the same time does not mean cases were consolidated. (504) The 2nd Circuit held that the imposition of concurrent sentences at the same time by the same judge did not establish that the cases were "consolidated for sentencing" and were therefore "related" under guideline section 4A1.2(a)(2). There must be a close factual relationship between the underlying convictions. This ensures that only truly related cases will be treated as such. There was not a close factual relationship between the two offenses here. The offenses, which involved separate criminal acts, were committed approximately three months apart, were separated by an intervening arrest, and were not part of a single plan. Where, as here, the only arguable link was that the defendant directed his violence at the same family, no close factual relationship exists. *U.S. v. Lopez*, __ F.2d __ (2nd Cir. April 13, 1992) No. 91-1561.

8th Circuit holds that juvenile misdemeanor under California law was adult felony for career offender purposes. (504)(520) Defendant argued that his California robbery conviction should not have counted as a predicate offense for career offender purposes because the offense was a misdemeanor under California law. The 8th Circuit ruled that the offense was a felony under federal law because it was punishable by a term of imprisonment of more than one year. Application note 3 to section 4B1.2 defines "prior felony conviction" as a "prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed." The fact that defendant was sentenced as a juvenile to the California Youth Authority did not mean the offense was not an "adult" conviction. Since defendant committed the California offense when he was 19, the conviction was an adult conviction. *U.S. v. Baker*, __ F.2d __ (8th Cir. April 21, 1992) No. 90-3098.

10th Circuit upholds consideration of conviction which occurred after the instant offense. (504) The 10th Circuit rejected defendant's contention that it was improper to include in his criminal history a conviction which occurred after the commission of the instant offense. In *U.S. v. Fortenbury*, 917 F.2d 477 (10th Cir. 1990) the court held that subsequent criminal conduct occurring before sentencing for an earlier offense is a permissible basis for departing upward by criminal history category. Moreover, be-

cause defendant failed to designate the record on sentencing, the court could not evaluate the district court's consideration of defendant's criminal history in further detail. *U.S. v. Abreu*, __ F.2d __ (10th Cir. April 13, 1992) No. 89-4145.

Commission amends criminal history guideline to explain how to depart. (508) In a proposed amendment effective November 1, 1992, the Commission amended section 4A1.3 to state that in departing upward from category history VI, "the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in history category VI until it finds a guideline range appropriate to the case." The Commission added that "[t]his provision is not symmetrical." "The lower limit of the range for criminal history category I is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for criminal history category I on the basis of the adequacy of criminal history cannot be appropriate."

3rd Circuit says upward departure from criminal history category VI is appropriate only in extraordinary circumstances. (510) The district court departed upward from criminal history category VI, the highest criminal history category, based upon on various circumstances. The 3rd Circuit, in considering what circumstances would justify an upward departure from this highest level, noted that the 2nd Circuit has interpreted guideline section 4A1.3 to only permit a departure beyond category VI in "extraordinary circumstances." Defendant's criminal record, amounting to 15 criminal history points, was not significantly more serious than that of most defendants in his criminal history category. Therefore, an upward departure beyond category VI was presumptively unjustified, unless there existed circumstances not adequately taken into consideration by the sentencing commission. *U.S. v. Thomas*, __ F.2d __ (3rd Cir. April 21, 1992) No. 91-5719.

6th Circuit upholds upward departure from criminal history category III to category VI. (510) The 6th Circuit upheld a departure from criminal history III to category VI based upon defendant's likelihood of recidivism, his history of drug abuse, the fact that he committed the instant offenses while out on bond on a state court indictment for drug law violations, the fact that he committed some of the charged offenses three days after he was released after arrest for the other charged offenses, and his history of violent crime. Defendant's claim that he should have only received one point under section 4A1.1(c) for a sentence of probation misunderstood the basis of the departure. The court relied on section 4A1.3, adequacy of criminal history category, and not section 4A1.1. Fields v. U.S., __ F.2d __ (6th Cir. April 22, 1992) No. 91-3939.

3rd Circuit rejects upward departure based upon juvenile crimes not specified in section 4A1.2(d). (514) The district court departed upward in part because no points were added for two burglaries defendant committed as a juvenile. The 3rd Circuit, following the D.C. Circuit's opinion in *U.S. v. Samuels*, 938 F.2d 210 (D.C. Cir. 1991), held that a court may not depart upward based on juvenile crimes not specified in section 4A1.2(d). Under section 4A1.2(d), only three types of juvenile convictions can be considered in the calculation of a defendant's criminal history. The guidelines specifically allow upward departures based on foreign offenses, tribal offenses, and expunged convictions, all of which are not counted, but no provision is made for uncountable juvenile convictions. However, a departure would be appropriate if the juvenile convictions were for conduct similar to the instant offense. To the extent the 7th Circuit's recent decision in *U.S. v. Gammon*, __ F.2d __ (7th Cir. March 9, 1992) approves departures based on nonsimilar juvenile convictions, the 3rd Circuit disagreed with the decision. *U.S. v. Thomas*, __ F.2d __ (3rd Cir. April 21, 1992) No. 91-5719.

3rd Circuit says criminal history category did not underrepresent likelihood of recidivism. (514) The district court departed upward from criminal history category VI based in part on defendant's likelihood of recidivism. The 3rd Circuit rejected this as a ground for departure. Defendant's previous sentences did not resemble any of the examples set forth in the guidelines as situations where a departure might be justified: there was no evidence that defendant's previous adult convictions were lightly punished, or so similar to the instant offense as to justify an upward departure, and his 15 criminal history points did not greatly exceed the 13 point minimum for criminal history category VI. The court did not state why it concluded that defendant's 15 criminal history points significantly underrepresented the likelihood of recidivism. *U.S. v. Thomas*, __ F.2d __ (3rd Cir. April 21, 1992) No. 91-5719.

