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Editor-in-Chief: *Judith A. Beeman* *(202) 514-4633*
Editor: *Audrey J. Williams* *(202) 514-4633*

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The Editor, United States Attorneys' Bulletin
Department of Justice, Room 1627
10th and Constitution Avenue, N.W., Washington, D.C. 20530
Telephone: (202) 514-4633 - Fax: (202) 514-5850

COMMENDATIONS

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

Robert G. Anderson (Mississippi, Southern District), by William J. Flanagan, United States Attorney for the Western District of Louisiana, Shreveport, for his valuable contribution to the success of a food stamp fraud case involving the illegal purchase, possession and redemption of over $958,890.00 worth of food stamp coupons in the Ferriday, Louisiana and Natchez, Mississippi area.

Melissa Annis, Kenneth Magidson, and ***Bernard E. Hobson*** (Texas, Southern District), by Louis J. Freeh, Director, FBI, Washington, D.C., for their successful prosecution of eight subjects for cocaine distribution, conspiracy, money laundering, and gun charges.

Jay Apperson, John G. Douglass, Gordon Kromberg, and ***Mike Smythers*** (Virginia, Eastern District), by Thomas A. Wise, ARC (Criminal Investigation), Mid-Atlantic Region, Internal Revenue Service, Philadelphia, for their participation in the annual narcotics/money laundering conference and for sharing their vast knowledge and expertise with the special agents and managers in attendance.

Joseph J. Aronica (Virginia, Eastern District), by Daniel S. Sweeney, Assistant Inspector General for Investigations, Environmental Protection Agency, Washington, D.C., for his excellent presentation and valuable contribution to the success of a procurement fraud training conference for special agents, auditors, and investigative managers.

Pamela Bishop and ***John G. Douglass*** (Virginia, Eastern District), by James E. Childs, Special Agent in Charge, Defense Criminal Investigative Service, Department of Defense, Arlington, Virginia, for their professionalism and organizational skill in the successful prosecution of two former U.S. Army Reservists and Department of Defense civilian employees on charges of conspiracy, theft of government property, and other federal violations.

Linda C. Boone (District of Arizona), by William R. Schroeder, Chief, Legal Forfeiture Unit, Legal Counsel Division, FBI, Washington, D.C., for her excellent presentation to Special Agent Attorneys on money laundering statutes at an asset forfeiture conference held recently in Phoenix.

Elizabeth Burnett (California, Southern District), by Brigadier General E. C. Kelley, Jr., U.S. Marine Corps Recruit Depot/Western Recruiting Region, San Diego, for her professionalism and legal skill in bringing a complex equal employment opportunity case to a successful conclusion.

Robert S. Cessar, Nelson P. Cohen, Leo M. Dillon, James Y. Garrett, Paul E. Hull, Cynthia L. Reed, and ***James R. Wilson*** (Pennsylvania, Western District), by George A. O'Hanlon, District Director, Internal Revenue Service, Pittsburgh, for their valuable contribution to the success of the Criminal Tax Trial Summary Witness Training program for employees preparing to testify as expert witnesses in criminal tax trials.

Robert C. Chesnut and ***Maureen Maguire*** (Virginia, Eastern District), by Stephen A. Mansfield, Deputy Chief, Public Corruption and Government Fraud Section, Office of the United States Attorney, Central District of California, Los Angeles, for their valuable assistance and prompt action in preparing and executing a search warrant for presentation in the Eastern District of Virginia.

Michael S. Child, Special Assistant United States Attorney (District of Arizona), by Stephen N. Marica, Assistant Inspector General for Investigations, Small Business Administration (SBA), Washington, D.C., for his outstanding leadership, resourcefulness and initiative in successfully prosecuting two complex SBA cases.

Gary Cobe (Texas, Southern District), by Louis J. Freeh, Director, FBI, Washington, D.C., for his successful prosecution of individuals involved in the theft of over $900,000 by utilizing inside information to purchase and sell stock and stock options. (This is the first inside trading case prosecuted criminally outside of New York.)

Nelson P. Cohen (Pennsylvania, Western District), by Richard A. Linzer, Senior Deputy Attorney General, Medicaid Fraud Control Section, Office of Attorney General, Greensburg, for his valuable assistance and cooperative efforts in both the investigatory and prosecutory phases of a number of cases over the years.

Frederick J. Dana (Missouri, Eastern District), by Professor Jean Scott, Faculty Advisor, Washington University-in-St. Louis School of Law, St. Louis, for his participation in a negotiation competition, and for his valuable contribution to the education of the law students.

William D. Delahoyde (North Carolina, Eastern District), by Judge Malcolm J. Howard, U.S. District Court, Greenville, for his successful prosecution of a complex "numbers gambling" conspiracy involving more than twenty-five defendants, and for other outstanding prosecutorial efforts and accomplishments during his tenure on the federal bench.

James Y. Garrett (Pennsylvania, Western District), by George A. O'Hanlon, District Director, Internal Revenue Service, Pittsburgh, for his successful prosecution of a complex investment fraud scheme involving two lengthy trials, hearings on allegations of defense attorney misconduct by one of the defendants, and lengthy sentencing hearings.

John F. Gibbons and ***Walter F. Brown, Jr.*** (California, Central District), by Julius C. Beretta, Special Agent in Charge, Drug Enforcement Administration, National City, for their outstanding success in obtaining the conviction of "one of the most prolific Bolivian cocaine traffickers in history" on nine counts of conspiracy to manufacture cocaine, tax evasion and money laundering. (The defendant was sentenced to thirty five years imprisonment.)

Richard S. Glaser Jr. and ***Scott P. Mebane*** (North Carolina, Middle District), by Joseph P. Schulte, Jr., Special Agent in Charge, FBI, Charlotte, for their successful efforts in a complex obstruction of justice and bankruptcy fraud case in which an individual, three corporations and a bank were convicted and some $4 million was returned to the bankruptcy trustee during the course of the cases.

Jay Golden (Mississippi, Southern District), by Lt. Randy Dearman, Laurel Police Department, Laurel, Mississippi, for his outstanding assistance in prosecuting a group of armed drug traffickers following an 18-month investigation.

John E. Green (Oklahoma, Western District), by B. L. Smith, Postal Inspector in Charge, U.S. Postal Inspection Service, Fort Worth, Texas, for his excellent service and continued support of the Postal Inspection Service during his tenure as Acting Assistant United States Attorney during the period of change in administration.

Christine B. Hamilton (North Carolina, Eastern District), by Scott J. Parker, Assistant Commander, Roanoke-Chowan Narcotics Task Force, Ahoskie, North Carolina, for her outstanding legal skills in obtaining the conviction of a narcotics dealer with connections extending to the State of New York.

Douglas Hendricks (California, Eastern District), by Dave Young, Area Special Agent, Toiyabe/ Humboldt National Forests, U.S. Forest Service, Sparks, Nevada, for his outstanding assistance in the preparation and service of several warrants issued by the South Lake Tahoe Magistrate Judge, and for his guidance in proper and timely arraignment procedures. ***Carrie Quirk*** and ***Patsy Sylva*** provided valuable legal support and services.

Mark Hulkower (Virginia, Eastern District), by R. James Woolsey, Director, Central Intelligence Agency, Washington, D.C., for his valuable assistance and cooperation in an espionage case of a former State Department employee.

James E. King (Michigan, Eastern District), by Dale W. Schuitema, Special Agent in Charge, Drug Enforcement Administration (DEA), Detroit, for serving as guest instructor at the DEA Conspiracy School in Marquette, Michigan, and for sharing his unique experience as a law enforcement officer and prosecuting attorney.

Barbara D. Kocher (North Carolina, Eastern District) by Ben H. Frazier, Jr., Program Specialist, Administrative Office of the United States Courts, Washington, D.C., for her outstanding contribution to the success of a mental health program sponsored by the Federal Correctional Institution Butner staff and attended by probation and pretrial services officers.

Gordon Kromberg (Virginia, Eastern District), by Robert M. Bryant, Special Agent in Charge, FBI, Washington, D.C., for his valuable participation in a forfeiture-related legal inservice held for approximately seventy five special agents assigned to the FBI white collar crime squads.

Christine Manuelian and ***Robert Sims*** (District of Maryland), by Craig N. Chretien, Assistant Special Agent in Charge, Drug Enforcement Administration, Baltimore, for their professionalism and outstanding organizational skill in successfully prosecuting a Nigerian heroin trafficking organization operating internationally in the Baltimore-Washington metropolitan area.

James A. Metcalfe and ***George M. Kelly III*** (Virginia, Eastern District), by Roy D. Nedrow, Director, Naval Criminal Investigative Service, Department of the Navy, Washington, D.C., for their outstanding efforts resulting in the prosecution of three Chinese nationals for smuggling image intensifier tubes to the Peoples' Republic of China.

Douglas R. Peterson (District of Minnesota), by Robert C. Dopf, Assistant United States Attorney and Chief, Criminal Division, Southern District of Iowa, Des Moines, for his outstanding assistance and legal guidance in a complex case involving harassing and threatening communications directed toward a federal Magistrate judge.

Richard Poehling (Missouri, Eastern District), by Henry E. Hudson, Director, U.S. Marshals Service, Arlington, Virginia, for his valuable assistance and cooperative efforts in the investigation and arrest of a "Top 15" fugitive.

David Portelli (Michigan, Eastern District), by Dale W. Schuitema, Special Agent in Charge, Drug Enforcement Administration, Detroit, for his excellent presentation and outstanding contribution to the success of the Asset Removal Training Seminar held recently for the Detroit Field Division.

John Roth (Michigan, Eastern Division), by Charles J. Gutensohn, Special Agent in Charge, Drug Enforcement Administration (DEA), for his excellent address at a Conspiracy Seminar held recently for DEA Agents, Task Force officers, and state and local officers, concerning legal issues inherent in conspiracy investigations.

John D. Sammon and ***James V. Moroney*** (Ohio, Northern District), by Thomas F. Jones, Special Agent in Charge, FBI, Cleveland, for their outstanding success in obtaining a guilty jury verdict on four of five counts of a bank fraud case. ***Laurie Boyer*** and ***Kerry Murphy*** contributed significantly to the outcome of the case.

Alan M. Salsbury (Virginia, Eastern District), by Carl R. Baker, Superintendent, Department of State Police, Commonwealth of Virginia, Richmond, for his successful prosecution of a Norfolk physician indicted on twenty-two counts of illegal drug distribution and related false records violations, which resulted in a prison sentence of thirty months.

Roslyn Silver (District of Arizona), by Daniel A. Clancy, United States Attorney for the Western District of Tennessee, Memphis, for serving as principal speaker at a recent Ethics Seminar, and for her excellent presentation on ethical issues to comply with Tennessee CLE requirements.

Karla Spaulding (Texas, Southern District), by Michael D. Wilson, Special Agent in Charge, FBI, Houston, for her initiative, aggressiveness and competence in the successful prosecution of two bankruptcy cases, one of which involved two former IRS employees who used false names and social security numbers to secure a home loan; then later filed a bankruptcy petition using the same false names and social security numbers.

Richard A. Stacy, United States Attorney, and ***Assistant United States Attorneys John R. Green*** and ***William U. Hill*** (District of Wyoming), by Patrick M. Valentine, Resident Agent in Charge, Drug Enforcement Administration, Cheyenne, for their outstanding efforts in the successful prosecution of what began as a routine drug trafficking case and developed into a lengthy, unusual and complicated judicial process that led to the dismantling of a major cocaine distribution organization encompassing the States of Wyoming, California and Michigan.

Sandra Teters (California, Northern District), by Steven V. Giorgi, Chief, Criminal Investigation Division, Internal Revenue Service, Sacramento, for her outstanding success in obtaining the conviction of an individual who engaged in a fraudulent investment scheme which resulted in a $7 million loss to the fraud victims.

Leon W. Weidman (California, Central District), by Stephen N. Marica, Assistant Inspector General for Investigations, Small Business Administration, Washington, D.C., for his excellent presentation on the affirmative civil enforcement (ACE) program for the investigators of the Office of Inspector General of the Small Business Administration.

Deborah A. Woods (Oklahoma, Western District), by Thomas H. Pigford, Chief Field Counsel, Law Department, U.S. Postal Service, Memphis, for her excellent representation of the U.S. Postal Service in one of the first cases tried before a jury under the Civil Rights Act of 1991. (This case was also the first Title 7 case tried before a jury in the Western District of Oklahoma.)

SPECIAL COMMENDATION FOR THE DISTRICT OF MINNESOTA

Andrew M. Luger, Assistant United States Attorney for the District of Minnesota, was commended by Margaret Jane Porter, Chief Counsel, Food and Drug Administration (FDA), Department of Health and Human Services, Rockville, Maryland, for his successful prosecution of a prominent University of Minnesota child psychiatrist in connection with clinical studies of the psychiatric drug Anafranil. On August 5, 1993, following a three-week trial, a jury convicted Dr. Garfinkel on two counts of mail fraud and three counts of making false statements. On November 22, 1993, Dr. Garfinkel was sentenced to six months in prison, six months' home detention with work release, a $25,000.00 fine, 400 hours of community service, restitution of $170,394.00 to Ciba-Geigy, and other costs.

Anafranil is an anti-depressant drug that was being studied for safety and effectiveness in treating children and adolescents with obsessive-compulsive disorders. The studies were sponsored by a drug company, Ciba-Geigy, and conducted pursuant to the investigational new drug provisions of the statute. After a study coordinator alleged misconduct and fraud by Dr. Garfinkel in March, 1989, Ciba-Geigy and the University independently commenced investigations of the study, and in June, 1989, Ciba-Geigy notified FDA that it would not include the Garfinkel data in the drug approval application for Anafranil. FDA subsequently conducted an investigation which prompted a referral to the Department of Justice and the United States Attorney for the District of Minnesota. In late 1989, FDA approved Anafranil for commercial distribution without the data from the Garfinkel study. Mr. Luger focused on Dr. Garfinkel's submission of patient records forms to Ciba-Geigy that falsely represented that he had conducted visits with patients and made psychiatric evaluations and physical examinations required by the study protocol. At trial, the government presented evidence that in as many as 140 cases, the required office visit and evaluations either did not occur or were conducted by personnel with no medical training. In each case, Dr. Garfinkel signed documents falsely representing compliance with the protocol requirements.

Ms. Porter stressed the significance of this case to the agency, and stated that it sends a powerful message to the medical community, and expert physicians in particular, that research fraud will be prosecuted. Second, drug manufacturers are reminded that they must be selective in choosing clinical investigators, and vigilant in monitoring the clinical studies of drugs. Finally, she stated that the outcome of this case upholds the integrity of FDA's drug approval process.

