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COMMENDATIONS

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

Steven M. Bauer and ***Sean Berry*** (California, Central District), by Charlie J. Parsons, Special Agent in Charge, FBI, Los Angeles, for their success in prosecuting five Los Angeles County Sheriff's deputies, and one of their wives, for stealing drug money.

Vicki Zemp Behenna (Oklahoma, Western District), by Jon E. Novak, Regional Inspector General for Investigations, Department of Agriculture, Temple, for her successful efforts in an FHA collateral conversion case where the defendants "laundered" cash from illegal secured collateral sales.

Sandra Bower (Florida, Middle District), by William G. Courtney, Supervisory Special Agent, FBI, Jacksonville, for her prompt and efficient action in processing a federal warrant charging an individual with making threatening telephone calls to a local radio station personality, and for developing a contingency plan if the individual makes bond or is released.

John W. Caldwell, Special Assistant United States Attorney (Texas, Western District), by Major Andrew P. Soisson, Chief, GYN Oncology Service, Department of Obstetrics and Gynecology, William Beaumont Army Medical Center, El Paso, for his excellent lecture on medical malpractice litigation at a quality assurance session for physicians at the Medical Center.

J. Gilmore Childers and ***William B. Pollard*** (New York, Southern District), by John S. Pritchard III, Inspector General, Metropolitan Transportation Authority, New York, for their excellent presentations at a staff meeting on federal statutes and investigative resources available within the U.S. Attorney's office.

Jonathan B. Conklin (California, Eastern District), by Linda K. Davis, Chief, Criminal Section, Civil Rights Division, Department of Justice, Washington, D.C., for his successful prosecution of a case involving a racially-motivated stabbing of an African-American in Oildale.

Lois W. Davis (Pennsylvania, Eastern District), by G. A. Mitchell, DVM, Director, Office of Surveillance and Compliance, Center for Veterinary Medicine, Food and Drug Administration, Department of Health and Human Services, Rockville, Maryland, for her excellent representation and for bringing a permanent injunction case to a successful conclusion.

Christine Witcover Dean (North Carolina, Eastern District), was nominated for the Chief Inspector's Award by C. R. Clauson, Chief Postal Inspector, U.S. Postal Service, Washington, D.C., and O. Richard Metz, Inspector in Charge, U. S. Postal Service, Charlotte, for her outstanding efforts and valuable assistance in the prosecution of a number of employee drug cases in Raleigh and Fayetteville since 1985.

William Edwards (Ohio, Northern District), by Robert M. Guttman, Assistant Secretary for Labor-Management Standards, Department of Labor, Washington, D.C., for his successful prosecution of two labor union officials for embezzlement and aiding and abetting.

Elizabeth Farr (District of Arizona), by David Lincoln Small, Supervisory Special Agent, FBI, Phoenix, for her demonstration of professionalism and legal skill in the preparation of several cases, and particularly for her successful prosecution of a difficult case involving the sexual abuse of a minor.

Elizabeth Wallace Fleming (Michigan, Eastern District), by Raymond C. Buday, Jr., Regional Counsel, Department of Housing and Urban Development, Atlanta, for her outstanding success in securing dismissal of a loan fraud case, thus averting a risky and expensive civil trial.

Alan M. Gershel and ***Craig Weier*** (Michigan, Eastern District), by James W. Hiller, Supervisory Special Agent, FBI, Detroit, for their outstanding success in the prosecution of a former Detroit police chief who was convicted of embezzling $1.3 million in public monies.

Joel Goldstein (Pennsylvania, Eastern District), by Connell J. McGeehan, Resident Agent in Charge, Drug Enforcement Administration, Allentown, for his professional and legal skills in successfully prosecuting a methamphetamine conspiracy case in which an elaborate clandestine laboratory was seized and dismantled. Also seized were two properties, an airplane, three vehicles, a $1,000 portable telephone, and $4,495.00 in U.S. currency.

D. Marc Haws (District of Idaho), by J. P. Clark, Regional Administrator, Federal Highway Administration, Department of Transportation, Portland, Oregon, for his successful efforts in obtaining the dismissal of a case in favor of the Federal Highway Administration. Also, by Lt. Col. Robert D. Volz, Army Corps of Engineers, Walla Walla, Washington, for obtaining a favorable decision in a hydroelectric company lawsuit as a result of their issuance of a Section 404 permit under the Clean Water Act.

James Hilbert (Florida, Middle District), by Van Vandivier, Deputy Regional Counsel, Federal Bureau of Prisons, Atlanta, for his outstanding efforts in recovering over $9,000 for the government for medical care services rendered to a prisoner at an outside hospital.

Brad Howard (Texas, Southern District), by Charles A. Harwood, Regional Director, Federal Trade Commission, Seattle, for his valuable assistance and advice in the prosecution of a civil case which led to a last minute settlement.

Cynthia K. Jorgenson (District of Arizona) by Derle Rudd, Regional Inspector, IRS, Dallas, for her valuable assistance in a forfeiture proceeding involving a 1990 Chevrolet Corvette, the purchase of which had been structured to avoid the laws of the United States.

Richard C. Kaufman (District of Colorado), by Robert D. Weller, Agent in Charge, Federal Communications Commission, Lakewood, for his outstanding assistance in preparing a technical warrant for seizure in rem of various contraband computers from a retail enterprise, the subject of numerous public complaints and criminal and civil investigations by federal, state and local authorities.

Michael K. Kawahara (District of Hawaii), by George Roberts, District Director, U.S. Customs Service, Honolulu, for his excellent presentation on the importance of non-drug evidence at a seminar for U.S. Customs Inspectors.

Stephen M. Kunz (Florida, Middle District), by Robert Merriner, Area Administrator, Office of Labor-Management Standards, Department of Labor, Washington, D.C., for his outstanding success in the prosecution of a former Jacksonville developer and his co-conspirators in a highly complex and sophisticated fraud case.

Robert R. Leight (Pennsylvania, Western District), by William E. Perry, Special Agent in Charge, FBI, Pittsburgh, for his valuable assistance and cooperative efforts in the successful prosecution of a major drug trafficker with ties to the Cali Cartel in Columbia.

Samuel G. Longoria (Texas, Southern District), by Douglas C. Payne, District Director, Food and Drug Administration, Department of Health and Human Services, Dallas, and Margaret Jane Porter, Chief Counsel, Food and Drug Administration, Department of Health and Human Services, Washington, D.C., for obtaining a landmark decision in a case involving good manufacturing practice regulations for medical devices. This victory establishes important precedent for the medical device manufacturing industry, and represents a major contribution to the protection of public health. (See, p. 256 of this Bulletin for a summary of this case.)

Marjorie Miller (New York, Southern District), by James M. Fox, Assistant Director in Charge, FBI, New Rochelle, for her professionalism and legal skill in the successful prosecution of a complex criminal case involving bankruptcy fraud, perjury, social security fraud and money laundering.

Joe Mirsky (Texas, Southern District), by Laurence S. McWhorter, Director, Executive Office for United States Attorneys, Department of Justice, Washington, D.C., for his valuable assistance to the Financial Litigation Staff in preparing legal policy opinions, directives, and regulations to collect fines and restitution.

Jose Angel Morena (Texas, Southern District), by Roberto Serna, District Attorney, and Robert Lee Little, Assistant District Attorney, 293rd Judicial District, Eagle Pass, Texas, and Sergeant Doyle Holdridge, Texas Rangers, Company "D", Laredo, for his demonstration of professional and legal skill in the capital murder trial of a Dimmit County Sheriff for which the defendant was sentenced to death.

Michael T. Morrissey (District of Arizona), by Robert E. Rogers, Special Agent in Charge, Bureau of Land Management (BLM), Department of the Interior, Phoenix, for his outstanding assistance and successful efforts in a case in which the defendant was found guilty of interfering with firefighters and interfering with BLM officers in the performance of their duties.

Steven A. Nisbet and the ***Financial Litigation Unit Staff*** (Florida, Middle District), by Richard W. Sponseller, Associate Director, Financial Litigation Staff, Executive Office for United States Attorneys, Department of Justice, Washington, D.C., for an outstanding job in carrying out the responsibilities of the Financial Litigation Unit, and for sending a videotape entitled "Deadbeat Doctors."

Carla B. Oppenheimer (Missouri, Western District), by James C. Esposito, Special Agent in Charge, FBI, Kansas City, for her professionalism and legal skill in the interception of a communications investigation, which resulted in a guilty verdict after a three-day trial.

Thomas M. O'Rourke (District of Colorado), by Joseph R. Davis, Assistant Director-Legal Counsel, FBI, Washington, D.C., for his valuable contribution to the success of the New Agents' Moot Court held recently at the FBI Academy in Quantico, Virginia.

Susan M. Poswistilo (District of Massachusetts), by Francis P. Skeiber, Chief, Contract Operations, Defense Contract Management Command, Defense Logistics Agency, Department of Defense, Boston, for her special efforts in negotiating a favorable settlement in a defense procurement fraud case.

Crandon Randell (District of Alaska), by Robert A. Maynard, Assistant Regional Attorney, Pacific Region, Department of Agriculture, Juneau, for his outstanding success in obtaining the first convictions in over a decade for theft of National Forest timber in Alaska, and for quality support from the Assistant United States Attorneys in related criminal and civil litigation.

Rudolf A. Renfer, Jr. and ***G. Norman Acker*** (North Carolina, Eastern District), by Peggy B. Deans, Clerk, U.S. Bankruptcy Court, Raleigh, for their valuable assistance during the course of a recent case, and for their contributions toward an excellent working relationship between the Court and the United States Attorney's office.

Mary Rigdon (Michigan, Eastern District), by Bankruptcy Judge Walter Shapero, U.S. District Court, Detroit, for her high quality representation in a civil case involving two Bankruptcy Court employees.

Alex Rokakis (Ohio, Northern District), by Hatem H. El-Gabri, Regional Counsel, Small Business Administration, Chicago, for his excellent representation and invaluable services in two actions filed against the agency involving several millions of dollars in alleged claims.

Whitney Schmidt (Florida, Middle District), by Allen H. McCreight, Special Agent in Charge, FBI, Tampa, for his excellent representation in a number of difficult civil actions with short deadlines, and for his continuing cooperation with the Principal Legal Advisor and respective case agents in the Tampa office.

Wevley William Shea, United States Attorney, and ***Staff*** (District of Alaska), by Janice Lienhart, Victims for Justice, Coalition for Victims of Crime, Anchorage, for attending the Victim Rights Week Tree Ceremony, and for providing continued assistance and support to the Victims for Justice organization. Also, by Mike A. Nielsen, President, Alaska Peace Officers Assn., Farthest North Chapter, Fairbanks, for attending and speaking at the 1992 International Crime Conference, the first conference of this kind in Alaska.

Steven Skrocki and ***Karen Loeffler*** (District of Alaska) by Stephen N. Marica, Assistant Inspector General for Investigations, Small Business Administration (SBA), Washington, D.C., for their successful efforts in obtaining the conviction of an individual for making false statements to the SBA to obtain unauthorized disaster loan funds and illegally selling the agency's collateral. ***Mary Ann Woodward*** of the secretarial staff provided valuable assistance.

William Soisson (Michigan, Eastern District), by William J. Esposito, Chief, White Collar-Crimes Section, FBI, Washington, D.C., for his excellent presentation on complex health care issues at a health care fraud training seminar held in Fort Lauderdale for FBI Special Agents and Assistant United States Attorneys.

Sandra Teters (California, Northern District), by Raymond A. Shaddick, Assistant Director, Investigations, U.S. Secret Service, San Francisco, for her professionalism, dedication, and aggressive spirit in the successful prosecution of an organization involved in a fraudulent credit card scheme.

Lee Thompson, United States Attorney (District of Kansas), by Paul L. Maloney, Senior Counsel for Policy, Criminal Division, Department of Justice, Washington, D.C., for his outstanding accomplishments in OSHA enforcement in the District of Kansas, "where there may be more guilty verdicts in OSHA criminal cases than any other single federal judicial district."

Presilliano A. Torrez (District of New Mexico), by George W. Proctor, Director, Office of International Affairs, Criminal Division, Department of Justice, Washington, D.C., for his excellent representation of the interests of the Government of Argentina in a complex extradition case.

Lanny Welch and ***Jim Flory*** (District of Kansas), by Charles J. Quinn, Jr., Resident Agent, U.S. Secret Service, Wichita, for their excellent representation and outstanding legal skill in bringing a criminal case to a successful conclusion.

Stephen A. West and ***Thomas P. Swalm*** (North Carolina, Eastern District), by Daniel D. Heinz, Instructor/Coordinator, Law Enforcement Department, North Carolina Justice Academy, Salemburg, for their excellent instruction to students from twenty five agencies on techniques of drug law enforcement.

Frank D. Whitney (North Carolina, Western District), by Betty Marshall, Acting Group Manager, Criminal Investigation Division, IRS, Charlotte, for his valuable assistance and cooperation in the field of asset forfeiture and particularly, the seizure of assets associated with Operation Jaybird, an OCDETF case.

L. Michael Wicks and his secretary, ***Beryl Robbins*** (Michigan, Eastern District), by John R. Dunne, Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C., for their invaluable assistance and hospitality to members of the Civil Rights Division during the course of a month-long trial conducted in Detroit.

Guy Womack and ***Joanne Doherty*** (Texas, Southern District), by Andrew J. Duffin, Special Agent in Charge, FBI, Houston, for their successful prosecution of a complex bank fraud case involving the service of approximately 40 grand jury subpoenas, the examination of numerous documents and exhibits, and the coordination of expert witnesses from the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation.

George H. Wu and ***Scott H. Park*** (California, Central District), by Brigadier General Sebastian F. Coglitore, Commander, Headquarters 30th Space Wing, Vandenberg Air Force Base, for their excellent representation in a highly complex case and for obtaining a favorable judgment for the Air Force Base.

Warren A. Zimmerman (Florida, Middle District), by Annette Hamburger, Attorney, Public Health Division, Department of Health and Human Services, Rockville, Maryland, for obtaining a $15,000 settlement of an estate case for the benefit of the National Institute of Mental Health.

SPECIAL COMMENDATION FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Amy Reynolds Hay, Assistant United States Attorney for the Western District of Pennsylvania, was commended by Homer D. Byrd, District Counsel, Department of Veterans Affairs, Pittsburgh, for her excellent representation and outstanding legal counsel in a medical malpractice action against the VA Medical Center in Pittsburgh. The plaintiff alleged that the VA physicians had misdiagnosed and improperly treated the patient over a ten year period for a condition which involved altered states of consciousness. The litigation involved extremely subtle and complex medical diagnostic issues regarding organic based seizure disorders, psychologically based psuedoseizures, and the overlap of coexistence of the two conditions. The defense of the case was made even more difficult when the plaintiff's medical expert witness attempted to obfuscate matters with theories based upon endocrine disorders in addition to theories involving the fields of neurology and psychiatry.

The successful defense of this litigation not only required ***Assistant United States Attorney Hay*** to assimilate and master the complex body of medical knowledge applicable to the case, but also to fashion its presentation in a manner in which the court would appreciate the diagnostic and treatment difficulties and issues of standard of care through the testimony of defense experts who were themselves not in agreement on some very significant points at issue. The one crucial common ground held by the defense experts was that there had not been a breach of the standard of care in this case.

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SPECIAL COMMENDATION FOR THE CENTRAL DISTRICT OF CALIFORNIA

John McEvoy, Administrative Officer, Central District of California, was commended by Laurence S. McWhorter, Director, Executive Office for United States Attorneys (EOUSA), Department of Justice, Washington, D.C., for his valuable assistance to EOUSA staff in arranging for the successful production of a security training video. The video, narrated by Richard Dysart of L.A. Law fame, was filmed in Los Angeles. ***Mr. McEvoy*** negotiated for the use of a court room, obtained commercial transportation services, served as liaison with other federal agencies involved, and made innumerable other arrangements necessary for such an endeavor. The production is now completed, and the final product is an outstanding training aid which will materially assist the United States Attorneys in fulfilling their mission.

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DEPARTMENT OF JUSTICE HIGHLIGHTS

Department Of Justice Official Organization Chart

Attached at the Appendix of this Bulletin as Exhibit A is the official signed and approved Department of Justice organization chart, dated May 19, 1992. The new organization chart shows the re-establishment of the Office of the Associate Attorney General and the newly created Office of Policy and Communications.

* * * * *

Manuel Antonio Noriega

On July 10, 1992, Manuel Antonio Noriega was sentenced in the U.S. District Court for the Southern District of Florida to 40 years for federal narcotics violations. Mr. Noriega was convicted on charges of exploiting his official position as head of the intelligence section of the Panamanian National Guard and as then-Commander-in-Chief of the Defense Forces of the Republic of Panama to receive payoffs in return for assisting and protecting international drug traffickers. Attorney General Barr noted that this conviction demonstrates that no drug kingpin is above the law.

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ATTORNEY GENERAL HIGHLIGHTS

Crime Summit In The District Of Kansas

On July 17, 1992, Attorney General William P. Barr and FBI Director William S. Sessions were the featured participants at a Crime Summit in Topeka, Kansas. More than 250 law enforcement officials from throughout the state attended the Summit, which was organized by Senator Bob Dole, (R.Kan.) and moderated by Lee Thompson, United States Attorney for the District of Kansas.

Attorney General Barr and Director Sessions made brief remarks outlining Department of Justice priorities in the areas of gangs, drugs and violent crime. The floor was then opened for a lively exchange of questions and answers fielded by General Barr, Director Sessions, Senator Dole and United States Attorney Thompson. The topics discussed included the establishment of localized violent crime and drug task forces, juvenile justice reform, unique problems related to rural law enforcement, negotiations on the President's crime bill, and DNA identification programs. As a result of the Summit, the Kansas Law Enforcement Coordinating Committee is preparing an implementation plan for the task forces recommended by the Attorney General. After more than two hours of questions and answers, the Crime Summit adjourned to a reception for the law enforcement officials, which included police chiefs, county sheriffs and members of the Kansas Highway Patrol.

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Attorney General Appears Before The Senate Judiciary Committee

On June 30, 1992, Attorney General William P. Barr testified before the Senate Committee on the Judiciary concerning the Department of Justice Authorization for FY 1993. In his testimony, the Attorney General discussed some of our initiatives and accomplishments over the last seven months in the areas of violent crime, the war on drugs, enforcement of civil rights laws, financial fraud and white-collar crime, as well as the Immigration and Naturalization Service and the integrity of our immigration laws. In conclusion, the Attorney General stated as follows:

> Mr. Chairman, when I was sworn-in as Attorney General, I stated that it was an honor for me to work with the career employees at the Department who have always demonstrated in my experience the highest level of professionalism and devotion. My experience in the last seven months has clearly reaffirmed that view. I am proud of what the Department has accomplished and enthusiastic about the possibilities for the future. It remains my goal to leave the Department of Justice a more effective and more professional institution.

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CRIME ISSUES

Attorney General Releases Violent Crime Report

On July 28, 1992, Attorney General William P. Barr released a blueprint for fighting violent crime at the state and local level in a report entitled "Combating Violent Crime: 24 Recommendations to Strengthen Criminal Justice." The report, a copy of which has been forwarded to each United States Attorney, highlights the success of tough law enforcement and the need for continued legal reform.

The report is an important part of the Administration's attack on violent crime. The Attorney General stated repeatedly in recent months that a successful strategy for fighting violent crime must include: 1) reforming the federal and state criminal justice systems; 2) maximizing resources for law enforcement; 3) seeking the greatest impact possible through cooperative efforts by federal, state and local law enforcement aimed at specific problems such as organized crime, gangs, drug trafficking, felons who use firearms and the capture of fugitives; and 4) integrating law enforcement with social and economic revitalization in targeted inner-city neighborhoods. The 24 recommendations contained in the report were developed in conjunction with state and local law enforcement experts and are divided into six groups: establishing pretrial detention; providing effective deterrence and punishment of all adult offenders; providing effective deterrence and punishment of juvenile offenders; providing efficient trial, appeal, and collateral attack procedures; providing for effective prevention and detection of crime; and providing adequate protection for victims' rights. Included in these groups are specific recommendations to:

- Adopt mandatory minimum penalties for gun offenders; armed career criminals and habitual violent offenders;
- Provide sufficient prison and detention capacity to support the criminal justice system;
- Adopt drug testing throughout the criminal justice system;
- Increase the ability of the juvenile justice system to treat the small group of chronic violent juvenile offenders as adults;
- Permit victims to require HIV testing before trial of persons charged with sex offenses.

Also included in the report is a tear-out citizen's checklist containing questions which should be posed to state and local leaders about their criminal justice systems. The list addresses such issues as asset forfeiture, victim restitution and victim rights, and allowing admission of a defendant's sexual violence history in cases of rape or child molestation.

Attorney General Barr emphasized that the first duty of government is to protect the safety of its citizens. He said, "Ninety-five percent of violent crime in America is handled at the state and local level. The primary goal of the criminal justice system must be to identify and incarcerate the hardened, chronic offenders who are responsible for a staggering number of crimes in this country. Unfortunately, unless we reform state criminal justice systems we will be unable to achieve that goal."

Single copies of the report, "Combating Violent Crime: 24 Recommendations to Strengthen Criminal Justice," (NCJ-137713) may be obtained from the Bureau of Justice Statistics Clearinghouse, Box 6000, Rockville, Maryland 20850. The toll-free telephone number is: 1-800-732-3277.

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Attorney General Discusses Violent Crime And Street Gangs On Capitol Hill

In his testimony before the Senate Judiciary Committee on June 30, 1992, Attorney General William P. Barr addressed the problem of violent crime. He stated that although it is primarily the responsibility of state and local law enforcement, aggressive federal involvement is a vital part of this struggle. Longstanding priorities in federal law enforcement, such as organized crime, must be maintained, as our decade-long string of successes against LCN leaders, including John Gotti, clearly reveals.

On the subject of violent street gangs, the Attorney General stated that we have found that tough federal firearms statutes, drug statutes and RICO statutes can greatly help local law enforcement to combat violent street gangs. The remarkable success in Philadelphia with our pilot Violent Traffickers Project and "F.A.S.T." initiative (Federal Alternative to State Trials) -- 38 gangs wiped out; 600 federal convictions -- convinced him to expand this strategy of federal and local cooperation.

General Barr said the changing world situation allowed him to shift 300 FBI agents from foreign counterintelligence to work on violent gang squads and anti-gang task forces with agents from the Bureau of Alcohol, Tobacco and Firearms (BATF). The FBI agents have been assigned to 39 cities across the country to augment the work of the 1,600 FBI already assigned to violent crime. This represents one of the largest re-allocations of resources in FBI history. The Bureau is also working jointly with BATF in setting up a new National Gang Analysis Center. Twenty five DEA agents have been shifted from Washington headquarters to drug-related homicide task forces in the field. Furthermore, in the wake of the L.A. riots, 50 FBI agents were recently assigned to violent gang squads in California. Finally, 150 new INS criminal investigators have been added to focus on criminal aliens involved in violent street gangs.

The Attorney General said, "Our ongoing offensive against violent street gangs engaged in the drug trade has completely eradicated entire gangs in cities such as Philadelphia, Chicago, Boston, Detroit and Washington, D.C. In prosecuting the war on drugs, we have fought successfully against these violent traffickers."

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Juvenile Records In Criminal History Reports

On July 6, 1992, Attorney General William P. Barr signed an order authorizing the Federal Bureau of Investigation to include in its national criminal history information system criminal offenses committed by juveniles. The Attorney General said the change was a "necessary and important step" in implementing an element of President Bush's comprehensive violent crime control initiative. The President's initiative calls on the states to "maintain records and report on all serious crimes committed by juveniles who frequently continue their criminal careers into adulthood, but often escape early identification as repeat offenders and recidivists because their juvenile records are not reported."

The change, which was published for public comment in the Federal Register June 5, 1991, would not compel states to forward juvenile records to the FBI for inclusion in the national system. The amendment would give the FBI the same authority to receive juvenile records and include them in its records system that it currently has concerning adult records. The types of records to be forwarded, who would be responsible for forwarding them, and other issues of this type would depend on state law and policy.

The Attorney General said the unavailability of such records was a substantial concern. He said, for example, the Bureau of Justice Statistics, a Department agency, estimated that 55 percent of armed robbers in state prisons in 1986 were sentenced previously to probation or incarceration as a juvenile and that 15 percent had a prior juvenile, but no adult, sentence. The FBI's Uniform Crime Reports also reported 1.6 million arrests of persons under the age of 18 in 1988. The previous provision excluded offenses committed by juvenile offenders unless the juvenile was tried as an adult.

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Household Crime

On July 19, 1992, the Bureau of Justice Statistics, Office of Justice Programs, reported that almost one in every four of the nation's households experienced or had a member who experienced a rape, robbery, assault, theft, burglary or motor vehicle theft in 1991. The proportion of households victimized by crime was unchanged from 1990.

The National Crime Victimization Survey, the nation's second largest ongoing household survey, conducts interviews in almost 50,000 U.S. households twice a year, gathering information on any criminal victimizations experienced by household members who are 12 years old or older. The survey counts both crimes that victims say were reported to law enforcement agencies as well as those that were not reported. Since 1975, when results from the National Crime Victimization Survey were first used to estimate crime among households, the percentage of households sustaining a crime has fallen from about 32 percent to just under 24 percent. From 1975 through 1991, the percentage of households with at least one member becoming a violent crime victim has dropped from 5.8 percent of all U.S. households to 4.9 percent. During 1975, 7.7 percent of all households experienced a burglary, whereas in 1991 the percentage had fallen to 4.7 percent, one of the lowest estimates in the 17-year period.

While households across the nation experienced an overall decline in the percentage that sustained a crime each year from 1975 to 1991, the magnitude of the decline differed according to household characteristics, such as the race of the head of the household. About the same percentage of white households experienced a crime each year from 1985 to 1989, but that percentage fell to 23 percent in 1990 and 1991. By contrast, from 1985 to 1989, black households experienced an increasing level of victimization, and the 27 percent of black households victimized by a crime in 1991 was relatively unchanged from the levels of 1989 and 1990.

In 1991, as in previous years, households in central cities were more likely than those in suburbs or rural areas to fall victim to a crime reported to the survey -- 29.1 percent of urban households compared to 22.8 of those in suburbs and 17.4 percent of those outside metropolitan areas. The percentage of households victimized was lowest in the Northeast (19.3 percent) and highest in the West (28.8 percent).

Generally, as household income increased, so did the household's susceptibility to personal theft. For example, 14 percent of the households with income of $50,000 or more experienced a personal theft sometime during the year, compared to less than 8 percent of households having an annual income below $7,500. Lower income households, however, experienced higher levels of violent crime -- 6.3 percent of households with incomes under $7,500, compared to 3.9 percent of households earning $50,000 or more.

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OPERATION WEED AND SEED

"The Weed And Seed Initiative" By The Attorney General

Attached at the Appendix of this Bulletin as Exhibit B is an article by Attorney General William P. Barr, entitled "The Weed and Seed Initiative," which appeared in the June/July 1992 newsletter of the National Association of Attorneys General.

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Weed And Seed Action In The District Of New Jersey

On July 16, 1992, ***Michael Chertoff, United States Attorney for the District of New Jersey,*** announced that three members of a crack cocaine drug gang known as "The New York Boys" received federal prison sentences from 57 to 210 months for admitting their connection to the operation of a Trenton crack house. A fourth member is still awaiting sentencing and a fifth member pleaded guilty last year. Mr. Chertoff said that this sentencing marks the first major federal sentencing under the Weed and Seed program.

In August, 1991, the City of Trenton was designated as a pilot site for the Weed and Seed initiative. The drug charges to which the "The New York Boys" pleaded guilty originate in the "Weed" portion of the program, one that is designed to target certain violent offenders and prosecute them in federal court where penalties are often harsher than local law allows. The "Seed" portion of the program includes community policing and "Safe Haven" schools, in which neighborhood schools become after-school activity centers for youngsters and other members of the community under the watchful eye of law enforcement to insure that the participants do not become the victims of crime or the targets of drug dealers.

Mr. Chertoff noted that parole has been eliminated for federal crimes committed after November, 1987. Under the Sentencing Guidelines, defendants must serve nearly all their terms before being eligible for release after which they must also serve a period of supervision. The case is being handled by ***Paul G. Shapiro,*** Assistant United States Attorney, Criminal Division, Trenton.

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Weed And Seed Action In The District Of Columbia

On July 21, 1992, ***Jay B. Stephens, United States Attorney for the District of Columbia,*** announced the conviction of three leaders of the R Street drug gang of federal drug, firearm, and murder charges. The three individuals were convicted under the federal drug kingpin statute of running a continuing criminal enterprise, conspiracy to possess and distribute narcotics, and second degree murder. ***Mr. Stephens*** said this verdict sends a clear and power message to drug dealers operating in Washington that "they will be arrested, they will be prosecuted, and they will spend the rest of their life in a federal prison."

The defendants, along with 19 other alleged members of the R Street gang were indicted in a superceding indictment returned by a federal grand jury on October 23, 1991. The 115-count indictment alleged that the R Street gang, a major cocaine, heroin, marijuana, and PCP distribution ring, operated from May, 1983 to March, 1991, in Northeast Washington, D.C. The gang, consisting of 5 leaders of the organization, 11 lieutenants, 4 associates, 3 suppliers, and one stash house operator, generated an estimated $50 million in illegal drug receipts. Sentencing is scheduled in October.

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Weed And Seed Action In The Western District Of New York

On July 9, 1992, ***Dennis C. Vacco, United States Attorney for the Western District of New York,*** announced the filing of a 73 count indictment, charging Donald "Sly" Green and 25 others with operating a major Buffalo based drug ring which violated federal racketeering laws by distributing large quantities of cocaine and heroin. ***United States Attorney Vacco*** credited officials of the Shawangunk Correctional Facility in Wallkill, New York with alerting law enforcement authorities in Western New York about narcotic trafficking which was being directed from inside the Correctional Facility. At the time the information was received from the Shawangunk officials, Donald Sly Green was incarcerated at the facility serving a life term of imprisonment for a murder conviction of a Jefferson Avenue woman. [Green previously served a prison term for his role in an armed bank robbery and at the age of fifteen was treated as a juvenile delinquent for his role in the 1973 slaying.]

The indictment represents a major inroad into the narcotics trafficking and related violent street crime in the City of Buffalo. It charges individuals who, in addition to their narcotic trafficking, have increased the level of violence in Buffalo and, more particularly, have concentrated their criminal activity in the East Side of Buffalo neighborhoods. The indictment also accuses an entire street gang organization for a full panoply of criminal activity and states that this street gang was operated in a structured and organized fashion patterned after the more traditional organized crime model, the La Cosa Nostra. The indictment accuses Donald Sly Green as being the self-proclaimed "godfather" of this mob-like gang, which was referred to as the "L.A. Boys." Green allegedly recruited members from Los Angeles to join his circle of narcotics traffickers, and also attempted to establish a crime commission to consolidate and coordinate the drug distribution activities of illegal street gangs operating in Buffalo and upstate New York. This gang is also accused of extortion in an effort to collect money from people who were threatened with physical harm or death. The indictment alleges that activities such as drive by shootings, kidnappings, and threats of murder were part of these extortionate acts.

The investigation was coordinated by Assistant United States Attorneys ***Richard D. Endler*** and ***William J. Hochul.***

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HEALTH CARE FRAUD

Operation Goldpill

On June 30, 1992, Attorney General William P. Barr and FBI Director William S. Sessions announced that more than 1,000 FBI agents and 120 other law enforcement officers carried out early morning raids in over 50 cities nationwide as part of "Operation Goldpill," the most widespread criminal fraud investigation of the health care industry.

The investigation was conducted by 16 FBI field offices -- Albany, Atlanta, Chicago, Cleveland, Columbia, Detroit, Indianapolis, Jacksonville, Miami, New Orleans, New York, Pittsburgh, Portland, San Francisco, San Juan, and Washington Metropolitan field office. The FBI closely coordinated its work with the Food and Drug Administration, Drug Enforcement Administration, Department of Health and Human Services, Postal Inspection Service, state Medicaid fraud control units, state and local police investigative units, State Attorney General's offices, state Boards of Pharmacy, state Medical Licensing Boards, Blue Cross and Blue Shield Special Investigative Units, pharmaceutical industry managers, and the United States Attorneys. The investigation uncovered two schemes: illegal diversion of non-controlled pharmaceutical medications and fraudulent billings.