3rd Circuit rejects parole revocation as basis for upward departure. (514) The district court departed upward in part because defendant had his parole revoked on at least two occasions. The 3rd Circuit rejected this as a ground for departure, ruling that the sentencing commission adequately provided for parole revocation in the calculation of criminal history

points. Note 11 to guideline section 4A1.2 specifies that the original sentence and the sentence imposed after probation is revoked are counted as if they were one sentence. By this approach, no more than three points will be assessed for a single conviction, even if probation was subsequently revoked. The presentence report assessed three points for both of defendant's sentences in which parole was revoked. The appellate court did state that an upward departure based upon parole revocation might be justified in some circumstances, such as where a defendant has a long history of violating parole. *U.S. v. Thomas*, __ F.2d __ (3rd Cir. April 21, 1992) No. 91-5719.

2nd Circuit prohibits examining underlying facts to determine whether offense is crime of violence. **(520)** Defendant contended that his third degree state burglary conviction should not be considered a crime of violence for career offender purposes because no actual violence was involved. The 2nd Circuit held that it was improper to consider the facts underlying a prior offense when that offense has been designated a crime of violence by the guidelines. The sentencing commission has determined that certain crimes, regardless of the precise conduct, are inherently violent. For purposes of determining career offender status, there is no such thing as a non-violent kidnapping or a non-violent burglary of a dwelling. *U.S. v. Telesco*, __ F.2d __ (2nd Cir. April 20, 1992) No. 91-1566.

6th Circuit reverses determination that two state felony convictions were invalid. **(520)** The district court held that defendant was not a career offender, finding that his two prior state convictions were invalid because his guilty pleas were not taken in compliance with Tennessee law under *State v. Mackey*, 553 S.W.2d 337 (Tenn. 1977). In *Mackey*, the Tennessee Supreme Court mandated a litany of advice to the defendant before a court could accept a guilty plea. However, in a later case, the Tennessee Supreme Court recognized that the *Mackey* procedure was based on both the constitution and the supervisory power of the Tennessee Supreme Court. It said that omissions of state requirements, as opposed to consitutional requirements, may be reviewed only on direct appeal and may not be the basis of post-conviction relief. The 6th Circuit found that because defendant did not raise objections to the alleged *Mackey* non-constitutional violations on direct appeal, his convictions were not invalid under state law. The court then found no federal constitutional violations. Therefore, defendant should have been sentenced as a career offender. *U.S. v. McGlockin*, __ F.2d __ (6th Cir. April 20, 1992) No. 91-6121.

9th Circuit holds that two burglaries in a two-week period were "consolidated for sentencing" for career offender purposes. **(520)** Defendant was classified as a career offender because he had been involved as an 18-year-old in two burglaries within a two week period. The two cases had been transferred to the same court for sentencing and a state judge sentenced defendant to identical, concurrent sentences for the two crimes, although no formal order of consolidation was entered. The 9th Circuit reversed defendant's career offender sentence, holding that the two prior burglaries should have been counted as a single offense under the Commentary to U.S.S.G. section 4A1.2 because they were "consolidated for sentencing." The court noted that the case on which the district court relied, *U.S. v. Gross*, 897 F.2d 414 (9th Cir. 1990), had been overruled by *U.S. v. Anderson*, 942 F.2d 606, 614 N.5 (9th Cir. 1991) (*en banc*). *U.S. v. Chapnick*, __ F.2d __ (9th Cir. April 29, 1992) No. 91-50194.

Commission reaffirms that possession of a firearm by a felon is not a "crime of violence." **(520)** In a proposed amendment effective November 1, 1992, the Commission ratified its previous amendment to the commentary to section 4B1.2, reaffirming that "the term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon." The court noted, however, that if the instant offense is the unlawful possession of a firearm by a felon, section 2K2.1 "provides an increase in offense level if the defendant has one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. section 924(e), section 4B1.4 (armed career criminal) will apply."

Determining the Sentence (Chapter 5)

Commission reduces two offense levels and designates four zones in sentencing table. **(550)** In a proposed amendment effective November 1, 1992, the Commission amended the sentencing table for criminal history category I to reduce offense level 7 from 1-7 to 0-6 months, and level 8 from 2-8 to 0-6 months. In addition, the Commission designated four zones: zone A contains all ranges having a minimum of 0 months; zone B, a minimum of at least 1 but not more than 6 months; zone C a minimum of 8, 9, or 10 months, and zone D, all guideline ranges having a minimum of twelve months or more.

5th Circuit holds that occupational restriction on supervised release was not an upward departure requiring advance notice. (580) Defendant was forbidden from working in the car sales business during his period of supervised release. The 5th Circuit rejected his contention that this occupational restriction constituted an upward departure from the guidelines and thus required advance notice prior to sentencing. Section 5F1.5 authorizes an occupational restriction as a special condition of supervised release. The restriction here was not an upward departure because it fell within the range of sentencing conditions available to the court under the guidelines. Moreover, it would not be in the interest of justice to extend the notice requirement to cases where the term of confinement was not at stake. Judge Jolly dissented, believing that notice was required because an occupational restriction is a significant deprivation of a liberty interest. *U.S. v. Mills*, __ F.2d __ (5th Cir. April 14, 1992) No. 91-1841.

5th Circuit upholds prohibition against working in car sales but strikes down requirement to sell dealership. (580) Defendant was a used car salesman who pled guilty to turning back odometers on 12 cars he sold, and to reporting false sales prices for state sales tax purposes. The district court prohibited defendant from working in the car sales business during his period of supervised release, and ordered him to close and sell his car dealership. The 5th Circuit upheld the employment restriction as a valid condition of supervised release, but struck down as overbroad the provision requiring sale of the business. Defendant's occupation as a car dealer obviously bore a direct relationship to his offense of tampering with odometers. However, guideline section 5F1.1 limits the scope of the occupational restriction to the minimum reasonably necessary to protect the public. It would be sufficient to ban defendant from all personal participation in the operation of this or any other car business during the term of supervised release. *U.S. v. Mills*, __ F.2d __ (5th Cir. April 14, 1992) No. 91-1841.