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SPECIAL COMMENDATION FOR THE SOUTHERN DISTRICT OF CALIFORNIA

In the United States Attorneys' Bulletin, Vol. 41, No. 9, dated September 15, 1993, at p. 293, ***Carol C. Lam, Assistant United States Attorney for the Southern District of California,*** was commended by Acting Director Floyd I. Clarke, FBI, Washington, D. C. for her professionalism and skillful litigation of a health-care fraud matter, resulting in guilty pleas and fines in the amount of $111,000.00. The dollar amount was incorrectly reported. To correct the record, the fines were an unprecedented amount of $111 million.

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SPECIAL COMMENDATION FOR THE NORTHERN DISTRICT OF ILLINOIS

Scott Mendeloff, Sean Martin, and ***Lisa Osofsky, Assistant United States Attorneys for the Northern District of Illinois,*** were presented Certificates of Appreciation by Kenneth G. Cloud, Special Agent in Charge, Drug Enforcement Administration, Chicago, for their outstanding contributions during the investigation, prosecution and subsequent convictions of the Rufus Sims narcotics trafficking organization. This Organized Crime Drug Enforcement Task Force case was initiated in early 1989, after the Chicago Police Department executed two search warrants that resulted in the seizure of over thirty firearms (including ten fully-automatic machine guns), twenty-three hand grenades, and a volume of documentary evidence. After three years of investigation, Sims and eighteen others were indicted on a plethora of charges, including narcotics conspiracy, money laundering, racketeering and murder. Sixteen of the defendants entered guilty pleas with sentences up to twenty-five years. Sims' attorney refused to enter a guilty plea and proceeded to trial. Rufus Sims was ultimately convicted on all counts, including narcotics conspiracy.

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HONORS AND AWARDS

Northern District Of New York

Thomas Spina, Jr., Assistant United States Attorney for the Northern District of New York, was honored by the New York State Chapter of the International Association of Arson Investigators as "Prosecutor of the Year" for his successful prosecution of an arson case involving a $20 million industrial complex. Through Mr. Spina's extraordinary efforts, the owner of the former Mohasco factory in Amsterdam, New York, and four others, pleaded guilty to charges of arson, mail fraud, bank fraud, and money laundering. The defendants also admitted that the owner of the factory defrauded a German bank out of $4 million to purchase the factory in early 1992 and that he hired the others to destroy the factory by fire to collect approximately $14 million in insurance proceeds. The defendants face maximum sentences of 25 years imprisonment and fines of $500,000. In addition, the factory owner faces forfeiture of up to $4 million upon his conviction. Sentencing dates have not yet been scheduled.

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DEPARTMENT OF JUSTICE LEADERSHIP

On November 19, 1993, ***Loretta Collins Argrett*** was confirmed by the United States Senate as Assistant Attorney General for the Tax Division. Ms. Argrett was formerly a Professor at Howard University School of Law, Washington, D.C.

On November 19, 1993, ***Jo Ann Harris*** was confirmed by the United States Senate to serve as Assistant Attorney General for the Criminal Division. Ms. Harris was formerly an attorney in private practice in New York City, and a law professor at the Pace University School of Law.

On November 17, 1993, ***Eduardo Gonzalez*** was confirmed by the United States Senate to serve as Director of the United States Marshals Service. Mr. Gonzalez was formerly Chief of Police in Tampa, Florida.

On November 19, 1993, ***Gerald M. Stern*** was confirmed by the United States Senate to serve as Special Counsel for Financial Institution Fraud. Mr. Stern is from the private sector in California.

United States Attorneys

The following United States Attorneys have been appointed by the President or are serving on an interim basis:

Charles J. Stevens	-	Eastern District of California
Alan D. Bersin	-	Southern District of California
Patrick M. Patterson	-	Northern District of Florida
Samuel A. Wilson, Jr.	-	Middle District of Georgia
Gerrilyn G. Brill	-	Northern District of Georgia
Walter Charles Grace	-	Southern District of Illinois
James Burton Burns	-	Northern District of Illinois
Stephen J. Rapp	-	Northern District of Iowa
Don Carlos Nickerson	-	Southern District of Iowa
Joseph L. Famularo	-	Eastern District of Kentucky
Michael David Skinner	-	Western District of Louisiana
Donald K. Stern	-	District of Massachusetts
Sherry S. Matteucci	-	District of Montana
John J. Kelly	-	District of New Mexico
John D. McCullough	-	Eastern District of North Carolina

A complete list of United States Attorneys as of December 6, 1993, appears at page 446 of this Bulletin. If you have any questions, please call the Executive Office for United States Attorneys, at (202) 514-2121.

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IN MEMORIAM

Mary C. Lawton
Counsel for Intelligence Policy, Office of Intelligence Policy and Review

On Monday, November 15, 1993, Mary C. Lawton, Counsel for Intelligence Policy of the Office of Intelligence Policy and Review since 1982, died at her home in Bethesda, Maryland.

This office is responsible for reviewing all foreign intelligence surveillance requests and representing the United States before the U.S. Foreign Intelligence Surveillance Court to get its approval. Much of the office's work involves classified national security matters. This office, for example, was involved in the approval of the wiretaps used to investigate the bombing at the World Trade Center in New York City in February.

Ms. Lawton, born June 2, 1935, in Washington, D.C., began her Department of Justice career in the Office of Legal Counsel in 1960, and became a Deputy Assistant Attorney General in 1972. She left the Department in 1979 to accept an appointment as general counsel at the Corporation for Public Broadcasting and in 1980 served in the White House as an administrative law officer. She returned to the Department of Justice in 1982 as Counsel for Intelligence Policy. During her career, she was awarded the Department's John Marshall Award in 1970. In 1983, she received the Attorney General's Exceptional Service Award, and in 1986, the Central Intelligence Agency awarded Ms. Lawton its Agency Seal Medallion in recognition of her work on behalf of the United States intelligence community.

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ATTORNEY GENERAL HIGHLIGHTS

Attorney General Janet Reno Applauds Passage Of The Crime Bill

On November 19, 1993, Attorney General Janet Reno applauded the United States Senate and the Senate Judiciary Committee Chairman, Joseph Biden, for taking a giant step in the fight against crime by passing a historic crime bill that would create a 5-year, $22 billion Violent Crime Reduction Trust Fund. Ms. Reno stated as follows:

> This will help prevent and combat violence throughout the nation -- by putting 100,000 more police on the streets, getting deadly assault weapons off of them and giving local communities the tools they need to catch criminals and lock them away. It will assure certainty of punishment, build boot camps and prisons for violent offenders, and establish 'Drug Courts' to get criminal addicts into treatment.
>
> This Crime Bill also recognizes the growing crisis in juvenile crime. It includes measures that will help states and communities provide programs to prevent kids from getting involved in crime and provide intensive supervision and treatment to turn the lives around of those who do. And very importantly, it will help keep guns out of the hands of juveniles, by prohibiting the sale or transfer of guns to them.

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World AIDS Day At The Department Of Justice

On December 1, 1993, Attorney General Janet Reno and FBI Director Louis J. Freeh kicked off a government-wide day of AIDS education and awareness programs to observe World AIDS Day. Appearing before federal employees in the Great Hall of the Department of Justice, the Attorney General and the FBI Director spoke about the challenges of AIDS in the workplace and the need to bring about a constructive change in the lives of people living with AIDS and HIV. President Clinton's National AIDS Policy Coordinator, Kristine Gebbie, also attended the ceremony, along with country music performers Mark Chesnutt and Diamond Rio, Kim Black, an AIDS caregiver, and Gerald Roemer, a Justice Department attorney, who has HIV.

World AIDS Day has been an annual event since 1988, and this year for the first time ever, all government agencies will carry out training programs about HIV and AIDS. One month ago, President Clinton directed all federal agencies to undertake HIV/AIDS education and training programs on a regular basis and to implement nondiscriminatory workplace policies for HIV infected employees. Following the kick-off ceremony, the Justice Department conducted training sessions focusing on AIDS in the workplace. The majority of those infected with HIV -- and those most at risk of acquiring it -- are young adults, age 25 to 44, an age group that comprises fifty percent of our nation's work force.

The Attorney General said, "Vicious stereotypes and blinding ignorance have combined to make work a place of fear for many people living with AIDS. If we do our jobs here at the Department of Justice, laws such as the Americans with Disabilities Act will mean a more open, just and dignified society."

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Attorney General Visits Washington Hospital Center

On November 28, 1993, Attorney General Janet Reno met with patients, their families and the doctors and other staff of the Washington Hospital Center. The Attorney General's visit, part of an Administration-wide effort to focus attention on health care reform and the importance of health security, emphasized the effects of violence on the nation's health care system. The Attorney General met with doctors in the Trauma Unit, and was briefed on the events of the previous night from the doctor on call. She also discussed the violence prevention program and accompanied doctors on their rounds to see patients.

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Attorney General Takes Firm Stand Against A Colombian Prosecutor

On November 18, 1993, Attorney General Janet Reno and Deputy Attorney General Philip Heymann met with Colombia's top prosecutor, Dr. Gustavo de Greiff. At the meeting Dr. de Greiff was quoted as favoring legalization of drugs. The Attorney General advised Dr. de Greiff that the fight against drug kingpins in that South American nation continues undiminished. She further stated that weakening the anti-drug effort would undercut a policy of rigorous prosecution to which both the United States and Colombia have committed themselves and which has resulted in significant gains against narcotics traffickers. She reiterated the Clinton Administration's adamant opposition to legalizing drugs.

The Deputy Attorney General said that it would be inappropriate to engage in plea bargaining with narcotics traffickers which would result in lenient sentences in exchange for unenforceable promises to give up their lucrative drug careers. Department officials also disputed statements by Dr. de Greiff and his deputy that the United States had failed to provide evidence to the Colombians needed for drug prosecutions. Deputy Attorney General Heymann said the President's drug strategy reaffirms the commitment of the United States to provide full cooperation to countries that demonstrate the political will to confront the threat of narcotics.

Dr. de Greiff, whose title in Colombia is Fiscal General, is not a member of the executive branch of the Colombian government, and his views are not regarded as those of Colombia.

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DEPARTMENT OF JUSTICE HIGHLIGHTS

Unlawful Discrimination In The Mortgage Lending Industry

On November 4, 1993, Attorney General Janet Reno and Henry G. Cisneros, Secretary of the Department of Housing and Urban Development, agreed to share resources, expertise, and investigative strategies to eliminate unlawful discrimination from the mortgage lending industry. In a joint appearance before the Senate Committee on Banking, Housing and Urban Affairs, the two Cabinet Secretaries testified about new Clinton Administration efforts to enforce fair lending and anti-discrimination laws.

Each agency has unique authority in investigation of lending discrimination. HUD, for instance, has the power to issue subpoenas under the Fair Housing Act, and may institute a Secretary-initiated investigation even if no complainant has come forward. The Department of Justice has authority to pursue investigations of "pattern or practices" of discrimination where no single instance is responsible for unlawful discrimination against minorities or other eligible applicants.

The two Cabinet agencies agreed that they would focus on, but not limit their investigations to, independent mortgage companies. More than one-half of the mortgage loans made in the United States are made by mortgage companies, including subsidiaries of financial institutions and independent companies. The Department of Housing and Urban Development and the Department of Justice will be joined by the Comptroller of the Currency in regular quarterly meetings to assess progress and consider additional options to end unlawful lending discrimination. The other regulators of mortgage lending institutions will be invited to participate in these meetings as well. Attorney General Reno said, "Homeownership is part of our cherished American dream, and to tolerate discrimination in housing in whatever form diminishes our potential to live and grow together as a nation."

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CIVIL RIGHTS ISSUES

Fair Housing Litigation

Attached at the Appendix of this Bulletin as Exhibit A is a memorandum dated November 10, 1993, from Attorney General Janet Reno to all United States Attorneys concerning fair housing litigation. As part of our efforts to improve and expand the enforcement of civil rights laws, the Attorney General asked the United States Attorneys to assume responsibility for the litigation of some of the cases that the Department of Justice is required to file under the Fair Housing Act. The cases arise from investigations conducted by the Department of Housing and Urban Development (HUD).

The Fair Housing Act, 42 U.S.C. 3601 et seq., prohibits discrimination in housing on the basis of race, color, religion, sex, familial status, national origin, or handicap. The Department of Justice shares responsibility for enforcement of the Act with HUD. HUD's primary role is to receive and investigate individual complaints from persons who believe that they have been victims of unlawful discrimination. The Assistant Attorney General for the Civil Rights Division will continue to have responsibility for enforcement of the Fair Housing Act and will, in consultation with the United States Attorneys, determine the litigation responsibility for each HUD case. The primary considerations for assignment will be whether the Department of Justice headquarters or the local office can litigate the case more efficiently and effectively and whether the assignment will unduly burden the United States Attorneys' offices. Accordingly, the Division will generally retain responsibility for certain types of lawsuits that experience has shown can be particularly time-consuming. These lawsuits include those that usually require extensive fact development or extensive briefing of legal issues because the particular area of the law has not yet been fully developed.

The delegation of litigation responsibility is effective December 1, 1993. An appropriate amendment to the United States Attorneys' Manual is being prepared. If you have any questions, please contact Paul Hancock, Chief of the Housing and Civil Enforcement Section, Civil Rights Division, at (202) 514-4713.

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Housing And Lending Discrimination In South Dakota

On November 16, 1993, in a stepped-up effort to root out discrimination against Native Americans, the Department of Justice initiated charges of housing and lending discrimination in South Dakota. Without waiting for specific complaints, the Department used Native American testers to uncover discrimination in the rental market. The testing is part of a nation-wide program implemented by the Justice Department. The complaints accuse three housing complexes and a South Dakota bank of violating federal law by failing to treat Native Americans the same as whites. The suits mark the first time the Justice Department has alleged a pattern of discrimination against Native Americans in housing or banking in that state.

In the banking discrimination complaint, the Justice Department asserts that Blackpipe State Bank in Martin, South Dakota, discriminated against Native Americans in its lending practices by allegedly refusing to make secured loans where the collateral was located on a reservation and by placing credit requirements on Native Americans that it did not require of whites -- a violation of the Equal Credit Opportunity Act and the Fair Housing Act. The complaint, filed in District Court in Rapid City, seeks an order requiring the bank to refrain from future discrimination, adopt a remedial plan that would provide for nondiscriminatory lending and pay compensatory and punitive damages to the victims as well as a civil penalty up to $50,000 as provided in the law. The three housing discrimination suits charge that owners of apartment complexes in Sioux Falls and Rapid City refused to rent to American Indians. The complaints, which allege violations of the Fair Housing Act, cite evidence gathered from a fair housing testing program conducted by the Justice Department in South Dakota over the past year.