In the illegal diversion scheme, individuals who are eligible to receive Medicaid obtain prescriptions for expensive medications through an unscrupulous physician, who may have recruited the patient. The physician would bill Medicaid for extensive office visits by these patients who are not ill and may only stay five minutes or less, just long enough for the doctor to write out the prescription. The patients then have the prescription filled by a pharmacist who is involved in the scheme. Medicaid is also billed for the medicine. The patient then turns around and sells the prescription drugs for approximately ten percent of their value to a "non-con" man, a street term for criminals who trade in non-narcotic prescription medication. The "non-con" men, or diverters, purchase the drugs for resale to other "non-con" men or, sometimes pharmacies which, in turn, then sell them to the unsuspecting public. In most cases, the drugs are repackaged to disguise the origin of the medications. FBI investigations show this criminal activity is occurring in many metropolitan areas throughout the United States.

In fraudulent billing, prescriptions are filled with generic drugs and billed for the more expensive brand name products. Medicaid and insurance carriers are billed multiple times for the same prescription, or the prescription is never filled. Sometimes only a portion of the prescriptions are filled causing the patients to return at a later date for the rest of the medication. By splitting the prescription, the pharmacist is paid two dispensing fees instead of the one he normally receives when he fills a prescription.

Attorney General Barr said, "Health care fraud is a serious crime that cheats the government and private industry, taking vast numbers of dollars from the pockets of Americans who pay taxes and insurance premiums. This type of fraud hurts all who use the health care system and particularly endangers those least capable of protecting themselves -- the aged and the infirm." The Attorney General stated that this is only part of our ongoing efforts in this important area.

[Note: The health care fraud initiative was first announced on February 3, 1992. See, United States Attorneys' Bulletin, Vol. 40, No. 2, at p. 37.]

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Health Care Fraud In The Eastern District Of Louisiana

On June 30, 1992, ***Harry Rosenberg, United States Attorney for the Eastern District of Louisiana,*** announced that five former administrators of the North Shore Regional Medical Center, Slidell, Louisiana, including a Tammany Parish Assessor, were indicted for their roles in schemes that defrauded the hospital of $2 million to $3 million. Indicted were the Chief Executive Officer, Associate Administrator, Assistant Financial Officer, and the Director of Marketing. The indictment alleges that from January, 1985 until June, 1991, the five defendants engaged in a conspiracy where North Shore Regional Medical Center and the United States were defrauded of a substantial sum of money. The indictment further states that the defendants created a number of corporations that they used to submit fraudulent invoices to the Medical Center for services that were never rendered to the hospital. The allegations are as follows:

- In 1985, Kirk Wascom, the Chief Executive Officer, and Randall Heller, Director of Marketing, created Healthcare Communications, and, in 1987, Media Brokers, to perform consulting and marketing work for the hospital. They then inflated invoices to the hospital by 25 percent, "caused other persons" to approve the invoices, and then submitted false invoices from the shell corporations for work not performed. The 15 percent inflated prices were added to the false invoice.

• In 1987, Ralph Flood, Chief Financial Officer, discovered the fraudulent scheme and agreed to participate. He allegedly asked for and received $1,000 a month on the false invoices. In June, 1990, Flood asked for and received a "raise" of $5,000 monthly, and later began receiving $40,000 quarterly through May, 1991.

• Daniel Himel, Associate Administrator, formed St. Tammany Domestic Services to provide a cleaning service for the hospital. The hospital was billed approximately $160,710 for services never performed. Wascom received $49,000 and Himel kept the remaining $111,170 in fraudulent payments. The same procedure was used for lawn services, typing services, recruiting nurses, computer hardware repair, as well as furniture and hospital equipment.

• John J. Coerver, Jr., Assistant Financial Officer, discovered the fraudulent scam, and allegedly joined in for which he received $1,000 monthly from the shell corporations, and also formed a dummy corporation of his own for which he received $50,000 in fraudulent payments.

United States Attorney Rosenberg said, "Health care fraud is a serious crime that robs both taxpayers, honest health care providers, and insurance policy holders. This type of fraud is endangering the existence of our health care system. The Federal government, therefore, has taken an aggressive role in this important case.

* * * * *

FINANCIAL INSTITUTION FRAUD

Unprecedented Success In White Collar Crime and Fraud In Financial Institutions

In testimony before the Senate Judiciary Committee on June 30, 1992, Attorney General Barr stated that we have continued to experience unprecedented success. Having over 1,600 FBI Special Agents and prosecuting attorneys dedicated to financial institution fraud, the Department has prosecuted more than 3,100 defendants in major financial institution fraud cases over the past 2 1/2 years. More than 1,000 of these defendants have been prosecuted in connection with major savings and loan cases, and more than three-fourths of those convicted have gone to jail.

* * * * *

BCCI

On July 29, 1992, the Department of Justice announced that a federal grand jury has indicted Clark M. Clifford and Robert A. Altman, former top officials of the First American Bank, on charges of conspiring to defraud the Board of Governors of the Federal Reserve System (FED) and concealing material facts in connection with the FED's investigation of the Bank of Credit and Commerce International (BCCI).

The three-count indictment, returned in U.S. District Court in Washington, D.C., alleged among other things that Clifford and Altman enriched themselves through loans and other agreements with BCCI, performed a number of acts to curry favor with BCCI, concealed their BCCI loan arrangements from the Board of Governors of the Federal Reserve System, and breached their duty of loyalty to the First American banks. The indictment also states that while serving as attorneys for BCCI and as officers and directors of First American Bank, Clifford and Altman enriched themselves through secret financial arrangements with BCCI, which resulted in millions of dollars of profits to them, and then conspired to keep those arrangements from the federal regulators.

Attorney General William P. Barr said, "[This] indictment represents another significant step in the Department of Justice investigation of the complex BCCI case. The federal investigation is continuing on a number of fronts."

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BCCI Ordered To Forfeit Additional $104 Million

On July 30, 1992, the Department of Justice announced that a federal judge has ordered BCCI to forfeit an additional $104 million in assets to the United States, bringing to about $651 million the total amount of assets BCCI has forfeited to the federal government. The $104 million includes about $93 million held in seven New York banks; a $4.9 million bankruptcy claim filed on behalf of BCCI in Florida; $5 million held in New York and Florida banks; and other property and cash.

Judge Joyce Hens Green of the U.S. District Court in Washington issued the order July 29 on the Department's June 24 motion asserting the discovery of additional BCCI assets since Judge Green ordered the bank to forfeit $347 million in cash and about $200 million in property in January, 1992.

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Financial Institution Fraud Updates

On July 9, 1992, the Department of Justice issued the following information describing activity in "major" savings and loan prosecutions from October 1, 1988 through June 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. All numbers are approximate, and are based on reports from the United States Attorneys's offices and the Dallas Bank Fraud Task Force.

Savings And Loan Prosecutions

Description	*Count*
Informations/Indictments..	718
Estimated S&L Losses....	$8,310,450,286
Defendants Charged.....	1,188
Defendants Convicted.....	905
Defendants Acquitted.....	71 *
Prison Sentences.....	1,797 years
Sentenced to prison....	582
Awaiting sentence.....	170
Sentenced w/o prison or suspended.....	168
Fines Imposed.....	$11,287,961
Restitution Ordered.....	$439,239,594

Description	*Count*
CEOs, Chairmen, and Presidents:	
Charged by indictment/ information.....	137
Convicted.....	102
Acquitted.....	10
Directors and Other Officers:	
Charged by indictment/ information.....	195
Convicted.....	166
Acquitted.....	7

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

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Bank Prosecutions

Description	*Count*	*Description*	*Count*
Informations/Indictments	1,407	CEO's, Chairmen, and Presidents:	
Estimated Bank Loss	$3,132,803,263	Charged by Indictments/	
Defendants Charged	1,975	Informations	137
Defendants Convicted	1,602	Convicted	119
Defendants Acquitted	38	Acquitted	1
Prison Sentences	2,251 years		
Sentenced to prison	1,057		
Awaiting sentence	239	Directors and Other Officers:	
Sentenced w/o prison		Charged by Indictments/	
or suspended	319	Informations	440
Fines Imposed	$ 6,372,911	Convicted	389
Restitution Ordered	$375,079,476	Acquitted	7

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Credit Union Prosecutions

Description	*Count*	*Description*	*Count*
Informations/Indictments	85	CEOs, Chairmen, and Presidents:	
Estimated Credit Union Loss	$84,961,169	Charged by Indictments/	
Defendants Charged	107	Informations	10
Defendants Convicted	96	Convicted	9
Defendants Acquitted	1	Acquitted	0
Prison Sentences	124 years		
Sentenced to prison	67		
Awaiting sentence	16	Directors and Other Officers:	
Sentenced w/o prison		Charged by Indictments/	
or suspended	12	Informations	56
Fines Imposed	$ 15,700	Convicted	53
Restitution Ordered	$12,970,140	Acquitted	0

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PROJECT TRIGGERLOCK

On June 30, 1992, Attorney General William P. Barr reported to the Senate Judiciary Committee that in our crackdown on felons who use firearms, we have continued Project Triggerlock, which began in April 1991. This initiative targets repeat offenders who use or carry guns. He said we confiscate their weapons, and put the chronic offenders behind bars under stiff federal mandatory sentences.

Under Triggerlock, the average sentence received by an Armed Career Criminal is eighteen years. As of May 1, nearly 7,000 defendants have been charged with federal firearms violations and our conviction rate is running at 96 percent.

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Project Triggerlock: Incarcerating The Armed Criminal

On July 29, 1992, Attorney General William P. Barr submitted a report to President George Bush entitled, "Project Triggerlock: Incarcerating the Armed Criminal - Year One, May 1991-April 1992." A copy has been forwarded to all United States Attorneys. The report states that in its first full year of operation, Project Triggerlock successfully mobilized federal, state and local law enforcement efforts to accomplish the following:

- 6,454 defendants have been charged with federal firearms violations;
- Federal firearms prosecutions have more than doubled;
- More than one out of ten of all federal prosecutions now include firearms charges;
- 84 percent of Triggerlock defendants are felons, drug dealers or violent criminals in possession of a firearm;
- The average sentence received by an armed career criminal under Project Triggerlock is eighteen years without parole.

* * * * *

Project Triggerlock: A Summary Report

Attached at the Appendix of this Bulletin as Exhibit C is a Project Triggerlock Summary Report for the period April 10, 1991 through June 30, 1992, which provides detailed information on the indictments and informations, the defendants charged, and the status of dispositions and sentencing.

* * * * *

DRUG ISSUES

Drug Testing Program In State And Federal Prisons

The Bureau of Justice Statistics, Office of Justice Program announced on July 26, 1992, that almost 90 percent of the nation's 1,287 federal and state correctional institutions test inmates for illegal drugs and more than 40 percent test staff members. As of June, 1990, all 80 federal institutions and almost all of the 250 state community-based facilities reported having a drug testing program for inmates. Approximately 83 percent of the 957 state prisons also reported having a testing program.

The findings are from a 1990 census of the nation's correctional facilities and make available for the first time detailed information about illegal drugs in prisons. Whereas about three-quarters of the facilities reported suspicion-based testing, about six in 10 reported testing random groups of inmates, and two in 10 reported testing every inmate at least once during his or her period of confinement. Other findings included:

- On June 29, 1990, state and federal correctional facilities had drug treatment programs with an estimated capacity of 132,000 people. At the time, there were approximately 100,200 participants enrolled.

• On the same date, about 76 percent of the available drug treatment capacity in state and federal correctional institutions was in use.

• Community-based correctional facilities relied primarily on testing for drug enforcement. Only a quarter of such facilities required entering residents to change clothes. These facilities--which are often used for pre-release programs or study or work release training--permit residents to come and go unaccompanied.

• Testing procedures for personnel vary substantially for federal and state prisons. While more than half of federal prisons reported that all staff members and new hires are tested for illegal drug use, only 13 percent of state prisons reported testing such personnel.

• Among state prisons reporting staff testing, about one in three said that a first positive drug test resulted in immediate dismissal and about six in 10 said such a matter was normally referred to an internal affairs unit for follow-up.

• About two in 10 state prisons and almost six in 10 federal prisons that tested staff members operated a program to assist personnel who tested positive.

* * * * *

Major Crack Cocaine Breakthrough In The Eastern District Of North Carolina

Jane H. Jolly, Assistant United States Attorney for the Eastern District of North Carolina successfully prosecuted a case arising out of a Drug Enforcement Administration (DEA) Task Force investigating cocaine base (crack cocaine) dealers, who were coming from New York to North Carolina to sell crack cocaine. The DEA and local agents stopped Ernest Bynum, Jr. and another individual in a car in Henderson, North Carolina, on March 17, 1992. The passenger in the vehicle threw some crack cocaine out the window. Mr. Bynum and the passenger were arrested. A short while later, officers searched two hotel rooms in Henderson and arrested two other individuals. The officers seized over two ounces of crack cocaine from one hotel room and more crack cocaine from a cigarette pack that had been flushed down the toilet in the other hotel room. Informant information and surveillance led agents to believe that all the defendants were working together and had returned to North Carolina two days before with a large shipment of crack cocaine.

The drugs were sent to the North Carolina State Bureau of Investigation Crime Lab for analysis. An expert witness from the crime lab compared the three samples and determined that all the drugs were from the same batch. In other words, the drugs all came from the same source. This signature analysis looks at the impurities of the cocoa plant and the impurities in the decomposition of cocaine. Every time that cocaine is manipulated, it changes composition of those impurities, thus giving rise to a new signature. For example, if cocaine is extracted, heated, ground, or exposed to extreme conditions, the signature changes. In this case, the evidence showing that drugs seized from different locations were from the same source was critical in linking the defendant to these three locations.

Attached at the Appendix of this Bulletin as Exhibit D is a copy of the Government's Memorandum of Law in Support of Admission of Scientific Evidence, which provides further details concerning drug signature analysis. If you have any questions, please contact ***Jane H. Jolly,*** Assistant United States Attorney, Criminal Division, Eastern District of North Carolina, Raleigh, at (919) 856-4530.

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CIVIL DIVISION ISSUES

Enhancements Of Attorney's Fee Awards To Reflect The Risk Of Non-Payment After City Of Burlington v. Dague

Litigants who win awards of attorney's fees against the United States and federal agencies frequently seek to have the amount of the fee enhanced on several grounds, including the risk that the party would lose and thus obtain no fee (known as "contingency enhancements"). The Supreme Court has just held unequivocally that contingency enhancements may not be awarded. If an opponent nevertheless still attempts to obtain a contingency enhancement, relying on old court of appeals caselaw, the Civil Division Appellate Staff has prepared suggested sample language that United States Attorneys can use to oppose the request. For a summary of City of Burlington v. Dague, please refer to page 257 of this Bulletin. If you have any questions, please contact Frank Rosenfeld of the Appellate Staff at (202) 514-0168.

Suggested Language for Use in Preparing Briefs

Under a new Supreme Court decision, courts may not add an enhancement to an award of attorney's fees to account for the fact that the attorneys were retained on a contingent basis, i.e., under an agreement that the attorney will not charge the client any fee if the client loses the case. In City of Burlington v. Dague, 112 S.Ct. 2638, 60 U.S.L.W. 4717 (June 24, 1992), the Supreme Court held, by a 6-3 vote, that the "reasonable fee" allowed by federal attorney's fees statutes cannot include a contingency enhancement. The Court thereby disposed of a question on which it had split three ways in Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711 (1987) (Delaware Valley II). All court of appeals decisions that attempted to apply Delaware Valley II, including those which determined that Justice O'Connor's concurring opinion set forth the controlling law, are now no longer good law and are superseded by the new rule in Burlington.

The Burlington decision is a clear rejection of contingency enhancements under any and all circumstances. It applies not only to the fee-shifting provisions of the Clean Water Act and the Solid Waste Disposal Act, the provisions that were applicable in that case, but to all federal fee-shifting statutes that authorize "reasonable * * *attorney * * * fees." 60 U.S.L.W. at 4718 (emphasizing that the "case law construing what is a 'reasonable' fee applies uniformly" to all federal fee-shifting statutes). In particular, Burlington applies with equal force to the Civil Rights Attorneys' Fees Act, 42 U.S.C. 1988, as well as the fee-shifting provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k). See 60 U.S.L.W. at 4718 (citing both).1/

In sum, by making clear that a "reasonable" attorney's fee under federal fee-shifting statutes cannot include an enhancement for contingency fees, the Court in Burlington has precluded contingency enhancements in federal fee litigation.

1/ The Supreme Court in an earlier case already ruled out contingency enhancements for fee awards made under the Equal Access to Justice Act, 28 U.S.C. 2412(d), on the ground that such enhancements are inconsistent with the limited grounds in the statute for allowing a court to exceed the $75 per our cap. Pierce v. Underwood, 487 U.S. 552, 573-74 (1988)

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CIVIL RIGHTS ISSUES

Attorney General Barr Reports On Civil Rights

In his testimony on June 30, 1992 before the Senate Judiciary Committee, Attorney General William P. Barr stated as follows:

> In the civil rights area, we have seen a record number of cases brought and defendants charged. From FY 1989 through FY 1991, the Department has prosecuted more racial violence cases than in the previous twelve years put together. Virtually all defendants charged have been convicted or have pled guilty. In response to the problem of police brutality, in the past three years, the Department has brought charges against 123 law enforcement officers alleging official misconduct and abuse.
>
> With the amendment to the Fair Housing Act that became effective in 1989, the Department of Justice has been able to file almost ten times as many fair-housing lawsuits per year as were possible before 1989. While I was serving as Acting Attorney General, I announced plans to aggressively attack housing discrimination by employing the Department's own testers. That testing program is now underway, and has already borne fruit. Furthermore, we will soon announce the filing and simultaneous settling of a major lawsuit involving discrimination in public housing to remedy racial and national origin discrimination.
>
> I have also directed Assistant Attorney General John Dunne in the Civil Rights Division to study the complex problem of mortgage discrimination. Soon we will suggest specific changes to improve racial and ethnic fairness in the mortgage underwriting process and, with the cooperation of the appropriate regulatory agencies, we will conduct more detailed investigations of specific lending institutions.
>
> We have sought to counter the disturbing rise in anti-Semitic activity, both in housing practices and in society at large. In the Airmont case, we are attempting to overthrow zoning laws allegedly designed to keep Orthodox Jews out of a community in New York. More recently, we convicted eight members of hate groups who desecrated a synagogue in Nashville, Tennessee. We have also convicted numerous "skinheads" for a variety of anti-Semitic crimes.

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ANTITRUST DIVISION ISSUES

Antitrust Division Grand Jury Practice Manual

The Antitrust Division has recently revised the Grand Jury Practice Manual. This Manual, consisting of two large volumes, explains the policies of the Division on grand jury investigations and the general strategy for prosecuting white collar criminal offenses.

A limited number of copies are available upon request. If you would like a set, please forward your request in writing to: United States Attorneys' Bulletin, Room 6021, Patrick Henry Building, 601 D Street, N.W., Washington, D.C. 20530, attn. Audrey Williams. The fax number is: (202) 219-1201.

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ASSET FORFEITURE

Policy On Bona Fide Purchasers For Value And The Relation Back Doctrine In Civil Forfeitures

Attached at the Appendix of this Bulletin as Exhibit E is a memorandum dated July 31, 1992, from Cary H. Copeland, Director and Chief Counsel, Executive Office for Asset Forfeiture, to all United States Attorneys, and other Department and Agency officials, concerning Bona Fide Purchasers for Value and the Relation Back Doctrine in Civil Forfeitures. The innocent owner defense to civil forfeiture is not available, as a matter of law, to one who has acquired an interest in the forfeited property after the illegal acts which resulted in the forfeiture. This memorandum reiterates the Department's policy that despite the statutory wording, the Department will treat bona fide secured creditors and purchasers for value the same in civil as in criminal forfeiture proceedings. Valid claims filed by bona fide secured creditors or other purchasers for value will be honored pending the enactment of corrective legislation.

If you have any questions regarding this policy, please contact the Asset Forfeiture Office in the Criminal Division at (202) 514-1263.

* * * * *

Memorandum Of Understanding Between The U.S. Marshals Service And The U.S. Customs Service

A Memorandum of Understanding (MOU) between the U.S. Marshals Service and the U.S. Customs Service was signed on April 23, 1992, by Commissioner Carol Hallett, U.S. Customs Service, and Acting Director Henry E. Hudson, U.S. Marshals Service. The MOU, as mandated by Congress, is for the post-seizure management and disposal of seized and forfeited property. A copy is attached at the Appendix of this Bulletin as Exhibit F.

Under the terms of the MOU, the U.S. Marshals Service will receive all seized and forfeited real property; the U.S. Customs Service will receive all seized and forfeited vessels; and seized and forfeited motor vehicles will be consolidated where feasible and cost-effective. A joint implementation team of the U.S. Marshals Service and the U.S. Customs Service have been meeting to develop procedures that will cover operational coordination, finance and accounting, automated data processing, and procurement. Under the terms of the MOU, some procedural changes may be required. The U.S. Marshals Service will coordinate with all affected agencies the modifications to current transfer of custody procedures for vehicles and vessels. A copy of the implementation procedures will be distributed prior to the actual effective date, which is October 1, 1992.

* * * * *

IMMIGRATION AND NATURALIZATION SERVICE

During his testimony before the Senate Judiciary Committee on June 30, 1992, Attorney General William P. Barr stated that he had directed the Immigration and Naturalization Service to hire 300 new Border Patrol Officers. As of June 12, 241 trainees have been hired, and 71 officers are already trained and working on the border. He also ordered the hiring of 200 additional criminal investigators to combat illegal immigration and violent crime by criminal aliens, the creation of a National Criminal Alien Tracking Center, and the hiring of over 700 additional INS workers to improve services to legal immigrants and travelers.

In addition, $5 million from the Department's Asset Forfeiture Fund has been used to purchase new lighting, sensors, vehicles and other interdiction equipment. The Attorney General also announced in Los Angeles a series of initiatives designed to facilitate the identification and deportation of criminal aliens.

* * * * *

POINTS TO REMEMBER

Congressional Relations Procedures

Laurence S. McWhorter, Director, Executive Office for United States Attorneys, asks that each United States Attorney, Assistant United States Attorney, and support staff be reminded of the congressional relations procedures for all communications between the Department of Justice and Congress. Mr. McWhorter said that we cannot overstress the importance of this policy within the offices of the United States Attorneys. If we are to fulfill the duties and obligations of the Department, it is essential that we speak with one voice to Congress. Section 1-8.020 of the United States Attorneys' Manual states that the Assistant Attorney General for the Office of Legislative Affairs (OLA) is responsible for coordination of all significant communications between Congress and the Department subject to the general supervision of the Attorney General and the direction of the Deputy Attorney General. (See. also, 28 C.F.R. §0.27).

If you have any congressional inquiries or actions, or require any assistance or advice, please call Louis DeFalaise, Counsel to the Director, Executive Office for United States Attorneys, at (202) 616-2128.

* * * * *

SENTENCING REFORM

NORTHERN DISTRICT OF OHIO

Sixth Circuit En Banc Decision In United States v. Davern

The Sixth Circuit decided two issues in this reversal of a panel opinion involving the questions: (1) whether a defendant convicted of possession with intent to distribute an unstated amount of cocaine should be sentenced based upon what he actually possessed or based upon the amount of cocaine defendant negotiated to buy from undercover agents? and (2) whether the sentencing guidelines are mere "proposals" to be disregarded when the district court deems them to be too harsh?

FACTS: Defendant Davern, a twenty-one year old college student with an upper middle class background agreed to buy a half kilogram of cocaine from an FBI agent for $10,000. When Davern came with the money the agent gave him 1,000 grams of plaster of paris covering a small package with 85 grams of cocaine inside. The defendant pled guilty to an indictment which charged that the defendant had possessed with intent to distribute an unspecified amount of cocaine. At sentencing defendant argued that he could only be sentenced based upon the 85 grams which he had actually possessed. The district court, after giving defendant acceptance of responsibility, sentenced defendant to the low end of the range. fifty-one months. Defendant appealed.

The appellate panel reversed, holding that a court must first consider the purposes of sentencing, as called for under Title 18, Section 8558(a), U.S.C., and fashion an appropriate sentence; only after following this procedure could the court consider whether the guideline sentence was greater than necessary to effectuate the purposes of sentencing per the enabling legislation. The panel also stated that the court must use the actual amount of cocaine possessed in considering the guidelines because the negotiation to purchase 500 grams was merely an "aggravating circumstance" to be weighed in context and not made part of a mandatory sentencing grid." The panel suggested that the sentencing commission may lack the authority to include unconvicted acts (i.e., the negotiation for 500 grams) as part of relevant conduct. The panel called for a "flexible approach" in which a district court may use its "own judgment" to determine whether the "commission's proposed guideline sentence is greater than necessary" to effectuate the purposes of sentencing.

The Sixth Circuit, sitting en banc, reversed the panel and held that a defendant convicted of possession with intent to distribute cocaine must be sentenced based on all "relevant conduct," the amount of cocaine which a defendant negotiates to possess. The court rejected the panel's attempt to minimize the significance of the guideline sentencing range. It stated that a court discharges its obligation to render "a sentence sufficient but not greater than necessary" by considering general sentencing goals in the course of applying the guidelines. The Circuit reasoned that if courts independently had to determine appropriate sentences on a case-by-case basis, apart from the guidelines, not only would the purposes of uniformity of sentencing be undermined, but finality also would suffer as all sentences would be appealed in every case by either the government or the defense as not long enough or as being more than is required to effectuate the purposes of sentencing. Accordingly, Davern teaches that the guideline range presumptively fulfills the purposes of sentencing.

United States v. Davern, No. 90-3681, July 21, 1992.

Attorneys: Gary D. Arbeznik, Assistant United States Attorney,
Northern District of Ohio - (216) 363-3900

Sean Connelly, Appellate Section, Criminal Division
Department of Justice - (202) 616-0114

* * * * *

Guideline Sentencing Updates

A copy of the Guideline Sentencing Updates, Volume 4, No. 24, dated July 13, 1992, and Volume 4, No. 25, dated July 28, 1992, is attached as Exhibit G at the Appendix of this Bulletin.

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Federal Sentencing Guide

Attached at the Appendix of this Bulletin as Exhibit H is a copy of the Federal Sentencing Guide, Volume 3, No. 18, dated June 29, 1992, and Volume 3, No. 19, dated July 13, 1992, which is published and copyrighted by James Publishing Group, Santa Ana, California.

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LEGISLATION

FY 1993 Commerce, Justice And State Appropriations

By July 30, 1992, the House had approved appropriations legislation for the Department. Initial review of the legislation reveals that the Department of Justice did not fare well, taking a 4.2 percent cut in the House bill compared to the 1992 enacted budget. Although the Department fared better in the Senate Appropriations Committee (an 8.7 percent increase over the 1992 enacted budget), a devastating amendment freezing the Department's General Administration account offered by Senator Bob Graham (D-Fla.), was adopted with the full Senate. Two letters from the Department have indicated strong opposition to this amendment, as well as the overall funding levels.

Both the Senate and the House bill still contain an objectionable reauthorization of the Legal Services Corporation. Several Administrative Policy Statements note that the President's Senior Advisors would recommend a veto, if this provision remains in the bill. The full Senate is yet to take a final vote on its bill. Once it does, a House-Senate conference will be set. The Department will continue to work with the Justice Management Division budget staff in responding to developments in the appropriations process.

* * * * *

Federal Housing Enterprises Regulatory Reform Act Of 1992

On July 1, 1992, the Senate passed S. 1733, the "Federal Housing Enterprises Regulatory Reform Act of 1992," which is designed to ensure the financial safety and soundness of government sponsored housing enterprises. The Department had threatened veto of the bill over certain provisions creating an office within the Department of Housing and Urban Development not subject to normal executive branch control and having independent litigating authority. The Department, however, was successful in modifying the most objectionable provisions, such as independent litigating authority, thus removing the veto threat on the bill.

The House has already passed a similar measure, H.R. 2900, which does not raise serious concerns. A conference is expected on these bill with enactment of the legislation likely before Congress adjourns.

* * * * *

Resale Price Maintenance

By a vote of 175-115, the Conference Report on the Consumer Protection Against Price-Fixing Act of 1992 was defeated on June 30, 1992. The bill would have overturned two Supreme Court cases concerning the legal and evidentiary standards that must be met to prove a conspiracy to set retail prices. The Administration had threatened veto of the bill. Any further consideration of legislation in this area in this Congress is unlikely.

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CASE NOTES

SOUTHERN DISTRICT OF TEXAS

Landmark Decision In The Southern District Of Texas Regarding Good Manufacturing Practices For Medical Devices

The government commenced this civil seizure in March, 1991, by filing a complaint for forfeiture under the Federal Food, Drug, and Cosmetic Act against facial and jaw implants used for reconstructive purposes. These medical devices were made with a substance known as Proplast, a porous material that is intended to promote tissue and bone ingrowth for stabilization of an implant. Four inspections conducted by the Food and Drug Administration (FDA) between March, 1989 and February, 1991, noted many deficiencies in the way the devices were being produced, a violation of the statutory requirement that devices be made according to current good manufacturing practice. Pursuant to an arrest warrant, the devices were seized, but at the request of the claimants (NovaMed, Inc., and Oral Surgery Marketing, Inc., related firms operating from the same facility in Houston, Texas), District Judge David Hittner quashed the warrant and ordered that the devices be returned to the claimants. The government obtained a stay of the release order from the Fifth Circuit Court of Appeals.

On appeal by the government, the Court of Appeals, in November, 1991, vacated the orders rescinding the arrest warrant, and remanded the case for a trial on the merits (946 F.2d 422). The case was tried before Judge Hittner on January 21-27, 1992. On March 10, the court ruled that the seized devices were adulterated because they were not manufactured in conformity with the good manufacturing practice regulations issued by FDA. The devices were also found to be misbranded because the manufacturers failed to submit to FDA reports required by the device reporting regulations. The court condemned the devices and awarded costs and fees against the claimants.

United States v. Undetermined Quantities of Various Articles of Device . . .Proplast, S.D. Tex., Civil Action No. H-91-0610

Attorney: Samuel G. Longoria, Assistant United States Attorney, Southern District of Texas - (713) 238-9400

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CIVIL DIVISION

Supreme Court Puts An End To Contingency Enhancements Under Federal Fee-Shifting Statutes

The Supreme Court has finally resolved an issue that it was unable to resolve in Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. 711 (1987) (Delaware Valley II), namely, whether and to what extent an award of attorney's fees under a fee-shifting statute ought to be enhanced to reflect the fact that the attorney agreed not to charge fees to the plaintiff if the plaintiff lost, thereby assuming the risk that he would receive no fee at all. Although the Court split 4-1-4 in Delaware Valley II, most courts of appeals have been applying Justice O'Connor's concurring opinion, under which the courts must examine whether the plaintiff would have faced substantial difficulty obtaining competent counsel in a given market without a contingency enhancement. In the present case, the Court reexamined the issue and decided, by a 6-3 vote, that contingency enhancements are never proper under fee-shifting statutes. The majority specifically adopted the plurality opinion in Delaware Valley II and rejected Justice O'Connor's market test.

City of Burlington v. Dague, No. 91-810 (June 24, 1992).
DJ # 145-185-373.

Attorneys: William Kanter - (202) 514-4575
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* * * * *

Supreme Court Holds That APA Challenge To 1990 Census Is Barred Because President Is Not An Agency Under the APA, And Rejects Constitutional Challenge To Allocation Of Overseas Personnel Among The States

In conducting the 1990 census, the Department of Commerce allocated federal personnel living overseas, including members of the armed forces, among the states. Massachusetts urged that such allocation was contrary to the requirements of the Constitution and was, in any event, arbitrary because the data base used by the Census Bureau did not provide a reasonable method of matching personnel with their home states. A three-judge court rejected the constitutional challenge but concluded that the data base used was irrational.

The Supreme Court has now reversed. Writing for a five-Justice majority, Justice O'Connor held that the President is not an agency for purposes of the APA. Because the final transmission of the census figures to the Congress is made by the President, review of APA claims is thus precluded. Writing for a four-Justice plurality, Justice O'Connor held that while APA claims were precluded, constitutional challenges could be maintained, relying on the Court's decision in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) and Panama Refining Co. v. Ryan, 293 U.S. 388u (1935). Writing for eight Justices, Justice O'Connor rejected Massachusetts' claim that the Constitution required that persons actually reside in the state to which they are allocated.