9th Circuit holds that Parole Commission did not retroactively forfeit street time after term expired. (590) Defendant argued that the Parole Commission improperly extended his special parole term by retroactively forfeiting street time after his "term" expired. The 9th Circuit held that his term had not expired. Therefore regulations implementing 21 U.S.C. section 841(c) (which permit reopening to deduct street time erroneously credited) were properly applied to defendant's case. The court rejected the defendant's arguments that the commission should be "estopped" from reopening his case, that it violated due process, and that it acted contrary to the commission's own regulations. *McQuerry v. U.S. Parole Commission*, __ F.2d __, (9th Cir. April 13, 1992) No. 91-55536.

8th Circuit denies credit for time spent under pretrial house arrest. (600) The 8th Circuit held that defendant was not entitled to credit for time he spent under pretrial house arrest. House arrest restrictions placed on a defendant as a condition of pretrial release do not constitute official detention within the meaning of 18 U.S.C. section 3585(b). Moreover, under the recent Supreme Court decision in *U.S. v. Wilson*, 112 S.Ct __ (March 24, 1992) No. 91-1745, the Attorney General, rather than the district court must determine credit for pretrial confinement. *U.S. v. Blumberg*, __ F.2d __ (8th Cir. April 13, 1992) No. 91-2794.

8th Circuit remands because district court failed to find whether defendant had the ability to pay $20,000 fine. (630) The 8th Circuit remanded because the district court failed to make specific findings as to defendant's ability to pay a $20,000 fine. Defendant graduated from high school and attended vocational school but never finished. He was self-employed for a time as a auto mechanic, and had previously worked as a machine operator, bus boy and paper boy. The presentence report indicated that defendant owned a house, but his equity in that house was unknown. No other assets were specifically listed in the presentence report nor was any independent evaluation of defendant's assets ever introduced at sentencing. It is an incorrect application of the guidelines to impose a fine that defendant has little chance of paying. A determination that the defendant has sufficient assets to pay a fine must be based on more than a statement to that effect in the presentence report. *U.S. v. Granados*, __ F.2d __ (8th Cir. April 15, 1992) No. 90-3012.

9th Circuit upholds cumulative sentences for attempted drug possession and related firearm offense. (650) Defendant conceded that it was clear that Congress intended to impose cumulative punishments for substantive drug offenses and related firearms offenses. However, he maintained that there was no evidence that Congress intended to punish cumulatively for an *attempt* offense and a related firearm offense. The 9th Circuit found no basis for this distinction, noting that it was "singularly unlikely that Congress intended to authorize cumulative punishment in the case of one but not the other." *U.S. v. Smith*, __ F.2d __ (9th Cir. April 24, 1992) No. 89-10649.

9th Circuit holds that court has discretion to impose concurrent terms for offenses committed while in custody. (650) U.S.S.G. 5G1.3(a) requires a consecutive sentence for an offense committed while the defendant is serving a term of imprisonment. Nevertheless, since 18 U.S.C. section 3584(a) permits sentences to be imposed concurrently or consecutively, the 9th Circuit in *U.S. v. Wills*, 881 F.2d 823, 826 (9th Cir. 1989) held that the district court retains discretion to order a concurrent term. The 9th Circuit held that this means that the court has discretion to depart, and impose concurrent sentences, provided the departure is in harmony with the guidelines. Since the court here recognized its ability to depart, but declined to do so, the sentence was not reviewable. *U.S. v. Lail*, __ F.2d __ (9th Cir. April 29 1992) No. 91-10226.

Commission rejects "youthful lack of guidance" as a basis for departure. (690)(715)(736) In a proposed amendment effective November 1, 1992, the Commission added a new section 5H1.12 stating that "lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds for imposing a sentence outside the applicable guideline range." This amendment appears to disapprove the 9th Circuit's contrary decision in *U.S. v. Floyd*, 945 F.2d 1096 (9th Cir. 1991).

Departures Generally (§5K)

2nd Circuit holds court was not required at plea hearing to give notice of its intent to depart upward. (700)(761)(780) The 2nd Circuit held that the district court was not required to advise defendant, prior to accepting his guilty plea, that it intended to depart upward from the guidelines. Fed. R. Crim. P. 11 required the court to advise defendant of the maximum sentence he faced and to advise him generally about the guidelines. Of course, before departing upward from the guidelines, the court was required to give defendant notice and an opportunity to be heard. But the district court satisfied both of these obligations. At the plea hearing, the court informed defendant of the minimum and maximum sentences provided by statute, advised him that the guideline sentencing range was unclear and that even after the range was determined the court had the authority in some circumstances to impose a more severe sentence, and that if a more severe sentence were imposed, defendant would still be bound by the plea. One month prior to sentencing, the court advised both sides in writing that it was considering whether an upward departure might be appropriate in light of the drug quantity involved. No more was necessary. *U.S. v. Rodriguez*, __ F.2d __ (2nd Cir. April 13, 1992).

3rd Circuit rejects upward departure designed to compensate for decision not to charge defendant with more serious offense. (715) Defendant pled guilty to four counts of making false statements in connection with the acquisition of firearms in return for the government's agreement not to charge defendant with the more serious crime of possession of a firearm by a felon. The false statement convictions resulted in a guideline range of 24 to 30 months. The government argued that the district court's departure to a 60 month sentence was justified by the fact that defendant could have been charged with the firearm possession charge, which would have resulted in a mandatory 15 year sentence. The 3rd Circuit held that it was error to depart upward to compensate for the government's decision not to charge defendant with a more serious crime. An upward departure in offense level may not be based upon uncharged crimes. Fairness dictates that the government not be allowed to bring the firearm possession crime through the "back door" in the sentencing phase, when it had previously chosen not to bring it through the "front door" in the charging phase. *U.S. v. Thomas*, __ F.2d __ (3rd Cir. April 21, 1992) No. 91-5719.