Under the testing program, trained pairs of Native American and white testers posed as prospective tenants. While the white testers were uniformly told about the availability of housing, the Native American testers were told nothing was available or were discouraged from seeking housing. The tests also uncovered a discriminatory policy that excluded families with children at one complex, or were alleged to have restricted families with children to a limited section of the facility.

The random testing program was initiated in Detroit last year as a proactive effort to identify and eliminate housing discrimination throughout the nation. To date, it has resulted in five cases in the Detroit area and one case in Los Angeles. Each housing discrimination complaint was filed in the District Court in the cities where the defendants are located and seeks an injunction preventing further discriminatory practices, compensatory damages for the victims, and civil penalties of up to 450,000 -- as provided in the Fair Housing Act.

Attorney General Janet Reno has described lending discrimination as one of the most important civil rights issues facing this country. She said, "In many cases discrimination has become so institutionalized and subtle that many victims don't know how to attack it or that it's even happening to them. Today we're sending a message that although discrimination may be accepted as commonplace by some, it is illegal by all."

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Other Civil Rights Action By The Justice Department

• The Madison County Courthouse in Madison, Florida will be made accessible to persons using wheelchairs as part of the first settlement obtained by the government that requires renovation of a county facility under a 1990 anti-discrimination law. The agreement resolves two complaints filed with the Department of Justice that the county courthouse which contains the offices of the sheriff, the tax collector, and supervisor of elections, could not be entered or used by persons with mobility impairments. The settlement, with the County Commissioners, was negotiated under Title II of the Americans with Disabilities Act. Title II prohibits discrimination against individuals with disabilities on the basis of their disability by state and local governments.

• A federal court in Los Angeles has ordered an Orange County property manager and homeowners' association to pay $61,000 in damages for discriminating against two Latino couples who wished to purchase a condominium apartment in San Juan Capistrano, California. The manager of the homeowners' association advised that the association "did not want this 'type of element' moving into the community." As a result, the couples decided not to purchase the unit and the sellers were forced to sell their unit several months later at a lower price. The suit was brought by the Department of Justice under the Fair Housing Act on behalf of the prospective purchasers and sellers. The court ordered the defendants to pay the two Latino couples $12,500 each, and $11,000 to the sellers. In addition, the court enjoined the defendants from committing any future violations of the Fair Housing Act.

• A Florida judicial circuit will provide qualified interpreters in trial courts for persons who are deaf or hard of hearing. The agreement resolves a complaint filed with the Department of Justice alleging that the Pinellas County Court in Clearwater, Florida failed to obtain a qualified interpreter for a defendant who is deaf. The agreement with the Sixth Judicial Circuit is the first settlement in Florida pertaining to the provision of qualified interpreters in trial court proceedings under Title II of the Americans with Disabilities Act. The agreement incorporates the requirements of Title II which obligate courts to provide appropriate auxiliary aids and services, including qualified interpreters, whenever necessary to give an individual with a disability an equal opportunity to participate in the court's programs.

• The Fargodome in Fargo, North Dakota, agreed to charge persons with disabilities ticket prices equivalent to those it charges others attending sport and entertainment events in the stadium. The settlement resolves a complaint filed with the Department of Justice alleging that the Fargodome, the city's sports stadium and general entertainment facility, had a ticket pricing policy that resulted in persons with disabilities who required special seating paying more for seats than others who attend such events. The agreement, reached through informal negotiations, establishes a formal policy providing for equivalent pricing. In addition to adopting a new price policy for tickets, the Fargodome will appoint an Americans for Disabilities Act coordinator, develop a grievance procedure, conduct a self-evaluation of its practices, and publicize its new policy in local papers. The agreement also permits the Department to petition U.S. District Court to seek specific performance if the city fails to comply with the terms of the agreement.

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ASSET FORFEITURE

Liability Of The United States For State And Local Taxes On Seized And Forfeited Property

On November 4, 1993, Cary H. Copeland, Director and Chief Counsel, Executive Office for Asset Forfeiture, issued Directive No. 6 to all United States Attorneys and other Department and Agency officials, concerning liability of the United States for state and local taxes on seized and forfeited property. In light of the Supreme Court's decision in United States v. 92 Buena Vista Ave., 113 S. Ct. 1126 (1993), Mr. Copeland asked the Office of Legal Counsel (OLC) to reconsider its July 9, 1991, opinion on this subject. A copy of OLC's opinion dated October 18, 1993, is attached as Exhibit B at the Appendix of this Bulletin.

The opinion concludes that we must pay state and local taxes on properties civilly forfeited where the taxing authority established its innocent owner status prior to the entry of a final order of forfeiture. Given the unique nature of the interest of taxing authorities, the Department will in the future indulge a presumption of innocence in the absence of exceptional circumstances. Accordingly, in civil forfeiture cases, the United States will henceforth pay standard ad valorem property taxes up to the date of entry of an order of forfeiture. In criminal forfeiture cases, we may not pay such taxes and are bound by the OLC opinion of July 9, 1991. This directive is effective immediately and permits the payment of taxes upon civilly forfeited properties: 1) which have not yet been sold, or 2) which are the subject of pending litigation regarding payment of taxes, provided, however, that a tax claim was filed with the federal district court prior to entry of the order of forfeiture, or that a valid lien had been recorded among the pertinent land records giving the federal district court notice of the tax claim prior to entry of the order of forfeiture.

If you have any questions, please call the Executive Office for Asset Forfeiture. The telephone number is: (202) 616-8000.

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ENVIRONMENTAL ISSUES

Environmental Crimes Enforcement Program

On November 3, 1993, Associate Attorney General Webster L. Hubbell testified before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce of the House of Representatives, concerning the environmental crimes enforcement program of the Department of Justice. Mr. Hubbell's testimony was in response to the Subcommittee's request for a summary of any preliminary findings and recommendations of the Department's internal review of the January, 1993 revisions to Title 5, Chapter 11 of the United States Attorneys' Manual. These revisions, known as the environmental crimes "Bluesheet," took place before President Clinton's Inauguration, and several changes were made in the Department's internal policy for handling environmental criminal cases. The Subcommittee also asked about the status of the Department's internal review of the environmental crimes program.

Associate Attorney General Hubbell stated that the Justice Department is committed to an aggressive environmental enforcement program. The goal of the program is to protect public health and the environment by deterring violations and encouraging voluntary compliance. The Associate Attorney General discussed the history of the program, and added that the United States Attorneys' offices have played a significant role in environmental prosecutions. As the program has grown, their share of the effort has grown as well. They participate, or take the lead, in a majority of investigations and prosecutions, and those prosecutors experienced in environmental litigation assist in training programs.

Copies of the Associate Attorney General's testimony are available by calling the United States Attorneys' Bulletin staff at (202) 514-4633.

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Rocky Flats Nuclear Weapons Plant, Denver, Colorado

After the environmental crimes investigation ended in a guilty plea in June, 1992 by the former corporate operator of the Rocky Flats Nuclear Weapons Plant near Denver, Colorado, newspaper articles quoted unnamed members of the special grand jury who, apparently in violation of their oath of secrecy, discussed the investigation and their deliberations. The Department of Justice investigated whether these disclosures were in violation of the federal law that imposes secrecy on grand jury proceedings. A person who knowingly violates the grand jury secrecy law can be prosecuted for contempt of court. After thorough review, the Department of Justice announced that it has determined to take no further action in connection with leaks involving the special grand jury investigation of environmental crimes at the nuclear weapons plant. The investigation determined that the disclosures were not made by employees of the Department of Justice, the Federal Bureau of Investigation, or the staff of the United States District Court for the District of Colorado, leaving only the grand jurors as potential subjects. The investigation was unable to identify, however, the specific persons responsible for the unauthorized disclosures.

The secrecy of federal grand jury proceedings, reflected in Rule 6(e) of the Federal Rules of Criminal Procedure, is one of the most fundamental principles of this country's federal criminal justice system. This historic veil of secrecy for federal criminal investigations protects not only the personal privacy interests of the citizens who serve as grand jurors, but also the witnesses who testify before the grand jury and any subjects of the investigation who are ultimately not indicted. Furthermore, secrecy of a grand jury proceeding is vital to the integrity, independence, and effectiveness of the investigation itself. Secrecy of the proceedings encourages witnesses to testify fully without fear of retaliation. It also guards against the escape of potential targets and lessens the potential for tampering with potential witnesses. The Department of Justice is committed to the principle that the secrecy of the function of the federal grand jury must not be broken, and views the actions of the individual or individuals who were responsible for this leak as a serious violation of the public trust placed in them.

Although no prosecutive action is being taken at this time, all persons who had access to the grand jury materials remain bound by federal law that prohibits disclosures of matters occurring before a federal grand jury. The Department will continue to monitor this situation and may reopen the investigation if additional disclosures are made.

For a summary of the case involving the Rocky Flats Nuclear Weapons Plant, please refer to the United States Attorneys' Bulletin, Vol. 40, No. 4, dated April 15, 1992, at p. 98.

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CRIME ISSUES

Department Fine Collection Efforts

On October 25, 1993, Attorney General Janet Reno issued a memorandum to all United States Attorneys urging that they aggressively collect fines from defendants convicted of federal crimes. Ms. Reno stated that restorative justice is served well by regular contributions to the Crime Victims Fund, a funding source created within the United States Treasury by the Victims of Crime Act of 1983 (VOCA). The Attorney General further stated as follows:

> The Crime Victims Fund consists of fines, bail bond forfeitures and special assessments paid by the defendants that you convict of federal crimes. Just as significant, and perhaps more consequential for crime victims, are the dedicated, persistent efforts of your financial litigation staff. Successful fine recoveries make greater federal resources available to assist our Nation's crime victims with their physical, emotional and financial recoveries. Your fine collection efforts result in our being able to provide battered women with safe shelter, sexually abused children with counselling, and survivors of homicide victims with funds to pay for funeral services. Last fiscal year, unfortunately, Fund deposits were substantially down, thereby reducing the amount of federal funding available for FY 1994 victim services grants.
>
> These funds help to support some 2,500 providers of rape crisis counselling, shelter and crisis intervention (VOCA assistance subgrantees) and VOCA state compensation grantees. The providers of assistance are primarily small non-profit organizations that operate on small budgets and draw from volunteer services. Many are managed by crime victims. All rely extensively on this federal support.
>
> Since deposits were first made into the Fund in 1985, over $1 billion has been collected and $829.7 million has been directly applied to help crime victims. While there has been a general trend toward increased Fund deposits over the years (from $68.3 million in 1985 to a record high of over $221 million in 1992), Fiscal Year 1993 showed a decrease in Fund deposits. The negative impact will be felt by victim organizations and crime victims alike.
>
> I encourage you to make FY 1994 a banner year for Crime Victims Fund deposits. Please vigorously collect outstanding fines levied on defendants within your districts.

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Street Gang Violence In Chicago

On November 28, 1993, the National Institute of Justice (NIJ), a research agency of the Department of Justice, announced that street gang violence in Chicago is becoming increasingly lethal -- primarily because of escalating gang firepower. NIJ also announced that gang-related killings in the country's third largest city soared from 11 in 1965 to 133 last year. The report, which reviewed gang murders going back to 1965 and non-lethal incidents from 1987 through 1990 from Chicago Police Department records, said the Department estimates that there are about 38,000 gang members in the city, with about one-half in the four largest gangs.

Also, according to the report, virtually the entire increase in the number of street gang-motivated homicides seems attributable to an increase in the use of high-caliber, automatic, or semiautomatic weapons. During the 1987-1990 period the number of gang murders involving automatics or semiautomatics increased from 11 to 31 homicides. Furthermore, during the same period the deaths caused by large-caliber weapons (.38-caliber or greater) jumped from 13 to 39. Other findings and statistics included in the report are:

- In Chicago, it was turf battles -- not drugs -- that led to the killings. Of 288 street gang-motivated homicides from 1987 to 1990, only eight also involved drug use or a drug-related motive.

- Drug-related activities did play a significant role, however. Of the 17,085 criminal offenses during the 1987-1990 period that Chicago police said were gang-related, 5,999 were drug crimes -- that is, related to the possession or sale of hard or soft drugs. In addition, there were 8,828 non-lethal violent offenses, primarily aggravated and simple assaults, as well as 2,081 other offenses, such as intimidation, vandalism, theft, liquor law violations, and weapons possession.

- More than 40 major street gangs are active in the city. The four largest -- the Black Gangster Disciples Nation, the Latin Disciples, the Latin Kings and the Vice Lords -- were each responsible for at least 1,000 criminal incidents during the 1987-1990 study period.

- Although at least one gang-related crime occurred in each one of Chicago's 77 neighborhoods during the 1987-1990 years, the rate of such crimes in the two most dangerous neighborhoods was 76 times higher than in the city's two safest communities.

- Some street gangs spent much of their time defending or expanding their turf while others were actively involved in the business of illegal drugs. According to the report, programs to reduce street gang-motivated violence must recognize these differences. For example, a program to reduce gang involvement in drugs in a community in which gang members are most concerned with defense of turf has little chance of success.

- Another focus of control over gang violence should be on weapons. The death weapon in 95 percent of gang-motivated homicides in Chicago was a gun, and much of the increase in gang-motivated homicides from 1987 to 1990 was an increase in killings with large-caliber, automatic or semiautomatic weapons. Therefore, reducing the availability of these most dangerous weapons also may reduce the risk of death in street-gang-plagued communities.

The report concluded that street gangs are a chronic problem that cannot be solved quickly. The ultimate solution must include a coordinated criminal justice response, as well as changes in educational opportunities, racial and ethnic attitudes and job opportunities. In the meantime, however, lives can be saved and serious injury prevented by targeting what is causing the increased violence.

The report entitled "Street Gang Crime in Chicago" (NCJ-144782), was prepared by Carolyn Rebecca Block, senior analyst at the Statistical Analysis Center, Illinois Criminal Justice Information Authority, and Richard Block, professor of sociology at Loyola University in Chicago. Single copies may be obtained from the National Criminal Justice Reference Service, Box 6000, Rockville, Maryland 20850. The telephone number is: (301) 251-5500 or 800-851-3420.

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Street Gangs: Current Knowledge And Strategies

Another National Institute of Justice report entitled "Street Gangs: Current Knowledge and Strategies" (NCJ-143290) is also available at the National Criminal Justice Reference Service. This report concludes that making criminal justice more community-centered, creating more job opportunities and expanding the role of the educational system, should be included in effective gang prevention programs. Also noted in the report is that neighborhoods that have gangs differ from one another, but they also are frequently affected by common problems -- poverty, racial tensions and demographic change.

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Other Crime Statistics

The Bureau of Justice Statistics, Office of Justice Programs, Department of Justice, has conducted a survey of all Americans over the last twenty years, and have identified the following long-term trends involving crime:

- Overall, the number of criminal victimizations dropped six percent since the annual National Crime Victimization Survey began in 1973.