Franklin v. Massachusetts, No. 91-1502 (June 26, 1992). DJ # 145-9-897.

Attorneys: Michael Jay Singer - (202) 514-5432
Mark B. Stern - (202) 514-5089
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Second Circuit Affirms Refusal To Substitute United States For Federal Employee Under The Westfall Act In Harassment Case

This case involved state law harassment claims brought against an Army ROTC instructor teaching at the University of Vermont, as a result of "callous and insulting remarks of [a] sexual and religious nature" alleged to have been made in the office during the work day to his secretary. The U.S. Attorney certified that Wheeler was acting within the scope of his employment, and moved to substitute the United States as a defendant under the Westfall Act. The district court refused to certify, and the Second Circuit affirmed. The court of appeals first concluded that it had jurisdiction over an interlocutory appeal in such circumstances under the collateral order doctrine. It then went on to hold, in accordance with several other decisions, that U.S. Attorney's certification regarding scope of employment was subject to de novo review. Finally, on the basis of an unpublished Vermont trial court opinion, the court held that Wheeler's alleged conduct was outside the scope of his employment (a question we agreed was governed by state law).

McHugh v. University of Vermont, No. 91-6062 (June 4, 1992).
DJ # 157-78-164.

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* * * * *

Fifth Circuit Applies Amended Fed.R.Civ.P. 15(c) Retroactively To Permit Amended Title VII Complaint Naming The Proper Party To Relate Back To Date Of Originally Filed Complaint

The district court dismissed Waclaw Skoczylas's Title VII suit against his former government employer on the ground that Skoczylas had named the wrong defendant. Because the proper defendant had not received notice prior to expiration of the limitations period for filing the suit, the Federal Rules of Civil Procedure in effect at the time, as interpreted in Schiavone v. Fortune, 477 U.S. 21 (1986), did not permit him to amend his complaint to change the name of the party being sued.

In 1991, while the case was on appeal, the Supreme Court amended Rule 15(c) to change the result in Schiavone. Under the amended rule, an amendment to a pleading to change the defendant or the naming of the defendant relates back to the date of the original pleading so long as the intended defendant is notified within the period allowed by Rule 4(m) for service of the summons and complaint (120 days). The court of appeals, relying on the preamble to the rules, which provided that the amended rules "shall govern all proceedings in civil actions * * * commenced [after the effective date of the rules] and, insofar as just and practicable, all proceedings in civil actions then pending," applied the new rule retroactively to Skoczylas's complaint and remanded the case to the district court.

Waclaw Skoczylas v. Federal Bureau of Prisons, No. 91-4044 (May 27, 1992).
DJ # 145-12-8704.

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Fifth Circuit Denies Our Motion For Stay Of Order Requiring Assistant United States Attorney To Pay Monetary Sanction For Failure To Answer Interrogatories And To Execute Affidavit Forswearing Right To Seek Or Receive Reimbursement From Government, But Rules That The Order Can Be Challenged On Appeal At The Conclusion Of The Underlying Case

An Assistant United States Attorney (AUSA) failed to answer interrogatories in a timely fashion. The district court (McBryde, J.) issued an order imposing $2500 in sanctions against the AUSA personally and required him to execute an affidavit stating that he would not seek or receive reimbursement from the Government. Before the required payment or execution of the affidavit, we sought a stay of the order pending appeal of the order, in part due to a fear that payment and execution of the affidavit might moot the issues and prevent a later appeal.

The Fifth Circuit denied our motion for a stay, but stated that the district court's order would not interfere with our right to appeal at the conclusion of the litigation and that the execution of the affidavit would not prevent the AUSA or the government from challenging "this rather harsh sanction order at the appropriate time."

Chilcutt v. United States, No. 92-1498 (June 8, 1992). DJ # CDNEW.

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John C. Hoyle - (202) 514-3469

* * * * *

Fifth Circuit Accepts Our Argument That FIRREA Abrogates Agreements Inconsistent With Its Capital Requirements

This case involves the effect of FIRREA on Security Savings' agreements with federal banking agencies, which allowed Security to treat certain assets, including supervisory goodwill, as regulatory capital. The district court held that the government's commitment to accord favorable accounting treatment to Security's assets survived both the termination of the written agreements and the enactment of FIRREA. The district court also found that OTS could not require Security to use consolidated accounting for purposes of determining regulatory capital.

The Fifth Circuit (Williams, Wiener, CJ; Little, DJ) reversed, accepting our argument that FIRREA abrogates prior agreements inconsistent with its capital requirements. The Fifth Circuit joins the Third, Sixth, Ninth, and Eleventh Circuits in ruling in our favor on this question. The court of appeals affirmed the district court on the issue of consolidated accounting.

Security Savings and Loan v. Director, OTS, No. 91-1570 (May 18, 1992). DJ # 145-3-3228.

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CIVIL RIGHTS DIVISION

The Civil Rights Division summarized a recent Supreme Court decision in R.A.V. v. City of St. Paul, Minnesota, No. 90-7675, which appeared in the United States Attorneys' Bulletin, Vol. 40, No. 7, dated July 15, 1992, at page 220. Inasmuch as two lines were inadvertently omitted, the decision is being reprinted in its entirety as follows:

Supreme Court Invalidates City Hate-Crime Ordinance On First Amendment Grounds

On June 22, 1992, the Supreme Court issued its decision in R.A.V. v. City of St. Paul, Minnesota, No. 90-7675. The Court unanimously invalidated, as a facial violation of the First Amendment, a St. Paul ordinance that made it a criminal offense to "place[] on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed,

religion or gender." All of the Justices agreed that the Court was bound by the interpretation of the ordinance by the Minnesota Supreme Court, which had held that it was limited to expressions that constituted "'fighting words,' i.e., conduct that itself inflicts injury or tends to incite immediate violence.'" The Court has previously held that statutes regulating "fighting words" are valid under the First Amendment. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The R.A.V. majority opinion, written by Justice Scalia, and joined by Chief Justice Rehnquist, and Justices Kennedy, Souter, and Thomas, nonetheless struck down the St. Paul ordinance because it proscribed some, but not all, "fighting words", on the basis of the content of the expression. In short, the majority opinion held that because the ordinance criminalized only "fighting words" relating to race and religion, it was facially invalid. The concurring justices, in separate opinions written by Justices White, Blackmun, and Stevens, would have invalidated the ordinance as overbroad. In their view, the Minnesota Supreme Court had defined the term "fighting words" and therefore the reach of the ordinance too broadly, to include not only expressive conduct that causes a breach of the peace, but also expression that "causes hurt feelings, offense, or resentment."

This case is distinguishable from federal prosecutions for cross-burnings and other racially motivated crimes under 18 U.S.C. 241 and 245, and 42 U.S.C. 3631. In contrast to the St. Paul ordinance, these statutes prohibit not mere expression, but intimidation, threats, and interference with federally guaranteed rights. The majority opinion, for example, specifically distinguished the St. Paul ordinance from 18 U.S.C. 871, which prohibits threats on the life of the President, because of the federal government's special interest in preventing such threats. The government has a similar interest in preventing interference with the rights guaranteed by federal statutes and the Constitution. The majority opinion also distinguished content-based regulation of expression where the statute is directed primarily at conduct rather than speech. As examples, it cited the prohibition of sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, as well as other civil rights statutes, 18 U.S.C. 242, and 42 U.S.C. 1981 and 1982. The federal statutes applied in cross-burning cases similarly are directed at the defendants' conduct, i.e., the intentional intimidation of or interference with those who are exercising federally guaranteed rights. The fact that the victim's race may have been the motivation for the defendant's conduct and an element of the government's proof does not shield such conduct from regulation.

The Criminal Section of the Civil Rights Division believes that this opinion will not interfere with our use of 18 U.S.C. 241 or 42 U.S.C. 3631 in cross burning cases where the cross burning was clearly intended as a threat of force. Since the R.A.V. decision, we have obtained both indictments and guilty pleas where the cross burning was intended to intimidate the victims and did constitute a threat of force.

R.A.V. v. City of St. Paul, Minnesota, No. 90-7675 (June 22, 1992)

Attorneys: Jessica Dunsay Silver - (202) 514-2195
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Linda Davis - (202) 514-3204

* * * * *

TAX DIVISION

Tax Division Makes Significant Progress In Electronic Filing Initiative

As of July 27, 1992, the Tax Division has authorized over 120 grand juries to investigate charges arising out of abuses of the IRS's new system for electronically filing tax returns. Many of the grand juries are being conducted directly by Tax Division personnel. These grand juries have already produced over 30 indictments. Overall, the IRS has detected 1,375 electronic filing fraud schemes this filing season. And because of the large number of taxpayers who apply for automatic extensions, this filing season will not end until August 15, 1992. Many of these schemes have not yet been referred to the Tax Division for investigation or prosecution.

* * * * *

Tax Division Files Second Mandamus Petition Against Texas Judge Regarding Attendance at Settlement Conferences

On July 13, 1992, the Tax Division filed a second mandamus petition, challenging the right of Fort Worth, Texas, Federal District Judge John McBryde to order high-ranking Department officials to attend settlement conferences in his court. The Solicitor General previously authorized the filing of similar petitions in In re M.P.W. Stone, No. 92-1406 (order in a Civil Division case requiring the attendance of Assistant Attorney General Gerson at settlement conferences); In re Internal Revenue Service and Sonja Roundtree, No. 92-1462 (order in Tax Division case requiring the attendance of the Deputy Attorney General at settlement conference); and In re United States, No. 92-1573 (order in Civil Division case requiring the attendance of Assistant Attorney General Gerson at settlement conferences).

In the latest case, Tucker v. United States v. Kerbs, Judge McBryde ordered an official "with unlimited settlement authority" to attend a three-hour settlement conference on July 8, 1992. Because over $800,000 in taxes are in dispute in the Tucker case, the only Departmental official with such "unlimited" settlement authority is the Acting Assistant Attorney General. While we had requested that Judge McBryde stay his settlement conference order pending resolution by the Fifth Circuit of the mandamus petitions previously filed by the Tax and Civil Divisions, he refused to do so. Rather, on July 10, 1992, he denied the stay we had requested and ordered an official with "unlimited settlement authority" to attend another settlement conference the following week. He further ordered the United States to show cause why it should not be held liable for sanctions, "including contempt of court," for "violating" his earlier order.

The Tax Division filed an emergency motion for a stay of the settlement conference order and a mandamus petition in the Fifth Circuit, challenging the right of Judge McBryde to order high-ranking Department officials to attend settlement conferences. The Division also filed an emergency motion for a stay of the settlement conference order and the Judge's further order to show cause why the United States should not be held liable for sanctions for "violating" his settlement conference order. On July 15, 1992, the Fifth Circuit granted the Division's emergency motion for a stay of both orders.

* * * * *

First Circuit Rules That Deferential Principles Of Administrative Law Govern Review Of The IRS's Interpretation Of Whether Information Is Excepted From Release Under The Freedom of Information Act

On July 10, 1992, the First Circuit reversed the unfavorable decision of the District Court in Aronson v. Internal Revenue Service. Aronson, a lawyer specializing in finding persons to whom the Government owes money and helping them to obtain the amounts due them, filed this action seeking the last known addresses of persons to whom the Government owes tax refunds for the years 1981 through 1987. While the Internal Revenue Code provides that the Internal Revenue Service "may" release information about unclaimed tax refunds, the Service releases only taxpayer names, cities and zip codes shown on the returns. The District Court held that, under the Freedom of Information Act, Aronson was entitled to street address information. The Government appealed, contending that Section 6103 of the Internal Revenue Code precluded the release of this information. The First Circuit agreed, finding that, although the Freedom of Information Act generally provides for de novo review of an agency's decision to withhold information, once it has been determined that the information at least arguably falls within a confidentiality statute, the court should defer to the agency's interpretation of that statute.

* * * * *

Second Circuit Rules That Control Premium Paid Pursuant to Hostile Takeover Can Be Allocated to Depreciable Assets

On June 25, 1992, the Second Circuit issued an unpublished order affirming the decision of the Tax Court in Philip Morris Inc. v. Commissioner, a multi-million dollar case involving Philip Morris' acquisition of Seven-Up pursuant to a tender offer for Seven-Up's stock. Under the Internal Revenue Code, a corporation that purchases a controlling stock interest in another corporation may liquidate the purchased corporation and allocate the stock purchase price among the acquired assets. Philip Morris persuaded the Tax Court that it paid too much for Seven-Up and that it should be permitted to allocate the resulting premium among, inter alia, the physical assets it acquired in its acquisition. This permitted Philip Morris to recover the over-allocation through depreciation.

On appeal, we contended that the price Philip Morris agreed to pay pursuant to the tender offer represented the arms-length price that it had to pay to acquire Seven-Up, and that to the extent this exceeded the fair market value of the tangible assets Philip Morris acquired, the excess should be attributed to Seven-Up's going concern value, i.e., nondepreciable goodwill. The Second Circuit disagreed, adopting the views of the Tax Court. As a result of this ruling, Philip Morris will be able to reduce its taxes for the years in question by $7 to $8 million, and perhaps several times that amount for the full period over which the assets in question will be depreciated. The Internal Revenue Service believes that this decision will affect the outcome of other hostile takeover cases involving over $2 billion in taxes.

* * * * *

Fifth Circuit Rules That Plaintiffs Have Standing To Challenge The Constitutionality Of Certain Transition Rules Enacted As Part Of The Tax Reform Act Of 1986

On June 25, 1991, the Fifth Circuit affirmed the judgment of the District Court in Apache Bend Apartments, Ltd. v. United States. The plaintiffs sought declaratory and injunctive relief with respect to certain targeted transition rules enacted as part of the Tax Reform Act of 1986, claiming that these rules violated the Equal Protection Clause of the United States Constitution. Among the provisions challenged were those excepting certain taxpayers from the retroactive repeal of the investment credit and of accelerated depreciation.

In the District Court, the Government asserted that the court lacked subject matter jurisdiction over the suit, arguing that the effect of the challenged provisions upon the plaintiffs' tax liability was purely speculative (they had not filed returns or refund claims) and that the Anti-Injunction Act precluded the issuance of an injunction relating to the assessment or collection of federal taxes. The District Court refused to dismiss the complaint on this basis, but later granted summary judgment in favor of the Government, reasoning that Congress had a rational basis for granting specific transitional relief to certain classes of taxpayers who made extensive business investments in projects that were near completion. On appeal, we defended the judgment of the District Court on the merits, but again argued that the District Court lacked subject matter jurisdiction over the action. The Fifth Circuit affirmed the District Court's decision with respect to both the standing issue and the constitutionality of the transition relief. One judge dissented, reasoning that the plaintiffs here had no standing to maintain this suit.

* * * * *

Ninth Circuit Rules For The Government In "Designated Summons" Case

On July 2, 1992, the Ninth Circuit affirmed the favorable decision of the District Court in United States v. K.T. Derr, Chairman of Chevron Corp., the first judicial test of the Internal Revenue Service's ability to issue a summons pursuant to Section 6503(j) of the Internal Revenue Code. Section 6503(j) was enacted in 1990 to facilitate tax enforcement in cases involving foreign "transfer pricing" by multinational corporations.

Prior to the enactment of Section 6503(j), the IRS had problems completing audits in foreign pricing cases when corporate taxpayers refused to provide information concerning their foreign operations. Since, under prior law, the IRS had only a limited amount of time within which to make audit adjustments, these "stone-walling" tactics forced the IRS to make audit determinations on the basis of incomplete audits and without the information it required to defend these adjustments from challenge. Section 6503(j) shifts this balance by providing that if the IRS issues a summons denominated a "designated" summons with respect to the tax liability of a corporate taxpayer within 60 days of the expiration of the period of limitations on assessment of such tax, the period of limitations will be suspended during the period in which the Government seeks judicial enforcement of the summons.

* * * * *

Ninth Circuit Rules That Alaska Liquor Licensing Statute Trumped By Federal Tax Lien Statute

On July 10, 1992, the Ninth Circuit reversed and remanded the decision of the Bankruptcy Appellate Panel in Kimura v. United States. This Government appeal involved the distribution by a bankruptcy trustee of the proceeds from the sale of a liquor license possessed by the debtor in bankruptcy. The United States claimed priority to these proceeds based on its tax lien for the debtor's unpaid withholding taxes. Although the Government's lien was filed prior to the claims of competing creditors, the Bankruptcy Appellate Panel ruled that all creditors, including the United States, should share the proceeds from the sale pro rata. It found that Alaska law, which allowed the Alaska Alcohol Beverage Control Board to condition the transfer of a liquor license upon satisfaction of claims against the original holder, precluded the Government's claim to priority status. The Ninth Circuit reversed, holding that the priority Alaska reserved to trade creditors over a prior federal tax lien was invalid and unenforceable.

* * * * *

ADMINISTRATIVE ISSUES

Career Opportunities

Office Of The U.S. Trustee
(New Haven, Connecticut; Detroit, Michigan; Jackson, Mississippi; Los Angeles, California; And Philadelphia, Pennsylvania)

The Office of Attorney Personnel Management, Department of Justice, is seeking an experienced attorney for the United States Trustee's Office in New Haven, Connecticut; Detroit, Michigan; Jackson, Mississippi; Los Angeles, California; and Philadelphia, Pennsylvania. Responsibilities include assisting with the administration of cases filed under Chapters 7, 11, 12, or 13 of the Bankruptcy Code; drafting motions, pleadings, and briefs; and litigating cases in the Bankruptcy Court and the U.S. District Court.

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

Office of the United States Trustee
Department of Justice
James English Building
105 Court Street, Rm. 402
New Haven, Connecticut 06511
Attn: Eric Small

Office of the United States Trustee
Department of Justice
477 Michigan Avenue, Rm. 1760
Detroit, Michigan 48226
Attn: Marion J. Mack

Office of the United States Trustee
Department of Justice
100 W. Capital St., Suite 1232
Jackson, Mississippi 39269
Attn: Ronald H. McAlpin

Office of the United States Trustee
Department of Justice
221 North Figueroa Street, Suite 800
Los Angeles, California 90012
Attn: Barbara Phillips

Office of the United States Trustee
Department of Justice
200 Chestnut Street, Room 607
Philadelphia, Pennsylvania 19106
Attn: Fred Baker

Current salary and years of experience will determine the appropriate grade and salary levels. The possible range is as follows:

New Haven: GS-11 ($32,423 - $42,152) to GS-15 ($64,233 - $83,423)
Detroit: GS-11 ($32,423 - $42,152) to GS-13 ($46,210 - $60,070)
Jackson: GS-11 ($32,423 - $42,152) to GS-13 ($46,210 - $60,070)
Los Angeles: GS-11 ($41,970 - $54,557) to GS-15 ($69,372 - $90,182)
Philadelphia: GS-11 ($35,017 - $45,524) to GS-14 ($58,976 - $76,666)

The positions are open until filled. No telephone calls, please.

* * * * *

APPENDIX

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

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

Effective Date	Annual Rate	Effective Date	Annual Rate	Effective Date	Annual Rate
10-21-88	8.15%	02-14-90	7.97%	05-31-91	6.09%
11-18-88	8.55%	03-09-90	8.36%	06-28-91	6.39%
12-16-88	9.20%	04-06-90	8.32%	07-26-91	6.26%
01-13-89	9.16%	05-04-90	8.70%	08-23-91	5.68%
02-15-89	9.32%	06-01-90	8.24%	09-20-91	5.57%
03-10-89	9.43%	06-29-90	8.09%	10-18-91	5.42%
04-07-89	9.51%	07-27-90	7.88%	11-15-91	4.98%
05-05-89	9.15%	08-24-90	7.95%	12-13-91	4.41%
06-02-89	8.85%	09-21-90	7.78%	01-10-92	4.02%
06-30-89	8.16%	10-27-90	7.51%	02-07-92	4.21%
07-28-89	7.75%	11-16-90	7.28%	03-06-92	4.58%
08-25-89	8.27%	12-14-90	7.02%	04-03-92	4.55%
09-22-89	8.19%	01-11-91	6.62%	05-01-92	4.40%
10-20-89	7.90%	02-13-91	6.21%	05-29-92	4.26%
11-16-89	7.69%	03-08-91	6.46%	06-26-92	4.11%
12-14-89	7.66%	04-05-91	6.26%	07-24-92	3.51%
01-12-90	7.74%	05-03-91	6.07%		

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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Alabama, M	James Eldon Wilson
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Arkansas, E	Charles A. Banks
Arkansas, W	J. Michael Fitzhugh
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California, E	George L. O'Connell
California, C	Lourdes G. Baird
California, S	William Braniff
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Georgia, S	Jay D. Gardner
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Illinois, S	Frederick J. Hess
Illinois, C	J. William Roberts
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Louisiana, M	P. Raymond Lamonica
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Mississippi, S	George L. Phillips
Missouri, E	Stephen B. Higgins
Missouri, W	Jean Paul Bradshaw

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New Hampshire	Jeffrey R. Howard
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New York, S	Otto G. Obermaier
New York, E	Andrew J. Maloney
New York, W	Dennis C. Vacco
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North Carolina, M	Robert H. Edmunds, Jr.
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Ohio, N	Joyce J. George
Ohio, S	D. Michael Crites
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Oklahoma, E	John W. Raley, Jr.
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Tennessee, M	Ernest W. Williams
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Texas, S	Ronald G. Woods
Texas, E	Robert J. Wortham
Texas, W	Ronald F. Ederer
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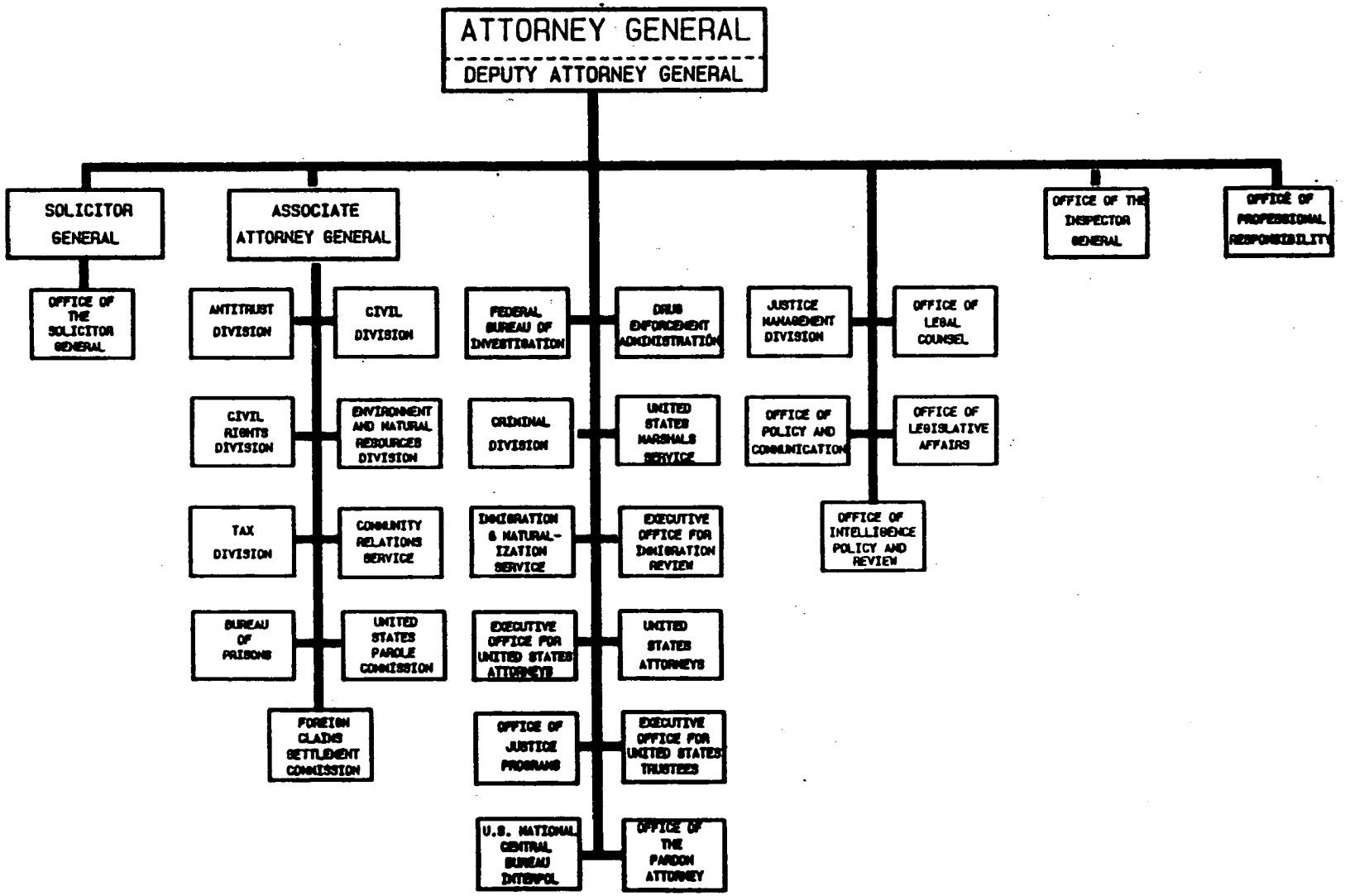
Virginia, W	E. Montgomery Tucker
Washington, E	William D. Hyslop
Washington, W	Michael D. McKay
West Virginia, N	William A. Kolibash
West Virginia, S	Michael W. Carey
Wisconsin, E	John E. Fryatt
Wisconsin, W	Kevin C. Potter
Wyoming	Richard A. Stacy
North Mariana Islands	Frederick Black

* * * * *

EXHIBIT A

U.S. DEPARTMENT OF JUSTICE



Approved: _____ Date: 5/19/92

WILLIAM P. BARR
Attorney General

EXHIBIT B

THE WEED AND SEED INITIATIVE

By William P. Barr, Attorney General
U.S. Department of Justice

Operation Weed and Seed is 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. [For more on Project Triggerlock, see page 27].

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. It's 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 three 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.

Prototype: 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 (SBA).

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 SBA; 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 expand 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 that 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, 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. 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 $1 million 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 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 say that they have been very enthusiastic about this critical effort.

In conclusion, 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.

Weed & Seed Transfer Of Real Property

On May 26, a memorandum that explains how federally forfeited real properties may be transferred to state and local public agencies participating in the seizure or forfeiture of property in the Weed & Seed initiative was distributed to all U.S. Attorneys and DoJ, and Treasury agencies. Among other procedures discussed, the memo notes that "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)." Also set forth is guidance to permit the expanded use of federally forfeited real property to support Weed & Seed programs. FMI: DoJ Executive Office for Asset Forfeiture, 202/616-8000.

EXHIBIT C

UNITED STATES DEPARTMENT OF JUSTICE
PROJECT TRIGGERLOCK
Summary Report

APRIL 10, 1991 through JUNE 30, 1992

DESCRIPTION	TOTAL	PERCENT
Indictments/Informations:	6,003	-
Defendants Charged:	7,714	-
Charge Information		
Defendants Charged under 922(g) w/o enhanced penalty:	2,049	26.56
Defendants Charged under 922 (g) with enhanced penalty under 924 (e):	407	5.28
Defendants Charged under 924 (c) :	2,918	37.83
Defendants Charged under both 922 (g) & 924 (c) :	523	6.78
Total defendants charged under 922 (g) and 924 (c) :	5,897	76.45
Defendants Charged with other Firearms violations :	1,817	23.55
Total defendants charged	7,714	100.00
Dispositions		
Defendants Convicted :	3,834	88.65
Defendants Acquitted :	144	3.33
Defendants Dismissed :	347	8.02
Total :	4,325	100.00
Sentencing Status		
Defendants Pending Sentencing :	1,348	
Defendants Sentenced :	2,510	
Sentencing Information		
Prison Sentences :	15211	years
Average Prison Sentence :	83	months
Number Sentenced to Life or More than 15 years	363	
Sentenced to prison :	2,212	
Sentenced w/o prison or suspended to 0 time served :	298	

EXHIBIT D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

NO. 92-37-01-CR-5-F
NO. 92-37-03-CR-5-F

UNITED STATES OF AMERICA	:	
	:	GOVERNMENT'S MEMORANDUM
v.	:	OF LAW IN SUPPORT OF
	:	ADMISSION OF
ERNEST BYNUM, JR.	:	SCIENTIFIC EVIDENCE
RAYMOND R. WALKER, JR.	:	

The United States of America, by and through the United States Attorney for the Eastern District of North Carolina, hereby files this memorandum of law in support of admission of scientific evidence and shows unto the Court the following:

The Government plans to introduce into evidence three separate amounts of cocaine base (crack cocaine) (hereinafter "crack cocaine") that were seized from three different locations on March 17, 1992. The crack cocaine was sent to the North Carolina State Bureau of Investigation (hereinafter "NC-SBI") for analysis. An expert witness, John Casale from the NC-SBI, compared these three different samples and reached the conclusion that they were from the same batch. In other words, the drugs all came from the same source. This signature analysis looks at the impurities of the cocoa plant and the impurities in the decomposition of cocaine. Every time that cocaine is manipulated it changes composition of those impurities, thus giving rise to a new signature. For example, if cocaine is extracted, heated, ground, or exposed to extreme conditions, the signature changes.

Federal Rule of Evidence 702 provides that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

This rule embodies two requirements for expert testimony. First, the testimony must assist the trier of fact to understand the evidence. The second is that the witness must be qualified as an expert. It, of course, is within the discretion of the trial court to determine whether each of these requirements is met. Hamling v. United States, 419 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974).

As a predicate to the admission of expert testimony pertaining to scientific evidence, the scientific principle in question must be sufficiently established to have gained general acceptance in the particular field to which it belongs. See Frye v. United States, 293 F.2d 1013 (D.C. Cir. 1923).

Therefore, for the drug signature evidence to be admissible in this case, the testimony must assist the trier of fact to understand the evidence, the witness must be qualified as an expert and the scientific principle (drug signature analysis) must be sufficiently established to have gained general acceptance in the field of forensic chemistry.

First, the drug signature evidence will assist the jury in understanding the evidence. It is relevant for the jury to consider if drugs seized from three different locations came from

the same source. The jury must first make a determination if the evidence is, in fact, cocaine. In addition, evidence showing that drugs seized from different locations are from the same source will assist the jury in determining whether the defendant was involved or not, such as this case where the defendant can be linked to the three locations. See United States v. Sellers, 566 F.2d 884 (4th Cir. 1977) (photographic expert allowed to point out similarities and differences between defendant's features and those of person shown in bank surveillance photograph and to express opinion as to whether defendant was person in the picture).

Second, the witness must be qualified as an expert. The witness that the Government will proffer to the Court is Mr. John Casale. Mr. Casale is now with the Federal Drug Enforcement Administration (hereinafter "DEA"), assigned to the Special Testing Laboratory in McLean, Virginia. Mr. Casale was a chemist with the NC-SBI from 1981 until the Spring of this year. Mr. Casale has testified as an expert in forensic chemistry on numerous occasions in both State and Federal Court.

Third, the drug signature analysis must have gained general acceptance in the field to which it belongs, forensic chemistry.

a. Mr. Casale has received several grants from the United States Department of Justice to work on cocaine and drug signature analysis. In 1988, Mr. Casale received a grant entitled, "Forensic Applications of Cocaine Chemistry," Grant No. U-

170-188-E6-D-009, $267,000. Mr. Casale received a second grant from the Department of Justice entitled, "Cocaine and Purity Signature Profile Analysis-CISPA," Grant No. 170-190-E-6-D-034, $169,000.

b. Mr. Casale has had several articles on this subject published in scientific publications including the following:

(1) "A Practical Total Synthesis of Cocaine's Enantiomers," Forensic Science International, Volume 33, No. 3, 1987, pages 275-298.

(2) "Detection of Pseudo-Ecgonine and Differentiation From Ecgonine in Illicit Cocaine," Forensic Science International, Volume 47, No. 3, 1990, pages 277-287.

(3) "Synthesis of Deuterium-Labeled Cocaine and Pseudo-Cocaine," Journal of Labeled Compounds and Radio-Pharmaceutical, Volume 29, No. 3, 1991, pages 327-335.