8th Circuit upholds refusal to depart based upon extraordinary rehabilitation but notes that government motion is not required. (715)(860) The district court denied defendant's request for a downward departure based upon her rehabilitation, finding that the circumstances did not warrant a downward departure. However, the court also expressed its view that it could not depart in the absence of a government motion. The 8th Circuit affirmed, since it lacked authority to review a sentencing court's exercise of its discretion to refrain from departing downward. However, it noted that contrary to the judge's view, a sentencing judge may depart downward without a government motion in unusual circumstances such as extraordinary restitution. *U.S. v. Condelee*, __ F.2d __ (8th Cir. April 15, 1992) No. 91-2032.

2nd Circuit rejects ineffective assistance of counsel claim based upon failure to request downward departure. (716)(736) The 2nd Circuit rejected defendant's claim that he had received ineffective assistance of counsel because of his attorney's failure to request a downward departure based upon the fact that his wife was expecting twins and the smaller sentence his co-defendant received. Family ties and responsibilities are not ordinarily relevant in deter-

mining whether to depart downward. The fact that a co-participant in the offense received a lower sentence is not a basis for a downward departure. *U.S. v. Javino,* __ F.2d __ (2nd Cir. April 6, 1992) No. 91-1490.

8th Circuit rejects disparate sentence of co-conspirator as grounds for resentencing. (716) The 8th Circuit found no error in the district court's imposition of two sentences that were much higher than the one imposed upon a co-conspirator. A sentence is not disproportionate just because its exceeds a co-defendant's sentence. Disparity will always exist so long as sentences are based upon the specific facts of each individual defendant's case. A court is not obliged to consider the sentence of a co-defendant when imposing a sentence on a defendant. Here, the defendants who challenged their sentences were either organizers or significant participants in the drug conspiracy, and had substantial criminal histories. In contrast, the co-defendant was a "mule" or "runner" who withdrew from the conspiracy prior to its end. Thus, the disparity properly reflected the defendant's individual criminal histories and degrees of involvement in the conspiracy. *U.S. v. Granados,* __ F.2d __ (8th Cir. April 15, 1992) No. 90-3012.

9th Circuit holds that absence of evidence of continued criminality constitutes a finding of "aberrant conduct." (719) Defendant had no criminal history and was convicted of one isolated criminal act. The district judge refused to depart downward stating that even if aberrant behavior was a permissible basis for departure, it could find no facts in this case to warrant a departure. On appeal, the 9th Circuit reversed, holding that "the *absence* of evidence of continued criminality constitutes a finding of aberrancy." There was no evidence that defendant was a regular participant in an ongoing criminal enterprise or that he had been convicted of unrelated illegal acts. The "district court erred in thinking that additional findings were necessary to give it the authority to depart down." *U.S. v. Morales,* __ F.2d __ (9th Cir. April 17, 1992) No. 91-50513.

D.C. Circuit refuses to review refusal to depart based on rehabilitative potential. (719)(860) Relying on *U.S. v. Harrington,* 947 F.2d 956 (1991), defendant appealed the district court's refusal to grant a downward departure based upon a psychological evaluation stating that he had enormous potential for rehabilitation which could be destroyed by a sentence within his guideline range. The D.C. Circuit ruled that the decision not to depart was unreviewable. Defendant's reliance upon *Harrington* was mistaken. That case suggested that a defendant's rehabilitation could be grounds for a reduction for acceptance of responsibility under guideline section 3E1.1. However, decisions not to depart from a guideline range are generally unreviewable absent a mistake of law or incorrect application of the guidelines. *U.S. v. Sherod,* __ F.2d __ (D.C. Cir. April 17, 1992) No. 91-3083.

9th Circuit reverses physical injury departure where court doubled the impact of its analogy. (721) The district court departed upward by four offense levels to take account of the bite wounds and crushed thumbs suffered by the FBI agents when defendant resisted arrest. The court justified the degree of departure by analogy to section 2A2.2 which provides for a two-level increase when the defendant's aggravated assault results in bodily injury. In arriving at its effective four-level increase, the district court apparently multiplied the two-level increase by the number of victims. The 9th Circuit reversed, because under the "grouping" rule in U.S.S.G. section 3D1.4, the offenses against the two victims would have been grouped, resulting in only a two-level net increase. Thus the district court improperly doubled the impact of the aggravating circumstance, and the departure was unreasonable. *U.S. v. Streit,* __ F.2d __ (9th Cir. April 23, 1992) No. 90-10509.

9th Circuit does not require any particular approach to departures beyond criminal history category VI. (508) The 9th Circuit declined to mandate that sentencing judges adhere to any one particular approach to departures beyond category VI. However, the sentencing court must follow some "reasonable, articulated methodology consistent with the purposes and structure of the guidelines." Here, the district court apparently "dis-aggregated" defendant's prior consolidated sentences to derive a new criminal history point total. The court and counsel made reference to hypothetical criminal history categories of IX, X, and XII and the judge remarked that he was increasing the criminal history category from category VI to "category IX." The 9th Circuit found the district judge's efforts "commendable" but nevertheless remanded because the court failed to explain adequately its reasoning process. The 9th Circuit rejected the use of so-called "vertical" analogies to more serious offenses, because there is no obvious limit on the district court's discretion. *U.S. v. Streit,* __ F.2d __ (9th Cir. April 23, 1992) No. 90-10509.