- The steepest declines are in household burglary and theft.

- Blacks are substantially more likely to be violent crime victims than are whites.

- Young minority males in central cities are violent crime victims at the highest rates the survey ever recorded.

- During the last two decades an estimated 37 million victims were injured, and more than one-third of those injured had no health insurance or were not eligible for public health benefits.

- Handguns are used in about 10 percent of all violent crimes. Handgun crime rates are above the 1986 low but have not returned to the highest rate reached in 1982.

- During 1991, an estimated $19.1 billion were lost directly from personal and household crimes.

- Males are much more likely to be victims of violence inflicted by strangers than by family members or other close associates, whereas females are as likely to be hurt by family members and close associates as by strangers.

- About 30 percent of all violent crimes and 25 percent of home burglaries occur when the victim or victims are away from home on a leisure activity.

- In approximately half of all female rapes the victim knew the offender. Strangers used some type of weapon in 29 percent of the offenses, compared to 17 percent by non-stranger rapists.

• In robberies during which the offender threatened the victim before the attack, those victims who defended themselves in some way were less likely to lose property but were more likely to be injured than were victims who took no action. When the offender had a handgun, the victim was seriously injured in 1 percent of the incidents in which self-protective measures were not taken, compared to 7 percent when such action was taken.

• Households earning more than $30,000 annually are generally more likely than are households in most other income categories to experience theft of a motor vehicle, but as household income rises, burglary rates fall.

• Black male teenagers (that is, boys and young men from 12 through 19 years old) are more likely to be violent crime victims than any other group of people. Their average annual rate is 113 victimizations per 1,000 residents -- or almost one in nine black teenagers. For white male teenagers the rate was 90 per 1,000 -- or about one in eleven.

• For adult black males (35 through 64 years) the violent victimization rate was 35 per 1,000; for adult white males -- 18 per 1,000; for adult white females -- 15; for adult black females -- 13.

• For the elderly (65 years or more), the violent victimization rate was black males -- 12; elderly black females -- 10; elderly white males -- 6; and elderly white females -- 3 per 1,000.

• The rate of criminal victimizations for all U.S. residents compared to other life experiences is as follows:

Occurrences	Yearly Rate Per 1,000 Adults	Occurrences	Yearly Rate Per 1,000 Adults
Accidental Injury (all circumstances)	220	**Aggravated assault**	8
Accidental Injury (at home)	66	Death from heart disease	5
Personal Theft	61	Death from cancer	3
Accidental Injury (at work)	47	**Rape** (women only)	1
Violent victimization	31	Accidental death (all circumstances)	0.4
Assault (aggravated and simple)	25	Death from pneumonia or influenza	0.4
Motor vehicle accident injury	22	Death in motor vehicle accident	0.2
Death (all causes)	11	Suicide	0.2
Victimization with injury	11	Death from HIV infection	0.1
Robbery	6	Homicide and capital punishment executions	0.1

The survey measures rape, robbery, assault, burglary, personal and household larceny and motor vehicle theft. It does not measure murder, kidnapping or commercial crimes. Last year 39 percent of all of these crimes were reported to police -- the highest since 1973, when it was 32 percent. The increased reporting rate was consistent with the fact that violent crime and motor vehicle theft have made up an increasing proportion of total crime during the last two decades. The highest reporting rate last year was for completed motor vehicle theft -- 92 percent. The lowest was for personal larceny without contact -- 15 percent.

Single copies of the Bureau of Justice Statistics special report entitled "Highlights from 20 Years of Surveying Crime Victims" (NCJ-144525), as well as other statistical bulletins and reports may be obtained from the National Criminal Justice Reference Service, Box 6000, Rockville, Maryland 20850. The telephone number is: 1-800-732-3277.

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POINTS TO REMEMBER

New Criminal Rules Effective December 1, 1993

Effective December 1, 1993, numerous amendments to the Federal Rules of Criminal Procedure previously transmitted to Congress by the Supreme Court will take effect. Principal among these are:

- An amendment of Rule 16 to provide for reciprocal pretrial discovery of expert witnesses;
- A new Rule, 26.3, establishing a procedure before ordering a mistrial; and
- An extension of Rule 26.2 (the rules equivalent of the Jencks Act) to various pretrial, trial, and post-trial proceedings. Specifically, the amendments will apply Rule 26.2 to detention hearings; to sentencing hearings; to hearings to revoke or modify probation or supervised release; and to hearings on motions under 28 U.S.C. 2255.

The text of the new Rules may be found at 61 U.S.L.W. 4402, et seq.

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Survey Of Attorneys' Fees And Rates Declined In The Chicago Area

The Antitrust Division of the Department of Justice has declined to clear a Chicago area bar association's proposal to conduct a survey as to what lawyers and firms of the association charge their clients. The proposal failed to provide sufficient information to alleviate antitrust concerns and protect against possible anticompetitive behavior. The South Suburban Bar Association, which represents about 250 lawyers practicing in an area south of Chicago in southern Cook County and northern Will County, submitted a business review letter asking what the Division's enforcement intention would be if the association conducted a survey of its members' rates and fees in fifteen areas of law.

Anne K. Bingaman, Assistant Attorney General for the Antitrust Division, said the proposed survey was described insufficiently to alleviate Department concerns that it could not be used by the association's members to agree on various fees or billing rates, or to assess the current disparity among fees or billing rates and the difficulty of entering into or maintaining any collusive agreements. The Department's position was stated in a business review letter in which Ms. Bingaman informed the association's president that the association failed to propose safeguards to protect against the possibility of anticompetitive behavior, including keeping the survey responses anonymous or ensuring that some association members would not have access to data submitted by other association members. Under the Department's business review procedure, a person or organization may submit a proposed course of action to the Antitrust Division and receive a statement as to whether the Division will challenge the activity under the antitrust laws. A file containing the business review request and the Department's response will be made available in the Legal Procedure Unit of the Antitrust Division, Room 3235, Department of Justice, Washington, D.C. 20530. After a 30-day waiting period, the documents supporting the business review request will be added to the file.

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Waco Report

A copy of the Waco report has been forwarded to all United States Attorneys. The report consists of the following: Report to the Deputy Attorney General on the Events at Waco, Texas; Evaluation of the Handling of the Branch Davidian Stand-off in Waco, Texas; Lessons of Waco; and Recommendations of Experts for Improvements in Federal Law Enforcement After Waco.

A few reports are still available. If you would like a copy, please call the United States Attorneys' Bulletin staff, at (202) 514-4633.

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Holiday Gifts

On November 29, 1993, Stephen R. Colgate, Assistant Attorney General for Administration, issued a reminder concerning the standard of conduct on accepting gifts, including gifts of entertainment (5 C.F.R. § 2635.202). The rule generally prohibits an employee from accepting a gift given because of the employee's official position or from persons having business with the Department (prohibited sources.) There are some exceptions under which an employee may accept a gift given because of his position or from a prohibited source:

- An employee may accept gifts from friends of relatives when the circumstances make it clear that the motivation for the gift is the personal relationship.

- An employee is permitted to accept an unsolicited gift having a value of $20.00 or less with a limit of $50.00 per year from one source.

- Another exception allows an employee to accept free attendance at a gathering of persons from a given industry or profession or persons with a mutual interest if the employee's component head determines that his attendance can be seen to further the Department's interests. If the sponsor is someone whose interests the employee can affect in performing his duties, this determination must be made in writing.

If an employee receives a gift either because of his position or from a prohibited source that does not fit comfortably into one of the first two exceptions, generally, he may not retain the gift, although perishable items such as food and flowers may be shared within the recipient's office with the supervisor's permission. If you have any questions, please call Donna Henneman, Legal Counsel's Office, Executive Office for United States Attorneys, at (202) 514-4024.

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SENTENCING GUIDELINES

Guideline Sentencing Updates

A copy of the Guideline Sentencing Update, Volume 6, No. 5, dated November 2, 1993, and Volume 6, No. 6, dated November 29, 1993, is attached as Exhibit C at the Appendix of this Bulletin. This publication is distributed periodically by the Federal Judicial Center, Washington, D.C. to inform judges and other judicial personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Guidelines.

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LEGISLATION

Congress Is Adjourned

On November 26, 1993, the first session of the 103rd Congress was concluded. Congress will return on January 25, 1994.

Legislation Enacted Into Law

Brady Bill: This legislation would require would-be gun buyers to wait five business days before purchasing a handgun. This would enable law enforcement officials to do a personal background check on the purchaser to screen out convicted felons and other ineligible buyers.

Family Leave: This legislation guarantees workers up to twelve weeks of unpaid leave for maternity reasons or family medical emergencies.

Voter Registration: This "motor voter" legislation allows voters to register by mail or when they apply for driver's licenses or certain government benefits.

Thrift Bailout: This legislation would provide a direct appropriation of $18.3 billion for the Resolution Trust Corporation (RTC), the agency charged with carrying out the thrift industry salvage operation, and is intended to complete the estimated $100 billion cleanup from the collapse of the savings and loan industry.

Legislation Passed by both Houses of Congress

Omnibus Anti-Crime: This bipartisan, $22.3 billion bill would boost spending for prison construction, expand the death penalty to dozens of new federal crimes, treat certain young criminals as adults and provide money for 100,000 additional police officers. It also would create an anti-crime "trust fund" to fight crime. [NOTE: The President advised Congress that the most important task facing Congress when they reconvene is to reconcile their differences in the two versions of this legislation, and to send a bill to his desk to be signed into law.]

Abortion Clinic Access: This legislation makes it a federal crime to obstruct access to abortion clinics. Relatively minor differences are expected to be resolved in conference early next year.

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AFFIRMATIVE CIVIL ENFORCEMENT PROGRAM (ACE)

Affirmative Civil Enforcement (ACE) is a White Collar Fraud initiative undertaken by the Executive Office of United States Attorneys and many United States Attorneys' Offices. ACE, as a law enforcement program, targets fraud in procurement and programs. It is a means of stemming fraud and bringing funds into the Treasury while helping to make Agencies and their programs more market-oriented and responsive to the customer of Government programs. Affirmative civil enforcement cases generally mean fraud cases under the civil False Claims Act. ACE recoveries include civil FIRREA, drug diversion penalties, other penalty statutes, False Claims Act, and some environmental cases. ACE recoveries do not include regular collections, such as student loans, foreclosures, or payments of debts owed to the United States. Also, ACE does not include bankruptcy, although this is clearly an affirmative source of litigation.

In FY '93, the ACE Program was a total success. For every dollar spent on the ACE program, approximately $20.00 has been returned to the Treasury.

"Heroes In The War Against Fraud"

Attorney General Janet Reno recognized the ACE Program in an article entitled "Heroes in the War Against Fraud" in the first issue of the "DOJ Newsletter" (September, 1993). Ms. Reno called ACE:

> ....[A] highly successful....project to pursue perpetrators of fraud involving the federal health care system and social security; SBA, FHA, and education loans; defense contracting; bankruptcies; and environmental violations. The pilot program has demonstrated a substantial monetary return on the investment of the AUSAs' time, resulting in millions of dollars to the Treasury in civil penalties.

To illustrate the commitment of the Attorney General to the ACE effort, Ms. Reno has requested that the Executive Office for United States Attorneys explore increasing resources for this endeavor. In no small measure this request is based on the fact that across the nation, United States Attorneys brought in many millions as a result of the ACE Program while at the same time using ACE as a key tool in the Reinvention of Government effort. Through the ACE program, more efficient and less bureaucratic ways can be found to serve the customers of the various federal programs, such as health care and food stamps.

To further this effort, Bob DeSousa, Assistant United States Attorney for the Middle District of Pennsylvania, and Chairman of the ACE Working Group, is working with Richard Sponseller, Associate Director of the Financial Litigation Staff of the Executive Office for United States Attorneys, to assist in the continued development of the ACE program. Mr. DeSousa is available to provide assistance and welcomes any suggestions or creative methods to further implement the ACE program.

Mr. DeSousa's address, telephone, Fax, and E-Mail numbers are:

Address:	Room 6040, Patrick Henry Building	Telephone:	(202) 501-7017
	601 D St N.W.	Fax:	(202) 501-7483
	Washington, D.C. 20530	E-Mail:	AEX02(RDESOUSA)

ACE Manual

Linda Wawzenski, Assistant United States Attorney for the Northern District of Illinois, and a member of the ACE Working Group, is the "keeper" of the ACE Manual, "Floppies," and forms. If you would like copies of any of these documents, or have any comments and/or suggestions, please contact Ms. Wawzenski at (312) 353-5300 - E-Mail: AILN02(LWAWZENS).

ACE Training

AFFIRMATIVE CIVIL LIT. SEMINAR (EAST)
JUNE 14-16, 1994
CLEARWATER, FLORIDA

AFFIRMATIVE CIVIL LIT. SEMINAR (WEST)
July 16-18, 1994
SALT LAKE CITY, UTAH

Conferences and training sessions are in the early planning stages and your suggestions are welcome. For further details, please call Bob DeSousa or Linda Wawzenski. Cathy Votaw, Assistant United States Attorney for the Eastern District of Pennsylvania, and also a member of the ACE Working Group, at (215) 451-5200 - E-Mail: APAE02(Votaw). 353-5300 AILN02(Lwawzens).

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DISTRICT ACTIVITY

Northern District Of Ohio

Jim Bickett, Assistant United States Attorney for the Northern District of Ohio, has expanded the District's ACE program on HHS fraud, and "adopted" the HUD program. He recently spoke at the HUD Regional Inspector General's Conference in Washington D.C. on HUD guaranteed loans for multi-family projects.

There are thousands of projects which are HUD-guaranteed to ensure an adequate supply of apartments for rent. HUD's guarantee, however, is only given when the project owner signs a regulatory agreement (contract) promising to use the funds generated by the project as required by the agreement such as to maintain the property and pay the mortgage. After the needs of the project are satisfied, the owner is entitled to withdraw the "surplus cash". 12 USC § 1715z-4a allows recovery of double damages, attorneys' fees, auditor fees, and costs for violations of the regulatory agreement. The regulatory agreement is most often violated by loaning project funds to a related entity rather than using the money for such things as project maintenance or improvements. The value of HUD's collateral deteriorates until it is worth less than the mortgage and then the project invariably defaults. Since 12 U.S.C. § 1715z-4a provides for personal liability for partners, 25 percent shareholders, officers, directors, etc., it can be a useful tool to recover damages and prevent the collateral from deteriorating below the mortgage value. Injunctive relief is also available. The Office of the Inspector General Audit Staff of the Department of Housing and Urban Development is currently reviewing hundreds of its audit reports which document these regulatory agreement violations. This is a valuable source of referrals. Typical violations total over $100,000 for each project and doubled can lead to large recoveries while acting as an important tool to maintain program integrity.