(4) "A Chromatographic-Impurity Signature Profile Analysis for Cocaine Using Capillary Gas Chromatography," Journal of Forensic Sciences, Volume 36, No. 5, 1991, pages 1312-1330.

(5) "A Neural Network Method for Pattern Recognition of Chromatographic Signature Patterns of Forensic Trace Evidence," Proceedings of the International Symposium on the Forensic Aspects of Trace Evidence, June 24-28, 1991, in Press, Quantico, Virginia.

(6) "In N-ACETYLNOR-Cocaine: A New Cocaine Impurity from Clandestine Processing," Journal of the clandestine Laboratory Investigating Chemists Association, Volume 1, No. 4, 1991, pages 23-26.

(7) "Methyl-Esters of Ecgonine: Injection-Port Produced Artifacts from Cocaine Base (Crack) Exhibits," Journal of Forensic Sciences, 1992, to be published in September, 1992.

(8) "A Neural Network Method for Pattern Recognition of Chromatographic Signature Patterns of Cocaine Samples," (accepted for publication, Forensic Journal of Forensic Sciences, 1992).

c. Mr. Casale developed the drug signature analysis for the NC-SBI. This procedure is not new. The DEA Laboratory has analyzed heroin signatures for over ten years. The drug signature analysis uses gas chromatography which is also used in determining whether or not a substance is cocaine.

d. The drug signature analysis has gained general acceptance in the field of forensic chemistry. Other laboratories have recognized and utilized this analysis. See "Comparison of Illicit Cocaine by Determination of Minor Components," LaBelle, Journal of Forensic Sciences, July, 1991. In addition, an expert witness, James Moore from the DEA Laboratory, testified in Federal court in Miami, Florida, in the case of United States v. Guillermo-Tolosa-Sabiencello, 91-4-CR-Marcus, about cocaine signature analysis and his opinion that two drug samples were from the same batch.

WHEREFORE, the United States would respectfully request this Court to admit scientific evidence concerning drug signature analysis.

Respectfully submitted, this 13th day of July, 1992.

MARGARET PERSON CURRIN
United States Attorney

BY: _____
JANE H. JOLLY
Assistant United States Attorney
Criminal Division

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

EXHIBIT E

July 31, 1992

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Administrator, Drug Enforcement Administration
Director, Federal Bureau of Investigation
Commissioner, Immigration and Naturalization Service
Director, United States 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: Cary H. Copeland CHC
Director and Chief Counsel

SUBJECT: Policy on Bona Fide Purchasers for Value and the Relation Back Doctrine in Civil Forfeitures

Summary:

The innocent owner defense to civil forfeiture is not available, as a matter of law, to one who has acquired an interest in the forfeited property after the illegal acts which resulted in the forfeiture. This memorandum reiterates the Department's policy that despite the statutory wording, we will treat bona fide secured creditors and purchasers for value the same in civil as in criminal forfeiture proceedings. Valid claims filed by bona fide secured creditors or other purchasers for value will be honored pending the enactment of corrective legislation.

Specifics:

The "relation back doctrine" provides that all right, title, and interest in property subject to forfeiture vest in the United States at the time of the commission of the act giving rise to the forfeiture. This doctrine is codified in both the criminal and the civil forfeiture statutes for the offense of sexual exploitation of minors, 18 U.S.C. §§ 2253(b) and 2254(g), for money laundering/FIRREA violations, 18 U.S.C. §§ 982(b)(1) and 981(f), and for controlled substance violations, 21 U.S.C. §§ 853(c) and 881(h).

The criminal forfeiture statutes expressly exempt from forfeiture property transferred after the act giving rise to forfeiture when the transfer was to a bona fide purchaser for value who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture. The interests of such "innocent bone fide purchasers for value" in otherwise forfeitable property are thus protected from the reach of the "relation back doctrine" in criminal forfeitures.[1]

In contrast, the relation back provisions and the "innocent owner" exceptions in the parallel civil forfeiture statutes do not exempt from forfeiture property transferred to an innocent bona fide purchaser for value after the time of the offense giving rise to the forfeiture.[2] Under the relation back doctrine in the civil forfeiture statutes, all right, title, and interest in the property vest in the United States at the time of the offense, except as to someone who is an "innocent owner" at that point in time. Once the offense has been committed, a valid interest in the property can only be acquired from the United States since the statutes make no exception for bona fide purchasers for value. Consequently, any subsequent transferee or purchaser from someone other than the United States has not acquired a valid interest and is not "an

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[1] See 18 U.S.C. §§ 2253(b) and (m)(6)(B) (sexual exploitation of minors); 21 U.S.C. §§ 853(c) and (n)(6)(B) (controlled substances); and by incorporation of 21 U.S.C. §§ 853(c) and (n) by reference, 18 U.S.C. § 982(b)(1) (money laundering). Also see the criminal forfeiture statutes that have no civil forfeiture parallel: 18 U.S.C. §§ 793(h)(3) and 794(d)(3) (espionage); 18 U.S.C. §§ 1467(b) and (1)(6)(B) (obscene material); 18 U.S.C. §§ 1963(c) and (l)(6)(B) (RICO).

[2] See the relation back provisions in 18 U.S.C. § 981(f), 18 U.S.C. § 2254(g), and 21 U.S.C. § 881(h), and the innocent owner exceptions in 18 U.S.C. § 981(a)(2), 18 U.S.C. §§ 2254(a)(2) and (a)(3), 21 U.S.C. §§ 881(a)(4)(C), (a)(6), and (a)(7). For example, 21 U.S.C. § 881(h) provides only that:

> All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

and 21 U.S.C. § 881(a)(4)(C) provides that:

> no conveyance shall be forfeited . . . to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

owner" entitled to raise the "innocent owner" defense regardless of how this alleged interest was acquired.

The Government made this point in a brief recently filed before the Supreme Court in United States v. A Parcel of Land, Buildings, Appurtenances and Improvements known as 92 Buena Vista Avenue, Rumson, New Jersey, 937 F.2d 98 (3d Cir. 1991), cert. granted, 112 S. Ct. 1260 (1992). The issue in this case is whether a person who receives a gift of money derived from drug trafficking, and uses that money to purchase real property, may assert an "innocent owner" defense to the forfeiture of the real property under 21 U.S.C. § 881(a)(6). The Government argues that the innocent owner defense is available only to one who acquired his interest in the forfeited property prior to the illegal acts giving rise to the forfeiture. Otherwise, a drug dealer could circumvent forfeiture by later conveying property to a friend or relative who was not aware of the illegal activity at the time of the transfer. Since the civil forfeiture statutes draw no distinction between those acquiring their interest by purchase or loan, on the one hand, or gift on the other, such an analysis is essential to being able to prevent criminals from frustrating civil forfeiture. The brief notes that some courts have drawn a distinction based on how an interest was acquired (see cases cited in footnote 3, infra) but indicates this issue is not presently before the Court.

The brief goes on to state that the Department may grant remission petitions on a broader basis than the innocent owner defense and that the Department has statutory authorization to pay off liens and mortgages from the proceeds of seized assets. As the brief states: " . . . federal law enforcement authorities do not, as a matter of practice, pursue forfeiture of property in the hands of bona fide purchasers for value who would ordinarily be expected to lack notice of the government's prior claim." Brief for the United States at 40, 92 Buena Vista Avenue (No. 91-781). Oral arguments in this case will probably take place this fall.

It is obviously undesirable that innocent bona fide purchasers for value, who are expressly protected from losing their interests in criminal forfeiture cases, not be protected in civil forfeiture cases, especially when the same property is subject to civil and/or criminal forfeiture for the same underlying offense.[3]

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[3] Some courts have suggested that the innocent owner defense should be available to innocent bona fide purchasers of property that is subject to civil forfeiture for previous drug violations. See In the Case of One 1985 Nissan 300 ZX, 889 F.2d 1317, 1322 (4th Cir. 1989) (Murnaghan, J., concurring); Eggleston v. State of Colorado, 873 F.2d 242, 247-248 (10th Cir. 1989); United States v. Four Parcels of Real Property on Lake Forrest Circle in Riverchase, Shelby County, Alabama, 870 F.2d 586, 590 n.11 (11th Cir. 1989);

Consequently, in order to ensure that application of the relation back doctrine in civil forfeiture cases is consistent with its application in criminal forfeiture cases, **it is the Department's policy in civil forfeiture cases not to apply the relation back doctrine to the property interests of innocent bona fide purchasers for value filing claims in civil forfeiture proceedings if those claims would have been honored in criminal forfeiture proceedings.** Government prosecutors are not to contest valid claims filed by innocent bona fide purchasers for value, including creditors with a secured ownership interest in the seized property acquired after the commission of the offense giving rise to the forfeiture. If for some reason such a claim is not filed or not honored during a forfeiture proceeding, the Department will continue to grant timely filed petitions for remission or mitigation. The Department will also continue to make available the procedures for expedited settlement in real property cases, which are set forth in the Expedited Forfeiture Settlement Policy for Mortgage Holders (revised April 1992), to financial institutions on a routine basis and to other secured creditors on a case-by-case basis.

The Department has proposed legislation to resolve the inconsistency between civil and criminal forfeiture statutes concerning application of the relation back doctrine to innocent bona fide purchases in accordance with the policy set forth in this memorandum. Recent legislative proposals in the Department's proposed Comprehensive Asset Forfeiture Amendments include a proposal to amend 18 U.S.C. §§ 981(f) and 2254(g), and 21 U.S.C. § 881(h) to conform civil forfeitures under these statutes to criminal forfeitures by excepting the property interests of innocent bona fide purchasers from the reach of the "relation back" doctrine. Pending enactment of this legislation, we are reiterating our policy to treat innocent bona fide purchasers for value alike in criminal and civil forfeiture proceedings.

If you have any questions regarding this policy, please contact the Asset Forfeiture Office in the Criminal Division at (202) 514-1263.

cc: Jeffrey R. Howard
Principal Associate Deputy Attorney General

United States v. One Single Family Residence Located at 6960 Miraflores Ave., Coral Gables, Florida, 731 F. Supp. 1563, 1568 (S.D. Fla. 1990), appeal dismissed, 932 F.2d 1433 (11th Cir. 1991), cert. granted on other issues sub nom. Republic National Bank v. United States, 112 S. Ct. 1159 (1992); United States v. One Single Family Residence Located at 2901 S.W. 118th Court, Miami, Florida, 683 F. Supp. 783, 787-88 (S.D. Fla. 1988).

EXHIBIT F

Memorandum of Understanding

Between

U.S. Customs Service

and

U.S. Marshals Service

The U.S. Customs Service of the Department of the Treasury and the U.S. Marshals Service of the Department of Justice hereby enter into the following Memorandum of Understanding.

A. PURPOSE OF AGREEMENT

1. Section 6078 of the ANTI-DRUG ABUSE ACT of 1988 requires that the Department of the Treasury and the Department of Justice coordinate and consolidate post-seizure property management. This Memorandum of Understanding (MOU) represents a formal agreement to consolidate the management of different types of seized property in various locations throughout the United States.

2. The U.S. Marshals Service (USMS) and the U.S. Customs Service (Customs) acknowledge that this MOU is exclusively for post-seizure custodial functions and for the disposition of non-cash seized and forfeited assets (as used here, "cash" includes negotiable instruments and other such funds).

3. This agreement covers only seized/forfeited assets that are taken into custody after the implementation date of the MOU, except in specific instances where it is jointly agreed by both agencies that it is more appropriate to include pre-existing seized/forfeited property.

B. GENERAL TERMS AND CONDITIONS

1. Provisions defining the scope of property covered by this MOU will not be considered limiting, and USMS and Customs may arrange for use of each other's contractor services and facilities to manage other property types not defined by this MOU, on a case-by-case basis with joint concurrence. The agency with custody of the asset(s) in question has ultimate responsibility for its management and disposition in accordance with this MOU.

2. For purpose of this MOU, USMS and Customs will together develop a procedure for determining "joint agreement" or "joint concurrence" according to the principle of maximizing efficiency and minimizing costs. If, after following the procedure, joint agreement or joint concurrence cannot be reached in any particular case, the agency initially responsible for the property (Customs or USMS) shall have the right to treat the property as not subject to this MOU.

3. Where the sole available basis for seizure of property seized by Customs officers cross-designated by D.E.A. is title 21, the property shall be processed in accordance with the November 7, 1990, "Interim Procedures for Handling of Seizures Made by Designated Customs Agents."

4. Certain conditions may preclude the use of this MOU, such as when the asset must be managed by a court-appointed substitute custodian or for special reasons, the court has mandated the manner/location of storage. The Department of Justice (DOJ) property that has been identified for official use or asset sharing may remain in the custody of the agency with the request pending. The Department of the Treasury property that has been identified for official use or asset sharing may remain in the custody of the agency with the request pending.

5. USMS is responsible for all costs incurred in the storage, management, and disposition of its seized property while in the custody of Customs. For the purposes of this MOU, such costs include, but are not limited to, overhead, transportation, warehousing, maintenance, and disposal.

6. Customs is responsible for all costs incurred in the storage, management, and disposition of its seized property while in the custody of the USMS. For the purposes of this MOU, such costs include, but are not limited to, overhead, transportation, warehousing, maintenance, and disposal.

7. USMS will distribute net proceeds* from the sale or remission of Customs seized/forfeited property directly to the National Finance Center. The U.S. Marshal shall provide on a quarterly basis a statement of gross

receipts collected, the costs of storage, management, and disposition, and net proceeds remitted to the National Finance Center, as well as any other information USMS has in its custody that is designated by Customs as relevant. In situations where no or insufficient gross receipts were collected and no storage charges are collected, the USMS reserves the right to bill Customs for costs of storage, management, and disposition.

The term "net proceeds" will be determined by joint agreement between Customs and USMS, but generally should be gross receipts, less costs of storage, management, and disposition.

8. Customs will distribute on a quarterly basis net proceeds from the sale or remission of Department of Justice seized/forfeited property to a central location as designated by USMS. Customs will also provide on a quarterly basis a statement of gross receipts collected, the costs of storage, management, and disposition, and net proceeds remitted to the USMS, as well as any other information Customs has in its custody that is designated by the USMS as relevant. In situations where no or insufficient gross receipts were collected and no storage charges are collected, Customs shall reserve the right to bill the USMS for costs of storage, management, and disposition.

9. The USMS and Customs shall satisfy each other's fiscal data requirements in the receipt and disbursement of funds collected, including, but not limited to, providing each other audited quarterly financial statements. Both agencies shall exchange transactional data to allow a complete analysis of the effectiveness of this MOU.

10. Within the scope of the existing contracts, USMS and Customs agree to make the necessary changes to their respective contract(s) to allow storage, management, and disposition of the other agency's property.

11. The target date for implementation is October 1, 1992. This date will enable the implementation team to develop the necessary procedures related to the consolidation of seized/forfeited property between the agencies. Upon approval of the MOU, the USMS and Customs will promptly appoint a joint implementation team to establish the operational procedures to implement this MOU. Specifically, the implementation team will address issues related to operational issues, training, the financial aspects of the MOU, asset tracking and reporting, ADP issues, and defining a problem resolution process.

12. Both agencies shall be required to submit to each other any releasable audits, Inspector General reports, or compliance reviews that deal with the management of seized assets. In addition, upon request, each agency will provide any public domain documents relating to

the management and disposition of seized property. If there is reason to believe that improper activity or contractor fraud exists, immediate notification shall be given to the respective agency.

13. At the end of one year, following the implementation of this MOU, a comprehensive cost-analysis and evaluation will be conducted to assess program performance, cost effectiveness and the efficiency of this MOU. This analysis will be jointly completed by both agencies.

14. If the MOU is terminated, property will generally remain in the custody of the respective agency until normal disposition is accomplished. However, on a case-by-case basis, with joint agreement by both USMS and Customs, property may be transferred back to the custody of the seizing agency.

C. VESSELS

1. Effective upon the implementation date of the MOU, all vessels that are subsequently seized or accepted by the USMS will be transferred to Customs. In cases where it is not feasible or cost-effective to relocate a vessel, Customs will provide management and disposal services in the area in which the vessel is located. To the maximum extent possible, USMS property will be maintained in a manner that is identical to that provided to Customs property.

USMS will make its best effort to communicate fully with the District Director, U.S. Customs, in whose jurisdiction the vessel(s) is located for the purpose of providing appropriate coordination of property management for pending seizures.

2. Upon sale of USMS vessels, Customs expenses and any outstanding lien(s) will be deducted from gross sales proceeds, and shall be paid pursuant to the relevant USMS policy, prior to transfer of monies to a central location as designated by the USMS.

D. REAL PROPERTY

1. Effective upon the implementation date of the MOU, all real property that is subsequently seized by Customs will be transferred to the U.S. Marshal in whose jurisdiction the property is located. To the maximum extent possible, Customs property will be maintained in a manner that is identical to that provided to USMS property. Customs will comply, prior to seizure of real property, with Customs policy for pre-seizure planning, which is generally consistent with the USMS pre-seizure planning policy.

Customs will make its best effort to communicate fully with the U.S. Marshal in whose jurisdiction the real property is located for the purpose of providing appropriate coordination of property management for pending seizures.

2. Upon the sale of Customs real property, USMS management and disposal expenses shall be deducted from gross sales proceeds prior to the transfer of monies to the Customs National Finance Center. Any outstanding taxes or lien(s) that are approved in accordance with Customs policy shall also be deducted from gross sales proceeds prior to the transfer of monies to the National Finance Center.

E. VEHICLES

Vehicle custody and management will be consolidated between the two agencies depending upon their needs and the availability of services and facilities. Prior to implementation of this portion of the MOU, the following information must be shared and coordinated between the two agencies.

a. Current inventory reports
b. Each agency's costs for storage and disposal of vehicles.
c. A comparison of the inventory, the greatest need for service, and availability of facilities.
d. A copy of the applicable Customs contract with EG&G to be provided to the USMS.
e. Copies of applicable USMS contracts for seized/forfeited vehicles to be provided to Customs.

F. REVISIONS

Revisions, amendments and modifications to the MOU may be made upon written approval of both agencies and shall become effective upon the date of approval.

G. TERMINATION

This MOU may be terminated upon joint agreement in conjunction with applicable laws and regulations.

H. NO PRIVATE RIGHT CREATED

This is an internal government agreement and is not intended to confer any right or benefit on any private person or party.

Certification:

I certify that this MOU has been reviewed by the Department of Justice and the Department of the Treasury, respectively, including its clauses relating to fiscal matters. Our respective Departments have advised us that they have approved this MOU.

Approved:

Henry Hudson
Acting Director
U.S. Marshals Service
Date: 4/23/92

Carol Hallett
Commissioner of Customs
U.S. Customs Service
Date: 4/23/92

Guideline Sentencing Update

FEDERAL

EXHIBIT G

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

Publication of *Guideline Sentencing Update* signifies that the Center regards it as a responsible and valuable work. It should not be considered a recommendation or official policy of the Center. On matters of policy the Center speaks only through its Board.

VOLUME 4 • NUMBER 25 • JULY 28, 1992

Criminal History

CONSOLIDATED OR RELATED CASES

Second Circuit rejects bright line rules for deciding when prior convictions are "related," holds relatedness is question of fact. Defendant was convicted of robbing a store and using a firearm during the robbery. The district court found he was a career offender, § 4B1.1, based on two prior robberies of gasoline stations committed within a fifteen-minute period, and imposed a 270-month sentence. Defendant appealed, claiming that the two prior robberies were committed pursuant to a common scheme or plan and thus should not have been treated separately, see § 4A1.2, comment. (n.3).

The Second Circuit determined that the district court erroneously held that "as a matter of law, robberies committed over a span of several days could not be part of a common scheme or plan, and that hence it would not 'make much sense' to find that robberies committed in a single day could be part of a common scheme or plan." The appellate court held that "[w]hether the defendant had a scheme or plan, or whether the defendant committed crimes that were otherwise related, are questions of fact." The court remanded the case because "[h]aving adopted the view . . . that temporally separated crimes are not part of the same common scheme or plan as a matter of law, the district court did not purport to explore whether [defendant's] robberies had been committed pursuant to a single common scheme or plan, or were otherwise 'related,' as matters of fact." *Cf. U.S. v. Chapnick*, 963 F.2d 224, 226 (9th Cir. 1992) ("whether two prior offenses are related under § 4A1.2 is a mixed question of law and fact subject to de novo review").

The court also noted that temporal proximity alone does not mean offenses are related: "Though the closer two events are in time the more credible the assertion may be that they occurred as part of the same plan, we cannot conclude that two similar robberies were part of a single common scheme or plan as a matter of law solely because they were committed 15 minutes apart."

U.S. v. Butler, No. 91-1369 (2d Cir. June 23, 1992) (Kearse, J.).

U.S. v. Chartier, No. 91-1619 (2d Cir. June 23, 1992) (Kearse, J.) (Affirmed career offender status based on four prior robbery convictions that the district court determined were not "a single common scheme or plan" under § 4A1.2, comment. (n.3). Defendant employed the same modus operandi in each robbery and committed them to support his heroin addiction, but at least one robbery was a "spur-of-the-moment decision." The appellate court explained that "the term 'single common scheme or plan,' must have been intended to mean something more than simply a repeated pattern of criminal conduct. . . . The mere fact . . . that, in engaging in a pattern of criminal behavior, the defendant has as his purpose the acquisition of money to lead a particular lifestyle does not mean either that he had devised a single common scheme or plan or, if he had, that his course of conduct was necessarily part of it. . . . While the four robberies . . . fit a pattern, . . . they were not part of a single common scheme or plan."). For other cases finding prior, similar robberies were not part of a single plan or scheme, see *U.S. v. Rivers*, 929 F.2d 136, 139–40 (4th Cir.) (robberies of two gasoline stations in different states, twelve days apart), *cert. denied*, 112 S. Ct. 431 (1991) [4 *GSU* #6]; *U.S. v. Jones*, 899 F.2d 1097, 1101 (11th Cir.) (robbery and attempted robbery of two banks ninety minutes apart), *cert. denied*, 111 S. Ct. 275 (1990) [3 *GSU* #8]; *U.S. v. Kinney*, 915 F.2d 1471, 1472 (10th Cir. 1990) (robberies of three banks, two in one state, over three months, to support drug addiction). *But cf. U.S. v. Houser*, 929 F.2d 1369, 1374 (9th Cir. 1990) (two prior drug sales were part of single common scheme or plan—convictions resulted from single investigation, sales were to same undercover agent and were charged separately only because they occurred in different counties) [4 *GSU* #6].

Ninth Circuit holds that there must be formal order or other indication that prior convictions were "consolidated for sentencing." The appellate court affirmed a criminal history calculation that treated separately three state convictions for which defendant was sentenced in the same proceeding. It held that the sentences were not "consolidated for . . . sentencing" under § 4A1.2, comment. (n.3), and explained that "it's not enough that the defendant has been sentenced for two or more cases in the same proceeding. . . . [W]e hold that there must be a formal order of consolidation, or some other indication that the trial court considered the prior convictions to be tantamount to a singe offense for purposes of sentencing." *See also U.S. v. Lopez*, 961 F.2d 384, 386–87 (2d Cir. 1992) ("the imposition of concurrent sentences at the same time by the same judge does not establish that the cases were 'consolidated for sentencing' . . . unless there exists a close factual relationship between the underlying convictions"); *U.S. v. Paulk*, 917 F.2d 879, 884 (5th Cir. 1990) (same); *U.S. v. Villareal*, 960 F.2d 117, 120–21 (10th Cir. 1992) (sentencing both offenses in one hearing by itself not sufficient). *But cf. U.S. v. Watson*, 952 F.2d 982, 990 (8th Cir. 1991) ("look to the court records of the defendant's prior offenses to see whether a decision was made to consolidate those offenses for trial or sentencing. . . . [T]he decision to consolidate sentencings is expressed by the dedication of a single proceeding to imposing punishment for verdicts reached in two or more trials"), *cert. denied*, 112 S. Ct. 1694 (1992).

As an example of an "other indication," the Ninth Circuit noted that "if a court enters an order transferring a case for sentencing with another case, and then the defendant receives identical concurrent sentences, the cases are deemed consolidated for sentencing" (citing *U.S. v. Chapnick*, 963 F.2d 224, 228–29 (9th Cir. 1992) (circumstances indicate that state judge handling sentencing considered prior offenses "related enough to justify treating them as one crime")). *Cf. U.S. v. Garcia*, 962 F.2d 479, 482–83 (5th Cir. 1992) (cases not related even though they had consecutive indictment numbers, were scheduled for same day and time, and concurrent sentences were imposed—state did not move to consolidate cases, and separate judgments, sentences, and plea agreements were entered).

U.S. v. Bachiero, 964 F.2d 896 (9th Cir. 1992) (per curiam).

Departures

Third Circuit sets standards for departures beyond criminal history category VI and departures for uncounted juvenile convictions; holds departure cannot be based on criminal conduct government agreed not to charge. Defendant pled guilty to four counts of making false statements in connection with acquisition of firearms in exchange for the government's promise not to charge him with possession of a firearm by a convicted felon, which carried a minimum fifteen-year sentence. Defendant's criminal history category VI and offense level 10 resulted in a range of 24–30 months. The district court imposed a 48-month sentence, finding that category VI underrepresented defendant's criminal history because of uncounted juvenile convictions for burglary, likelihood of recidivism, and parole revocations. Defendant appealed the departure, and the government claimed that, even if the above grounds were invalid, departure was warranted because it could have charged the more serious offense. The appellate court held that only defendant's likelihood of recidivism could have justified a departure, but because adequate findings were not made remand was necessary.

The court first stated that departure above category VI is warranted only if defendant's criminal record is "'egregious,' 'serious' or 'extraordinary.'" *See also U.S. v. Coe*, 891 F.2d 405, 413 (2d Cir. 1989) ("'[o]nly the most compelling circumstances ...' would justify a [section] 4A departure above Category VI"). Here, defendant's fifteen criminal history points "would fall within the two or three point range of category VI were such a range to exist. Given the nature of Thomas' criminal record, we cannot say that his criminal history is 'significantly more serious than that of most defendants in the same criminal history category.' U.S.S.G. 4A1.3, p.s. . . . Therefore, an upward departure beyond category VI is presumptively unjustified in this case, unless there clearly exist circumstances" that were not adequately considered by the Sentencing Commission. As explained below, the court held there were no such circumstances.

As for defendant's uncounted juvenile convictions, the court held that departure was improper because they were not similar to this offense, adopting the rule in *U.S. v. Samuels*, 938 F.2d 210, 214–15 (D.C. Cir. 1991) (juvenile convictions not listed in § 4A1.2(d) can be basis for departure only if they involved conduct similar to instant offense) [4 *GSU* # 8]. *But cf. U.S. v. Gammon*, 961 F.2d 103, 107–08 (7th Cir. 1992) (departure proper for dissimilar juvenile convictions that "illustrate a significant history of criminality") [4 *GSU* #19]; *U.S. v. Nichols*, 912 F.2d 598, 604 (2d Cir. 1990) (departure proper for lenient punishment for prior, violent, dissimilar juvenile offense).

Regarding defendant's parole revocations, the court stated that although "a defendant with a long history of violating parole would be a prime candidate for an enhanced sentence, particularly if his instant offense is similar to the offenses for which he had been paroled in the past," defendant's parole revocations were adequately taken into account by the Guidelines and thus did not warrant departure.

Finally, the court held that departure could not be based on the government's decision not to charge a more serious crime: "[T]his upward departure involves the offense level, rather than the criminal history. . . . [B]road discretion is not available in offense level departures, since nowhere do the Guidelines permit consideration of uncharged offenses." *See also U.S. v. Faulkner*, 952 F.2d 1066, 1069–71 (9th Cir. 1991) (upward departure based on eight dismissed or uncharged bank robberies improper) [4 *GSU* #8]. The court distinguished *U.S. v. Mobley*, 956 F.2d 450 (3d Cir. 1992), where it upheld an enhancement for stolen firearms under § 2K2.1(b)(2) even though defendant was not charged with the more serious crime of receiving or transporting stolen firearms. "The government's 'end run' was tolerable in *Mobley* since that case involved a mandatory enhancement clearly specified in the Guidelines. The case currently before us involves a discretionary departure in which the Guidelines are silent as to whether an upward departure can be based on an uncharged crime. . . . [W]e will not allow the government to take a 'convenient detour' by seeking additional punishment for an uncharged crime . . . ."

U.S. v. Thomas, 961 F.2d 1110, 1115–22 (3d Cir. 1992).

Aggravating Circumstances

U.S. v. Ponder, 963 F.2d 1506, 1509–10 (11th Cir. 1992) (Affirmed six level upward departure under § 5K2.0, p.s. based on seriousness of crime—possessing marijuana and methamphetamine with intent to distribute while a prisoner in a county jail. Assessment of two criminal history points for "committ[ing] the offense while under any criminal justice sentence, including . . . imprisonment," § 4A1.1(d), did not preclude a departure: "[C]ommentary to [§ 4A1.1] indicates that the purpose of this provision is merely to account for the recency of the subsequent crime. . . . There is no indication that the Sentencing Commission took into consideration the serious nature of distributing drugs within a jail facility itself.").

Substantial Assistance

U.S. v. Mitchell, 964 F.2d 454 (5th Cir. 1992) (per curiam) (Remanded: Holding § 5K1.1, p.s. motion open until after sentencing was error—district court must rule on it before imposing sentence.). *Accord U.S. v. Drown*, 942 F.2d 55, 58 (1st Cir. 1991) [4 *GSU* #8]; *U.S. v. Howard*, 902 F.2d 894, 896–97 (11th Cir. 1990) [3 *GSU* #9].

Offense Conduct

Calculating Weight of Drugs

U.S. v. Robins, No. 91-50286 (9th Cir. June 24, 1992) (Thompson, J.) (Remanded: Defendant purchased two "bricks" of cornmeal weighing 2,779 grams. To trick customers into thinking they were cocaine, he carefully wrapped them, made small incisions and poured a total of one-tenth of a gram of cocaine inside. The appellate court held it was error to include the weight of the cornmeal as part of a drug "mixture or substance" under § 2D1.1. Using *Chapman v. U.S.*, 111 S. Ct. 1919 (1991), as a guide, the court reasoned that the cornmeal and cocaine were easily distinguishable, cornmeal is not a "tool of the trade" or a carrier medium or cutting agent for cocaine, and it "did not facilitate the distribution of the cocaine." The court concluded the cornmeal "was thus the functional equivalent of packaging material, which the Court in *Chapman* recognized was not to be included in the weight calculation."). *Accord U.S. v. Acosta*, 963 F.2d 551, 553–56 (2d Cir. 1992) (creme liqueur that was uningestible and unmarketable was "the functional equivalent of packaging material" and should not be counted) [4 *GSU* #23].

Criminal History

Career Offender Provision

U.S. v. Bell, No. 91-1965 (1st Cir. June 10, 1992) (Selya, J.) (Remanded: Following, *inter alia*, amended Note 2 of § 4B1.2, the court held that "where the offense of conviction is the offense of being a convicted felon in knowing possession of a firearm, the conviction is not for a 'crime of violence' and . . . the career offender provision . . . does not apply."). For other cases, see 4 *GSU* #23.

Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

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VOLUME 4 • NUMBER 24 • JULY 13, 1992

Departures

SUBSTANTIAL ASSISTANCE

Second Circuit remands case for further proceedings on whether government acted in bad faith in refusing to move for substantial assistance departure. Defendant entered into a plea agreement under which the government would move for a departure under § 5K1.1, p.s. if, in its "sole and unfettered discretion," it was satisfied with his cooperation. As requested, defendant testified at the trial of a codefendant, but the codefendant was acquitted and the government refused to make the § 5K1.1 motion. At the sentencing hearing defendant claimed the refusal was in bad faith, but the district court accepted the government's reasons for refusing and ruled, without making specific findings, that the government acted in good faith.

The appellate court remanded for further proceedings. The record indicated that the only cooperation sought from defendant was his truthful testimony, and there was no evidence or claim by the government that he testified untruthfully. Of the six reasons offered by the government for its refusal, only one—that defendant's testimony was "inconsistent" with that of another testifying codefendant—might be valid as a matter of law. However, remand was required because no specific finding was made on that issue. The appellate court indicated that the inquiry on remand would be affected by the particular circumstances of this case: "The district court is of course obligated in most cases to allow considerable deference to the government's evaluation of a defendant's cooperation. But where the contemplated cooperation involves solely in-court testimony, as it apparently did here, the district court is well-situated to review the defendant's performance of his obligations under the plea agreement."