2nd Circuit upholds departure despite court's failure to consider interim levels of departure. (738) The 2nd Circuit found that resentencing was not necessary even though in departing upward by six levels, the district court failed to explicitly consider and

state its reasons for rejecting each interim level, as required by *U.S. v. Kim*, 896 F.2d 678 (2nd Cir. 1990). The applicable version of the continuing criminal enterprise guideline, section 2D1.5, carried a base offense level of 36, regardless of drug quantity involved. The commentary provides that if the quantity of drugs substantially exceeds that required for level 36 in the drug quantity table, an upward departure may be justified. A level 36 corresponded to only a half-kilogram of crack, while defendant's offense involved over 100 times more than that. The court then noted that the November 1, 1989 version of the drug quantity table set an offense level of 42 for quantities of crack in excess of 15 kilograms, and found this then-current version was the "best guide for the degree of departure." An offense level of 42 yielded a guideline range of 360 months to life, and defendant received a 360 month sentence. *U.S. v. Rodriguez*, __ F.2d __ (2nd Cir. April 13, 1992).

3rd Circuit suggests downward departure where case only technically qualified under schoolyard statute. (738) The so-called "schoolyard provision" of the federal drug laws provides enhanced penalties for certain drug crimes that occur within 1000 feet of a school. Defendant argued that the provision requires an intent to distribute the drugs within 1000 feet of a school. The 3rd Circuit rejected this argument. The possibility of application to a defendant who goes by a school in a train or other vehicle on the way to a narcotics deal did not warrant an intent requirement. A trial court presented with one of these extreme cases could depart downward under the sentencing guidelines. In most cases, the effect of the schoolyard statute is a one or two point increase in offense level under section 2D1.2(a). If a case "technically" qualifies for such an increase but it is clear that the defendant's conduct did not create any increased risk for those whom the schoolyard statute was intended to protect, a one or two point departure to eliminate this increase would be permissible. *U.S. v. Rodriguez*, __ F.2d __ (3rd Cir. April 17, 1992) No. 91-1252.

Sentencing Hearing (§6A)

9th Circuit upholds sentence announced before defendant's allocution. (750) While addressing defense counsel's argument, the court stated that defendant would receive a sentence of 225 months. After this "preliminary sentence" was announced, the prosecutor reminded the court that it must allow defendant to make a statement before imposing sentence. The defendant then made the same arguments as his attorney, after which the court pronounced sentence. On appeal, the 9th Circuit affirmed, holding that Fed. R. Crim. P. 32(a)(1)(C) was satisfied as long as the defendant made his statement before the end of the sentencing hearing. Nothing in the record suggested that the district court's preliminary views were final or inflexible before it heard defendant's allocution. The court added that this was not a case where a remand to a different judge would have been necessary. *U.S. v. Laverne*, __ F.2d __ (9th Cir. April 28, 1992) No. 89-10356.

10th Circuit holds that termination date of conspiracy is sentencing factor to be decided by judge. (750) The 10th Circuit held that due process does not require a special factual finding from the jury regarding sentencing factors. The termination date of a conspiracy is a sentencing factor which relates only to the calculus of the sentence rather than to the issue of guilt or innocence. Thus, it was proper for the judge to determine the termination date of the conspiracy. *U.S. v. Stanberry*, __ F.2d __ (10th Cir. April 21, 1992) No. 91-7021.

D.C. Circuit upholds district court's refusal to order supplemental presentence report. (760) After a successful appeal, defendant's case was remanded for resentencing. On defendant's second appeal, the D.C. Circuit rejected his claim that the district court erred in denying his request for a supplemental presentence report prior to resentencing. The initial presentence report had given defendant the required notice of the probation officer's recommendations on sentencing classifications and the applicable guideline range. Absent a change of mind by the probation officer, which defendant did not allege, there was no basis in Rule 32(a) for requiring the preparation of a supplemental report. Moreover, the court allowed defendant to submit new information that he deemed relevant to his resentencing. Thus, the court did not violate 18 U.S.C. section 3661 by placing limits on the introduction of information concerning defendant's background, character or conduct. *U.S. v. Barry*, __ F.2d __ (D.C. Cir. April 17, 1992) No. 91-3258.

7th Circuit rules defendant had sufficient opportunity to review presentence report. (761) Two weeks before sentencing, defendant attempted to withdraw his plea and asked for new counsel to be appointed. When his motions were denied, he expressed a desire for his retained lawyer to represent him. The judge rescheduled sentencing for one month later and ordered defendant's lawyer to file his objections to the presentence report. The lawyer then submitted six pages of typed single-spaced objections. At the hearing, when defendant told the

judge he had not seen his lawyer to discuss the presentence report, the judge suspended the hearing for an hour to allow defendant to confer with the lawyer. When the hearing resumed, defendant and his lawyer both told the judge that they had sufficient opportunity to confer about the presentence report. At sentencing, both defendant and his lawyer commented on the presentence report. The 7th Circuit rejected defendant's claim that he was denied a sufficient opportunity to review and rebut the presentence report. *U.S. v. Trussel*, __ F.2d __ (7th Cir. April 14, 1992) No. 91-1220.

3rd Circuit rules district court did not rely upon disputed amount of loss in pre-guidelines case. (765) In a pre-guidelines case, defendant challenged the presentence report's determination that the loss caused by his offense totalled $140 million by noting that a civil suit in connection with the matter had been settled for $13 million. The judge declined to resolve the matter, stating that he would not rely upon the $140 million figure at sentencing. Nonetheless, the court rejected a community service sentence because the dimensions of defendant's fraud and the harm he inflicted were "enormous." The 3rd Circuit rejected defendant's claim that the district court relied on the $140 million in sentencing defendant. There was ample evidence in the record which demonstrated that his actions caused substantial financial loss. Defendant conceded that he had agreed to pay $13 million in settlement of a civil suit. *U.S. v. Gross*, __ F.2d __ (3rd Cir. April 20, 1992) No. 91-1520.