For further information, please call Jim Bickett, at (216) 375-5716 - E-Mail: AOHN01(JBICKETT).

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District Of Colorado

The United States Attorney's Office for the District of Colorado began the ACE program in 1989. During that time, that office has been giving lectures to various federal agencies regarding False Claims and the ACE program. They have also litigated numerous false claims cases without having to go beyond initial demand or a draft complaint. The program includes DEA diversion cases, HHS Medicare/Medicaid cases, procurement fraud, ranging from bad leather for holsters to incurred cost fraud in multi-hundred million dollar space contracts. In addition, they currently have a postal fraud case with over $1 million in single damages.

The United States Attorney's Office is now looking into HUD project fraud, and fraud in the Minerals Management Service (collectors of billions of dollars in mineral, oil and gas royalties). These cases include under-reporting and daisy-chaining sales to beat the royalty payments. This office has developed a wealth of sample material over the past couple of years, which should be of interest to other U.S. Attorneys' Offices. For further information, please contact AUSA Paul J. Johns, at (303) 844-3885 E-mail: ACO01(PJOHNS).

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Central District Of California

Lee Weidman, Assistant United States Attorney for the Central District of California, and a member of the ACE Working Group, recently served as a guest speaker at the Inspector General's office of the Small Business Administration. Mr. Weidman's discussion on SBA fraud cases under FIRREA and the Civil False Claims Act was quoted in the Wall Street Journal in an article entitled "SBA's Loan-Guarantee Program Is Threatened by Fraud."

Mr. Weidman has developed a fast track method of prosecuting SBA/bank applications containing false tax information under FIRREA. The Inspector General's office of SBA is anxious to prosecute these cases and direct false claims, and is interested in using civil remedies for a wide variety of cases in addition to their loan fraud guarantee program. For further information concerning this program, please call Lee Weidman at (213) 894-2434 - E-mail: ACAC03(LWEIDMAN).

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ACE CASE NOTES

District Of Connecticut

The United States and Raymond Engineering, a subsidiary of Kaman Diverified Technologies, one of the nation's top 100 defense contractors, jointly agreed to a civil settlement of $265,000. The United States had asserted that Raymond violated federal law by failing to disclose updated pricing data to the Navy during the course of contract negotiations. Federal statutes require contractors such as Raymond to disclose their most current, accurate and complete pricing data when negotiating a contract of the type herein. Raymond was contracted to manufacture electronic equipment for the Navy EA-6BProwler Aircraft. The contract was valued at approximately $2.9 million.

Assistant United States Attorney: Alan Soloway - (203) 579-5596

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Southern District Of Illinois

Olin Corporation is the sole source supplier of small arms munitions to the United States Army. The United States Attorney's Office for the Southern District of Illinois was approached by the Army's Criminal Investigation Division with a criminal referral for overcharging for small arms bullets. After a criminal declination, the matter was referred for possible civil action. The U.S. Attorney's office sent Olin a demand letter and entered into extensive settlement negotiations which culminated in a settlement of $325,000. A complaint was drafted and given to Olin, but was never filed in court. The main area of recovery was the Army's failure to provide current, complete and accurate pricing information.

Assistant United States Attorneys: Gerald M. Burke and James Hipkiss
(618) 628-3700

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SUPREME COURT WATCH

An Update Of Supreme Court Cases From The Office Of The Solicitor General

Selected Cases Recently Decided

Civil Cases

Harris v. Forklift Systems Inc., No. 92-1168 (decided November 9)

In this case, the Court held that a plaintiff need not demonstrate psychological injury in order to prove an abusive environment Title VII claim.

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp., No. 92-1123 (dismissed November 30)

The government argued, as amicus curiae, that courts of appeals should, upon request, vacate district court judgments in civil cases when the parties settle those cases while appeal is pending. The Court dismissed the case as improvidently granted.

Selected Cases Recently Argued

Criminal Cases

Staples v. United States, No. 92-1441

The government argues in this case that the National Firearms Act, 26 U.S.C. 5861(d), only requires the government to prove that the weapon possessed was a dangerous device likely to be subject to regulation, and not that it possessed all the characteristics of a machinegun.

Civil Cases

J.E.B. v. T.B., No. 92-1239 (argued November 2)

The government argues in this case that the rule of Batson v. Kentucky, 476 U.S. 79 (1986), prohibiting peremptory strikes on the basis of race, should be extended to prohibit strikes made on the basis of gender.

U.S. Dept of Defense v. Federal Labor Relations Authority, No. 92-1223 (argued November 8)

The government argues in this case that the 1974 Privacy Act prohibits a federal agency from releasing the addresses of federal employees to unions.

Waters v. Churchill, No. 92-1450 (argued December 1)

The government, as amicus curiae, argues in this case that the First Amendment is not violated where the terminating supervisor was unaware of the fired employee's protected speech.

BFP v. RTC, No. 92-1370 (argued December 7)

The government argues in this case that a public, noncollusive foreclosure sale conducted in accordance with state law is reasonably equivalent value for purposes of Section 548(a)(2)(A) of the Bankruptcy Code.

NOW v. Scheidler, No. 92-780 (argued December 8)

The government, as amicus curiae, argues that RICO does not require that a defendant be motivated by an economic purpose in order to be held liable under 18 U.S.C. 1962(c) and (d).

Questions Presented in Selected Cases in Which the Court has Recently Granted Cert.

Criminal Cases

Davis v. U.S., No. 92-1949 (granted November 1)

Whether an interrogator must cease questioning when a suspect makes an ambiguous request for counsel.

Shannon v. U.S., No. 92-8346 (granted November 1)

Whether the Insanity Defense Reform Act requires that jury be instructed that a verdict of not guilty by reason of insanity will not lead to the release of a potentially dangerous defendant.

Beecham v. U.S., No. 93-445 (granted November 15)

Whether 18 U.S.C. 921(a)(20) allows an individual convicted of a federal felony whose civil rights are restored by operation of state law to possess a firearm lawfully.

Civil Cases

O'Melveny & Meyers v. FDIC, No. 93-489 (granted November 29)

Whether the wrongdoing of an insolvent savings-and-loan should be imputed to the FSLIC in its capacity as receiver to bar a suit against the thrift's law firm for legal malpractice.

Dolan v. City of Tigard, No. 93-518 (granted November 29)

Whether Nollan v. California Coastal Commission, 483 U.S. 825 (1987), requires that a permit exaction be "substantially related" to the increased intensity in use of the subject property to avoid being held to be a taking.

* * * * *

CASE NOTES

CIVIL DIVISION

Federal Circuit Holds That Revocation Of Permits To Import Assault Rifles Did Not Give Rise To A Claim For An Uncompensated Taking

Plaintiff was one of several importers of assault rifles. In 1989, all import permits were suspended and most were ultimately revoked. Permits for approximately 640,000 rifles were affected by the regulatory action. Although the permits were not, by their terms, revocable, we successfully defended the legality of the revocation. In this suit, plaintiff alleged that the revocation of his permits constituted a taking without compensation.

The Federal Circuit (Rich, Lourie, Schall) has now ruled that plaintiff had no property interest in his permits. The Court rejected a number of arguments advanced by plaintiff and strongly reaffirmed the principle that the expectations of persons doing business in regulated areas must include the expectation that the government may take new regulatory action in the public interest. The court also strongly emphasized that, as against reasonable government regulation, no one has a protected right to use property in a manner injurious to the public.

Mitchell Arms, Inc. v. United States, No. 92-5125 (October 14, 1993) [Fed. Cir.; Ct. Fed. Cl.]. DJ # 154-90-3864.

Attorneys: Michael Jay Singer - (202) 514-5432
Mark B. Stern - (202) 514-5089

* * * * *

Fifth Circuit Affirms Imposition Of Discovery Sanctions Against United States, And Rejects Separation Of Powers Arguments Regarding Imposition Of Nonreimbursable Sanctions On Assistant U.S. Attorney

Plaintiff sustained serious back injuries after falling on the floor of a Post Office and brought this tort action against the United States. When the government did not make timely responses to plaintiff's interrogatories and document requests, she filed a motion for sanctions. The district court issued an order compelling compliance with the requests and awarded sanctions in the amount of $2500, to defray plaintiff's attorney fees on the motion. The court directed the Assistant United States Attorney (AUSA) to pay the award personally, and not to seek or accept any reimbursement. Because of the shortness of time until the scheduled trial, the court ordered full compliance with the discovery requests within an extremely short period. There were some additional problems in locating and producing documents, including the failure to produce one relevant document due to a misunderstanding between the AUSA and a postal employee. When these problems came out at a hearing on the eve of trial, the district court entered conclusive findings of liability in plaintiff's favor, as a further sanction against the United States. After a one-day trial on damages, judgment was entered for plaintiff for nearly $900,000.

We appealed on behalf of both the United States and the AUSA, raising two issues: the excessiveness of the sanction against the United States, and the impropriety of foreclosing the Attorney General from exercising her discretion under regulations permitting the reimbursement of Department employees. Despite our efforts on appeal to take a conciliatory approach and acknowledge the deficiencies in our handling of discovery matters below, the court of appeals (Johnson, Jolly, Jones) has now affirmed the district court order in full, in a rather scathing opinion. Unfortunately, the court of appeals (like the district court) remains convinced that the withholding of certain documents was intentional, rather than the result of miscommunication. In light of the perceived intentional failures (including ones on which the district court had made no findings), the court concluded that the severe sanction against the United States was justified. The court also concluded that the district court had discretion to forbid the AUSA from seeking reimbursement, giving short shrift to our arguments that such an order implicates, in this context, serious separation of powers concerns.

Chilcutt v. United States, No. 92-1668 (October 25, 1993) [5th Cir.; N.D. Tx.]. DJ # 157-73-1135

Attorneys: Barbara C. Biddle - (202) 514-2541
John F. Daly - (202) 514-2496

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Ninth Circuit Condemns "Impact Litigation" And Affirms, On Standing Grounds, Dismissal Of Challenge To Employment Conditions Approved By Department Of Labor For Foreign Temporary Agricultural Worker Program

In this action, three farmworkers sought to challenge certain productivity, experience, and reference requirements approved by the Department of Labor for use during the 1991 growing season by Idaho growers seeking to hire workers under the foreign temporary agricultural worker program, 8 U.S.C. § 1101(a)(15)(H)(ii)(a). The district court dismissed the action on standing grounds and, in the alternative, held the occupational requirements on the merits. On appeal, the Ninth Circuit (Thompson, Boochever, Kleinfeld) has now affirmed on Article III standing grounds. The court stated that "[n]o doubt [plaintiffs'] lawyers planned the lawsuit to accomplish generalized social impact that the lawyers earnestly believed would be desirable for migrant workers. But the relief would not benefit their clients * * *." While stating that "[w]e readily vindicate the legal rights of those who do the hard work of migratory farm laborers" (citation omitted), the court assailed "[t]he kind of policy-oriented lawsuit sometimes called 'impact litigation,' designed to change social policy rather than to vindicate legal rights of a particular plaintiff * * *."

Snake River Farmers' Ass'n, Inc. v. Department of Labor, et al., Nos. 91-35885, 92-35074, 92-35075 (November 9, 1993) [9th Cir.; D. Idaho]. DJ # 145-10-4540.

Attorneys: Michael Jay Singer - (202) 514-5432
John S. Koppel - (202) 514-2495

* * * * *

TAX DIVISION

United States Is Awarded $4.4 Million In Large Tax Protestor Case

In a memorandum and order dated October 22, 1993, the United States District Court in Colorado awarded the United States $4.4 million from the National Commodity and Barter Association. NCBA is a large tax protestor organization that is active today. In the 1980s, it had more than 1,700 members and operated a nationwide network of sixty-three "warehouse banks." The banks, which handled tens of millions of dollars during some years, were designed to enable NCBA's members to keep their financial transactions secret from the Internal Revenue Service (IRS). The court upheld $4.2 million in penalties which the United States had asserted against NCBA for failure to file partnership income tax returns and $176,000 in penalties for making false or fraudulent statements about the internal revenue laws.

In challenging the penalties for failure to file partnership income tax returns, NCBA contended that it was not a partnership, without stating what form of entity it was. The government responded that, while the NCBA was amorphous, indeed deliberately so, the Internal Revenue Code did not allow amorphous organizations to escape taxation. The district court agreed, holding that the NCBA did not "fall between the cracks" as the taxpayer contended, but rather that it fit within the broad definition of partnership found in the Internal Revenue Code. Following a number of decisions in other courts, the district court further held that NCBA was liable for penalties for making false or fraudulent statements about the internal revenue laws as a result of statements contained in the tax protest materials it distributed. The court also explicitly rejected NCBA's oft-repeated contention that the IRS was engaged in an illegal conspiracy against NCBA, noting that "[t]he evidence at trial revealed no such conspiracy," and that "the not-coincidental correspondence between convicted tax offenders and NCBA members justified the IRS" interest in NCBA activities."

* * * * *

Fifth Circuit Ordered Rehearing En Banc After Divided Panel Of The Court Twice Affirmed, In Part, The Adverse Decision Of The District Court

On October 28, 1993, the Fifth Circuit, sua sponte, ordered rehearing en banc in Elvis E. Johnson v. Robert Sawyer and United States, after a divided panel of the court twice affirmed, in part, the adverse decision of the district court. The Government filed a petition for rehearing and a suggestion for a rehearing en banc after the first opinion issued in this case.

The district court awarded Johnson damages under the Federal Tort Claims Act (FTCA) for the wrongful disclosure of tax return information. The Fifth Circuit upheld the District Court's award of over $5 million in damages to Johnson for his economic losses, but remanded the case with respect to the remaining $5 million award for emotional distress and mental anguish for further explanation as to how the district court determined that amount. Johnson sought damages from various Internal Revenue Service employees, officials in the office of the United States Attorney, and the United States, for injuries he claimed resulted from disclosures contained in an IRS press release. The press release reported that Johnson pled guilty to an information charging him with evasion of tax for two years (only one year was actually covered by the information) and set forth personal information about him which was not contained in the information. The district court found that the United States agreed in the plea bargain that it would issue no press release and that the press release contained information that was not in the public record. It went on to hold that the discretionary function exception to the FTCA did not shield the United States from liability.

On appeal, the government contended that under the FTCA, the plaintiff must sue under a state law cause of action, and that a suit for the unauthorized disclosure of return information under Section 6103 of the Internal Revenue Code is a federal cause of action. The Fifth Circuit initially held that this case presented a state law cause of action based on negligence per se. In its second opinion, it held that the case presented a state law cause of action based on Texas' doctrine of tortious invasion of privacy. In both opinions, the court of appeals refused to adopt the position of the Ninth Circuit that once tax return information is disclosed in a judicial proceeding the IRS may release that information to the press.