U.S. v. Knights, No. 92-1016 (2d Cir. June 23, 1992) (Pratt, J.).

MITIGATING CIRCUMSTANCES

U.S. v. Vilchez, No. 91-50429 (9th Cir. June 23, 1992) (Tang, J.) (Remanded: District court had no authority to depart downward to reduce disparity between this defendant and another participant in the same heroin distribution scheme who was arrested several months earlier, was tried in state court, and received a shorter sentence. Government's decision to leave one case in state court and try the other in federal court was not an unusual circumstance and "the desire to equalize state and federal sentences does not constitute a permissible basis for departure."). *See also U.S. v. Reyes*, No. 91-50301 (9th Cir. June 8, 1992) (Pregerson, J.) (affirmed: district court properly held it did not have authority to grant downward departure where defendant's "co-accused" was tried in state court and received much lower sentence); *U.S. v. Mejia*, 953 F.2d 461, 468 (9th Cir.) (may not depart downward to avoid unequal treatment of codefendants), *cert. denied*, 112 S. Ct. 1983 (1992). *Cf. U.S. v. Sitton*, No. 91-50154 (9th Cir. July 2, 1992) (O'Scannlain, J.) (affirmed: fact that defendants would have received substantially shorter sentences had they been tried in state court is not proper basis for departure); *U.S. v. Dockery*, (D.C. Cir. June 9, 1992) (R. Ginsburg, J.) (reversed: may not depart because U.S. Attorney first brought charges in D.C. Superior Court, then dropped them and recharged defendant in federal court to take advantage of harsher penalties).

U.S. v. Higgins, No. 91-1877 (3d Cir. June 16, 1992) (Hutchinson, J.) (Affirmed in part, remanded: "To the extent that the disparity of sentences among the co-defendants is alleged to be a mitigating factor, . . . this is not a proper basis for a downward departure." However, the district court erred in holding it could not consider defendant's claim that his youth, significant family ties and responsibilities, and stable employment record warranted departure—court has discretion to depart if one of these factors "can be characterized as extraordinary," and should consider whether defendant's circumstances "fall within the very narrow category of extraordinary.").

EXTENT OF DEPARTURE

U.S. v. Streit, No. 90-10509 (9th Cir. May 19, 1992) (as amended) (Goodwin, J.) (Affirmed in part and remanded: Defendant inflicted bodily injury on arresting officers that was not accounted for in his offense guideline. The district court properly departed, under § 5K2.2, p.s., by analogizing to § 2A2.2(b)(3)(A) (aggravated assault), but incorrectly gave two two-level increases—one for each officer injured—because under the rules for grouping offenses only one two-level increase would have resulted.).

DEPARTURE ABOVE CATEGORY VI

U.S. v. Spears, No. 89-3154 (7th Cir. June 9, 1992) (Bauer, C.J.) (Affirmed: Defendant, who was already in criminal history category VI, would have been a career offender had two prior assaults not been consolidated. It was "eminently reasonable" and "related to the structure of the Guidelines" to depart upward and sentence defendant within the range for the offense level midway between his offense level and level he would have been assigned as a career offender.).

U.S. v. Streit, No. 90-10509 (9th Cir. May 19, 1992) (as amended) (Goodwin, J.) (Affirmed in part and remanded: "We decline to mandate that sentencing judges adhere to any one particular approach to departures beyond [criminal history] category VI. We do require, however, that the sentencing court follow some reasonable, articulated methodology consistent with the purposes and structure of the guidelines." For career offender, district court could calculate departure by "horizontal analogy" to hypothetical categories above VI. *Accord U.S. v. Schmude*, 901 F.2d 555, 560 (7th Cir. 1990) [3 *GSU* #6]. *See also U.S. v. Molina*, 952 F.2d 514, 522 (D.C. Cir. 1992) (approach in *Schmude* "appears to make the most

sense"); *U.S. v. Jackson*, 921 F.2d 985, 993 (10th Cir. 1990) (en banc) (*Schmude* method acceptable). However, the sentence must be remanded because the court did not adequately explain how it calculated the hypothetical categories or why it found category IX appropriate rather than VII or VIII.

Also, the district court improperly increased the offense level, a "vertical analogy," in setting the departure: "[F]actors to be considered in departing from applicable criminal history categories are distinct from those relevant to departing from inappropriate offense levels," and thus prior criminal conduct reflecting an inadequate criminal history score "'does not provide the basis for an offense level departure.'"). *Accord U.S. v. Jones*, 948 F.2d 732, 739 (D.C. Cir. 1991); *U.S. v. Thornton*, 922 F.2d 1490, 1494 (10th Cir. 1990).

Criminal History

U.S. v. Spears, No. 89-3154 (7th Cir. June 9, 1992) (Bauer, C.J.) (Affirmed upward departure: District court held that defendant's criminal history category—fifteen prior convictions and confinement for 20 out of past 32 years—did not adequately reflect the seriousness of his past criminal conduct or the likelihood that he would commit future crimes, § 4A1.3, p.s. The court also held that defendant "fit[s] the classic profile of a career recidivist" who is a threat to the public welfare and safety under § 5K2.14, p.s., and the appellate court found "no error in the judge's factual findings.").

Adjustments

Acceptance of Responsibility

U.S. v. Frazier, No. 91-5865 (4th Cir. June 12, 1992) (Luttig, J.) (Affirmed: "[C]onditioning the acceptance of responsibility reduction on a defendant's waiver of his Fifth Amendment privilege against self-incrimination does not penalize the defendant... in violation of the Fifth Amendment." The § 3E1.1 reduction was properly denied to defendant who stole 1,200 money orders worth over five million dollars, admitted stealing them and cooperated with the government in returning most of the remaining uncashed money orders, but refused to further assist the government in locating the rest of the orders on the ground that doing so required providing information that might expose him to further prosecution.). *Accord U.S. v. Mourning*, 914 F.2d 699, 706–07 (5th Cir. 1990). *Contra U.S. v. Rodriguez*, 959 F.2d 193, 195–98 (11th Cir. 1992) (per curiam) ("section 3E1.1 does not allow the judge to weigh against the defendant the defendant's exercise of constitutional or statutory rights") [4 *GSU* #23]; *U.S. v. Frierson*, 945 F.2d 650, 658–60 (3d Cir. 1991) (denial of reduction for refusal to admit conduct beyond offense of conviction violates Fifth Amendment) [4 *GSU* #11]; *U.S. v. Watt*, 910 F.2d 587, 592 (9th Cir. 1990) ("court cannot consider *against* a defendant any constitutionally protected conduct") [3 *GSU* #10]; *U.S. v. Oliveras*, 905 F.2d 623, 626–28 (2d Cir. 1990) (per curiam) (denying reduction for refusal to admit to crimes outside offense pled to violates Fifth Amendment); *U.S. v. Perez-Franco*, 873 F.2d 455, 463–64 (1st Cir. 1989) [2 *GSU* #6].

U.S. v. Shipley, 963 F.2d 56 (5th Cir. 1992) (per curiam) (Affirmed: Proper to deny § 3E1.1 reduction to defendant who "clearly admitted and accepted full responsibility" for the offense but denied he was a leader under § 3B1.1. "Even though leadership role in the offense of conviction is covered in a different section of the guidelines than is acceptance of responsibility for committing that crime, such a role is conduct related to the offense and thus proper grist for the 'acceptance of responsibility' mill.").

Abuse of Position of Trust

U.S. v. Williams, No. 91-1371 (10th Cir. June 1, 1992) (Moore, J.) (Affirmed § 3B1.3 enhancement for a military pay account technician and auditor who embezzled funds. Court noted: "In determining whether a defendant was in a 'position of trust' courts have considered a number of factors. These include: the extent to which the position provides the freedom to commit a difficult-to-detect wrong, and whether an abuse could be simply or readily noticed; defendant's duties as compared to those of other employees; defendant's level of specialized knowledge; defendant's level of authority in the position; and the level of public trust." (Citations omitted.)).

General Application Principles

Incriminating Statements As Part of Cooperation Agreement

U.S. v. Marsh, 963 F.2d 72 (5th Cir. 1992) (per curiam) (Remanded: When defendant, pursuant to § 1B1.8(a), enters into cooperation agreement with government that states he would "not be prosecuted further for activities that occurred or arose out of [his] participation in the crime charged," self-incriminating information provided to probation officer may not be used against him in sentencing.). *See also* U.S.S.G. § 1B1.8, comment. (n.5) (Nov. 1991) (§ 1B1.8(a) limits use of self-incriminating information in determining guideline range, "e.g., where the defendant, subsequent to having entered into a cooperation agreement, repeats such information to the probation officer preparing the presentence report").

More Than Minimal Planning

U.S. v. Maciaga, No. 91-3075 (7th Cir. June 8, 1992) (Kanne, J.) (Reversed: Part-time bank security guard who stole night deposit bag did not engage in "more than minimal planning," §§ 2B1.1(b)(5) and 1B1.1, comment. (n.1(f)). Defendant's offense was "much less complicated and show[ed] much less premeditation" than other cases where the enhancement has been applied, involved little activity outside of his normal duties, and did not involve "repeated acts over a period of time." Furthermore, defendant's steps to conceal his crime were not out of the ordinary and there was "no evidence of any advance planning in Maciaga's efforts at concealment.").

U.S. v. Williams, No. 91-1371 (10th Cir. June 1, 1992) (Moore, J.) (Affirmed: Noting that "more than minimal planning is deemed present in any case involving repeated acts over a period of time," see § 1B1.1, comment. (n.1(f)), court held that embezzler engaged in more than minimal planning under § 2B1.1(b)(5) where embezzlements occurred over period of six months and involved numerous computer entries. Defendant also took "significant steps" to conceal the crimes.).

Sentencing Procedure

Unlawfully Seized Evidence

U.S. v. Jessup, No. 91-6296 (10th Cir. June 11, 1992) (Belot, Dist. J.) (Affirmed: In denying § 3E1.1 reduction for failure to accept responsibility, the district court could consider evidence obtained in violation of state law that indicated defendant had continued to engage in similar criminal activity after his arrest and indictment.).

EXHIBIT H

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

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IN THIS ISSUE:

Guideline Sentencing, Generally

10th Circuit rejects vindictive sentence claim since total sentence after appeal was shorter. (110) Defendant was originally sentenced to 20 years on three counts, 10 years concurrent on another count, a five-year concurrent sentence on another count, and a five-year sentence on an additional count, to run consecutively. He successfully appealed and was resentenced. On remand he was sentenced to 10 years on one count, plus two five-year consecutive sentences. He complained because the five year term of imprisonment which originally was to run concurrently to his other sentences was changed after remand to run consecutively. The 10th Circuit rejected the claim of vindictive resentencing since after remand, defendant actually received a total sentence which was lighter. His original sentence totalled 25 years imprisonment, while on remand, he was sentenced to a total of 20 years. *U.S. v. Sullivan*, __ F.2d __ (10th Cir. June 12, 1992) No. 91-7046.

Article describes 1992 amendments to Guidelines (110) In "*Commission Sends 31 Amendments to Congress*," Paul J. Hofer, Senior Research Associate, Federal Judicial Center, describes the 1992 amendments to the guidelines which will take effect November 1, 1992 unless Congress affirmatively dissents. He gives particular attention to amendments responsive to Judicial Conference recommendations, i.e. alternatives to incarceration, departures, relevant conduct, and acceptance of responsibility. He also discusses the amendments to the plea bargaining guidelines and offers insight into why some proposed amendments were *not* adopted. 4 FED. SENT. RPTR. 310 (May-June, 1992).

5th Circuit holds that district court was required to rule on government's section 5K1.1

motion prior to sentencing. (115)(710) The 5th Circuit held that the district court erroneously withheld a ruling on the government's motion under section 5K1.1 until after sentencing. A district court is required to rule on a government's section 5K1.1 motion before it imposes a sentence. Section 5K1.1 operates at sentencing, while Fed. R. Crim. P. 35(b), under which the government may move to resentence a defendant to reflect substantial assistance rendered after the original sentence, operates after sentence has been imposed. A refusal to rule on a section 5K1.1 motion conflicts with this temporal framework. Postponing a section 5K1.1 ruling would vest the district court with the discretion to resentence which was taken away at the time the sentencing guidelines took effect. Amendment to Rule 35 effective the same date as the guidelines removed a sentencing court's discretion to resentence on its own motion. *U.S. v. Mitchell*, __ F.2d __ (5th Cir. June 19, 1992) No. 91-1864.

Article questions proposed 1992 ex post facto amendment to guidelines. (130) In "*The Ex Post Facto Amendment*," Steven M. Salkey and Robert Gulack question the wisdom and need for 1992 Proposed Amendment 5, which would create a new section 2B1.11 of the Guidelines titled "Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)." The authors note that the amendment was adopted without public comment after the Commission's ex post facto position was rejected in *U.S. v. Bell*, 788 F.Supp. 413 (N.D. Iowa 1992). The new amendment does not track the Commission's position in *Bell*. Rather, it says that the guidelines in effect on the date of *sentencing* are applicable, unless this would violate the ex post facto clause, in which case the "entire Guidelines Manual" in effect on the date the offense was committed" should be used. 4 FED. SENT. RPTR. 317 (May/June, 1992).

1st Circuit finds conspiracy ended before guidelines took effect. (132) The district court found that the drug conspiracy ended in 1989, and sentenced defendant under the guidelines. The 1st Circuit reversed, holding that although defendant continued to be involved in a drug conspiracy after November 1, 1987, the effective date of the guidelines, this conspiracy was different from the one with which defendant had been charged. The court identified several factors to consider in deciding whether activity is part of separate conspiracies or a single conspiracy: when the activity occurred, the location of the activity, the identities of the persons involved, the co-conspirators' ends, the means used to achieve those ends, and the similarity in the evidence used to prove the activities. The court noted that defendant's post-guidelines activity was generally related to personal use, while the earlier activities were more profit-oriented. Judge Campbell dissented. *U.S. v. Cloutier*, __ F.2d __ (1st Cir. June 9, 1992) No. 91-1435.

8th Circuit holds that district court gave adequate reasons for maximum guidelines sentence. (135)(775) Defendant had a guideline range of 151 to 188 months and received a 188 month sentence. She argued that the guidelines violated due process by preventing the district court from considering the specific circumstances of her crime. The 8th Circuit summarily rejected this claim. When a guideline range exceeds 24 months, due process and 18 U.S.C. section 3553(c)(1) require the court to state its reasons for imposing a sentence at a particular point within the sentencing range. The district court satisfied this obligation at sentencing by stating as its reasons the ongoing nature of defendant's offenses and the need to deter defendant from committing those offenses in the future. *U.S. v. Jones*, __ F.2d __ (8th Cir. June 9, 1992) No. 91-1987.

9th Circuit upholds filing case in federal court

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

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even though it resulted from state parole search. (135) Defendant claimed that because this case originated as a state parole search, it should have stayed in the California court system. The 9th Circuit rejected the argument, relying on *U.S. v. Nance*, __ F.2d __ (9th Cir. May 18, 1992) No. 91-30193, which held that, with limited exceptions, due process is not violated by the referral of cases for federal rather than state prosecution. Other courts are in agreement. *U.S. v. Williams*, __ F.2d __ (10th Cir. May 5, 1992) No. 90-4135; *U.S. v. Parson*, 955 F.2d 858, 873 n.22 (3rd Cir. 1992); *U.S. v. Allen*, 954 F.2d 1160, 1165-66 (6th Cir. 1992); *U.S. v. Carter*, 953 F.2d 1449, 1461-62 (5th Cir. 1992). Here, defendant's case was referred to the attorney's office for review and prosecution, and the 9th Circuit "assume[d] that the United States Attorney exercised proper discretion to prosecute in federal court." *U.S. v. Robinson*, __ F.2d __ (9th Cir. June 15, 1992) No. 90-10433.

9th Circuit says that decision to bring federal, rather than state charges is unreviewable. (135) Defendants argued that the government violated their due process rights by bringing federal, rather than state charges against them. The 9th Circuit held that it lacked authority to review this claim, noting that it had recently held that "a prosecutor's charging decision cannot be judicially reviewed absent a prima facie showing that it rested on an impermissible basis, such as gender or race. *U.S. v. Redondo-Lemos*, 955 F.2d 1296, 1300-01 (9th Cir. 1992); *U.S. v. Diaz*, __ F.2d __ (9th Cir. April 15, 1992); *U.S. v. Nance*, __ F.2d __ (9th Cir. May 18, 1992). The court observed that defendants did not claim that discrimination on the basis of any suspect characteristic played a role in their referral to federal court. *U.S. v. Sitton*, __ F.2d __ (9th Cir. July 2, 1992) No. 91-50154.

5th Circuit rules that upward departure for armed career offender was not cruel and unusual or double punishment. (140)(510) Defendant's guideline range was enhanced under the armed career criminal statute from 33 to 41 months to a mandatory minimum 180 months based on his three prior convictions. The 5th Circuit rejected defendant's claim that an upward departure to a sentence of 230 months based on the seriousness of his criminal history was cruel and unusual or a double penalty for the same conduct. In *U.S. v. Fields*, 923 F.2d 358 (5th Cir. 1990), the court held that an upward departure of a sentence already enhanced under 18 U.S.C. section 924(e)(1) was permissible. *U.S. v. Carpenter*, __ F.2d __ (5th Cir. June 9, 1992) No. 91-8381.

8th Circuit affirms that life sentence for defendant with two prior drug felonies was not cruel and unusual. (140) For violating 21 U.S.C. section 841(b)(1)(A), the district court sentenced defendant, as a career offender with two prior drug felony convictions, to a mandatory sentence of life in prison without parole. The 8th Circuit rejected defendant's claim that section 841(b)(1)(A)'s mandatory life sentence constituted cruel and unusual punishment. In *Harmelin v. Michigan*, 111 S.Ct. 2680 (1991), the Supreme Court concluded that a sentence of life without parole for a serious drug crime was not cruel and unusual punishment. *U.S. v. Jones*, __ F.2d __ (8th Cir. June 9, 1992) No. 91-1987.

Application Principles, Generally (Chapter 1)

7th Circuit reverses determination that security guard's two bank thefts involved more than minimal planning. (160)(220) Defendant, a security guard at a bank, stole money from the night depository on two different occasions. The second theft occurred after defendant accidentally set off one of the alarms. The 7th Circuit reversed an enhancement for more than minimal planning. Defendant's offenses did not involve more planning than typical. The fact that in both thefts defendant deactivated the alarm was not significant since deactivating the alarm was part of his ordinary duties. Defendant did not commit repeated acts over a period of time. The appellate court found no cases where the enhancement was applied to fewer than three repeated acts. Finally, defendant did not do anything extraordinary to conceal his crime. When the enhancement has been applied based on significant steps to conceal an offense, evidence of some pre-offense planning of the concealment has been present. Here, there was no evidence of any advance planning of defendant's efforts at concealment. *U.S. v. Maciaga*, __ F.2d __ (7th Cir. June 8, 1992) No. 91-3075.

5th Circuit holds that Chapter 7 policy statements are advisory, not binding. (180)(800) Defendant's supervised release was revoked after he tested positive for cocaine. Although policy statement 7B1.4 provided for a sentence of 12 to 18 months, the district court rejected this range and imposed a 24-month sentence. The 5th Circuit affirmed, holding that while the Chapter 7 policy statements must be considered by the court, they are advisory and not binding. The sentencing

commission chose to issue policy statements in Chapter 7, rather than guidelines, to provide greater flexibility to the courts. This indicates that the commission did not intend for the policy statements of Chapter 7 to be binding on the courts. This holding does not conflict with interpretations of other policy statements in the guidelines such as section 5K1.1 and section 5H1.1. Unlike these sections, the policy statements in Chapter 7 do not interpret or explain any statute or guideline. *U.S. v. Headrick*, __ F.2d __ (5th Cir. June 11, 1992) No. 91-1854.

1st Circuit affirms that loss calculation should include amount of interest victim lost on embezzled funds. (220) Defendant, a bankruptcy trustee, embezzled approximately $174,000 and deposited it into accounts he controlled. An auditor concluded that the embezzled funds would have earned more than $10,000 interest in the victim's account. The 1st Circuit affirmed that the lost interest was properly included in the calculation of loss under guideline section 2B1.1. The court also held that on remand (for other reasons) the district court must accept as correct the auditor's $10,000 figure as the amount of the lost interest. Defendant did not challenge the $10,000 interest calculation in the presentence report, did not object to the calculation at sentencing, did not seek to call the auditor as a witness, and did not, on appeal, give any reason for the court to believe that the figure was incorrect. *U.S. v. Curran*, __ F.2d __ (1st Cir. June 12, 1992) No. 91-1990.

7th Circuit upholds application of extortion guideline to defendant who sent threatening letter. (224) Defendant and a co-defendant sent a letter to a woman which demanded $25,000 and threatened that if the woman did not "pay up," the house would be "blown up" and she could "forget about [her] life." The 7th Circuit affirmed the application of guideline section 2B3.2 (Extortion) rather than section 2A6.1 (Threatening Communications). Defendant was not convicted merely of making threatening communications, but of attempting to force the intended victim to give defendant $25,000 by threatening to harm the victim and her property. Whether defendant intended to carry out the threat was irrelevant. *U.S. v. Johnson*, __ F.2d __ (7th Cir. June 12, 1992) No. 91-1857.

5th Circuit holds that destruction of drug mixture prior to weighing did not violate due process or confrontation rights. (242)(250) The magistrate who issued the search warrant authorized the police to destroy the chemical mixtures, except for retained samples, provided that photographs were taken of the mixtures and their containers before destruction. The order did not authorize the destruction of the containers, but the agents decided to destroy them as well because they were contaminated by the hazardous chemical mixtures. The 5th Circuit, relying on an unpublished opinion, found no violation of defendants' due process and confrontation rights. Defendants were afforded ample opportunity to show that the government's evidence as to drug quantity was incorrect. They were not deprived of their right to confrontation. Defendants could have but did not call the DEA chemist to testify at sentencing regarding his calculations of the volumes in the containers. *U.S. v. Sherrod*, __ F.2d __ (5th Cir. June 23, 1992) No. 90-4467.

5th Circuit upholds application of more lenient statutory provision. (245) Defendants were convicted of manufacturing 17.5 kilograms of a mixture containing methamphetamine. The version of 21 U.S.C. section 841 in effect at the time defendants committed their drug offenses set forth two different penalties for identical violations of section 841(a) involving 100 grams or more of a substance containing methamphetamine. Defendants were sentenced under the more lenient provision, 21 U.S.C. section 841(b)(1)(B), instead of section 841(b)(1)(A). The 5th Circuit affirmed that under this prior version of the statute, and following the rule of lenity, defendants were properly sentenced under the more lenient statutory provision. *U.S. v. Sherrod*, __ F.2d __ (5th Cir. June 23, 1992) No. 90-4467.

8th Circuit says defendant was not accountable for drug quantity alleged in indictment. (245)(275) Although the court agreed with the presentence report's determination that defendant could not be tied to more than the .5 grams that he actually sold, it felt that it was bound by the jury's verdict to give defendant a mandatory minimum sentence of 10 years for conspiring to distribute at least 50 grams of crack. The 8th Circuit reversed. Although the district court read the indictment to the jury, the generic conspiracy instruction did not require the jury to link defendant to a specific quantity of crack. The evidence did not support a determination that defendant was aware that he had joined a large-scale conspiracy. For activities of a co-conspirator to be reasonably foreseeable to a defendant, they must fall within the scope of the agreement between the defendant and the other conspirators. Simply because a defendant knows

that a dealer he works with sells large amounts of drugs to other people does not make the defendant liable for the dealer's other activities. Defendant never received any benefits from his co-conspirators' large quantity sales and received only a few rocks for his services. Judge Gibson dissented. *U.S. v. Jones*, __ F.2d __ (8th Cir. June 9, 1992) No. 91-1987.

8th Circuit says first and second convictions under section 924(c) may arise in same indictment, but recommends rehearing en banc. (245)(280) (330) Defendant was convicted of six different drug offenses and two counts of using a firearm during a drug transaction in violation of 18 U.S.C. section 924(c). Although he had no prior felony convictions, defendant received a 44-year sentence: 19 years for the six drug offenses, a consecutive five year sentence for the first count of using a firearm during a drug crime, and an additional consecutive sentence of 20 years for the second count of using a firearm during a drug crime. The 8th Circuit affirmed. Section 924(c) mandates a five-year sentence for a first offense, and in the case of a second or subsequent conviction, a sentence of 20 years. Under Circuit precedent, a defendant's first and second convictions may arise from counts alleged in the same indictment. Because section 924(c) might reasonably be read to require that an offender be convicted of his first offense before he commits the offense resulting in his second conviction, the panel suggested that this issue be reheard en banc. Judge Gibson dissented from the suggestion to rehear the issue en banc. *U.S. v. Jones*, __ F.2d __ (8th Cir. June 9, 1992) No. 91-1987.

5th Circuit affirms sentence based upon weight of mixture in the formative stages of manufacturing process. (252) Defendants were convicted of manufacturing methamphetamine. They contended that it was improper to base their sentences upon the full weight of the chemical mixture found in their laboratory, because it only contained a small quantity of methamphetamine. The 5th Circuit rejected their claim that the Supreme Court's decision in *Chapman v. United States*, 111 S.Ct. 1919 (1991) effectively overruled the line of cases holding that a district court should consider the total weight of a substance containing a detectable amount of methamphetamine. The court expressly declined to follow recent cases in other circuits which have refused to include poisonous by-products or uningestible carriers in the weight of a drug. *U.S. v. Sherrod*, __ F.2d __ (5th Cir. June 23, 1992) No. 90-4467.

2nd Circuit reverses estimate of past growing activity based on number of plants rather than weight produced. (253) Police seized approximately 3700 mature marijuana plants from two highly sophisticated marijuana farms operated by defendant and his co-conspirators. To determine defendant's sentence, the judge began with the number of marijuana plants seized during the police searches, estimated the number of plants grown previously, and applied the guidelines to treat each plant as the equivalent of one kilogram of marijuana. Defendant contended that the estimates of past growing activity should have been based on evidence of weight produced, not plants grown. The 2nd Circuit agreed, since the uncontroverted evidence indicated that defendant's farms produced an amount of marijuana substantially less than that used for sentencing. The total dry weight of marijuana produced over the life of the operations, when added to the 3700 plants actually seized, supported a sentence for 4000 kilograms, rather than the 11,000 kilograms used for sentencing. *U.S. v. Blume*, __ F.2d __ (2nd Cir. June 10, 1992) No. 91-1570.

8th Circuit affirms quantity estimate based upon cooperating co-conspirator's testimony. (254) The 8th Circuit affirmed the district court's attribution to defendant of 69 pounds of methamphetamine, even though only four pounds were actually seized by the government. The district court was permitted to estimate the amount of drugs involved in the conspiracy. Here, the court based its estimation of drug quantity involved in the conspiracy on a cooperating co-conspirator's trial testimony. The district court was entitled to believe the co-conspirator and the appellate court would not disturb the lower court's credibility determination. Senior Judge Bright concurred separately to protest the "draconian" sentences required by the sentencing guidelines in this case. *U.S. v. England*, __ F.2d __ (8th Cir. June 8, 1992) No. 91-2128.

5th Circuit upholds estimate where chemicals and their containers were destroyed. (254)(770) DEA agents who searched defendants' methamphetamine laboratory destroyed the chemical mixtures and their containers, except for retained samples, but took photographs of the mixtures and their containers before destruction. Although the agents' initial estimate was that the laboratory contained 4.5 kilograms of the methamphetamine mixture, the 5th Circuit affirmed the determination that the laboratory contained

17.5 kilograms. The original estimate was not based on accurate measurements made at the scene, but was a conservative guess. Before the trial began, a DEA agent obtained and measured the capacity of a standard Coke canister of the kind that had been destroyed. Also, he reworked his estimate of the volume of the cake pan which had been destroyed based on measurements of the pan made at the time of the search. Based upon these calculations, a DEA chemist testified that the methamphetamine mixture totalled 17.5 kilograms. *U.S. v. Sherrod*, __ F.2d __ (5th Cir. June 23, 1992) No. 90-4467.

10th Circuit affirms determination of marijuana's net weight based upon estimate by case agent. (254) Defendant was arrested after accepting from an undercover agent three suitcases filled with marijuana. The actual net amount of marijuana was never weighed by the government and the amount used for sentencing was based on an estimate of the weight, attributing eight percent of the gross weight of 100 pounds to packaging. The 10th Circuit found no abuse of discretion in basing the net of the marijuana on the estimate of the case agent. There was testimony by the case agent that he weighed the packaged marijuana in the suitcases and that it weighed 100 pounds. Contrary to U.S. Customs practice, the agent calculated eight percent as packaging rather than five to give the defendant the benefit of the doubt since some of the marijuana was packaged in cellophane and some in heavier contact paper. The agent's estimate was based on his experience with the weights of different types of packaging. *U.S. v. Clonts*, __ F.2d __ (10th Cir. June 15, 1992) No. 91-2044.

11th Circuit affirms sentence based upon full amount under negotiation. (265) Defendant contested the district court attributing two kilograms of cocaine to him because he claimed he and his co-conspirators agreed to purchase, and were only capable of purchasing, a quarter kilogram. The 11th Circuit rejected this argument, since the evidence showed that defendant negotiated a purchase of two kilograms from the confidential informant and indicated an interest in later purchasing up to six kilograms. At the time of the actual transaction, however, the defendants only had enough money on hand to purchase one quarter kilogram of cocaine. *U.S. v. Gates*, __ F.2d __ (11th Cir. June 10, 1992) No. 91-8083.

6th Circuit affirms that drugs purchased from different source for distribution in same city were relevant conduct. (270) Defendant contended that drug purchases he made in St. Louis were unrelated to the drug conspiracy for which he was convicted, and thus could not be considered relevant conduct. The 6th Circuit held that even though the drugs were purchased from a different source, they were relevant conduct because they were procured for the same purpose or scheme as the offense of conviction: for distribution in Cincinnati by defendant and his confederates. Judge Cohn dissented. *U.S. v. Ushery*, __ F.2d __ (6th Cir. June 18, 1992) No. 91-5715.

5th Circuit rejects determination that 20 kilograms to be distributed by supplier was reasonably foreseeable to customer. (275) A drug supplier notified his customers that he was expecting a shipment of cocaine. Defendant was one of those customers, and he requested a couple of ounces. The entire shipment was 20 kilograms. The 5th Circuit held that defendant could not be held accountable for the entire 20 kilograms to be distributed by the supplier, rejecting the district court's determination that the 20 kilograms was reasonably foreseeable to defendant. Although defendant admitted that he had purchased cocaine from the supplier in the past, and it was reasonable to infer that defendant knew his supplier was dealing in amounts larger than a few ounces, it was "quite a leap" from one-half a kilogram to 20 kilograms. There was only the barest evidence that defendant had a relationship with the supplier, and there was no indication of the regularity of his purchases, the amounts he purchased, or the length of time he had been associated with his suppliers. Moreover, there was no indication that defendant was aware of the other members of the conspiracy or the extent of their purchases. *U.S. v. Mitchell*, __ F.2d __ (5th Cir. June 19, 1992) No. 91-1864.

9th Circuit says leniency toward co-conspirator did not bar sentencing defendant for all the heroin. (275) Three of defendant's co-defendants transported heroin from Nigeria by carrying it in their digestive tracts. The defendant was convicted on being involved in a conspiracy with the three. In sentencing one of the couriers, the district court took into consideration only the amount of heroin he actually carried, because it found that he was unaware of the heroin smuggled by the other two. The 9th Circuit held that the fact that the court exercised leniency in sentencing the courier did not preclude it from finding that defendant was accountable for the amount of heroin possessed by all the members of the conspiracy. The evidence

showed that the defendant was a knowing participant throughout the conspiracy. *U.S. v. Egbuniwe*, __ F.2d __, 92 D.A.R. 9120 (9th Cir. June 30, 1992) No. 91-50378.