10th Circuit affirms that defendant had ample opportunity to object to enhancement recommended in presentence report. (765) The 10th Circuit rejected defendant's claim that the district court failed to give him the opportunity to object to an enhancement recommended in his presentence report. At sentencing, the district court asked whether defense counsel had any objections to the sentencing report other than those contained in a motion filed prior to sentencing. The motion did not object to the enhancement. Defense counsel stated that he had reviewed the report with defendant and that there were no additional objections. There was no merit to defendant's claim that the district court erroneously failed to make specific findings as to the accuracy of the information in the presentence report related to the enhancement. Rule 32(c)(3)(D) contemplates that the defendant or his counsel allege any factual inaccuracy in the presentence report before the district court is require to make a particular finding as to the factual inaccuracy. Defendant's failure to object waived the issue on appeal. *U.S. v. Kay*, __ F.2d __ (10th Cir. April 17, 1992) No. 91-4060.

1st Circuit upholds reliance on information adduced at trials of co-conspirators. (770) Defendant complained that he was denied effective assistance of counsel by the district court's reliance upon information adduced at the trials of co-conspirators to find him the leader of five or more people under guideline section 3B1.1(a). The 1st Circuit rejected this complaint, since a district court may rely on evidence adduced at trials of co-conspirators for sentencing purposes as long as the defendant receives notice prior to its use and has the opportunity to challenge its reliability. Here, defendant received notice through the presentence report that the information was being used. Moreover, the original indictment named seven co-conspirators, thereby putting defendant on notice that he might be considered a leader of a conspiracy consisting of at least five members. The disputed information was also contained in a trial memorandum that defendant received prior to trial. *U.S. v. McCarthy*, __ F.2d __ (1st Cir. April 15, 1992) No. 91-1617.

6th Circuit upholds reliance upon hearsay statements corroborated by other witness testimony at trial. (770) The 6th Circuit upheld the district court's reliance upon hearsay statements in defendant's presentence report to determine defendant's role in the offense. The statements were corroborated by other witness testimony at trial, and thus, contained sufficient indicia of reliability to support their probable accuracy. *U.S. v. Holmes*, __ F.2d __ (6th Cir. April 13, 1992) No. 91-3735.

8th Circuit upholds reliance on testimony at trial of co-defendants where defendant failed to object. (770)(855) Defendant challenged the quantity of drugs attributed to him at sentencing, arguing that because he objected to the presentence report, the government should have presented evidence other than the presentence report at sentencing. The 8th Circuit affirmed. Although sentencing a defendant solely on hearsay statements from a presentence report may violate a defendant's 6th Amendment rights, here the district court also relied upon the live testimony it heard at the trial of defendant's co-defendant's. The court considered this evidence at sentencing and defendant made no objection. Judge Arnold concurred, finding it was proper to rely upon this evidence only because defendant made no objection to it at sentencing. He was bothered by the implication in the majority opinion that the procedure followed here was proper. In a footnote, the majority noted that had defendant made a proper objection to

the evidence its opinion might have been different. *U.S. v. Summerfield*, __ F.2d __ (8th Cir. April 13, 1992) No. 91-2386.

Plea Agreements (§6B)

6th Circuit says judge complied with Rule 11 in accepting plea agreement prior to receipt of presentence report. (780) At defendant's plea hearing, the judge stated that "I'm going to accept the plea agreement with 15 years and I will not change it. I'm not going to wait for the presentence report to commit to that situation." Defendant's plea agreement revealed that defendant could not be classified as a career offender, and thus a 15-year sentence exceeded his guideline range. At the sentencing hearing, the judge gave defendant the opportunity to withdraw his plea, but defendant declined, agreeing to accept a modified sentence of 10 years. The 6th Circuit rejected defendant's claim that the judge had not complied with Fed. R. Crim. P. 11 in taking the plea. Guideline section 6B1.1, as interpreted by *U.S. v. Kemper*, 908 F.2d 33 (6th Cir. 1990), makes it clear that although the court stated it was unconditionally accepting defendant's plea agreement, in fact the acceptance was contingent upon its review of the presentence report. If the court determines that there was an error in calculating the agreed-upon sentence, it must reject the plea and afford defendant an opportunity to withdraw his guilty plea. The judge did so, but defendant chose not to withdraw his plea. *Fields v. U.S.*, __ F.2d __ (6th Cir. April 22, 1992) No. 91-3939.

2nd Circuit refuses to permit withdrawal of plea entered in erroneous belief that government would dismiss indictment against co-conspirator. (790) The 2nd Circuit rejected defendant's contention that he should have been permitted to withdraw his guilty plea because it was entered in the erroneous belief that the government would dismiss the indictment against a co-conspirator. In his plea hearing, defendant gave no indication that he was pleading guilty in order to secure favorable treatment for the co-conspirator. When asked whether anyone had made any other promises to him in connection with sentencing, he answered in the negative. Remarking on the colloquy and noting that defendant did not, claim his innocence of the charge, the district court denied defendant's motion in connection with his motion to withdraw his plea,. This was not an abuse of discretion. *U.S. v. Rodriguez*, __ F.2d __ (2nd Cir. April 13, 1992).

7th Circuit upholds district court's refusal to hold evidentiary hearing before denying motion to withdraw plea. (790) The 7th Circuit upheld the district court's refusal to hold an evidentiary hearing prior to denying defendant's motion to withdraw his guilty plea. A defendant who presents a reason for withdrawing his plea that contradicts the answers he gave at a Rule 11 hearing "faces an uphill battle" in persuading a judge that his purported reason for withdrawing his plea is fair and just. Here, defendant contended that he was confused about a possible entrapment defense and that he did not receive sufficient advice from counsel to dispel his confusion. However, at the hearing, defendant displayed no confusion about what he was doing, and never once used the word "entrapment." Moreover, he was no "babe in the woods," being 42 years old with four prior felony convictions. It was not clear error for the district judge to conclude without an evidentiary hearing that defendant's claims of confusion were just an attempt to manipulate the court. *U.S. v. Trussel*, __ F.2d __ (7th Cir. April 14, 1992) No. 91-1220.