* * * * *

Eighth Circuit Affirms In Part, And Reverses In Part, Favorable Decision Of The Tax Court In Case Involving over $5 Million

On October 18, 1993, the Eighth Circuit affirmed in part, and reversed in part, the favorable decision of the Tax Court in Anton Zabolotny, et ux. v. Commissioner. This case, which involved over $5 million, concerned the application of Section 4975 of the Internal Revenue Code to the taxpayers' sale of their farmland, which was subject to a mineral leasehold owned by a third-party (Gulf Oil Co.), to an employee stock ownership plan (ESOP) created by their wholly-owned farming corporation, and the subsequent lease of that farmland back to the corporation. Section 4975 imposes an excise tax on certain "prohibited transactions," and further provides in Section 4975(c)(1)(A) that "the term 'prohibited transaction' means any indirect or direct sale or exchange . . . of property between a plan and a disqualified person." The Internal Revenue Service determined that the sale of the farmland was a prohibited transaction within the meaning of Section 4975, even though the taxpayers ultimately terminated their employment with the farming corporation, forfeiting their rights under the ESOP and leaving only their children as beneficiaries under the plan, and that the taxpayers were thus liable for the 5-percent tax imposed by that provision, as well as the 100-percent tax for failing to correct the transaction. In a fully reviewed decision with several dissents, the Tax Court agreed.

On appeal, the Eighth Circuit agreed that the sale was a prohibited transaction and that taxpayers were liable for the 5-percent tax for one year. The court of appeals, however, refused to sustain the imposition of any further tax, reasoning that the transaction was a good deal for the ESOP and thus was "self-correcting." The Eighth Circuit rejected the government's position that an affirmative act of correction (such as reversing the exchange) was required.

* * * * *

Ninth Circuit Affirms Favorable Decision In Case Involving Over $2 Million

On October 18, 1993, the Ninth Circuit affirmed the favorable decision of the District Court in The Flintkote Company v. United States. This case involved over $2 million and presented the question whether the Internal Revenue Service, under the authority of Section 162(g) of the Internal Revenue Code, properly disallowed two-thirds of a deduction claimed for a payment made in settlement of a civil antitrust action. Section 1652(g) provides that if a taxpayer is convicted of (or enters a plea of guilty or nolo contendere to) criminal antitrust violations, the taxpayer is not entitled to deduct the "punitive" two-thirds amount of any antitrust damages award. Noting that the taxpayer pled nolo contendere to criminal charges arising out of the same activity, the District Court upheld the IRS's action. The Ninth Circuit affirmed, rejecting the taxpayer's contention that its conviction related to different activities than were the subject of the civil suit, and reasoning that a Sherman Act conspiracy "is a single event that has 'continuance in time,' and is not a 'cinematographic series of distinct conspiracies.'"

* * * * *

Ninth Circuit Denies Petition For Rehearing And Suggestions For Rehearing En Banc In Bivens Action

On October 14, 1993, the Ninth Circuit denied our petition for rehearing and suggestion for rehearing en banc in Nelson v. Silverman. This Bivens action was commenced against an Internal Revenue Service revenue officer who had attempted to collect taxes that he thought were validly owing but which in fact were not. The District Court refused to grant our motion to dismiss the complaint for failure to state a claim, and we thereafter filed a protective notice of appeal. That appeal was thereafter dismissed on the federal employee's motion, in anticipation of filing a motion for summary judgment on qualified immunity grounds in the trial court.

After the District Court denied the motion for summary judgment, we appealed. The Ninth Circuit dismissed the appeal on procedural grounds, holding that the defendant was entitled to only one pre-trial appeal. Although the defendant's initial notice of appeal was dismissed on his own motion, the Ninth Circuit ruled that no further pre-trial appeals would be permitted and that the case must proceed to trial. We filed the petition for rehearing en banc because we believe that this "one-bite-at-the-apple" rule is wrong, particularly in circumstances, such as this, in which the first "appeal" was merely protective to allow the Solicitor General and then the taxpayer to make considered decisions whether to go forward.

* * * * *

OFFICE OF LEGAL EDUCATION

COMMENDATIONS

Donna A. Bucella, Director of the Office of Legal Education (OLE), and the members of the OLE staff, thank the following Assistant United States Attorneys (AUSAs), Department of Justice officials and personnel, and federal agency personnel for their outstanding teaching assistance and support during courses conducted from October 16 - November 15, 1993. Persons listed below are AUSAs unless otherwise indicated:

Freedom Of Information Act For Attorneys And Access Professionals (Washington, D.C.)

From the Office of Information and Privacy: ***Richard L. Huff***, Co-Director, ***Daniel J. Metcalfe***, Co-Director, ***Margaret Irving***, Associate Director, ***Melanie Ann Pustay***, Senior Counsel, ***Paul-Noel Chretien***, ***David L. Dougherty***, ***Michael A. Hodes***, ***Michael H. Hughes***, ***Carmen L. Mallon***, ***Kirsten J. Moncada***, ***Janice Galli McLeod***, and ***Anne D. Work***. From the Civil Division: ***Elizabeth A. Pugh***, Assistant Director, Federal Programs Branch; ***Matthew M. Collette***, ***Peter R. Maier***, ***John P. Schnitker***, ***Mark B. Stern***, Attorneys, Appellate Staff. From the Criminal Division: ***Frank R. Newett***, Assistant Director, Office of Enforcement Operations; ***Lee J. Ross, Jr.***, Deputy Chief, Money Laundering Section. ***Stuart Frisch***, Deputy General Counsel, Justice Management Division. ***J. Kevin O'Brien***, Section Chief, ***Constance J. Ahrens***, Paralegal Specialist, Federal Bureau of Investigation. ***Charlie Y. Talbott***, Freedom of Information Specialist, Office of the Secretary of Defense, Department of Defense. ***Robert N. Veeder***, Senior Policy Analyst, Office of Management and Budge. ***Gayla D. Sessoms***, Assistant Director for Information Services, Securities and Exchange Commission.

Privacy Act (Washington, D.C.)

Kirsten J. Moncada, Attorney, Office of Information and Privacy. ***Philip A. Kesaris***, Deputy Assistant General Counsel, Department of Housing and Urban Development. ***Johanna Bonnelycke***, Privacy Act Officer, Department of Health and Human Services. ***Jeff Corzatt***, Staff Attorney, Department of Veterans Affairs. ***John Sanet***, Privacy Act Officer, Office of Personnel Management.

Money Laundering/Financial Issues/Asset Forfeiture Seminar (Albuquerque, New Mexico)

Robert J. Boitmann, United States Attorney, Eastern District of Louisiana; ***Roslyn Moore-Silver***, Criminal Chief, ***Linda Boone***, and ***Arthur Garcia***, District of Arizona; ***Virginia Covington***, Asset Forfeiture Chief, and ***Gregory N. Miller***, Middle District of Florida; ***John Peyton***, District of Hawaii; ***Kevin Vanderschel***, Asset Forfeiture Chief, Southern District of Iowa; ***Arthur Hui***, Eastern District of New York; ***Sonia C. Jaipaul***, Eastern District of Pennsylvania; ***Terry Lehmann***, Southern District of Ohio; ***Dennis Pfannenschmidt***, Middle District of Pennsylvania; ***Tom Swaim***, Eastern District of North Carolina. ***Laurie Sartorio***, Assistant Director for Policy and Operations, Executive Office for Asset Forfeiture, Office of the Deputy Attorney General; ***Lee J. Ross, Jr.***, Deputy Chief, Money Laundering Section, and ***James Knapp***, Deputy Director, Asset Forfeiture Office, both from the Criminal Division; ***Glen McAdams***, Assistant Director for Policy and Operations, Executive Office for Asset Forfeiture, Department of the Treasury.

Complex Prosecutions Seminar (Washington, D.C.)

Kenneth Melson, First Assistant United States Attorney, ***Joseph Aronica, Wingate Grant,*** and ***Jack Hanly,*** all from the Eastern District of Virginia; ***Oliver McDaniel,*** Deputy Chief, Violent Crimes, and ***Eric Dubelier,*** District of Columbia. ***Carol C. Lam,*** Southern District of California; ***Dan Mills,*** Western District of Texas; ***David Nissman,*** Chief, Criminal Division, District of the Virgin Islands; ***Cheryl Pollak,*** Lead Drug Task Force Attorney, Eastern District of New York; ***Deborah Smith,*** Director, New England Bank Fraud Task Force, District of Massachusetts; ***Robert H. Westinghouse,*** Western District of Washington. ***David Farnham,*** Senior Trial Attorney, Tax Division. From the Criminal Division: ***Linda Candler,*** Associate Director, Office of International Affairs; ***Ronald Roos,*** Senior Litigation Counsel, Internal Security Section; ***Stephen T'Kach,*** Deputy Chief, Electronic Surveillance Unit, Office of Enforcement Operations; ***Steven Zipperstein,*** First Assistant United States Attorney, Central District of California.

Federal Administrative Process (Washington, D.C.)

Marina Braswell, District of Columbia; ***Gary J. Edles,*** General Counsel, ***Jeffrey S. Lubbers,*** Research Director, and ***David Pritzker,*** Senior Attorney, all from the Administrative Conference of the United States. ***Don Arbuckle,*** Deputy Branch Chief, Commerce and Lands Branch, and ***Maya A. Bernstein,*** Policy Analyst, Information Policy Branch, Office of Information and Regulatory Affairs, and ***Gary Bass,*** Executive Director, Office of Management and Budget. ***Neil Eisner,*** Assistant General Counsel, Regulation and Enforcement, Office of the Secretary, Department of Transportation. ***Janet Gnerlich,*** Associate Counsel, Office of Chief Naval Research, Department of the Navy. ***John Golden,*** Associate General Counsel, Department of Agriculture. ***Jerome Nelson,*** Administrative Law Judge, Federal Energy Regulatory Commission.

Legal Support Staff Training (Annapolis, Maryland)

Laura A. Pellatiro, Eastern District of Virginia; ***Geraldine Zinser*** and ***Sue Hoadley,*** Paralegal Specialists, District of Maryland; ***Michelle Neverdon,*** Senior Paralegal Specialist, Economic Crime Section, District of Columbia. From the Executive Office for United States Attorneys: ***Wayne A. Rich, Jr.,*** Principal Deputy Director, ***Gary Padgett,*** Attorney and Management Analyst, and ***Heather Jacobs,*** Paralegal Specialist, Evaluation and Review Staff.

Attorney Supervisors Seminar (Washington, D.C.)

Yvonne Hinkson, Deputy Associate General Counsel, Bureau of Prisons.

Agency Civil Practice (Washington, D.C.)

Mark Nagle, Deputy Chief, Civil Division, District of Columbia; ***Jeanette Plante,*** District of Maryland. From the Civil Division: ***Vincent Garvey,*** Deputy Director, ***Thomas Millet,*** Assistant Director, and ***Elizabeth Pugh,*** Assistant Director, Federal Programs Branch; ***Polly Dammann,*** Assistant Director, ***John Groat,*** Trial Attorney, and ***John Schowalter,*** Assistant Director, Commercial Litigation Branch; ***Lawrence Klinger,*** Assistant to the Director, and ***John Euler,*** Deputy Director, Torts Branch. ***Christopher Wright,*** Assistant to the Solicitor General, Office of the Solicitor General.

In House Criminal Asset Forfeiture Training (New Orleans, Louisiana)

Terry Derden, Senior Litigation Counsel, Eastern District of Arkansas; ***Robert Kent,*** Northern District of Illinois.

In House Criminal Asset Forfeiture Training (Columbus, Ohio)

Gordon Zubrod, Criminal Chief, Middle District of Pennsylvania; ***Bill Yahner,*** FIRREA Chief, Southern District of Texas; and ***Kathy Brinkman,*** Southern District of Ohio.

Discovery Skills (Washington, D.C.)

Richard Parker, Deputy Chief, Civil Division, Eastern District of Virginia. From the Civil Division: ***Colette J. Winston,*** Trial Attorney, ***Mary M. Leach,*** Senior Trial Counsel, ***Michael T. Truscott,*** Trial Attorney, and ***Jill Martindell,*** Trial Attorney, Torts Branch; ***Arthur R. Goldberg,*** Assistant Director, ***Sheila M. Lieber,*** Deputy Director, ***John R. Tyler,*** Senior Trial Counsel, ***Elizabeth A. Pugh,*** Assistant Director, and ***Anne L. Weismann,*** Assistant Director, Federal Programs Branch. ***Bob Erickson,*** Deputy General Counsel, Office of the General Counsel, United States Marshals Service.

In-House Criminal Asset Forfeiture Training (Cheyenne, Wyoming)

Terry Derden, Senior Litigation Counsel, Eastern District of Arkansas; and ***Greg Marchessault,*** Eastern District of Texas.

Environmental Law Seminar (Seattle, Washington)

Peter Hsaio, Central District of California; ***Thomas C. Lee,*** District of Oregon; ***Robert Taylor,*** Western District of Washington. From the Environment and Natural Resources Division: ***William M. Cohen,*** Chief, ***James E. Brookshire,*** Deputy Chief, and ***Ellen Athas,*** Attorney, General Litigation Section; ***James C. Kilbourne,*** Chief, Wildlife Marine Resources Section; ***Thomas H. Pacheco,*** Assistant Chief, Environmental Defense Section; ***Peter Murtha,*** Trial Attorney, Environmental Crimes Section; ***Charles Sheehan,*** Staff Attorney, Policy, Legislation, and Special Litigation Section; ***Michael Gheleta,*** Attorney, Denver Field Office; ***Maria Iizuka,*** Attorney, Sacramento Field Office. ***Robert Carosino,*** Assistant Chief Counsel, Richland (Washington) Operations Office, Department of Energy. ***Martin Cohen,*** Assistant Chief for Litigation, United States Army Corps of Engineers. ***Anne Miller,*** Director, Federal Agency Liaison Division, ***Earl C. Salo,*** Assistant General Counsel, Superfund, ***David Coursen,*** Attorney, and ***Julie Matthews,*** Assistant Regional Counsel, Air and Toxic Branch, Seattle, Washington, all from the Environmental Protection Agency. ***Michael Gippert*** and ***Eric Olsen,*** Staff Attorneys, Department of Agriculture.

Civil Trial Advocacy (Washington, D.C.)