8th Circuit affirms firearm enhancement despite acquittal on related charges. (280) The 8th Circuit rejected defendants' claim that an acquittal under 18 U.S.C. section 924(c) for carrying a weapon in connection with a drug-trafficking crime barred an enhancement under section 2D1.1(b)(1) for similar conduct. In order to obtain a conviction under section 924(c), the conduct must be proven beyond a reasonable doubt, while the enhancement need only be proven by a preponderance of the evidence. Here, the evidence was sufficient to support the enhancement. Each defendant had a large cache of weapons in his home. Two witnesses testified that the defendants used firearms for protection of their drug business during the course of the conspiracy. At the time of his arrest, while on his way to pick up drugs, one defendant had a weapon and ammunition in his car. During searches of other defendant's home, police found weapons near drug paraphernalia. *U.S. v. England*, __ F.2d __ (8th Cir. June 8, 1992) No. 91-2128.

11th Circuit upholds firearm enhancement based on co-conspirator's possession of firearm. (284) Defendant argued that an enhancement under section 2D1.1(b)(1) for possessing a firearm during a drug trafficking crime was improper because he was unaware of the two guns stored under the front seat of his co-conspirator's truck. The 11th Circuit upheld the enhancement. A co-conspirator's possession of a firearm will support enhancement of a second co-conspirator's offense level under section 2D1.1(b)(1) if: (a) the firearm possessor was charged as a co-conspirator; (b) the co-conspirator possessed the firearm in furtherance of the conspiracy; and (c) the co-conspirator who is to receive the sentence enhancement was a member of the conspiracy at the time that his-conspirator possessed the firearm. These three prongs were met. The three defendants were convicted of conspiracy to distribute cocaine; two members of the conspiracy were convicted of possession of a firearm during and in furtherance of a drug transaction; and defendant was a member of the cocaine conspiracy when his co-conspirators possessed the firearms. *U.S. v. Gates*, __ F.2d __ (11th Cir. June 10, 1992) No. 91-8083.

10th Circuit bases loss in consumer fraud case on consumer's net out-of-pocket loss. (300) Defendant induced people to buy water purification systems at grossly inflated prices by promising them a misleading vacation prize. The district court computed the loss under guideline section 2F1.1 by subtracting the wholesale cost of the water purification system ($50) and of the prize ($30) from the price each victim paid ($400), resulting in a net loss of $320 per victim. Since a total of 150 systems were sold, the total loss was found to be $48,000. The 10th Circuit affirmed, holding that this determination of each victim's net out-of-pocket loss more closely corresponded to the definition of loss in the guidelines than a "benefit of the bargain" computation. The court rejected defendant's claim that the district court should have used the manufacturer's suggested retail price ($598) as the value of the system, and that the value of the vacation prize (a list of timeshare condominiums) depended upon how much an individual used it. The measure of the value of goods is the fair market value. The fact that the manufacturer of the water system recommended a retail price 12 times the wholesale price did not necessarily determine the fair market value. *U.S. v. Gennuso*, __ F.2d __ (10th Cir. June 23, 1992) No. 91-2263.

10th Circuit affirms that felon who possessed firearm used it in drug offense. (330) Defendant was convicted of, among other crimes, being a felon in possession of a firearm. Guidelines section 2K2.1(c)(1) provides that if the firearm was used or possessed in connection with another offense, the offense level for that offense should be applied if it is higher. The district court determined that the firearm was used in the manufacture of marijuana plants and other drug offense, and accordingly assigned defendant the higher drug offense level. The 10th Circuit affirmed the district court's determination that defendant used the weapon in or during the commission of a drug crime. Defendant's access to firearms not only facilitated his drug manufacturing efforts, but also provided the type of protection the defendant believed he needed for the operation. Furthermore, a co-conspirator testified that defendant possessed a "clip" of ammunition. *U.S. v. Sullivan*, __ F.2d __ (10th Cir. June 12, 1992) No. 91-7046.

5th Circuit rejects enhancement under prior guideline for believing sting funds were drug proceeds. (360) Defendant was convicted of money laundering. Section 2S1.1(b)(1) provides for an enhancement if the defendant knew that the funds were the proceeds of an unlawful drug activity. Defendant claimed that this enhancement was inapplicable to him because the money involved in

his offense was not the proceeds of an unlawful activity but government "sting" money. Relying on the amended section effective November 1, 1991, the 5th Circuit reversed the enhancement. The amended section, which was not applicable to defendant, provides that the enhancement applies if the defendant knew or *believed* that the funds were the proceeds of an unlawful activity. The revised guideline reflects the enactment of section (a)(3) of 18 U.S.C. section 1956 that authorizes undercover "sting" operations in money laundering cases. The addition of the word "believe" suggested that the word "know" in the prior version was insufficient, by itself, to cover government sting money. Hence, the enhancement was in error. *U.S. v. Breque,* __ F.2d __ (5th Cir. June 15, 1992) No. 91-5625.

6th Circuit affirms application of 1990 version of money laundering guideline. (360) Defendant was convicted of attempted money laundering in violation of 18 U.S.C. section 1956(a)(3)(B). He argued that he should not have been sentenced under the November 1990 version of the sentencing guidelines because section 2S1.1, the guideline under which he was sentenced, was drafted before enactment of 18 U.S.C. section 1956(a)(3). Thus, it was designed to punish a class of defendants to which he did not belong. The 6th Circuit found no clear error in the district court's application of the guidelines. Further, the district court correctly enhanced defendant's offense level because the evidence was sufficient to provide that defendant had the necessary knowledge of belief that the source of the funds for the transaction was drug activity. *U.S. v. Loehr,* __ F.2d __ (6th Cir. June 10, 1992) No. 91-1655.

7th Circuit upholds enhancement for defendant who hid assets. (370) Defendant was convicted of tax evasion. The district court increased his base offense level under section 2T1.2(b)(2) because defendant employed "sophisticated means" to conceal his crimes. The 7th Circuit found no clear error in this finding in light of defendant's use of a so-called "warehouse bank" to deposit his assets anonymously and defendant's deposit of other assets into a son's account. *U.S. v. Becker,* __ F.2d __ (7th Cir. June 5, 1992) No. 91-2737.

9th Circuit upholds guideline calculating tax loss as 28% of unreported income. (370) Defendant argued that U.S.S.G. 2T1.3(a)(1) violates due process because it creates an irrebutable presumption that tax loss is 28% of unreported taxable income. The 9th Circuit rejected the argument, ruling that the guideline does not establish a presumption but merely establishes the amount of unreported income as the "legally operative fact" for determining the guideline range. The court said that the guideline affects only sentencing and does not create an evidentiary presumption. Defendant was mistaken in relying on cases that involved the use of presumptions in proving elements of a crime at the guilt phase of trials. *U.S. v. Barski,* __ F.2d __ (9th Cir. July 1, 1992) No. 91-50615.

Adjustments (Chapter 3)

10th Circuit upholds vulnerable victim enhancement for defendant who raped woman with double mastectomy. (410) After escaping from prison, defendant kidnapped a 57-year old woman to obtain her car. Shortly after the abduction, defendant stopped the car in a remote area, and sexually assaulted her. He told the woman that he was aroused because she had no breasts. The 10th Circuit affirmed a vulnerable victim enhancement under guideline section 3A1.1. The government introduced evidence that the victim appeared elderly, weighed 97 pounds, was less than five feet three inches tall, and was in a weakened condition because she had suffered a double mastectomy. Most importantly, the record revealed that during the course of the kidnapping, the defendant decided to sexually assault the woman. Section 3A1.1 encompasses cases in which a defendant, while committing the offense for which he is convicted, targets the victim for related, criminal conduct because he knows the victim is unusually vulnerable to that criminal conduct. *U.S. v. Pearce,* __ F.2d __ (10th Cir. June 18, 1992) No. 91-7118.

9th Circuit remands where court failed to state that it accepted the probation officer's recommendation. (430) There was nothing in the record to indicate whether or not the district court accepted the probation officer's recommendation to enhance the base offense level for defendant's leadership role. "Although evidence exists that would satisfy the requirements of section 3B1.1(a), the district court's utter failure to perform the requisite inquiry of evaluating that evidence on the record requires us to remand this issue." *U.S. v. Harrison-Philpot,* __ F.2d __ (9th Cir. July 2, 1992) No. 89-30212.

6th Circuit holds that leadership role in relevant conduct justified enhancement. (431) Defendant held a leadership role in a criminal operation that constituted relevant conduct for the offense of

conviction. The 6th Circuit held that defendant's leadership role in the relevant conduct mandated a two point enhancement under section 3B1.1. Judge Cohn dissented. *U.S. v. Ushery,* __ F.2d __ (6th Cir. June 18, 1992) No. 91-5715.

8th Circuit holds that five co-conspirators each held managerial roles in drug conspiracy. (431) The 8th Circuit found that it was not clearly erroneous for the district court to infer that five defendants were managers of supervisors of a drug conspiracy. After the source of methamphetamine dried up, one defendant secured an alternative source for the network. The second defendant served as the middleman for dealings between various dealers. A third defendant purchased one pound of methamphetamine from the first defendant for resale. A fourth defendant provided drugs to a distributor for resale, and if the distributor wanted drugs for personal use, that defendant would refer him to individuals selling drugs at the street level. When the drug source did not want to receive payments directly, payments were made to the fifth defendant. At the fifth defendant's direction, three men drove methamphetamine from Missouri to Arkansas. *U.S. v. England,* __ F.2d __ (8th Cir. June 8, 1992) No. 91-2128.

1st Circuit reverses where record did not support supervisor enhancement. (432) The 1st Circuit reversed a supervisor enhancement since the sentencing court's subsidiary findings of fact did not support the enhancement. The record did not reveal any facts and at oral argument, the government conceded that the record did not justify the enhancement. Because relatively small increases in base offense level can have serious consequences at sentencing, an enhancement must be based on more than the trial judge's hunch, no matter how sound his instincts or how sagacious his judgment. *U.S. v. Ortiz,* __ F.2d __ (1st Cir. June 10, 1992) No. 91-1974.

5th Circuit holds that chemist did not play supervisor role in methamphetamine conspiracy. (432) Defendant and others were convicted of manufacturing methamphetamine. The 5th Circuit rejected the government's contention that defendant, as the chemist or "cook" for the methamphetamine, should have received a supervisor role enhancement under section 3B1.1. Although defendant, as the chemist, was undoubtedly a necessary member of the conspiracy, the record supported the district court's finding that he did not manage any part of the conspiracy. *U.S. v. Sherrod,* __ F.2d __ (5th Cir. June 23, 1992) No. 90-4467.

1st Circuit rules that defendant failed to demonstrate right to mitigating role adjustment. (445)(855) The 1st Circuit rejected defendant's claim that he was entitled to a minor role reduction for two reasons. First, the record did not reflect that he raised the point with sufficient clarity at the time of sentencing, and therefore the question was waived. Second, defendant did not come close to demonstrating an entitlement to a reduction. A defendant has the burden of proving that he merits a downward adjustment in the offense level. Considering that role-in-the-offense determinations are ordinarily factbound, and that defendant was charged only with aiding and abetting a sale at which he was culpably present, the sentencing court was not legally required to label him a minor or minimal participant in that offense. *U.S. v. Ortiz,* __ F.2d __ (1st Cir. June 10, 1992) No. 91-1974.

5th Circuit rejects minor role for defendant who coordinated setting up methamphetamine laboratory. (445) Defendant and others were convicted of manufacturing methamphetamine. The 5th Circuit affirmed the district court's rejection of a minor role reduction for defendant. Defendant coordinated the set up of the laboratory: he compiled a list of chemicals and equipment needed at the laboratory, he called a co-conspirator several days before the activity at the lab to inform him that some people were coming to use the lab, and the conspiracy's leader instructed other conspirators to keep defendant informed of the status of the activity at the lab. *U.S. v. Sherrod,* __ F.2d __ (5th Cir. June 23, 1992) No. 90-4467.

7th Circuit rejects mitigating role for extortionist. (445) Defendant and a co-defendant sent a letter to a woman which threatened to harm the woman and her house unless she paid the defendants $25,000. The 7th Circuit rejected defendant's claim that she had a lesser role in the extortion scheme. Both defendants were in the post office together for about 20 minutes prior to mailing the letter, moving from the clerk's window to the work tables to the copying machines. This made it unlikely that defendant was unaware of the preparation of the threatening letter. When the co-defendant was attempting to pick up the dummy extortion package, defendant was with him across the street from the drop-off point for over an hour and had been seen looking in the direction of the drop-off point. The district court found that defendant's claim that she was less culpable than

her co-defendant was not believable in light of evidence that the pair were convicted of theft by swindle in 1987, had a close relationship and had lived together for 12 years before their arrest. *U.S. v. Johnson,* __ F.2d __ (7th Cir. June 12, 1992) No. 91-1857.

11th Circuit rejects minor role reduction for drug conspirator. (445) Defendant claimed he was entitled to a reduction under section 3B1.2(b) for being a minor participant. The 11th Circuit rejected this argument in light of evidence that defendant was a member of the cocaine conspiracy all along, knew the other co-conspirators, served as a liaison between the confidential informant and the other co-conspirators in three recorded telephone conversations prior to the actual meeting, and arranged the manner in which the transaction would occur. *U.S. v. Gates,* __ F.2d __ (11th Cir. June 10, 1992) No. 91-8083.

5th Circuit affirms obstruction enhancement for defendant who used alias at arrest and before magistrate. (461) Defendant concealed his true identity from law enforcement officials for over a month after his arrest in an effort to hide his criminal record. The 5th Circuit affirmed an enhancement for obstruction of justice because defendant gave the alias to a magistrate and filed a financial status affidavit with the magistrate under the false name. Application note 3(f) to guideline section 3C1.1 provides that the use of a false name before a judge or magistrate merits enhancement, even without a showing of significant hindrance. *U.S. v. McDonald,* __ F.2d __ (5th Cir. June 15, 1992) No. 91-8178.

7th Circuit holds that defendant's "admissions" were lies that justified obstruction enhancement. (461)(488) The 7th Circuit affirmed an enhancement for obstruction of justice and the denial of a reduction for acceptance of responsibility based upon defendant's explanation for his involvement in a murder for hire scheme. Defendant's contentions that he was forced into the scheme by the undercover FBI agent, that the confidential informant threatened the safety of defendant and his family, and that he did not intend to have former in-laws killed, were properly labelled by the district court as lies and fabrications. Defendant's trip to meet the FBI agent, the payment of $500 on account with a promise of another $1000, and his supplying pictures and addresses of the intended victims supported this determination. The lies not only were grounds for a denial of a reduction for acceptance of responsibility, but were grounds for the obstruction enhancement. *U.S. v. Carr,* __ F.2d __ (7th Cir. June 8, 1992) No. 91-1525.

7th Circuit upholds obstruction enhancement for committing perjury. (461) The 7th Circuit found no clear error in the district court's two-level enhancement under §3C1.2 for committing perjury. *U.S. v. Becker,* __ F.2d __ (7th Cir. June 5, 1992) No. 91-2737.

11th Circuit rejects obstruction enhancement for defendant who hid Coast Guard boarding slip in his shoe. (462) Defendant was arrested after Customs agents in Naples, Florida discovered marijuana on a sailboat in which defendant was a passenger. When the agents boarded the vessel, defendant and the other passengers misrepresented that the boat had come from Key West, Florida, instead of Jamaica. In fact, several days prior to arriving in Naples, the boat was stopped and boarded by the Coast Guard. Customs agents were aware of this fact at the time they boarded the vessel. The district court imposed an obstruction of justice enhancement because defendant had hidden the Coast Guard boarding slip in his vessel. The 11th Circuit reversed, since defendant's conduct did not materially hinder the government's investigation or prosecution of the crimes. At the time of defendant's arrest, the Customs agents already possessed all of the information contained on the boarding slip. *U.S. v. Savard,* __ F.2d __ (11th Cir. June 15, 1992) No. 90-3422.

9th Circuit remands for court to state reasons for denying credit for acceptance of responsibility. (480) Defendant argued that he was denied the two level reduction for acceptance of responsibility because he would not discuss the facts of his case prior to appeal. Since the district court gave no reason for denying credit for acceptance of responsibility, the 9th Circuit remanded the case to the district court for the limited purpose of clarifying the record on this issue. The court said that a district court "may deny the reduction because of lack of contrition *despite* the increased costs imposed upon the defendant's choice to remain silent or to proceed to trial, but may not deny the reduction *because of* that choice, in spite of other manifestations of sincere contrition" (emphasis added). *U.S. v. Sitton,* __ F.2d __ (9th Cir. July 2, 1992) No. 91-50154.

4th Circuit rules acceptance of responsibility reduction may be conditioned upon waiver of 5th Amendment rights. (484) Defendant stole money

orders worth a potential $5,060,000, and returned all but $698,000 worth. He refused to identify the individual to whom he had given the missing money orders, contending that the provision of such information might subject him to criminal prosecution. The 4th Circuit affirmed the denial of a reduction for acceptance of responsibility based in part upon defendant's refusal to provide the incriminating information. Conditioning the acceptance of responsibility reduction on a defendant's waiver of his 5th Amendment privilege against self-incrimination does not penalize the defendant for asserting his 5th Amendment rights. The choice presented to a defendant under section 3E1.1 is analogous to and constitutionally indistinguishable from the choice confronting defendants who are offered a plea bargain. Such choices, while difficult, are not forbidden by the constitution. *U.S. v. Frazier,* __ F.2d __ (4th Cir. June 12, 1992) No. 91-5865.

4th Circuit says court considered all the facts in denying acceptance of responsibility reduction. (486) Defendant stole money orders worth a potential $5,060,000, and returned all but $698,000 worth. He argued that the district court improperly used a "per se" rule to deny him an acceptance of responsibility reduction, requiring complete assistance to receive the reduction, without regard to whether defendant had indicated his acceptance in other ways. The 4th Circuit found that the district court did not base its decision solely on the fact that defendant did not fully cooperate with authorities. Rather, the district court based its decision on a number of factors. As factors weighing against reduction, the court noted that defendant had not voluntarily made restitution, had failed to fully assist the authorities in recovering the fruits of the offense, and had declined to reveal to whom those money orders had been given. In favor of a reduction, the court considered both that defendant had pled guilty to the charges and had turned over some of the missing money orders. *U.S. v. Frazier,* __ F.2d __ (4th Cir. June 12, 1992) No. 91-5865.

1st Circuit remands to clarify whether denial of acceptance of responsibility reduction was improperly based on alcohol abuse. (488) Defendant contended he was entitled to a reduction for acceptance of responsibility because he paid most of the money back that he embezzled on the very day he was confronted by investigators, he cooperated with authorities, voluntarily resigned his position as bankruptcy trustee, and entered drug and alcohol rehabilitation programs. The district court denied the reduction in part because at trial defendant claimed that his alcohol and drug problem forced him to take the money. The 1st Circuit remanded for resentencing, because it was unclear from the lower court's comments whether the court found no acceptance of responsibility or whether its conclusion rested simply upon defendant's showing insufficient remorse for having become involved with drugs and alcohol in the first place. The first question was relevant, the second was relevant only to the extent it shed light upon the first question. *U.S. v. Curran,* __ F.2d __ (1st Cir. June 12, 1992) No. 91-1990.

5th Circuit denies acceptance of responsibility reduction to defendant who concealed his true identity from police. (492) The 5th Circuit affirmed the district court's decision to deny defendant a reduction for acceptance of responsibility. Defendant concealed his true identity from law enforcement officials for over a month in an effort to hide his criminal record. This fact alone was sufficient to support the denial. In addition, defendant also denied the charges against him, despite the admissions in the factual basis and the evidence against him. *U.S. v. McDonald,* __ F.2d __ (5th Cir. June 15, 1992) No. 91-8178.

8th Circuit denies acceptance of responsibility reduction to defendant who did not cease illegal activities. (494) Defendant argued that he was entitled to a reduction for acceptance of responsibility based upon his confession shortly after arrest and his statements to police. The 8th Circuit affirmed the refusal to grant the reduction. A sentencing court's findings in this areas are reversed only if they are "without foundation." Defendant was not entitled to the reduction because he neither pled guilty to his crimes nor voluntarily stopped his illegal activities. *U.S. v. Jones,* __ F.2d __ (8th Cir. June 9, 1992) No. 91-1987.

Criminal History (§4A)

4th Circuit finds that offenses need not be tried separately to serve as predicate offenses for armed career criminal status. (500) Defendant argued that his two drug convictions should be treated as one for armed career criminal purposes because they were consolidated and a concurrent sentence was imposed. The 4th Circuit rejected this argument, since nothing in the guidelines or 18 U.S.C. section 924(e) suggests that offenses must be tried or sentenced separately in order to be

counted as separate predicate offenses. The only requirement is that the predicate offenses be committed on different occasions, and defendant's offenses clearly met that standard. Defendant's offense level under section 4B1.4 was 34, because defendant used or possessed the firearm in connection with a crime of violence. The fact that the court previously held that a felon's possession of a firearm was not a crime of violence did not bar application of the offense level of 34. The trigger to the application of the base offense level of 34 is not a finding that possession of a firearm is a crime of violence, but a finding that the firearm was used in connection with a crime of violence. *U.S. v. Samuels,* __ F.2d __ (4th Cir. June 22, 1992) No. 91-5429.

5th Circuit says step-by-step consideration of next highest criminal history category is not mandated. (508) Defendant claimed that in making an upward criminal history departure, the court erred in failing to consider a sentence in the next highest criminal history category. The 5th Circuit held that the guidelines do not mandate a step-by-step procedure for considering the next highest criminal history category, especially not where the criminal history category is already high. A district court should explain why it reached the level of departure that it did, but is not required to explain why it did not reach some other level. *U.S. v. Lopez,* 871 F.2d 515 (5th Cir. 1989), which suggested that a step-by step procedure was required, is most applicable in cases where the defendant's criminal history is low. In cases such as this, where the defendant has been in the criminal justice system virtually his entire adult life and has shown a consistent disrespect for the law, it is not so important for the sentencing court explain fully why sentences corresponding to lower criminal history categories do not suffice. Judge Jones concurred specially, suggesting en banc review. Judge Wisdom dissented and concurred in the suggestion for rehearing. *U.S. v. Lambert,* __ F.2d __ (5th Cir. June 8, 1992) No. 91-1856.

D.C. Circuit holds that downward criminal history departures may be made for career offenders. (508)(520) Defendant argued for a downward departure based on several factors, including the fact that he "just barely" qualified as a career offender, and that one of his two predicate convictions for applying career offender status occurred 15 years before the instant offense. The district court found that it lacked discretion to depart downward. The D.C. Circuit reversed, holding that section 4A1.3 authorizes a downward departure when criminal history category VI, assigned pursuant to the career offender guideline, significantly overrepresents the seriousness of a defendant's past criminal conduct and the likelihood of recidivism. In authorizing criminal history departures under section 4A1.3, the commission did not exclude category VI or career offenders. The case was remanded for the district court to consider whether defendant qualified for a downward departure on these grounds. *U.S. v. Beckham,* __ F.2d __ (D.C. Cir. June 19, 1992) No. 91- 3051.

5th Circuit affirms upward departure based in part upon dismissed charge. (510)(718) Defendant was arrested on burglary charges which were eventually dismissed by the state because of insufficient evidence. However, based on a weapon he possessed at the time of his arrest, he was convicted of being a felon in possession of a firearm. The 5th Circuit affirmed an upward departure based in part upon the alleged burglary for which he had been arrested. The fact that the burglary charge was dismissed by the state was irrelevant. The standard of proof necessary to support an enhancement, preponderance of the evidence, was not nearly as demanding as the beyond a reasonable doubt standard necessary to support a conviction. *U.S. v. Carpenter,* __ F.2d __ (5th Cir. June 9, 1992) No. 91-8381.

5th Circuit affirms that court gave sufficient reasons for upward departure. (510)(700) Defendant's sentence was enhanced under 18 U.S.C. section 924(e)(1) to a mandatory minimum 180 months. The court departed upward based on defendant's extensive criminal history. However, since defendant already fell within criminal history category V, the court found that an increase in criminal history would not be appropriate. Since a 180-month sentence with a category V criminal history would be an offense level of 30, the court departed two levels to an offense level of 32. This resulted in a guideline range of 188 to 235 months. The court imposed a 230-month sentence. The 5th Circuit affirmed, rejecting defendant's claim that the district court failed to articulate sufficient reasons for the departure. It was clear that the court found a criminal history departure was warranted. There was no doubt that the court based its decision to depart on the grounds urged by the government. The sentence was affirmed because the departure reflected a reasonable upward adjustment. *U.S. v. Carpenter,* __ F.2d __ (5th Cir. June 9, 1992) No. 91-8381.

5th Circuit affirms upward criminal history departure based on use of weapons in prior crimes and consolidation of prior offenses. (510)(725) The 5th Circuit affirmed an upward criminal history departure based in part upon defendant's use of weapons in two of his past offenses and in part upon the consolidation of two of defendant's prior offenses. Guideline section 5K2.6 lists possession or use of weapons to commit crimes as a ground for departure. Although this guideline refers to departures due to the gravity of the instant offense rather than underrepresentation of criminal history, the guideline was instructive because a criminal history category may not take into account the gravity of past wrongdoing. The consolidation of two of defendant's prior offenses was also a proper ground for departure under comment 3 to section 4A1.2. The departure was particularly appropriate since these two crimes were committed against the same family. Moreover, defendant displayed contempt for the law by committing crimes while in lawful custody for other offenses. *U.S. v. Lambert*, __ F.2d __ (5th Cir. June 8, 1992) No. 91-1856.

Supreme Court summarily vacates case holding that felon in possession of a firearm is not a violent felony for career offender purposes. (520) In an unpublished disposition, the 5th Circuit in this case held that being a felon in possession of a firearm is not a violent felony for career offender purposes. After this case was decided however, the 5th Circuit reached the contrary conclusion in *U.S. v. Shano*, 955 F.2d 291 (5th Cir. 1992) (withdrawing *U.S. v. Shano*, 947 F.2d 1263 (5th Cir. 1991). On June 15, 1992 by a 5-4 vote, the Supreme Court summarily vacated the judgment in this case and remanded the case to the 5th Circuit for further consideration in light of its new *Shano* ruling and U.S.S.G. section 4B1.2 comment., n.2 (Nov. 1991). Chief Justice Rehnquist, and Justices Scalia, Kennedy and Thomas dissented. *Kyle v. U.S.*, __ U.S. __, 112 S.Ct. __ (June 15, 1992) No. 91-7295 (summary disposition).

1st Circuit adopts categorical approach to determine that felon's possession of a firearm is not a crime of violence. (520) In *Taylor v. United States*, the Supreme Court held that in determining whether a crime constitutes a violent felony under 18 U.S.C. section 924(e), a sentencing court should look at the crime categorically and not at the circumstances surrounding the offense. The 1st Circuit, applying *Taylor*, held that for purposes of applying the career offender guideline and the armed career criminal guideline, the district court is similarly limited to a categorical examination of the offense of conviction. Under this approach, defendant's instant offense of being a felon in possession of a firearm did not constitute a crime of violence for career offender purposes. As the Circuit had previously found for purposes of 18 U.S.C. section 924(e), many if not most of the ways in which a felon can possess a firearm do not involve the likely accompanying violence required by the literal language of the enhancement statute. *U.S. v. Bell*, __ F.2d __ (1st Cir. June 10, 1992) No. 91-1965.

4th Circuit holds that crime of violence may be determined only by facts in indictment. (520) Defendant was convicted of three counts of being a felon in possession of a firearm in violation of 18 U.S.C. section 922(g). Based on the facts underlying the possession offenses, the court determined that these were crimes of violence under section 4B1.2(1)(ii) and sentenced him as a career offender. The 4th Circuit reversed, holding that the language of section 4B1.2 forecloses inquiry into the specific circumstances of a conviction and limited the factual inquiry to those facts charged in the indictment. Because the indictment failed to charge any conduct beyond mere possession of firearms, the section 922(g) offense could not constitute a crime of violence. *U.S. v. Samuels*, __ F.2d __ (4th Cir. June 22, 1992) No. 91-5429.

5th Circuit upholds reliance on uncertified reports to determine nature of prior burglaries. (520)(770) Defendant argued that his prior burglary convictions should not have been classified as crimes of violence because burglary that is not of a dwelling is not a crime of violence under section 4B1.2. The 5th Circuit affirmed the district court's reliance on uncertified reports to determine that defendant's prior offenses were for burglary of a dwelling. The probation officer who prepared defendant's presentence report could not tell from the certified and exemplified copies of the convictions what type of burglary defendant had committed, so he obtained copies of the state presentence reports. These documents, which were not certified, indicated that the six offenses were burglaries of a dwelling. The reports, prepared by state correctional officers, were sufficiently reliable to sustain the application of section 4B1.1. *U.S. v. McDonald*, __ F.2d __ (5th Cir. June 15, 1992) No. 91-8178.

9th Circuit says that even though California prior conviction could have been treated as a misdemeanor, it was a felony. (520) Under

California Penal Code section 17(b), where the offense is alternatively a felony or misdemeanor it is regarded as a felony for every purpose until judgment. In the present case, the court suspended the imposition of sentence and placed defendant on probation on condition that he serve 9 months in custody. His probation was later terminated as unsuccessful. Since the court never entered a judgment and never declared the offense to be a misdemeanor, defendant's conviction was treated as a felony for career offender purposes. *U.S. v. Robinson*, __ F.2d __ (9th Cir. June 15, 1992) No. 90-10433.

9th Circuit holds that battery on a police officer is a crime of violence. (520) The 9th Circuit has construed U.S.S.G. section 4B1.2 to require "an analysis of the elements of the crime charged *or* whether the actual charged 'conduct' of the defendant presented a serious risk of a physical injury to another." In this case, the defendant's California offense of battery on a peace officer included as an element "the willful and unlawful use of force or violence upon the person of another." Cal. Penal Code section 242. Therefore the 9th Circuit concluded that battery on a peace officer is a crime of violence for the purpose of determining defendant's career offender status under section 4B1.1. *U.S. v. Robinson*, __ F.2d __ (9th Cir. June 15, 1992) No. 90-10433.

Article urges simplifying sentencing grid to reveal policy choices. (550) In *"True Grid: Revealing Sentencing Policy"* Professor Marc Miller, co-editor of the *Federal Sentencing Reporter* argues that the guidelines' 258-box sentencing grid is unnecessarily complex, and obscures the Sentencing Commission's policy choices. He offers an experimental grid that collapses the 43-level grid to 7 levels in an effort to encourage the Commission to develop "a simpler and more meaningful array." He argues that the grid "highlights the obsessive focus of the federal system on harm and the trivialization of considerations of blameworthiness." 25 U.C. DAVIS L. REV. 587-615 (1992).

9th Circuit reaffirms that prisoner is entitled to custody credit for pretrial time at drug center. (600) As a condition of release pending trial and sentencing, petitioner resided for six months at a community drug treatment center in Denver, Colorado. Reaffirming its ruling in *Brown v. Rison*, 895 F.2d 533 (9th Cir. 1990) the 9th Circuit held that the petitioner was entitled to credit against his sentence for the time he spent at the center. Although *Brown* was based on an interpretation of 18 U.S.C. section 3568 which was repealed in 1987 and replaced with 85 U.S.C. section 3585, the court found that no substantive change was intended by Congress when it replaced the word "custody" in section 3568 with "detention" in section 3585. The court held that confinement to a treatment center "fall[s] convincingly within both the plain meaning and the obvious intent" of "official detention" as it is used in section 3585. The court noted that its ruling was contrary to at least one other circuit, *U.S. v. Becak*, 954 F.2d 386, 388 (6th Cir. 1992). *Mills v. Taylor*, __ F.2d __ (9th Cir. June 26, 1992) No. 91-55362.

9th Circuit says victim has no obligation to mitigate damages for restitution. (610) Defendants argued that the district court should not have ordered restitution for losses that could have been avoided had the FDIC properly mitigated damages. The 9th Circuit rejected the argument, finding "no support in the VWPA or our caselaw for the proposition that the victim of a criminal offense is required to mitigate damages." The court expressed no opinion, however, on "whether the VWPA *permits* a district court to limit damages due to a victim's failure to mitigate properly." *U.S. v. Soderling*, __ F.2d __ (9th Cir. June 30, 1992) No. 88-1216.