9th Circuit holds that court is not bound by inaccurate stipulation of drug amount. (795) As part of the plea agreement, the parties stipulated that the amount of cocaine base was less than five grams. Both parties knew this was inaccurate. The presentence report, relying on information furnished by the prosecutor, correctly stated that defendant distributed 5.19 grams of cocaine base. The district court refused to follow the stipulation and based the sentence on 5.19 grams. On appeal, the 9th Circuit affirmed, holding that, in accordance with U.S.S.G. section 6B1.4(b) the court was not bound by the stipulation in the plea agreement. The court noted that its holding was in agreement with other circuits. *U.S. v. Mason*, __ F.2d __ (9th Cir. April 23, 1992) No. 89-30156.

Violations of Probation and Supervised Release (Chapter 7)

10th Circuit holds sentence after probation revocation must be within original range. (800) Defendant had a guideline range of zero to five months, and received a sentence of three years probation. After his probation was revoked, defendant received a seven month sentence based upon newly-enacted guideline section 7B1.4(a), which yielded a guideline range of 5 to 11 months. The 10th Circuit reversed, holding that 18 U.S.C section 3565 and the policy statements regarding probation revocation in Chapter 7 of the guidelines mandate a sentence that was

available at the time of the initial sentencing. The initial sentencing is the time the defendant was originally sentenced to probation, not the time probation is revoked. *U.S. v. Maltais*, __ F.2d __ (10th Cir. April 15, 1992) No. 91-8060.

11th Circuit rules that after revocation of supervised release, court may not order term of imprisonment and reimpose supervised release. (800) Under 18 U.S.C. section 3583(e)(3), a district court is authorized to revoke a supervised release term, and then require the defendant to serve in prison all or part of the term of supervised release without credit for time previously served on post-release supervision. The 11th Circuit ruled that there was no statutory provision authorizing the district court to reimpose supervised release after defendant serves his revoked prison term. Section 3583(a) only authorizes supervised release in conjunction with prison sentences for other crimes. Section 3583(e)(2) authorizes the extension of a term of supervised release if less than the maximum authorized term was previously imposed. Here, the district court did impose the maximum authorized supervised release term for defendant's offense. *U.S. v. Williams*, __ F.2d __ (11th Cir. April 16, 1992) No. 91-3000.

Appeal of Sentence (18 U.S.C. §3742)

10th Circuit rules that ineffective assistance of counsel claim cannot be raised on direct appeal if not raised in district court. (850)(880) Defendant claimed that if his right to challenge a firearm enhancement was not preserved for appeal because his counsel failed to object to it below, then he received ineffective assistance of counsel. The 10th Circuit held that ineffective assistance of counsel claims cannot be resolved on direct appeal when the claim has not been raised in the district court. Thus, it declined to review this issue, without prejudice to defendant's right to raise the issue in proceedings brought under 28 U.S.C. section 2255. *U.S. v. Kay*, __ F.2d __ (10th Cir. April 17, 1992) No. 91-4060.

6th Circuit reviews sentencing issues raised in amendment to motion to vacate sentence. (855)(880) In an appeal of the district court's denial of defendant's motion under section 2255 to vacate his sentence, the government argued that the appellate court was not required to address defendant's challenges to the calculation of his sentence under the guidelines because defendant failed to raise the issues below. The 6th Circuit found that a review of the district court's application of the guidelines was appropriate because defendant filed an amendment to his motion to vacate sentence in which he specifically raised the guidelines issues. *Fields v. U.S.*, __ F.2d __ (6th Cir. April 22, 1992) No. 91-3939.

9th Circuit refuses to resolve questions not raised in the district court. (855) Defendant argued that the district court was required to permit him to withdraw his plea because it was entered pursuant to Fed. R. Crim. P. 11(e)(1)(C). However, this issue was not presented to the district court, and as a result the government did not have an opportunity to demonstrate that the plea was not entered pursuant to that section. Accordingly, the 9th Circuit declined to resolve the question on the present record. For the same reason, the court refused to rule on whether the prosecutor violated the plea agreement by disclosing facts to the probation department that were inconsistent with those set forth in the plea agreement. The court affirmed the sentence, expressing no view on the merits of these issues or whether they could be resolved in a post-conviction challenge to the judgment. *U.S. v. Mason*, __ F.2d __ (9th Cir. April 23, 1992) No. 89-30156.

1st Circuit refuses to review sentence at top of applicable guideline range. (860) The 1st Circuit refused to review defendant's claim that the district court erroneously sentenced him to the maximum sentence under his applicable guideline range. An appellate court lacks jurisdiction to review a sentence within the applicable guideline range. *U.S. v. Aubin*, __ F.2d __ (1st Cir. April 15, 1992) No. 91-1870.

7th Circuit says appeal of court's refusal to depart downward is frivolous. (860) The 7th Circuit found that defendant's appeal of the district court's refusal to depart downward "border[ed] on being frivolous." It had no jurisdiction under 18 U.S.C. section 3742(a) over a district court's refusal to depart downward unless the sentence was imposed in violation of the law. Defendant did not suggest how the refusal to depart in this case violated any law. *U.S. v. Trussel*, __ F.2d __ (7th Cir. April 14, 1992) No. 91-1220.

9th Circuit says judge knew he could depart. (860) When defense counsel first asked for a departure, the judge said, "I'm not inclined to go below 240 months which is . . . barely above the minimum guideline range . . . . The guideline is 235-293. I mean, would you have me depart below that?" When defense counsel answered yes because he believed there was entrapment, the judge stated that there was no entrapment because the defendants were involved in an ongoing business. The court also considered and rejected counsel's plea to reduce the sentence be-

cause the defendant's criminal history was overstated. There was no indication that the judge thought he was powerless to depart. His refusal to do so was unreviewable. *U.S. v. Reyes-Alvarado*, __ F.2d __ (9th Cir. April 29, 1992) No. 91-50052.