Loretta Lynch, Deputy Chief, Criminal Division, Garden City Office, Eastern District of New York; ***Irene Dowdy,*** District of New Jersey; ***Paul Newby,*** Eastern District of North Carolina; ***Debra Prillaman,*** Eastern District of Virginia; ***Ping Moy,*** Deputy Appellate Chief, Southern District of New York; ***Brian McCarthy,*** Western District of New York; ***Lois Davis,*** Eastern District of Pennsylvania; ***Brian Kipnis,*** Western District of Washington; ***Tom Majors,*** Western District of Oklahoma; ***James Shively,*** Eastern District of Washington; ***Sharon Stokes,*** Northern District of Georgia; ***Carlie Christensen,*** District of Utah. ***Frank W. Hunger,*** Assistant Attorney General, Civil Division. From the Torts Branch, Civil Division: ***John A. Bain, J. Patrick Glynn,*** and ***Gary Allen,*** Directors; ***JoAnn Bordeaux,*** Deputy Director; ***Lawrence Klinger,*** Assistant to the Director; ***Charles Gross,*** Assistant Director; ***James Wilson,*** Senior Aviation Counsel; ***Mary M. Leach,*** Senior Trial Counsel; ***Gail K. Johnson, Marianne Finnerty, Debra Fowler, Wendy L. Rome, Henry Miller, Michael Truscott, Colette Winston,*** and ***Jill Martindell,*** Trial Attorneys. From the Commercial Litigation Branch, Civil Division: ***Robert Hollis*** and ***Polly Dammann,*** Assistant Directors; ***Bea Witzleben, Kathy Shahan, Samuel Maizel, David Klontz, Keith Sickendick,*** and ***Steven Poliakoff,*** Staff Attorneys. From the Federal Programs Branch, Civil Division: ***Ted Hirt, Arthur Goldberg, Anne Weismann,*** and ***Susan Rudy,*** Assistant Directors; ***Scott Simpson, Margaret Plank, Tom Peebles, Margaret Hewing, Bonnie Osler,*** and ***Margot DeFerranti,*** Trial Attorneys.

Criminal Paralegal Seminar (Columbia, South Carolina)

Nancy C. Wicker, First Assistant United States Attorney, ***John McIntosh,*** Senior Litigation Counsel, ***Terry Wooten, Kelly Shackelford,*** and ***Dave Slattery,*** District of South Carolina; ***Robert Chesnut, Mark Hulkower, John T. Martin, Jan Purvis,*** Paralegal Specialist, and ***Sabrina Black,*** Paralegal Specialist, Eastern District of Virginia; ***Brandon Johnson, Michael Callaghan, John Parr,*** and ***Pamela Hudson,*** Paralegal Specialist, Southern District of West Virginia; ***Lynne Lamprecht,*** Deputy Director of Professional Development, ***Barbara Ward*** and ***Sue Johansen,*** Paralegal Specialist, Southern District of Florida; ***Mary Jane Stewart,*** Northern District of Georgia; ***Steve Sozio*** and ***Theresa Bozak,*** Paralegal Specialist, Asset Forfeiture Division, Northern District of Ohio; ***Patsy Silva,*** Paralegal Specialist, Eastern District of California; ***Elizabeth Regan,*** Paralegal Specialist, Eastern District of North Carolina; ***Peggy Martin,*** Paralegal Specialist, and ***Larry Montano,*** Systems Manager, Central District of California.

COURSE OFFERINGS

The staff of OLE is pleased to announce OLE's projected course offerings for the months of December 1993 through March 1994, for both the **Attorney General's Advocacy Institute (AGAI)** and the **Legal Education Institute (LEI)**. AGAI provides legal education programs to Assistant United States Attorneys (AUSAs) and attorneys assigned to Department of Justice divisions. LEI provides legal education programs to all Executive Branch attorneys, paralegals, and support personnel, and to paralegal and support personnel in United States Attorneys' offices.

AGAI Courses

The courses listed below are tentative only. OLE will send an announcement via Email approximately eight weeks prior to the commencement of each course to all United States Attorneys' offices and DOJ divisions officially announcing each course and requesting nominations. Once a nominee is selected, OLE funds costs for Assistant United States Attorneys only.

December 1993

Date	*Course*	*Participants*
7-10	Evidence for Experienced Litigators	AUSAs
8-10	Attorney Supervisors	Supervisory AUSAs
13-17	Criminal Federal Practice	AUSAs
14-16	Eminent Domain	AUSAs, DOJ Attorneys
14-16	Customs Fraud	AUSAs, DOJ Attorneys, Attorneys

January 1994

10-14	Advanced Civil Trial Advocacy	AUSAs, DOJ Attorneys
11-13	Securities Fraud	AUSAs

January 1994 (Cont'd.)

Date	Course	Participants
11-13	Asset Forfeiture Eleventh Circuit Component	AUSAs, Support Staff, LECC Coordinators
25-27	Civil Federal Practice	AUSAs

February 1994

7-10	Advanced Asset Forfeiture	AUSAs
7-11	Complex Prosecutions/ Advanced Grand Jury	AUSAs
7-11	Criminal Federal Practice	AUSAs
7-11	Appellate Advocacy	AUSAs
22-24	First Assistants	FAUSAs (Large Offices)
23-25	Advanced White Collar/ Financial Institution Fraud	AUSAs
28-March 11	Civil Trial Advocacy	AUSAs

March 1994

1-4	Evidence for Experienced Litigators	AUSAs
7-9	Basic Asset Forfeiture/ Money Laundering	AUSAs
14-18	Complex Prosecutions/ Advanced Grand Jury	AUSAs
21-23	Asset Forfeiture Fourth Circuit Component	AUSAs
21-Apr. 1	Criminal Trial Advocacy	AUSAs
22-24	Advanced FTCA	AUSAs

LEI Courses

LEI offers courses designed specifically for paralegal and support personnel from United States Attorneys' offices **(indicated by an * below).** Approximately eight weeks prior to each course, OLE will send an Email to all United States Attorneys' offices announcing the course and requesting nominations. The nominations are sent to OLE via FAX, and student selections are made. OLE funds all costs for paralegals and support staff personnel from United States Attorneys' offices who attend LEI courses.

Other LEI courses offered for all Executive Branch attorneys (except AUSAs), paralegals, and support personnel are officially announced via mailings, sent every four months to federal departments, agencies, and USAOs. Nomination forms must be received by OLE at least 30 days prior to the commencement of each course. A nomination form for LEI courses listed below (except those marked by an *) is attached at the Appendix of this Bulletin as Exhibit D. Local reproduction is authorized and encouraged. Notice of acceptance or non-selection will be mailed to the address typed in the address box on the nomination form approximately three weeks before the course begins. **Please note: OLE does not fund travel or per diem costs for students attending LEI courses (except for paralegals and support staff from USAOs for courses marked by an *).**

December 1993

Date	*Course*	*Participants*
13-15	Negotiation Skills	Attorneys
14	Advanced FOIA	Attorneys
14-16*	Eminent Domain for Support Staff	USAO Paralegals and Support Staff
16-17	Alternative Dispute Resolution	Agency Counsel
20	Statutes and Legislative Histories	Paralegals, Support Staff

January 1994

6	Appellate Skills	Attorneys
10-14*	Support Staff	USAO Support Staff
19-20	FOIA for Attorneys and Access Professionals	Attorneys, Paralegals
28	Legal Writing	Attorneys
31-Feb.*	Civil Paralegal	USAO Paralegals
31-Feb. 2	Trial Preparation	Attorneys

February 1994

Date	*Course*	*Participants*
3-4	NEPA	Attorneys
7-8	Federal Administrative Process	Attorneys
14	Ethics for Litigators	Attorneys
14-18	Basic Paralegal	Agency Paralegals
15-17	Banking	Attorneys
18	FOIA Forum	Attorneys
23-24*	Bankruptcy	Support Staff
25	Ethics and Professional Conduct	Attorneys

March 1994

1-3	Law of Federal Employment	Attorneys
7-11	Experienced Paralegal	Paralegals
14-15	Evidence	Attorneys
16	Introduction to FOIA	Attorneys, Paralegals
25	Legal Writing	Attorneys

OFFICE OF LEGAL EDUCATION CONTACT INFORMATION

Address: Room 10332, Patrick Henry Bldg.
601 D Street, N.W., Washington, D.C. 20530

Telephone: (202) 208-7574
FAX: (202) 208-7235
(202) 501-7334

Director	Donna Bucella
Deputy Director	David Downs
Assistant Director (AGAI-Criminal)	Charysse Alexander
Assistant Director (AGAI-Civil & Appellate)	Ron Silver
Assistant Director (AGAI-Asset Forfeiture and Debt Collection	Nancy Rider
Assistant Director (LEI)	Donna Preston
Assistant Director (LEI)	Chris Roe
Assistant Director (LEI-Paralegal & Support)	Donna Kennedy

* * * * *

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	Effective Date	Annual Rate
10-21-88	8.15%	02-14-90	7.97%	05-31-91	6.09%	09-18-92	3.13%
11-18-88	8.55%	03-09-90	8.36%	06-28-91	6.39%	10-16-92	3.24%
12-16-88	9.20%	04-06-90	8.32%	07-26-91	6.26%	11-18-92	3.76%
01-13-89	9.16%	05-04-90	8.70%	08-23-91	5.68%	12-11-92	3.72%
02-15-89	9.32%	06-01-90	8.24%	09-20-91	5.57%	01-08-93	3.67%
03-10-89	9.43%	06-29-90	8.09%	10-18-91	5.42%	02-05-93	3.45%
04-07-89	9.51%	07-27-90	7.88%	11-15-91	4.98%	03-05-93	3.21%
05-05-89	9.15%	08-24-90	7.95%	12-13-91	4.41%	04-07-93	3.37%
06-02-89	8.85%	09-21-90	7.78%	01-10-92	4.02%	04-30-93	3.25%
06-30-89	8.16%	10-27-90	7.51%	02-07-92	4.21%	05-28-93	3.54%
07-28-89	7.75%	11-16-90	7.28%	03-06-92	4.58%	06-25-93	3.54%
08-25-89	8.27%	12-14-90	7.02%	04-03-92	4.55%	07-23-93	3.58%
09-22-89	8.19%	01-11-91	6.62%	05-01-92	4.40%	08-19-93	3.43%
10-20-89	7.90%	02-13-91	6.21%	05-29-92	4.26%	09-17-93	3.40%
11-17-89	7.69%	03-08-91	6.46%	06-26-92	4.11%	10-15-93	3.38%
12-15-89	7.66%	04-05-91	6.26%	07-24-92	3.51%	11-17-93	3.57%
01-12-90	7.74%	05-03-91	6.07%	08-21-92	3.41%		

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

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EXHIBIT A

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

November 10, 1993

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: Janet Reno
Attorney General

SUBJECT: Fair Housing Litigation

As part of our efforts to improve and expand the enforcement of civil rights laws, I am asking United States Attorneys to assume responsibility for the litigation of some of the cases that our Department is required to file under the Fair Housing Act. These cases arise from investigations conducted by the Department of Housing and Urban Development.

The Fair Housing Act, 42 U.S.C. 3601 et seq., prohibits discrimination in housing on the basis of race, color, religion, sex, familial status, national origin, or handicap. Our Department shares responsibility for enforcement of the Act with HUD. Within our Department the Civil Rights Division is responsible for enforcement. We have authority to implement a pro-active enforcement program by filing lawsuits that involve a pattern or practice of unlawful discrimination, or that involve a denial of rights to any group of persons protected by the Act. 42 U.S.C. 3614. HUD's primary role is to receive and investigate individual complaints from persons who believe that they have been victims of unlawful discrimination.

HUD must investigate each complaint that the agency receives and, if the complaint cannot be resolved in a conciliation process, HUD is required to determine whether there is reasonable cause to believe that the Act has been violated. 42 U.S.C. 3610. The issuance of a "Charge of Discrimination" by HUD begins an administrative proceeding before an administrative law judge, prosecuted by HUD lawyers, to seek a remedy for the complainant. The administrative remedy can include injunctive relief, compensatory monetary damages and civil penalties. 42 U.S.C. 3612.

The Act provides an alternative to the administrative litigation process which involves the Department of Justice. Within 20 days of the issuance of the Charge, the complainant, respondent, or aggrieved person on whose behalf the complaint

was filed, may elect to have the claims asserted in the charge resolved in federal court rather than in the administrative proceeding. If such an election is made, the Department of Justice is required to file a lawsuit on behalf of the aggrieved person within 30 days. We can seek injunctive relief, compensatory monetary damages and punitive monetary damages. 42 U.S.C. 3612(a), 3612(o).

Our Department also can be called to HUD's assistance during the investigative stage. The Prompt Judicial Action provision, set out in 42 U.S.C. 3610(e), provides that HUD may authorize our Department to file "a civil action for appropriate temporary or preliminary relief pending final disposition of the complaint [within HUD]." The design of this provision is to prevent an injury from occurring while the investigation is progressing. The provision has been used, for example, to enjoin temporarily an eviction when the initial information indicates that the eviction may be a violation of the Act.

Your offices can be of assistance in litigating both "election" lawsuits and "prompt judicial action" lawsuits. Both types of lawsuits were authorized, for the first time, by the Fair Housing Amendments Act of 1988, which became effective on March 12, 1989. The number of election and prompt judicial action lawsuits has increased each year as HUD has developed its enforcement program; the number of such lawsuits filed in FY-93 was 99. The election lawsuits generally involve individual victims of discrimination, HUD already has conducted an investigation, and the facts usually are not unduly complex. Of course the lawsuits require further factual development, interviews with witnesses, discovery, settlement negotiations and normal trial procedures. While the attorneys in the Civil Rights Division's Housing and Civil Enforcement Section specialize in fair housing cases, our enforcement program can be improved, and our limited dollars stretched further, by involving your offices in the litigation of at least some of these nondiscretionary lawsuits.

Prompt judicial action lawsuits also seem well suited for United States Attorney offices. By nature, these cases are emergencies necessitating very quick action. Knowledge of local procedures for seeking temporary and preliminary relief is essential.

The increase in the number of election and prompt judicial action lawsuits has burdened our Civil Rights Division particularly since the entire Division operates out of our headquarters. I recognize that your resources also are thin, but I do not expect this assignment to tax you significantly. The cases arise from many areas of the country and the number to

be filed in most federal judicial districts is very small. Also, some of the election and prompt judicial action lawsuits will continue to be litigated by the Civil Rights Division; when your office is responsible for litigation, the Civil Rights Division will provide assistance.

The Assistant Attorney General for the Civil Rights Division will continue to have responsibility for our enforcement of the Fair Housing Act and will, in consultation with the United States Attorneys, determine the litigation responsibility for each HUD case. The primary considerations for assignment will be whether the headquarters staff or the local office can litigate the case more efficiently and effectively and whether the assignment will unduly burden your offices. Accordingly, the Division will generally retain responsibility for certain types of lawsuits that experience has shown can be particularly time-consuming. These lawsuits include those that usually require extensive fact development or extensive briefing of legal issues because the particular area of the law has not yet been fully developed. Of course, if your office has a particular interest in handling a particular case or type of case, the Division will work with you in allocating some of these cases to your office. On a periodic basis the implementation of the case assignment program will be reviewed by the Attorney General's Advisory Committee and the Assistant Attorney General for Civil Rights.