9th Circuit reverses contempt restitution where defendant was already obligated to make restitution. (610) Defendants pled guilty to bank misapplication and were ordered to pay restitution. When it became apparent that they were wasting assets and avoiding restitution, they were convicted of criminal contempt and again ordered to make restitution in the full amount. On appeal, the 9th Circuit reversed, holding that the second restitution order served no purpose. The court added, however, that on remand, the district court would be free to order restitution for any actual loss suffered by the FDIC for the defendants' contumacious acts. *U.S. v. Soderling*, __ F.2d __ (9th Cir. June 30, 1992) No. 88-1216.

9th Circuit upholds pre-1990 plea agreement for restitution outside offense of conviction. (610) Following 9th Circuit cases holding that the now-repealed Federal Probation Act allowed restitution beyond the offense of conviction as part of a plea bargain, the 9th Circuit held that the Victim-Witness Protection Act, 18 U.S.C. section 3663, also permits such plea bargains. The VWPA was amended in 1990 to expressly permit such restitution, but the 9th Circuit held that even before the amendment, the VWPA permitted the parties to agree to

restitution beyond the offense of conviction. The court recognized that its opinion was contrary to decisions in the 5th, 7th, 8th and 11th Circuits and the Eastern District of Virginia, as well as *U.S. v. Snider*, 945 F.2d 1108 (9th Cir. 1991) which had been vacated on motion of the government. But it saw "no principled way" to distinguish its prior precedents. *U.S. v. Soderling*, __ F.2d __ (9th Cir. June 30, 1992) No. 88-1216.

Departures Generally (§5K)

3rd Circuit rules that district court may not make substantial assistance departure in the absence of government motion. (712) Following the Supreme Court's decision in *United States v. Wade*, 60 U.S.L.W. 4389 (May 18, 1992), the 3rd Circuit affirmed that in the absence of a government motion, the district court lacked the ability to depart downward under section 5K1.1. Defendant did not allege that the government refused to file the motion for suspect reasons such as race or religion. Even if defendant's assistance was unquestionably substantial, such a showing is neither necessary or sufficient. Similarly, defendant's offer to provide assistance was not a proper basis for departure under section 5K2.0. *U.S. v. Higgins*, __ F.2d __ (3rd Cir. June 16, 1992) No. 91-1877.

D.C. Circuit reverses downward departure for defendant who was apprehended only because he was a crime victim. (715) While attempting to escape two masked gunmen hiding inside his apartment, defendant was shot in the leg. He was pulled to safety by a neighbor who called 911. The police went to defendant's apartment to investigate, where they found a large supply of drugs. The D.C. Circuit reversed a downward departure based on the "extraordinary" manner in which defendant was apprehended. No matter how unusual the circumstances surrounding defendant's apprehension, they were not mitigating circumstances under 18 U.S.C. section 3553(b). While defendant's misfortune might make him the object of sympathy, it did not make him less culpable for the drug crime. The court rejected the district court's determination that the shooting was a certain amount of punishment for the crime: no representative of the government acting for society shot defendant. Society cannot be responsible for the random act of criminals. Judge Wald concurred. *U.S. v. Mason*, __ F.2d __ (D.C. Cir. June 19, 1992) No. 90-3267.

3rd Circuit rejects disparity between co-defendants as a ground for downward departure. (716) Defendant argued that the district court mistakenly believed that it lacked the authority to depart downward on various offered grounds. The 3rd Circuit held that to the extent that the disparity of sentence among the co-defendants was alleged to be a mitigating factor, it was not a proper basis for a downward departure. *U.S. v. Higgins*, __ F.2d __ (3rd Cir. June 16, 1992) No. 91-1877.

9th Circuit bars departure based on disparity between state and federal sentences. (716) In *U.S. v. Ray*, 930 F.2d 1368, 1372-73 9th Cir. *cert. denied*, 111 S.Ct. 1084 (1991), and *U.S. v. Boshell*, 952 F.2d 1101, 1108 (9th Cir. 1991), the 9th Circuit held that a departure was permissible to equalize the sentences of co-defendants, some of whom received nonguideline sentences in federal court. In this case, the defendants argued that the court should have departed downward because their sentences would have been substantially shorter if they had been tried on state charges. The 9th Circuit declined to extend *Ray* and *Boshell*, holding that "sentencing courts may *not* depart from the guidelines on the basis of disparities between state and federal sentencing regimes." Allowing departures because defendants could have been subjected to lower state penalties "would undermine the goal of uniformity by making federal sentences dependant on the practice of the state within which the federal court sits." *U.S. v. Sitton*, __ F.2d __ (9th Cir. July 2, 1992) No. 91-50154.

10th Circuit rejects disparity claim where co-defendant was convicted of additional offenses. (716) Defendant complained that she received a 15-year sentence for conspiracy whereas her equally culpable husband received only a 10-year sentence for the same offense. The 10th Circuit rejected this claim since the two defendants had different records and pled guilty to different charges. Defendant was sentenced only for her role in the drug conspiracy. By contrast, the district court had to devise a total "package" for her husband; he was sentenced both for his role in the drug conspiracy and for various firearms offenses. Although he only received a 10-year sentence for the drug conspiracy charge, he received a total sentence of 20 years. *U.S. v. Sullivan*, __ F.2d __ (10th Cir. June 12, 1992) No. 91-7046.

3rd Circuit holds that in exceptional circumstances specific offender characteristics can support downward departure. (736) Defendant requested a downward departure based in part upon

his young age, his steady employment and his stable employment record. The district court ruled that these factors were considered by the guidelines, and therefore it lacked discretion to depart on these grounds. The 3rd Circuit held that in extraordinary circumstances, the guidelines permit a downward departure on the stated grounds. Since it was not clear whether the district court believed defendant's circumstances were not extraordinary or whether the district court thought defendant's circumstances were extraordinary but that it could not depart, the case was remanded for resentencing. *U.S. v. Higgins*, __ F.2d __ (3rd Cir. June 16, 1992) No. 91-1877.

Sentencing Hearing (86A)

6th Circuit affirms preponderance of the evidence standard at sentencing. (755) The 6th Circuit affirmed that relevant conduct need only be proven at sentencing by the preponderance of the evidence. The use of this standard does not violate the 8th Amendment's requirement that all elements of a crime be proven beyond a reasonable doubt. *U.S. v. Ushery*, __ F.2d __ (6th Cir. June 18, 1992) No. 91-5715.

9th Circuit says government has the burden of proving drug quantity. (755) In *U.S. v. Howard*, 894 F.2d 1085, 1090 (9th Cir. 1990), the 9th Circuit said that "[s]ince the government is initially invoking the court's power to incarcerate a person, it should bear the burden of proving the facts necessary to establish the base offense level." In this case the amount of drugs in the count of conviction totaled 67 grams. "While there was certainly evidence indicating that the amount of drugs actually involved in the conspiracy was significantly greater than 67 grams, the burden of establishing that amount rests squarely with the government." *U.S. v. Harrison-Philpot*, __ F.2d __ (9th Cir. July 2, 1992) No. 89-30212.

9th Circuit reaffirms that preponderance standard applies in determining amount of drugs in conspiracy. (755) The amount of drugs involved in the distribution convictions totalled only 67 grams, but the district court endorsed the amount recommended by the probation officer, finding that 3-5 kilograms a week "is a reasonable amount." In a footnote the 9th Circuit noted that the presentence report's estimate exceeded the quantity of cocaine proved in the distribution counts by at least a factor of 220 and resulted in a sentence approximately seven times the length of the cocaine quantity proved in the distribution counts. Nevertheless the court reaffirmed the holding in *U.S. v. Restrepo*, 946 F.2d 654 (9th Cir. 1991) (*en banc*), *cert. denied*, 112 S.Ct. 1564 (1992), that uncharged facts or conduct used at sentencing need only be proven by a preponderance of the evidence. The case was remanded on other grounds. *U.S. v. Harrison-Philpot*, __ F.2d __ (9th Cir. July 2, 1992) No. 89-30212.

6th Circuit says defendant failed to preserve challenge to use of magistrate at sentencing. (760) Defendant's sentencing hearing was conducted by a magistrate, and the magistrate's report and recommendation was adopted by the district judge. The 6th Circuit refused to consider whether a district judge may ever delegate the responsibility for conducting a sentencing hearing to a magistrate, as defendant failed to preserve the issue for appeal. It noted, however, that because sentencing remains a highly subjective and complicated endeavor, it would be inappropriate for a district judge to "sycophantically sustain a sentencing recommendation." Judge Cohn dissented. *U.S. v. Ushery*, __ F.2d __ (6th Cir. June 18, 1992) No. 91-5715.

9th Circuit vacates sentence where court did not tie sentencing to the guidelines. (760) Although the sentence ultimately imposed by the district court fell within the guideline range, the court did not indicate, either at the sentencing hearing or in the judgment, how that sentence related to the guidelines. "[T]he fact that the district court neither expressly adopted the presentence report nor made any attempt to tie its sentencing decision to the guidelines requires that the sentence be vacated." *U.S. v. Harrison-Philpot*, __ F.2d __ (9th Cir. July 2, 1992) No. 89-30212.

5th Circuit rejects claim that defendant was not provided with tentative findings sufficient to allow objections. (765) Defendant contended that the district court failed to comply with section 6A1.3(b) by failing to provide defendant with tentative findings sufficient to allow objections. The 5th Circuit rejected this as frivolous. Defendant received the presentence report a month before the sentencing hearing. He raised numerous objections to the presentence report at that hearing and presented testimony of two witnesses to support those objections. After cross-examination of those witnesses, the court made specific oral findings rejecting defendant's objections and then asked defendant and his counsel for any further comments. This procedure satisfied section 6A1.3.

The district court is not obliged to furnish tentative factual findings before a sentencing hearing where, as here, it simply adopts the presentence report. *U.S. v. Ramirez*, __ F.2d __ (5th Cir. June 5, 1992) No. 90-4746.

5th Circuit vacates because it had no record of district court's resolution of disputed facts. (765) Defendant filed numerous written objections to the findings and recommendations of his presentence report. The 5th Circuit vacated his sentence and remanded for resentencing to allow the district court to enter the findings of fact required by Fed. R. Crim. P. 32(c)(3)(D). The appellate court had no transcript of the sentencing hearing, and no other record of the district court's findings. Where there are disputed facts material to the sentencing decision, the district court must cause the record to reflect its resolution of such disputes, particularly when the dispute is called to the court's attention. *U.S. v. Ramirez*, __ F.2d __ (5th Cir. June 5, 1992) No. 90-4746.

5th Circuit finds that district court's adoption of presentence report's findings satisfied Rule 32. (765) Defendant contended that the district court failed to make a factual finding as required by Fed. R. Crim. P. 32(c)(3)(D) concerning one of his objections to the presentence report. The 5th Circuit held that the district court's adoption of all of the findings in the presentence report satisfied the requirements of Rule 32. It indicated that the court at least implicitly weighed the positions of the probation department and the defense and credited the probation department's determination of the facts. *U.S. v. Ramirez*, __ F.2d __ (5th Cir. June 5, 1992) No. 90-4746.

9th Circuit says reasonable factual dispute does not automatically require an evidentiary hearing. (765)(870) Rule 32(c)(3)(A) expressly vests in the district court discretion whether to hold an evidentiary hearing. The 9th Circuit reviews a decision to deny a request for an evidentiary hearing on alleged inaccuracies in a presentence report for abuse of discretion. On the facts of this case, the court concluded that as a matter of law, a reasonable factual dispute existed over the quantity of drugs involved in the conspiracy. Since the district court made no factual findings regarding this dispute the case was remanded to the district court to determine "in the sound exercise of its discretion, whether to hold an evidentiary hearing on the alleged inaccuracies in the presentence report." *U.S. v. Harrison-Philpot*, __ F.2d __ (9th Cir. July 2, 1992) No. 89-30212.

1st Circuit rules reference to hearsay nature of testimony insufficient to preserve confrontation claim. (770)(855) At defendant's sentencing, the quantity of drugs was determined by testimony from a law enforcement officer as to what he was told by defendant's criminal associates, turned informants. Defendant claimed the procedure violated the confrontation clause, but the 1st Circuit held that he waived the claim. Defendant had not attempted to call any of the hearsay declarants, and had not explicitly raised a 6th Amendment claim below. His conclusory reference to the testimony as hearsay was insufficient to alert the district court to the confrontation claim; it would more likely be interpreted as a challenge to the accuracy of the estimates. The court collected authority from other circuits that take differing approaches to the confrontation clause question. A 5th Amendment claim based on the alleged unreliability of the evidence was also waived, and there was no plain error given defendant's failure to offer any evidence to suggest the evidence was false. *U.S. v. Montoya*, ___ F.2d ___ (1st Cir. June 8, 1992) No. 91-1537.

5th Circuit affirms decision to credit co-conspirator's testimony against testimony of defendant's wife and daughter. (770) Defendant contended the district court erred in finding that he had assisted in the transportation of three loads of marijuana when both his wife and daughter testified that no marijuana was stored in the shed behind his house and the wife testified that she did not believe that her husband dealt in marijuana. The 5th Circuit affirmed, finding the district court could properly reject the testimony of defendant's wife and daughter on the basis of their demeanor and contradictions in their testimony. The court was entitled to disbelieve defendant's witnesses and credit the trial testimony and information in the presentence report. At trial, a co-conspirator testified that another co-conspirator told him that defendant was a participant in one of the loads. Although this co-conspirator was testifying pursuant to a plea agreement and thus may have had an incentive to testify against defendant, at best this created a credibility question for the district court to resolve. *U.S. v. Ramirez*, __ F.2d __ (5th Cir. June 5, 1992) No. 90-4746.

6th Circuit upholds reliance on FBI agent's testimony from his interviews with three informants. (770) The district court determined the quantity of drugs involved in defendant's relevant conduct by relying upon the testimony of an FBI agent about the interviews he conducted with three

informants. The court resolved discrepancies between the informants' recollections by adopting the version most favorable to defendant. The 6th Circuit rejected defendant's claim that this was not reliable evidence. The district court specifically found the FBI agent's testimony credible, and this implied a finding that his informants were credible. There was no evidence that the agent or his informants suffered any faultiness of memory or that their statements were mere guesses. Although there were some discrepancies, most of the informants' testimony corroborated one another. Any residual discrepancies were resolved in defendant's favor. Judge Cohn dissented. *U.S. v. Ushery*, __ F.2d __ (6th Cir. June 18, 1992) No. 91-5715.

6th Circuit upholds consideration of hearsay at sentencing until en banc court issues its decision in *Silverman*. (770) Relying on *U.S. v. Silverman*, 945 F.2d 1337 (6th Cir. 1991), defendant argued that the use of hearsay evidence at sentencing violated his 6th Amendment rights under the confrontation clause. The 6th Circuit noted that *Silverman* had been vacated when the government's petition to rehear the case en banc was granted, __ F.2d. __ (Dec. 4, 1991) No. 90-3205, and that the case had been reargued and disposition was currently pending. Until the en banc court issues its opinion, the 6th Circuit will follow the majority of circuits in rejecting the application of the 6th Amendment's confrontation clause to sentencing proceedings. The use of the hearsay evidence did not violate defendant's due process rights. *U.S. v. Ushery*, __ F.2d __ (6th Cir. June 18, 1992) No. 91-5715.

Appeal of Sentence (18 U.S.C. §3742)

1st Circuit reverses sentence within corrected guidelines range because computation of original range was incorrect. (865) The court determined that defendant had a guideline range of 78 to 97 months and imposed a 78-month sentence. On appeal, the 1st Circuit reversed a two level enhancement, which resulted in a guideline range of 63 to 78 months. Although defendant's sentence fell within his corrected guideline range, the 1st Circuit found that remand was necessary. When the court appears to have chosen a sentence because it was at or near either polar extreme, the case should be remanded for resentencing if any error is found within the calculation of the guideline range, even if the sentence falls within the correct guideline range. The sentence should be upheld only if the record makes it reasonably clear that the trial court would have imposed the same sentence under either range. Here, remand was required. *U.S. v. Ortiz*, __ F.2d __ (1st Cir. June 10, 1992) No. 91-1974.

Rehearing En Banc Granted

(115)(760)(650) *U.S. v. Hardesty*, 958 F.2d 910 (9th Cir. 1992), *rehearing en banc granted*, __ F.2d __ (9th Cir. July 7, 1992) No. 90-30260.

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Federal Sentencing and Forfeiture Guide NEWSLETTER

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

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IN THIS ISSUE:

Guideline Sentencing, Generally

10th Circuit affirms referral of case for federal prosecution. (110) The 10th Circuit rejected defendant's claim that he was denied due process because the police referred his case to federal rather than state prosecutors, which subjected him to a five-year mandatory minimum prison term. Three recent 10th Circuit cases held that without proof that the choice of 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 referrals. The fact that the harsher federal statute may have influenced the referral decision did not rise to a due process violation. Although police undoubtedly have some influence in charging decisions because they decide whether to refer the case to federal or state prosecutors, the ultimate decision whether to charge a defendant, and what charges to file, rests solely with the two prosecutors. *U.S. v. Maxwell*, __ F.2d __ (10th Cir. May 28, 1992) No. 91-4011.

Justice White would grant certiorari on acceptance of responsibility, preponderance of evidence and plea bargain issues. (120)(245)(270)(431)(482)(790) Although the 5th Circuit remanded this case for resentencing, *U.S. v. Kinder*, 946 F.2d 362 (5th Cir. 1991), the defendant sought review by the Supreme Court, challenging (1) the burden of proof at sentencing, (2) district court's reliance on conduct made the basis of counts dismissed pursuant to a plea bargain, and (3) the Fifth Amendment implications of the acceptance of responsibility guideline. Justice White dissented from the denial of certiorari, collecting the conflicting cases, and arguing that the court should resolve the conflicts among the circuits on each of these issues. *Kinder v. U.S.*, __ U.S. __, 112 S.Ct. __ (May 26, 1992) No. 91-6658, (*White, J., dissenting from denial of certiorari*).

8th Circuit upholds longer sentence after successful appeal. (125) Defendant was charged with three drug offenses, and eventually pled guilty to one charge, conditioned on the outcome of his appeal of the district court's refusal to suppress certain evidence. He received a 63-month sentence. The appeal was partially successful, defendant withdrew his guilty plea, and was subsequently convicted by a jury of all three charges. He received a 108-month sentence. The 8th Circuit rejected defendant's claim that it was error to impose a longer sentence than he received after his conditional guilty plea. Vindictiveness played no part in the sentencing. He had pleaded guilty to only one count, while the jury found him guilty of all three counts. Moreover, he had originally received a two-point reduction for acceptance of responsibility, but after his jury conviction he was denied this reduction and received an organizer enhancement. Thus, the lengthier sentence was based on the additional information developed during the trial. *U.S. v. Templeman*, __ F.2d __ (8th Cir. May 27, 1992) No. 91-3750.

9th Circuit says mandatory sentence for possessing weapon in drug crime is not cruel and unusual. (140)(280) The district court ruled that a thirty-year consecutive prison term for possessing a machine gun during a drug crime was cruel and unusual punishment. The government appealed, and the 9th Circuit reversed. The court held that drugs and guns are a major societal ill, and mandatory consecutive sentences are consistent with the eighth amendment. However, the court rejected the government's argument that separate mandatory consecutive sentences were required for each weapon. The court ruled that each section 924(c) charge must be based on a separate predicate offense. Here, while there were two weapons, there was only one drug crime. Defendant's sentence was vacated and the case was remanded for resentencing. *U.S. v. Martinez*, __ F.2d __ (9th Cir. June 23, 1992) No. 90-30354.

Article critiques *Harmelin v. Michigan*. (140) The Supreme Court rejected an Eighth Amendment challenge to a life sentence without the possibility of parole in *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991). In "A Trunk Full of Trouble," a student author argues that *Harmelin* too severely restricts the availability of proportionality review for noncapital prison sentences. The author traces the development of Eighth Amendment jurisprudence in both capital and noncapital cases. 27 HARV. C.R.-C.L. L. REV. 262-80 (1992).

Application Principles, Generally (Chapter 1)

10th Circuit affirms that two embezzlements by military pay technician involved more than minimal planning. (160) Defendant, a military pay account technician, fraudulently manipulated the automated pay system, causing two different checks to be issued to a friend. The 10th Circuit affirmed that the offenses involved more than minimal planning. To complete the embezzlements, defendant was required to access and make computer entries on the friend's master military pay account. Next, using a second access code, defendant had to access a second computer in the payroll areas to cause the check to be issued. Last, he needed to complete several items of paperwork for each transaction. Defendant's embezzlement transpired over a period of six months and involved numerous computer entries. Finally, defendant's use of another pay clerk's initials to conceal his own criminal activities were significant steps taken to conceal the embezzlements. *U.S. v. Williams*, __ F.2d __ (10th Cir. June 1, 1992) No. 91-1371.

10th Circuit affirms modest upward departure despite failure to state reasons for extent. (175)

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(700)(770) Defendant pled guilty to one count of bank fraud, with a guideline range of 15-21 months. The court departed upward by five months based on two automobile burglaries which defendant admitted and other criminal conduct that defendant did not admit. The 10th Circuit affirmed the departure, even though the district court failed to state its reasons for the extent of the departure. It was proper for the court to rely on information in the presentence report concerning the uncharged criminal conduct. The government was not required to produce evidence to prove this conduct since defendant did not contest the presentence report at sentencing. The degree of departure, only five months, was clearly reasonable in light of defendant's substantial additional criminal conduct. Under *Williams v. United States*, 112 S.Ct. 1112 (1992), no remand is required if the appellate court is satisfied that the district court would impose the same sentence if required to articulate its reasons. *U.S. v. O'Dell*, __ F.2d __ (10th Cir. June 2, 1992) No. 91-5082.

5th Circuit holds it is improper to rely on information defendant provides to probation officer under 1B1.8. (185) The 5th Circuit held that guideline section 1B1.8 prohibits a court from sentencing a defendant based upon self-incriminating information revealed to a probation officer in reliance on the government's promise in a plea agreement not to use the information to further prosecute the defendant. Application note 5 to section 1B1.8, added effective November 1, 1991, clarified the prohibition against using such information in sentencing. *U.S. v. Marsh*, __ F.2d __ (5th Cir. June 4, 1992) No. 91-1459.

Offense Conduct, Generally (Chapter 2)

2nd Circuit uses extortion guideline where defendant threatened to drive service station out of business. (224) Defendant, posing as an Immigration and Naturalization agent, threatened the owner of a service station with a large fine and a 10-year prison sentence based on the station's employment of illegal aliens. Defendant initially demanded $25,000 and then $1,000 to overlook the violation, and threatened that if the owner did not cooperate, defendant would drive him out of business. The 2nd Circuit affirmed the application of guideline section 2B3.2 (Extortion by Force or Threat of Injury) rather than section 2B3.3 (Blackmail). Application note 2 for section 2B3.2 states that this section applies if there was any threat to injure a person or property or any comparable threat such as to drive an enterprise out of business. There was ample evidence to justify the owner's concern that defendant's threats, if carried out, might drive the service station out of business. *U.S. v. Penn*, __ F.2d __ (2nd Cir. May 27, 1992) No. 91-1721.

5th Circuit uses retail value of counterfeit item to calculate 2B5.4(b)(1) enhancement. (226) Section 2B5.4(b)(1) provides for an increase in a defendant's offense level based upon the "retail value of the infringing items." The 5th Circuit reversed the district court's determination that the retail value to be used was the retail value of the legitimate item rather than the counterfeit item. The phrase "retail value of the infringing items" should be given its ordinary meaning, and thus referred to the counterfeit merchandise. Nonetheless, remand was unnecessary because the retail value of the genuine articles was relevant to determine the retail value of the counterfeit articles. There was not enough other evidence to calculate the value of the counterfeit items. Although defendant gave agents a price list, the district court was unable to consider it because neither party presented it at sentencing. Moreover, it contained wholesale prices, not retail prices. *U.S. v. Kim*, __ F.2d __ (5th Cir. June 3, 1992) No. 91-7030.

4th Circuit holds that 10 gram threshold for minimum sentence was met by possession of 72 grams of 86 percent pure methamphetamine. (245) A five year mandatory minimum sentence is applicable under 21 U.S.C. section 841(b)(1)(B)(viii) if the offense involved 10 grams or more of methamphetamine or 100 grams or more of a mixture containing methamphetamine. Defendant argued that the "10 grams" referred to pure methamphetamine, and therefore his possession of 72 grams of methamphetamine of between 86 and 91 percent purity did not qualify him for the minimum sentence. The 4th Circuit, following the 1st Circuit's decision in *U.S. v. Stoner*, 927 F.2d 45 (1st Cir. 1991), rejected this argument. Under defendant's interpretation, a person with 99 grams of 99 percent pure methamphetamine would not receive the mandatory minimum sentence while another with merely 10 grams of pure methamphetamine would. *U.S. v. Rusher*, __ F.2d __ (4th Cir. June 3, 1992) No. 91-5375.

9th Circuit reverses departure below the mandatory minimum. (245)(712) The 9th Circuit said that in the absence of a government motion for a downward departure, the district court is

"presumptively without power to circumvent the mandatory minimum." The court followed the Eighth and Tenth circuits in holding that absent improper motivation or a constitutional violation the federal courts will not attempt to supervise the prosecutor's decision to treat one defendant differently than another. *U.S. v. Vilchez*, __ F.2d __ (9th Cir. June 23, 1992) No. 91-50429.

7th Circuit upholds drug quantity determined by interested co-defendant's testimony. (250)(770) Defendant's drug quantity was based in part on the testimony of a co-defendant with an incentive to provide evidence against the defendant. The 7th Circuit affirmed the district court's determination that the co-defendant's testimony supported the drug quantity, finding no clear error. The court also found no clear error in the district court's conclusion that defendant lied at sentencing and therefore had not accepted responsibility, and also upheld a four-level increase for role in the offense based on evidence that defendant supplied numerous drug retailers. *U.S. v. Spears*, __ F.2d __ (7th Cir. June 2, 1992) No. 89-3154.

9th Circuit holds that 2,779 grams of cornmeal and .10 grams cocaine was not a "mixture." (251) The 9th Circuit concluded that the cornmeal was not used to facilitate the distribution of one tenth of a gram of cocaine, but the other way around, i.e., the cocaine was spread on strategic spots of the cornmeal package to trick the purchaser into buying cornmeal, believing it was cocaine. The panel held that this was not a "mixture" under 21 U.S.C. section 841 or U.S.S.G. section 2D1.11(c) because the cornmeal was not (1) used to dilute the cocaine, (2) seized as part of the product, moving through the chain of distribution, nor (3) a consumable carrier medium. The case was remanded for resentencing. *U.S. v. Robins*, __ F.2d __ (9th Cir. June 24, 1992) No. 91-50286

7th Circuit affirms that co-defendant's marijuana plants were part of defendant's manufacturing offense. (260) The 7th Circuit affirmed that marijuana plants grown by a co-defendant were properly included in defendant's base offense level calculation because they were part of the same course of conduct or common scheme or plan as defendant's manufacturing offense. Defendant owned a business that sold equipment to cultivate marijuana and the co-defendant was his employee. Both grew marijuana at their residences and defendant knew his co-defendant grew marijuana at his residence. The evidence supported the inference that the plants grown by both defendants were used, either directly or indirectly, in their business. The defendants each gave undercover agents a marijuana cigarette free of charge. Further, defendant promoted the manufacture of marijuana as his business. During negotiations, defendant told undercover agents that he and his co-defendant both cultivated marijuana. *U.S. v. Pollard*, __ F.2d __ (7th Cir. June 2, 1992) No. 91-3163.

5th Circuit affirms that defendant who had bought substantial quantities of drugs could foresee additional drugs sold by conspiracy. (275) Defendant pled guilty to being involved in a 45 kilogram marijuana transaction. The district court refused to hold him accountable for all the marijuana in the conspiracy, but estimated that the amount of drugs imputable to defendant was double the amount of his 45 kilogram transaction. The 5th Circuit affirmed. Drug ledgers indicated that defendant was assigned a code number and had bought substantial quantities of cocaine over a period of time. An individual dealing in a sizeable amount of drugs ordinarily would be presumed to recognize that the drug organization with which he deals extends beyond his universe of involvement. *U.S. v. Thomas*, __ F.2d __ (5th Cir. June 2, 1992) No. 91-8581.

9th Circuit holds that defendant reasonably foresaw brother's heroin sales. (275) Defendant pleaded guilty to one sale of heroin and two other sales by his brother were included as relevant conduct for sentencing. Approximately five months before his arrest defendant accompanied his brother to two meetings where heroin was sold to an agent. Shortly before his arrest, he drove a car to pick up his brother from a meeting where a heroin sale was negotiated. The car was registered to a person who had recently been arrested for selling heroin. Based on these facts, the 9th Circuit upheld the district court's finding that defendant either personally participated in his brother's two sales or reasonably foresaw them. *U.S. v. Sanchez*, __ F.2d __ (9th Cir. June 24, 1992) No. 91-30250.

10th Circuit affirms that court may not depart below mandatory minimum sentence for firearm offense. (280)(330) Defendant was convicted of carrying a firearm during a drug trafficking crime in violation of 18 U.S.C. section 924(c)(1). The district judge found the minimum sentence mandated by statute to be unduly harsh, but found he lacked discretion to depart below it. The 10th Circuit affirmed, holding that the district court lacked authority to depart below the mandatory minimum

sentence. *U.S. v. Mosley*, __ F.2d __ (10th Cir. May 28, 1992) No. 90-8100.

4th Circuit affirms weapon enhancement for weapon found in truck in which defendants and others were riding. (284) Defendants were found guilty of drug offenses after a highway patrolman discovered drugs and firearms in a truck driven by a co-conspirator and occupied by defendants. The 4th Circuit affirmed a firearm enhancement under section 2D1.1(b)(1) based upon the firearms found in the truck, even though the weapons belonged to the co-conspirator and not defendants. One of the guns was found in the same briefcase as the drugs, and the others, fully loaded, were found in the bed of the same truck. Even if the co-conspirator owned the guns, defendants possessed them for sentencing enhancement purposes. *U.S. v. Rusher*, __ F.2d __ (4th Cir. June 3, 1992) No. 91-5375.

10th Circuit affirms that acquittal on firearms offense does not bar 2D1.1(b) enhancement. (284) The 10th Circuit held that defendant's acquittal on charges of using or carrying a firearm during a drug trafficking crime did not preclude an enhancement under section 2D1.1(b) for possessing a firearm during a drug trafficking crime. Here, the enhancement was proper because defendant had a loaded handgun in his bag when he sold a controlled substance to a government informant. *U.S. v. Eagan*, __ F.2d __ (10th Cir. May 28, 1992) No. 90-4158.

9th Circuit reverses where upward departure not justified by analogy. (340)(700) Defendant was convicted of smuggling 51 illegal aliens in a truck. The District court departed upward from the guideline sentence of 10 months to 30 months. On appeal, the 9th Circuit held that departure was appropriate based on the large number of aliens. However, in deciding on the extent of the departure, the district court relied on a proposed guideline amendment which was later withdrawn. The 9th Circuit held that this was not sufficient justification for the extent of the departure. Because departures must be justified by analogy to the structure of the Guidelines, the sentence was reversed. *U.S. v. Ramirez-Jiminez*, __ F.2d __ (9th Cir. June 22, 1992) No. 91-50211.

Adjustments (Chapter 3)

7th Circuit affirms that 20-year-old who had been raped at age 15 was vulnerable victim to defendant's fraud. (410) During an eight-month relationship with a 20-year old girl, defendant fraudulently obtained $46,500 from her parents, administered massive doses of drugs to her, used threats to compel her to have sex with him, and otherwise physically and psychologically abused her. The 7th Circuit affirmed a vulnerable victim enhancement under section 3A1.1. The victim had told defendant that she had been raped at age 15, and victims of sexual abuse are often susceptible to sexual exploitation as adults. To receive the enhancement, a defendant must know that a victim is vulnerable. But defendant must have realized that he was dealing with someone abnormally susceptible to intimidation and deceit. Vulnerability does not require that the victim have a demonstrated physical or mental deficiency. *U.S. v. Newman*, __ F.2d __ (7th Cir. May 26, 1992) No. 90-3645.