1st Circuit reviews de novo whether flight constituted obstruction of justice under 1989 guidelines. (870) The 1st Circuit reviewed *de novo* whether defendant's flight after conviction but prior to sentencing constituted obstruction of justice under the 1989 version of the guidelines. *U.S. v. McCarthy*, __ F.2d __ (1st Cir. April 15, 1992) No. 91-1617.

7th Circuit reviews de novo whether tax loss should be based on previously assessed tax deficiency or value of hidden assets. (870) The 7th Circuit found that it was a question of law whether the amount of tax loss under guideline section 2T1.1 and 2T1.3 should be based on the amount of defendant's previously assessed tax deficiency or the value of assets she hid from the IRS. Thus, the district court's determination was reviewed de novo. *U.S. v. Brimberry*, __ F.2d __ (7th Cir. April 17, 1992) No. 90-3754.

Forfeiture Cases

1st Circuit rules that default in forfeiture case is res judicata against action to recover damages for property lost in forfeiture action. (900) The 1st Circuit, in a one paragraph opinion, affirmed the district court's determination that plaintiff's present action to recover damages for jewelry which was the subject of a forfeiture action was barred by res judicata. That plaintiff's defenses to the forfeiture actions were not actually litigated either in the forfeiture action or in plaintiff's subsequent Rule 60(b) motion to set aside the forfeiture judgment did not change this since a judgment, even if obtained by default, has res judicata effect against all defenses which could have been raised in the action. *Ramirez-Fernandez v. U.S.*, __ F.2d __ (1st Cir. April 10, 1992) No. 91-2254.

9th Circuit requires pre-seizure hearing before seizure of claimant's home. (910) In this case, the government waited four and a half years before seizing defendant's home for forfeiture. The 9th Circuit held that on these facts, the claimant was entitled to notice and an opportunity to be heard before his home was seized. The court rejected the government's argument that no pre-seizure hearing should be required because "quick action" was necessary. The court said that while the government has a strong interest in seeing that the property is no longer used for illegal purposes, "this interest can be met through means less drastic than seizure of the real property." Nevertheless, the court said that the mere fact of the illegal seizure, standing alone, did not immunize the property from forfeiture. It simply entitled the claimant to the rents accrued during the illegal seizure of his home. *U.S. v. James Daniel Property*, __ F.2d __ (9th Cir. April 24, 1992) No. 90-16636.

5th Circuit rules that notice of appeal was not nullified by motion for rehearing. (920) On April 22, claimant filed a motion to set aside an April 15 default judgment in a forfeiture action. On May 15 the motion was denied. Defendant then filed a motion for rehearing on May 22 and a notice of appeal on May 28. The motion for rehearing was denied by the district court on May 29 and no subsequent notice of appeal was filed. The 5th Circuit held that the May 28 notice of appeal was not nullified under Fed. R. Civ. P. 4(a)(4) by the May 22 motion for rehearing that was not disposed of until May 29. The April 22 motion to set aside the default judgment should be treated, for purposes of Rule 4(a)(4), as a motion under Fed. R. Civ. P. 59. As such the May 22 motion for rehearing would, under *Harcon Barge Co. v. D & G Boat Rentals*, 784 F.2d 665 (5th Cir. 1986), be regarded as a Rule 59 motion directed to the overruling of a prior Rule 59 motion. Any motion to amend a judgment served within 10 days after entry of judgment, except for a proper Rule 60(a) motion to correct purely clerical errors, is to be considered a Rule 59(e) motion. *U.S. v. One 1988 Dodge Pickup*, __ F.2d __ (5th Cir. April 22, 1992) No. 91-2556.

5th Circuit affirms that claimant had notice of judicial default in forfeiture case. (930) In a forfeiture action brought against a truck, the 5th Circuit affirmed the district court's denial of claimant's motion to set aside a default judgment. The vehicle was seized in August 1990 when claimant drove it across the border from Mexico. In November, 1990, claimant, aided by his attorney, filed a bond and claim with Customs, and both were notified that judicial forfeiture proceedings would be filed. In February, 1990 these proceedings were instituted, and notice was published. An Assistant U. S. Attorney called claimant's attorney at least twice prior to April 4, and left messages concerning the vehicle. On April 4, the Assistant U.S. Attorney wrote a letter advising that on April 8 he intended to file a motion for default. Claimant admits he received this letter on April 9. On April 10, the Assistant U.S. Attorney mailed to the attorney his motion for entry of default. On April 10, the attorney called but the Assistant U.S.

Attorney was unavailable. The determination that defendant had adequate and timely notice of the forfeiture proceedings, and failed to demonstrate good cause for not filing a claim sooner, was supported by the record. *U.S. v. One 1988 Dodge Pickup*, __ F.2d __ (5th Cir. April 22, 1992) No. 91-2556.

9th Circuit permits dismissal for delay in filing forfeiture suit even where statute of limitations has not yet run. (930) The customs laws provide for a five year statute of limitations for initiating customs, forfeiture and penalty proceedings. 19 U.S.C. section 1721. Section 1603 requires customs officers to report customs offenses to the U.S. Attorney, and section 1604 requires the Attorney General to "immediately" and "forthwith" bring a forfeiture action if he believes that one is warranted. The 9th Circuit held that the substance of the procedures outlined in sections 1602-04 "is not limited to those instances where seizure of the property has already occurred." The same procedural requirements require the government to act promptly when they learn of violations of the law that may subject property to forfeiture. Accordingly, the case was remanded to develop a factual record to determine whether the government acted promptly in filing this forfeiture action four and one-half years after the violation occurred. Judge Noonan dissented, arguing that the majority "in effect creates a new statute of limitations." *U.S. v. James Daniel Property*, __ F.2d __ (9th Cir. April 24, 1992) No. 90-16636.

Amended Opinion

(710)(719)*U.S. v. Valente*, __ F.2d __ (9th Cir. april 1, 1992) No. 91-10256, *amended*, __ F.2d __ (9th Cir. April 29, 1992).

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