5th Circuit says defendant who sold large quantity of drugs to conspiracy leader was not a minor participant. (445) The 5th Circuit rejected defendant's contention that he was a minor participant even though the volume of controlled substances attributed to him was a small fraction of the operation's total drug trade and others in the operation had more active roles. Even if others were more culpable, this did not automatically qualify defendant for minor or minimal status. Defendant had been selling large amounts of controlled substances to the conspiracy leader for several years and regularly appeared on the drug trade ledgers along with other distributors. *U.S. v. Thomas*, __ F.2d __ (5th Cir. June 2, 1992) No. 91-8581.

7th Circuit defers to trial court's conclusion that defendant was not a minor participant. (445) The 7th Circuit found no clear error in the district court's denial of a minor participant reduction based on the factual finding that defendant "was a well-established coke dealer who did engage in a number of coke transactions." *U.S. v. Spears*, __ F.2d __ (7th Cir. June 2, 1992) No. 89-3154.

10th Circuit affirms abuse of trust enhancement for military pay account technician. (450) Defendant, a military pay account technician, fraudulently manipulated the automated pay system, causing two different checks to be issued to a friend. The 10th Circuit affirmed an abuse of trust enhancement, rejecting defendant's contention that his position as a military pay account technician was no different than an ordinary bank teller. Defendant's section of the

military finance center was broken up into two groups. The line technicians accessed individual accounts. Before any payment was issued, changes had to be approved by an auditor. The payment section then issued the check. As an auditor, defendant had greater authority and greater access to the master military pay accounts than line technicians. Because of his expertise and special training, and the trust placed in him by his supervisors, defendant was given access to both the line and payment sections so that he could act as a liaison between the two. *U.S. v. Williams*, __ F.2d __ (10th Cir. June 1, 1992) No. 91-1371.

10th Circuit reverses upward departure for special skill where defendant also received a 3B1.3 adjustment. (125)(450)(700) The 10th Circuit reversed an upward departure based in part on defendant's special skill as a chemist, since he had already received an enhancement under section 3B1.3 for his use of a special skill in a manner that significantly facilitated the offense. Special skill was factored into the determination of defendant's base offense level, and as such could not be used a second time to justify an upward departure. *U.S. v. Eagan*, __ F.2d __ (10th Cir. May 28, 1992) No. 90-4158.

8th Circuit affirms upward departure despite reliance upon some improper factors. (460)(715) In departing upward, the court properly relied on the similarity of defendant's prior offense, and the need to deter him from further such activity. However, the 8th Circuit held that it was improper, to rely on the defendant's dangerous high speed chase. Effective November 1, 1990, the Sentencing Commission added section 3C1.2, which authorizes a two-point enhancement for high speed chases, but defendant had already received a two level enhancement for obstruction of justice. The court's reliance on defendant's exploitation of a trusting, vulnerable woman who he used as a pawn in his drug operation did not justify a departure because there was no support in the record for the court's finding. Nevertheless, although the court relied upon some improper grounds, the departure was upheld because the district court placed no special reliance upon the improper factors and only a minimal departure was involved. *U.S. v. Estrada*, __ F.2d __ (8th Cir. June 1, 1992) No. 91-3628.

8th Circuit affirms denial of reduction where defendant took none of the actions listed in section 3E1.1 commentary. (480) The 8th Circuit affirmed the district court's refusal to grant defendant a reduction for acceptance of responsibility, since defendant took none of the actions listed in the commentary to section 3E1.1. *U.S. v. Sawyers*, __ F.2d __ (8th Cir. April 16, 1992) No. 91-1707.

5th Circuit affirms that defendant's refusal to admit leadership role was grounds for denying acceptance of responsibility reduction. (488) Defendant clearly admitted and accepted full responsibility for the crime of conviction, but denied he held a leadership role in the offense, suggesting instead that a co-defendant was the unofficial leader of the group. The 5th Circuit held that defendant's denial of his leadership role in the offense was a proper ground for denying an acceptance of responsibility reduction. A defendant who is found to have had leadership role in the offense does not fully accept responsibility for purposes of section 3E1.1 if, despite his admission of all elements of the offense of conviction, he nevertheless attempts to minimize his leadership role. *U.S. v. Shipley*, __ F.2d __ (5th Cir. May 29, 1992) No. 91-7117.

8th Circuit denies acceptance of responsibility reduction because defendant continued illegal conduct after questioning by INS agents. (494) Defendant, a previously deported alien, was arrested on unrelated charges and admitted to INS agents that he had illegally reentered the United States and had used a false social security number to obtain welfare benefits. Several months later he again used the false number to obtain benefits. A jury found him guilty of illegally entering the United States and using a false social security number. The 8th Circuit affirmed the denial of a reduction for acceptance of responsibility, since defendant's continued illegal use of the social security number after his admissions to the INS was inconsistent with a genuine acceptance of responsibility. *U.S. v. Unzueta-Gallarso*, __ F.2d __ (8th Cir. June 5, 1992) No. 91-3418.

Criminal History (§4A)

5th Circuit affirms that cases scheduled for same day and time were not consolidated. (504) The 5th Circuit held that defendant's prior state drug offenses were not consolidated for trial and sentencing, and thus did not constitute related cases for criminal history purposes, even though the cases had consecutive indictment numbers, were scheduled in the same court for the same day and time, had plea agreements which referred to each other, and the ten year sentences for each

conviction ran concurrently. There were separate indictments, docket numbers, plea agreements, and sentences, no order of consolidation and another unrelated matter was also resolved at the same time as the two cases were handled. Contrary to defendant's contention, informal consolidations cannot occur in Texas. Although concurrent sentences and sentencing on the same day are factors to consider when evaluating whether cases are consolidated, cases should not automatically be considered consolidated when state law is to the contrary. A district court must determine for itself whether the crimes were in fact related. *U.S. v. Garcia*, __ F.2d __ (5th Cir. May 28, 1992) No. 91-5684.

5th Circuit affirms that convictions for two heroin deliveries which occurred within nine days of each other were not related. (504) In 1989, defendant pled guilty to two separate indictments for delivery of heroin: the first delivery was to one undercover agent for $25, the second to another undercover officer for $19. The two sales occurred within a nine-day period and in the same vicinity. In the first, defendant had to go elsewhere to retrieve the heroin, in the second, he had it with him. As a result of these two prior controlled substance offenses, defendant was classified as a career offender. The 5th Circuit rejected defendant's claim that the two offenses were related because they were part of a common scheme or plan. Defendant executed two distinct, separate deliveries of heroin. Although the crimes may have been temporally and geographically alike, they were not part of a common scheme or plan that would preclude career offender status. *U.S. v. Garcia*, __ F.2d __ (5th Cir. May 28, 1992) No. 91-5684.

6th Circuit upholds refusal to conduct "full fledged hearing" on allegedly unconstitutional prior conviction. (504) Defendant's sentence was enhanced because of prior convictions. Defendant alleged that the district court did not adequately address his claim that one prior conviction was unconstitutional. Relying in part on commentary added to section 4A1.2 after the defendant was sentenced to discern the meaning of the guideline at the time of sentencing, the 6th Circuit affirmed, citing "finality, comity, and federalism" as reasons for disagreeing with the 4th Circuit's view of the district court's obligations respecting prior convictions alleged to be invalid but not already adjudicated to be invalid. The 6th Circuit suggested that district courts have discretion to determine whether to hear challenges to such prior convictions. *U.S. v. French*, __ F.2d __ (6th Cir. May 28, 1992) No. 90-6222.

10th Circuit holds that prior state drug conviction was not part of instant firearm conviction. (504) The 10th Circuit rejected defendant's claim that his prior state drug conviction was part of the instant federal firearm conviction, even if defendant possessed the weapon while he was dealing the drugs. The proper inquiry is not whether defendant had possession of the shotgun on the dates he was dealing drugs, but whether the conduct involving the drugs was part of the conduct of possessing an unregistered firearm. The indictment charged defendant with possessing the firearm on December 6, while defendant's state conviction involved delivering methamphetamine on November 16 and 20. Thus, the two crimes were separable by conduct and by chronology. Neither offense was dependent upon conduct associated with the other and neither shared a common element of proof. Thus, the conduct underlying the convictions was severable and the trial court properly included the drug conviction in defendant's criminal history. *U.S. v. Butler*, __ F.2d __ (10th Cir. June 2, 1992) No. 91-8054.

4th Circuit says that old convictions may be grounds for departure even if not evidence of similar misconduct. (508) Note 8 to guideline section 4A1.2 authorizes an upward criminal history departure based upon outdated sentences that provide evidence of similar misconduct. The 4th Circuit found this did not implicitly prohibit using dissimilar old convictions to depart. The guidelines should be read to allow old convictions to be used as reliable information to depart even if the convictions are not evidence of similar misconduct. However, the old convictions may only be used if they "evince some significantly unusual penchant for serious criminality, sufficient to remove the offender from the mine-run of other offenders." *U.S. v. Rusher*, __ F.2d __ (4th Cir. June 3, 1992) No. 91-5375.

4th Circuit adopts category-by-category approach to criminal history departures. (508) At sentencing, the court asked the probation officer how far he would have to depart to impose a 120-month sentence. The probation officer said he would have to depart from criminal history category III to VI, to obtain a maximum sentence of 105 months. The court then found that defendant fell within category VI and imposed a 105-month sentence. The 4th Circuit held that the district court bypassed the criminal history categories

entirely in its desire to impose a particular sentence. The appellate court adopted a category-by-category approach: once the district court has decided to depart upward in the criminal history category, the judge must refer first to the next higher category and can move on to a still- higher category only upon a finding that the next higher category failed to adequately reflect the seriousness of the defendant's record. Judge Luttig dissented, and expressed his belief that the majority's adoption of a category-by category approach was dictum, and invited another 4th Circuit panel to reconsider this issue. *U.S. v. Rusher*, __ F.2d __ (4th Cir. June 3, 1992) No. 91-5375.

7th Circuit affirms upward departure based on inadequacy of criminal history score. (510)(700) Defendant had a lengthy criminal record and avoided classification as a career offender only because two separate assaults on separate occasions had previously been consolidated for sentencing, and hence treated as a single conviction. The 7th Circuit affirmed the district court's sentence of 210 months. The district court found that defendant's criminal history score did not adequately reflect the seriousness of his past criminal conduct or the likelihood that he would commit other crimes, and the court found that defendant was a threat to the public welfare and safety. Thus, there was no error in raising defendant's offense level to 30, partway between the guidelines level (26) and the applicable level for a career offender (34). *U.S. v. Spears*, __ F.2d __ (7th Cir. June 2, 1992) No. 89-3154.

7th Circuit upholds departure from criminal history category I to III for admitted con man. (510) The 7th Circuit affirmed an upward departure from criminal history category I to III for a defendant who confessed that he had been a con man most of his life, even though the district court failed to expressly consider whether a departure to category II would be sufficient. Defendant's only prior sentence was a Canadian fraud conviction which was not counted in his criminal history because it was foreign. In addition, defendant had committed numerous other frauds for which he had never been convicted. Thus, defendant's criminal history was not only misleading concerning the gravity of his criminal history and the likelihood of recidivism, but in combination with his confession of his many other frauds, it was "perverse." It showed that defendant was not only a con man, but a successful con man who was rarely caught and therefore would have a strong incentive to resume his life of crime when he was released from prison. Although the court jumped from category I to III without discussing the possibility that category II might be sufficient, a remand was not necessary. It was sufficiently plain from the judge's opinion why he skipped a category. The Canadian conviction would have put defendant incategory II, while consideration of only one or two of the uncharged frauds easily moved defendant into category III. *U.S. v. Newman*, __ F.2d __ (7th Cir. May 26, 1992) No. 90-3645.

5th Circuit affirms that attempted burglary is a crime of violence for career offender purposes. (520) The 5th Circuit affirmed that defendant's prior conviction for attempted burglary was a crime of violence for career offender purposes. The guidelines specifically designates burglary of a dwelling as a negligible predicate offense, and application note 1 of the commentary states that the term crime of violence includes attempts to commit the offenses enumerated in the guidelines. The fact that the government did not rely upon note 1 in making its argument below or in its brief was irrelevant: even if never cited by a party, an appellate court can and must consider the commentary to the guideline used by the district court. The holding in this case was not in conflict with a recent 5th Circuit case holding that attempted burglary did not constitute a violent felony under the Armed Career Criminal Act. Although the term crime of violence is derived from the definition of violent felony, the two terms are not identical. *U.S. v. Guerra*, __ F.2d __ (5th Cir. May 28, 1992) No. 91-5574.

9th Circuit reaffirms that felon in possession of a firearm is not a crime of violence for career offender purposes. (520) The Ninth Circuit reaffirmed its decision in *U.S. v. Sahakian*, __ F.2d __ (9th Cir. May 26, 1992) No. 91-10199, which held that, under the 1989 amendments to U.S.S.G. section 4B1.2, being a felon in possession of a firearm is *not* a crime of violence. *Sahakian* rejected the circuit's earlier contrary rule, which was based on the pre-1989 guideline. Therefore, the district court erred in concluding that the offense of conviction, i.e., felon in possession of a firearm, was a crime of violence. The sentence was vacated and the case was remanded for resentencing. *U.S. v. Huffhines*, __ F.2d __ (9th Cir. June 15, 1992) No. 91-50426.

Determining the Sentence (Chapter 5)

10th Circuit affirms consecutive terms of supervised release where defendant had section 924(c) conviction. (580)(650) Defendant was convicted of a drug charge and carrying a firearm during a drug trafficking crime, in violation of 18 U.S.C.924(c)(1). In addition to a term of imprisonment, he received a six year term of supervised release. The 10th Circuit rejected the claim that the six-year term of supervised release exceeded the period authorized by statute. Section 5D1.2(a) of the guidelines authorizes a maximum supervised release term of five years, or the minimum which is required by statute, whichever is greater. The drug statute under which defendant was convicted did not list a maximum. Thus, if defendant was only convicted ofthe drug offense, the six year term would not be authorized. However, defendant was also convicted of the weapons charge under 18 U.S.C. section 924(c)(1). Under section 5D1.1(a), the court was required to imposed a supervised release term for the weapons conviction. The court found that nothing precluded the district court from imposing a consecutive term of supervised release onthe weapons charge, consecutive to that which it imposed on the drug conviction. Congress clearly intended consecutive penalty schemes for weapons violations under section 924(c). *U.S. v. Maxwell*, __ F.2d __ (10th Cir. May 28, 1992) No. 91-4011.

9th Circuit reaffirms that district court cannot grant credit for time spent in custody. (600) Pursuant to 18 U.S.C., section 3585(b), defendant requested credit for 88 days he spent under house arrest in Italy. The district court denied the request. On appeal, the 9th Circuit noted that under *U.S. v. Wilson* __ U.S. __, 112 S.Ct. 1315 (1992), district courts no longer have jurisdiction to grant credit for time spent in custody. The Attorney General now has the power to grant credit. Defendants must begin exhaust their administrative remedies in seeking credit for time in custody The district court's denial of the defendant's request for credit was affirmed. *U.S. v. Checchini*, __ F.2d __ (9th Cir. June 23, 1992) No. 91-50598.

9th Circuit holds that Federal Probation Act restitution may include all the victims of the fraud, unlike VWPA. (610) In *Hughey v. U.S.* 495 U.S. 411 (1990), the Supreme Court held that under the Victim and Witness Protection Act of 1982 (VWPA), 18 U.S.C. section 3663, restitution may be ordered only for losses caused by the specific conduct that is the basis of the offense of conviction. Here, however, The defendant's mail fraud was committed while the Federal Probation Act, 18 U.S.C. section 3651, was in effect, before the VWPA was passed in 1982. The Federal Probation Act did not limit restitution.. Nevertheless the district court treated the case as if the VWPA applied, and limited restitution to the counts of conviction. The government appealed, and the 9th Circuit reversed, holding that the restitution should include all victims of the fraud. *U.S. v. Hammer*, __ F.2d __ (9th Cir. June 23, 1992) No. 90-10386.

9th Circuit holds that victim was not a co-conspirator and therefore was entitled to restitution. (610) Defendant was convicted of conspiracy to smuggle the victim into Guam for illegal employment. The 9th Circuit rejected defendant's claim that the victim was a co-conspirator. Defendant and his wife employed the victim for approximately two years. Her lost wages were a direct consequence of the defendant's conspiracy. Under the Victim and Witness Protection Act, 18 U.S.C. section 3663, a person directly harmed by the defendant's criminal activity is properly awarded restitution for the loss caused. The court rejected defendant's claim that his wife would receive a double benefit if she were not forced to also pay the amount of restitution to the victim. *U.S. v. Sanga*, __ F.2d __ (9th Cir. June 22, 1992) No. 91-10455.

9th Circuit affirms restitution schedule despite claim of inability to pay. (610) Defendant was ordered to pay restitution within 30 days of judgment. He argued that he could not pay the money unless he were put on probation so he could obtain it. The 9th Circuit rejected this argument, noting that the District Court had a complete accounting of the defendant's finances, which contradicted his claim of poverty. Defendant had combined assets of $162,000 and he had offered to make the $5,000 initial payment before any negotiations about a probationary sentence. Therefore, there was sufficient evidence that the $5,000 restitution was not contingent on a probationary sentence. It was not a clear error to order the payment within thirty days of judgment. *U.S. v. Sanga*, __ F.2d __ (9th Cir. June 22, 1992) No. 91-10455.

Departures Generally (§5K)

6th Circuit rules out downward departure below statutory minimum. (700) Defendant was convicted of a drug offense with a statutory five-year minimum term, but the district court departed downward to impose a 36-month sentence because

defendant had a heart condition that gave him a 50 percent chance of surviving for two years. The 6th Circuit reversed, noting that the court has no general authority to "depart" below a statutory minimum. Though the government did not object to the sentence when it was imposed, the issue was not waived; the government had instructed the court of the five-year minimum prior to the sentencing hearing, and the court had noted the minimum at sentencing. *U.S. v. Smith*, __ F.2d __ (6th Cir. June 5,.1992) No. 91-5207.

9th Circuit says presentence report's recommendation for departure gave adequate notice. (700)(761) The presentence report stated the grounds for departure, and recommended that the court depart upward. The 9th Circuit held that this gave the defendant adequate notice to enable him to meaningfully comment on the departure. *U.S. v. Ramirez-Jiminez*, __ F.2d __ (9th Cir. June 22, 1992) No. 91-50211.

7th Circuit upholds government motion requirement. (712) Notwithstanding the absence of a government motion seeking a downward departure based substantial assistance, the district court departed downward on those grounds, concluding that the government motion requirement violated substantive and procedural due process. Relying on Circuit precedent, the 7th Circuit reversed. *U.S. v. Spears*, __ F.2d __ (7th Cir. June 2, 1992) No. 89-3154.

7th Circuit affirms four level departure for unlawful restraint of fraud victim. (715) During an eight-month relationship with a 20-year old girl, defendant misrepresented that he would give her a modeling contract, caused her to quit her job, fraudulently obtained $46,500 from her parents, administered massive doses of drugs to her, used threats to compel her to have sex with him, and otherwise physically and psychologically abused her. The district court departed upward by four levels based on defendant's unlawful restraint of his victim, basing it upon the restraint provision applicable to kidnapping cases. The judge did not mention the restraint provision in section 3A1.3, which is applicable to any crime but only provides a two level increase in offense level. The 7th Circuit affirmed, since no one asked the judge to consider the two level departure, and the failure to do so was not plain error. (Defendant's conduct did involve kidnapping, and the unlawful restraint provision applicable to kidnappings was therefore the natural place to look for guidance on a departure in a case where kidnapping was not charged.?) It was highly unlikely that the judge would have applied the two level provision even if it had been brought to his attention. *U.S. v. Newman*, __ F.2d __ (7th Cir. May 26, 1992) No. 90-3645.

9th Circuit overturns downward departure intended to equalize sentences of state and federal defendants. (716). The 9th Circuit held that equalization of the sentences received by co-defendants is not permissible. This ground for departure was reviewed and rejected by the Sentencing Commission. The court found that the circumstances that created separate federal and state prosecutions in this case were not "highly unusual" but were only fortuitous. Equalizing the sentences of these two co-defendants would simply create increased disparity between federal defendants. *U.S. v. Vilchez*, __ F.2d __ (9th Cir. June 23, 1992) No. 91-50429.

10th Circuit affirms different upward departures for co-defendants. (716) The district court originally departed upward for three defendants: the first defendant received a 120-month sentence, the second a 72-month sentence, and the third a 36-month sentence. The 10th Circuit, on defendants' first appeal, remanded for resentencing so that the district court could explain the reasons for the disproportionate sentences. On resentencing, the first two defendants received 72-month sentences, while the third defendant received a 36-month sentence. The 10th Circuit affirmed. The third defendant was not similarly situated to the other two because of his offense level and criminal history. In addition, there were other mitigating factors, including the third defendant's very young age, problems resulting from peer pressure, and his continued involvement with mental health counseling. *U.S. v. St. Julian*, __ F.2d __ (10th Cir. June 2, 1992) No. 91-6065.

7th Circuit affirms one departure based upon physical injury and another based upon psychological injury. (721) The district court departed upward by two based upon the physical injury suffered by the defendant's victim and by two based upon the psychological injury suffered by the defendant's victim. The 7th Circuit affirmed the two departures, since the physical and psychological harms were separate. The physical harm caused by the administration of potent drugs was distinct from the physical manifestations of psychological injury inflicted by threats, confinement, lies and rape. There was no double counting in treating these harms as separate grounds for increasing defendant's offense level.

Section 2A2.2(b)(3)(B) authorizes a four-level enhancement for inflicting serious bodily injury in the course of an aggravated assault, and the combination of bodily and psychological harm in the present case was the equivalent to such an injury. *U.S. v. Newman*, __ F.2d __ (7th Cir. May 26, 1992) No. 90-3645.

10th Circuit refuses to review refusal to depart based on defendant's diminished capacity. (730)(860) The 10th Circuit refused to review defendant's claim that the district court erred in refusing to depart downward based upon his diminished mental capacity. The language of section 5K2.13 is discretionary, not mandatory. When a district court has discretion to depart downward, and explicitly declines to exercise that jurisdiction, 18 U.S.C. section 3742 does not grant jurisdiction to review that decision. *U.S. v. Eagan*, __ F.2d __ (10th Cir. May 28, 1992) No. 90-4158.

10th Circuit reverses upward departure based on large quantities of precursor drugs. (738) The 10th Circuit reversed an upward departure based in part upon the large quantity of precursor drugs in defendant's possession. The district judge, in fixing the amount of controlled substances to be considered in determining defendant's base offense level, estimated the "potential" of defendant's laboratory by taking into consideration the amount of precursors then on hand. Thus, the district court already considered the amount of precursors involved in setting defendant's offense level, and an upward departure based on a factor that was already considered in establishing the guideline range in an incorrect application of the guidelines. *U.S. v. Eagan*, __ F.2d __ (10th Cir. May 28, 1992) No. 90-4158.

10th Circuit affirms upward departure which used hypothetical offense level based upon large quantity of drugs. (738) The district court originally departed upward based upon the large quantity of drugs in the case. Defendant received a 120-month sentence, one co-defendant received a 72-month sentence, and a second co-defendant received a 36-month sentence. On defendant's first appeal, the 10th Circuit agreed that drug quantity was an appropriate basis for departing upward, but found the basis for defendant's disproportionately large sentence inexplicable. At resentencing, the district court sentenced both defendant and the first co-defendant to 72 months, and the second co-defendant to 36 months. The 10th Circuit affirmed, finding that the district court had done exactly as directed by the appellate court's first opinion. The court treated the aggravating factor of the amount of drugs -- 36 ounces of cocaine base -- as a separate crime and calculated a hypothetical offense level and guideline range. The court then found that a sentence in the hypothetical range would be too high because it exceeded the 20-year statutory maximum for the offense, and because of the factors in 18 U.S.C. section 3553 (the nature of the offense, defendant's ages, the short duration of the conspiracy, and the lack of a history of drug abuse). The appellate court concluded that the degree of upward departure was reasonable and that if it were to remand again for more articulation, the district court would impose the same sentence. *U.S. v. St. Julian*, __ F.2d __ (10th Cir. June 2, 1992) No. 91-6065.

Sentencing Hearing (86A)

9th Circuit suggests higher standard of proof where sentencing factors have extremely disproportionate effects. (755) Defendant argued that the preponderance of evidence standard was insufficient because the relevant conduct enhancement increased his sentence from 12-16 months to 63-78 months. The 9th Circuit suggested that due process may require a higher standard of proof where the sentencing factors have extremely disproportionate effects. In *U.S. v. Kikumura*, 918 F.2d 1084 (3rd Cir. 1990), the court required defendant's relevant conduct to be proved by clear and convincing evidence because his sentence was increased by twelve fold. Here, however, the panel held that the relevant conduct enhancement was not so extreme that a higher standard of proof was necessary. *U.S. v. Sanchez*, __ F.2d __ (9th Cir. June 24, 1992) No. 91-30250.

7th Circuit upholds reliance upon testimony by victim's psychologist. (770) The 7th Circuit affirmed the district court's reliance upon testimony by the psychologist of the victim of defendant's fraud as to the abuse the victim suffered from defendant. The victim herself did not testify. Although the psychologist's testimony was hearsay, the rules of evidence do not apply to sentencing hearings. Moreover, the testimony would have been admissible under the exception to the hearsay rule for statements for purposes of medical diagnosis or treatment. In addition, if defendant and his counsel had really thought that the victim would contradict the psychologist's story, they would have made a more serious effort to subpoena her. Instead, they handed the subpoena to the victim's father (who had previously tried to kill defendant)

the day before sentencing without determining whether the victim even lived with her father, which she did not. *U.S. v. Newman,* __ F.2d __ (7th Cir. May 26, 1992) No. 90-3645.

Appeal of Sentence (18 U.S.C. §3742)

5th Circuit rules defendant waived challenge to enhancement by failing to provide appellate court with sentencing transcript. (855) The 5th Circuit held that defendant waived his challenge to a supervisory role enhancement by failing to provide the court with a transcript of the sentencing hearing or a justification for not doing so. *U.S. v. Hernandez,* __ F.2d __ (5th Cir. June 3, 1992) No. 91-4502.

6th Circuit refuses to consider challenge to predicate offense first raised on appeal. (855) Life imprisonment is required under 21 U.S.C. section 841(b)(1)(A) if certain drug felonies are committed after two prior felony drug convictions have become "final." The 6th Circuit refused to consider whether defendant's predicate offenses satisfied the finality requirement where defendant first raised the issue on appeal. Defendant did not show good cause for the failure to raise the finality question, and because defendant could still move to vacate or correct the sentence, failure to consider the issue on appeal did not involve "manifest injustice." *U.S. v. French,* __ F.2d __ (6th Cir. May 28, 1992) No. 90-6222.

5th Circuit gives de novo review to determination of whether prior convictions are related. (870) The 5th Circuit reviewed de novo the question of whether prior convictions are related under section 4A1.2. It noted that although the question was in large part one of fact, previous cases, without expressly ruling, have viewed this issue as an application of the guideline, subject to de novo review. The cases have not applied a clearly erroneous standard. Thus, it was appropriate to apply the de novo standard here, even though a compelling argument could be made that the clearly erroneous standard was appropriate. The Court suggested that in an appropriate case, the Circuit should give this issue en banc consideration. *U.S. v. Garcia,* __ F.2d __ (5th Cir. May 28, 1992) No. 91-5684.

Forfeiture Cases

6th Circuit permits forfeiture of property valued at $1 million for growing just over 100 marijuana plants. (910) Defendant contended that forfeiture of his property, combined with his prison sentence of five years, constituted cruel and unusual punishment for the crime of manufacturing just over 100 marijuana plants. Assuming that criminal forfeitures under 21 U.S.C. section 853 were subject to the Eighth Amendment prohibition, the 6th Circuit found that the forfeiture was not "grossly disproportionate" to defendant's crime. The court noted that Congress had authorized a maximum fine of $2 million, in addition to a maximum 40-year prison term, for defendant's crime. *U.S. v. Smith,* __ F.2d __ (6th Cir. June 5, 1992) No. 91-5207.

6th Circuit applies preponderance standard to criminal forfeiture. (920) Following defendant's criminal conviction, the government sought criminal forfeiture of some of defendant's property under 21 U.S.C. section 853(a). Following precedent in other circuits, the 6th Circuit held that the forfeitability of defendant's property need be shown only by a preponderance of the evidence, not by proof beyond a reasonable doubt. The court noted but rejected the argument that the preponderance standard should apply only to "proceeds" forfeitures. *U.S. v. Smith,* __ F.2d __ (6th Cir. June 5, 1992) No. 91-5207.

7th Circuit holds that manager's knowledge of drug activities could not be imputed to corporation. (960) A corporation owned the defendant property, and three individuals owned stock in the corporation. A husband and wife owned 2/3 of the stock, and their son owned the remaining 1/3. The son's shares were a gift from his parents. The son lived on the property and directed its day-to-day operations while his parents lived elsewhere. Without the knowledge or consent of his parents, the son began engaging in drug transactions on the property in his personal residence. He never used corporate funds to purchase drugs and never put any drug proceeds into the corporation. In a forfeiture action against the property, the 7th Circuit reversed a summary judgment in favor of the government and held that the corporation was an innocent owner. The son's knowledge of his own criminal activity could not be imputed to the corporation to defeat the corporation's innocent owner defense. Section 881(a)(7) focuses on the claimant's actual knowledge of the illegal activities, not whether the claimant should have known of the illegal activities. Thus, the son's knowledge of his own illegal activities would not be imputed to the

corporation because the son was dealing drugs to benefit himself, and not the corporation. Judge Posner dissented. *U.S. v. One Parcel of Land Located at 7326 Highway 45 North, Three Lakes, Oneida County, Wisconsin*, __ F.2d __ (7th Cir. June 2, 1992) No. 91-1617.

1st Circuit rejects forfeiture of property not specifically identified in government's complaint. (970) The government's forfeiture complaint described the defendant property as 384-390 West Broadway, but made no mention of an abutting parcel, known as 309 Athens St., which claimant purchased from a different seller. Over a year after a forfeiture order was entered against the Broadway property, the district court granted the government's motion to expand the forfeiture order to include the Athens property. The 1st Circuit reversed, ruling that the government's complaint did not describe the Athens property with sufficient particularity. The exacting particularity standard applicable to forfeiture actions is not merely a procedural technicality, but is a "significant legal rule designed to curb excesses of government power." Here, the government's complaint sought to forfeit the Broadway property and nothing more. The claimant was entitled to rely on what the complaint indicated. *U.S. v. One Parcel of Real Property with the Building, Appurtenances, and Improvements Known as 384-390 West Broadway, South Boston, Mass.*, __ F.2d __ (1st Cir. May 28, 1992) No. 91-2141.

6th Circuit addresses forfeiture of property that facilitates marijuana growing on adjacent property. (970) Defendant owned four contiguous tracts of property. He grew marijuana on one of the tracts. The 6th Circuit permitted forfeiture of an adjacent tract because the corn field that hid the marijuana extended to the adjacent tract. However, it rejected the government's argument that the tract on which a residence was located should be forfeited because defendant "used the residence to guard the marijuana and to conceal the entire operation by making the farm appear to be a legitimate use of the land." The record contained no evidence that defendant had actually used the residence to guard the marijuana, and the court found no error in the district court's conclusion that the mere presence of a residence did not sufficiently "facilitate" the offense to permit forfeiture. *U.S. v. Smith*, __ F.2d __ (6th Cir. June 5, 1992) No. 91-5207.

6th Circuit defines forfeitable "property" by reference to recorded instruments, state law. (970) Defendant used his farm to grow marijuana. Though defendant's interest in the farm was created by four deeds covering four separate tracts, the government argued that the entire farm should be considered a single piece of "property" subject to criminal forfeiture under 21 U.S.C. section 853(a)(2) if any part of the farm was used to facilitate drug activity. Following 4th Circuit cases on civil forfeiture, the 6th Circuit disagreed with the government's contention, looking to the four separate deeds creating defendant's interests to define what constituted a single piece of "property." Relying on state law about when an interest is created, the court declared irrelevant that defendant's ex-wife had conveyed her interest in the four tracts in a single quitclaim deed. Judge Guy dissented on this issue. *U.S. v. Smith*, __ F.2d __ (6th Cir. June 5, 1992) No. 91-5207.

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