This sharing of responsibility is designed to make the most effective use of the resources of our headquarters and local staffs, but it is not designed to limit your participation. If your staff develops the expertise in the fair housing area, your participation can be greater. Also, if you face serious resource limitations, you can request additional assistance from the Civil Rights Division.

The cases that I am asking you to litigate require prompt attention -- we are required to file the election lawsuit within 30 days of the election -- and we must implement procedures ensuring an orderly assignment and review of the cases. The Civil Rights Division receives notice of elections from the Chief Administrative Law Judge at HUD. I have directed the Division to make an immediate determination regarding litigation responsibility and to notify your office by telephone or facsimile that same day if possible. We expect that you will have notice of your responsibility no later than two or three days of the election. You will also be informed immediately of any election cases that are proposed to be retained by the Civil Rights Division.

Division personnel will assist you in obtaining the HUD file. We ask that your staff prepare a brief memorandum addressed to the Assistant Attorney General for the Civil Rights Division describing the facts of the case and the legal basis for the lawsuit; you should also provide a copy of the complaint that you propose to file. The Assistant Attorney General must authorize the filing of the lawsuit, but it is not necessary that he or she sign the complaint. Of course, we are required by statute to file these lawsuits, but we also have an obligation to ensure that the filing would not contravene Rule 11 of the Federal Rules of Civil Procedure and would not otherwise contradict the litigation policies of the United States. If you believe that a filing would contravene Rule 11, you should immediately raise this concern with the Division. The primary purpose of Division review, however, is to ensure uniformity in the implementation of our enforcement program throughout the United States. For the same reasons, we ask that you notify the Division for any proposed settlement of the lawsuit.

As noted earlier, the Division can assist you in carrying out your litigation responsibilities. The Division has implemented the amended Fair Housing Act for four years, and likely has addressed many of the issues that will be presented to you for litigation. Model pleadings and briefs will be available, and in emergency situations Division personnel will be available to prepare pleadings or briefs to be filed in your cases. The Division's assistance may be particularly helpful in prompt judicial action matters since we must act very quickly, often within a day or two, to prevent an injury to be occasioned by an act of housing discrimination.

This delegation of litigation responsibility will be effective on December 1, 1993. An appropriate amendment to the United States Attorneys' Manual will be delivered to you soon.

I thank you for your participation in our fair housing enforcement program. Congress has given us a strong fair housing law. National studies demonstrate that unlawful housing discrimination remains a serious problem in our country. We must use all tools available to us to erase this national disgrace, and we can do that most effectively if both our headquarters and local offices work together to address the issues.

U.S. Department of Justice

Office of Legal Counsel

EXHIBIT B

Office of the
Assistant Attorney General

Washington, D.C. 20530

October 18, 1993

MEMORANDUM FOR CARY H. COPELAND
Director and Chief Counsel
Executive Office for Asset Forfeiture

Re: Liability of the United States for State and Local Taxes on Seized and Forfeited Property

You have asked us to reconsider our opinion that property seized by and forfeited to the United States is not subject to state or local taxation for the period between the commission of the offense that leads to the order of forfeiture and the entry of the order of forfeiture. See Liability of the United States for State and Local Taxes on Seized and Forfeited Property, 15 Op. O.L.C. 85 (1991) (preliminary print) ("Harrison Memorandum"). In light of the Supreme Court's decision in United States v. 92 Buena Vista Ave., 113 S. Ct. 1126 (1993), we partially reverse our opinion.

Because states and localities may not tax federal property (absent express congressional authorization),[1] the time at which ownership of forfeited property passes to the United States and the extent of the ownership interest that passes to the United States determine whether state and local taxes are owed. In many property transactions, the time and the extent of transfer of ownership are unambiguous and independent issues. In cases of transfers of ownership under the federal forfeiture statutes, however, the answer to the question of when ownership is transferred has been a matter of dispute, and of great consequence for the extent of the interest transferred.

The Harrison Memorandum expresses the Justice Department's traditional view that title vests in the United States at the

[1] See, e.g., United States v. City of Detroit, 355 U.S. 466, 469 (1958) ("a State cannot constitutionally levy a tax directly against the Government of the United States or its property without the consent of Congress."); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

time of the offense. This view is based on an interpretation of the "relation back" doctrine, which provides that a judicial order of forfeiture retroactively vests title to the forfeited property in the United States as of the time of the offense that leads to forfeiture, not as of the time of the judicial order itself. See 21 U.S.C. § 881(h) ("[a]ll right, title, and interest in property [subject to forfeiture] shall vest in the United States upon commission of the act giving rise to forfeiture . . . ."); 18 U.S.C. § 1963(c), 21 U.S.C. § 853(c) (substantially identical to quoted language from 21 U.S.C. § 881(h)). Under the Department's traditional interpretation, title in forfeited property vests in the federal government at the time of the offense. The date of the judicial order of forfeiture is not significant. From the date of the offense, states and other parties are barred from acquiring interests in the property from the owner whose interests are forfeited to the United States. See In re One 1985 Nissan, 889 F.2d 1317, 1319-20 (4th Cir. 1989); Eggleston v. Colorado, 873 F.2d 242, 245-48 (10th Cir. 1989), cert. denied, 493 U.S. 1070 (1990) (cases decided before Buena Vista and consistent with the Harrison Memorandum).

The Harrison Memorandum considers and rejects several possible grounds for limiting the operation of the relation back doctrine and requiring payment of state and local tax liens for the period between the offense and the forfeiture order. The two grounds of principal concern here are the "innocent owner" defense in the civil drug forfeiture statute, see 21 U.S.C. § 881(a)(6)[2], and the "bona fide purchaser" defense in the criminal drug forfeiture statute, see 21 U.S.C. § 853(c), and in the forfeiture provision of the RICO statute, see 18 U.S.C. § 1963(c). The Harrison Memorandum concludes that these defenses do not protect a state or locality (or anyone else) who innocently acquires a property interest after the time of the offense. The Supreme Court's decision in Buena Vista forces us to reconsider this conclusion. We conclude that the Harrison Memorandum's conclusion concerning the innocent owner defense must be reversed, but that the Harrison Memorandum's conclusion regarding the bona fide purchasers defense is correct (although this latter conclusion is less certain than the Harrison Memorandum indicates and we reach it through an analysis different from that set forth in the Harrison Memorandum).

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[2] The conclusions with regard to section 881(a)(6), the innocent owner provision immediately at issue in Buena Vista and applicable to all "things of value" traceable to an exchange for a controlled substance, also apply to section 881(a)(7), which contains a nearly identical innocent owner provision applicable to real property used in a drug offense. See notes 3, 7, infra.

I.

The civil drug forfeiture statute provides that "no property shall be forfeited . . . , to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." 21 U.S.C. § 881(a)(6). The Harrison Memorandum accepted that "owner" could include a state or locality holding a tax lien on the property. See Harrison Memorandum, 15 Op. O.L.C. at 88 (preliminary print). The Memorandum concluded, however, that this "innocent owner" provision does not apply to asserted property interests that arise after the time of the offense because, as of the moment of the offense, the property belongs (by operation of the relation back doctrine) to the United States, and not to the person from whom a third party innocently acquires an interest.

We conclude, consistent with the Harrison Memorandum, that a state or locality holding a tax lien can be an "owner" as that term is defined in the civil forfeiture statute's innocent owner provisions. The broad language of the statute -- "[a]ll . . . things of value" and "[a]ll real property, including any right, title and interest" -- provides no reason to exclude a tax lien-holder from the definition of "owner." 21 U.S.C. § 881(a)(6), (7). The legislative history urges a broad reading.[3] And the courts have followed, sometimes explicitly, the path suggested by Congress.[4] The "innocence" requirement of

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[3] See Joint Explanatory Statement of Titles II and III, 95th Cong., 2d Sess. (1978), reprinted in 1978 U.S.C.C.A.N. 9522 (in section 881(a)(6), "[t]he term 'owner' should be broadly interpreted to include any person with a recognizable legal or equitable interest in the property seized"); see also S. Rep. No. 225, 98th Cong., 2d Sess. 195, 215 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3378, 3398 (describing section 881(a)(7) as, in effect, extending section 881(a)(6) to cover real property used in a drug offense but not acquired with proceeds of prohibited drug transactions).

[4] See, e.g., United States v. 717 S. Woodward St., 1993 U.S. App. Lexis 21051 at *15 (3d Cir. Aug. 20, 1993) (citing legislative history); United States v. 6960 Miraflores Ave., 995 F.2d 1558, 1561 (11th Cir. 1993) ("Lien holders have the right to assert their claims of innocent ownership" under section 881(a), as interpreted in Buena Vista); United States v. 6109 Grubb Rd., 886 F.2d 618, 625 n.4 (3d Cir. 1989) (cited in Buena Vista and citing legislative history); see also United States v. 2350 N.W. 187 St., 996 F.2d 1141 (11th Cir. 1993) (Buena Vista analysis of section 881(a) innocent owner provisions assumed to apply where purported innocent owner is local tax lien holder).

an innocent owner defense would seem to be easy to satisfy in most cases. Like an innocent donee or purchaser, a state or locality holding a tax lien generally has obtained its interest without knowledge of the offense giving rise to the forfeiture.

The Harrison Memorandum's further conclusion with regard to the innocent owner defense, however, cannot survive the ruling in Buena Vista. The plurality and concurring opinions reject the interpretation of the relation back doctrine set forth in the Harrison Memorandum, and agree that the innocent owner defense is available to persons who acquire interests in forfeitable property after the commission of the offense that rendered the property subject to forfeiture. The opinions differ only as to the reading of the statute that leads to this result.

The plurality and the concurrence both analyze the common law doctrine of relation back as transferring ownership of forfeited property retroactively to the date of the offense, but only upon the entry of a judgment of forfeiture. Until a court issues such a judgment, this retroactive vesting of ownership in the United States does not occur, and all defenses to forfeiture that an owner of the property otherwise may invoke will remain available. Thus, a person who has acquired an interest in the property may raise any such defense in a forfeiture proceeding. If that person prevails, a judgment of forfeiture will not vest (retroactively) ownership of that property interest in the United States. Buena Vista, 113 S. Ct. at 1135-36, 1137 (plurality opinion), 1138-39 (Scalia, J., concurring).

The plurality and the concurrence both conclude that the federal civil forfeiture statute is fully compatible with the common law, and that the statutory innocent owner clause provides a defense for a third party who innocently acquires ownership of the property after the offense and before a judgment of forfeiture. The plurality notes that section 881(h), which sets forth the relation back doctrine for the civil forfeiture statute, applies that doctrine only to "property described in subsection (a) of this section." Subsection (a)(6) excepts, from its description of forfeitable property, the property of an innocent owner. Therefore, in the plurality's analysis, subsection (a) places the property of an innocent owner beyond the reach of the forfeiture and relation back provisions in subsection (h). See Buena Vista, 113 S. Ct. at 1136-37. Accordingly, an ownership interest in forfeitable property that is transferred to an innocent person (after the offense giving rise to forfeiture) does not vest in the United States as of the time of the offense. Indeed, it does not vest in the United States at all.

Interpreting the civil forfeiture statute as a more

straightforward codification of common law doctrine,[5] the concurrence reads the phrase, in subsection (h), "'shall vest in the United States upon commission of the act giving rise to forfeiture'" as meaning "'shall vest in the United States upon forfeiture, effective as of commission of the act giving rise to forfeiture.'" Buena Vista, 113 S. Ct. at 1140 (Scalia, J., concurring).[6] The result, of course, is the same as under the plurality's analysis: a property interest innocently acquired after the offense is not forfeited to the United States if an owner asserts the interest in a proper and timely way, before the entry of a forfeiture judgment.

In sum, we reverse the Harrison Memorandum's conclusion that the innocent owner defense, set forth in 21 U.S.C. § 881(a), does not protect state and local claims for tax liabilities arising between the time of an offense rendering property subject to forfeiture and the issuance of a court order of forfeiture.[7]

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[5] The concurrence specifically rejects the plurality's reading of the phrase, in subsection (h), "property described in subsection (a)" as meaning, in effect, "property forfeitable under subsection (a)." The concurrence stresses that subsection (h) refers to "property described in subsection (a)," not property deemed forfeitable under subsection (a). Since subsection (a) describes property generally and does not declare that property that cannot be forfeited is not "property," the "property described in subsection (a)" refers to all relevant property interests, including those of innocent owners. Buena Vista, 113 S. Ct. at 1139 (Scalia, J., concurring).

[6] The concurrence "acknowledge[s] that there is some textual difficulty with th[is] interpretation," but argues, first, that the imprecision imputed to the quoted language in subsection (h) is to be expected "in a legal culture familiar with retroactive forfeiture" and, second, that the civil forfeiture statute as a whole, including subsection (d) and its adoption of forfeiture procedures applicable under 19 U.S.C. § 1602 et seq., does not make sense if one rejects the concurrence's reading of subsection (h) (and the plurality's reading of subsections (a) and (h)). Buena Vista, 113 S. Ct. at 1140 (Scalia, J., concurring).

[7] The local tax lien cases decided by lower courts since the Supreme Court's decision in Buena Vista do not alter our conclusion. In 2350 N.W. 187 St., 996 F.2d 1141, the court vacated the judgments in two cases in which the district courts had relied on the interpretation of the relation back doctrine described in the Harrison Memorandum, and had granted summary judgment against a county invoking the innocent owner defense in 21 U.S.C. § 881(a)(6), (7) to assert liens for property taxes owed for some of the period between an offense giving rise to

II.

The two federal criminal forfeiture statutes addressed in the Harrison Memorandum do not contain an innocent owner defense. Those statutes, however, do provide protection for a "transferee [who] establishes in a hearing [to 'amend' an order of forfeiture] that he is a bona fide purchaser for value of [the] property [subject to criminal forfeiture] who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture . . . ." 21 U.S.C. § 853(c); 18 U.S.C. § 1963(c) (same). The Harrison Memorandum concluded that this statutory "bona fide purchaser" defense is not available to a state or locality asserting a lien for tax liability incurred after the offense that made the property subject to forfeiture.

We conclude, consistent with the apparent assumption of the Harrison Memorandum, that such tax liens are "property" or an "interest" in property under the two criminal forfeiture statutes. Both statutes define property broadly, as including all "real property" and all "tangible and intangible personal property, including rights, privileges, interests, claims and securities." 21 U.S.C. § 853(b); 18 U.S.C. § 1963(b) (same);

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forfeiture and the entry of a judgment of forfeiture. The appellate court remanded the cases for further consideration in light of the Supreme Court's decision in Buena Vista.

In United States v. 7501 S.W. Virginia St., No. 92-921-BE (D. Ore. Aug. 3, 1993), the district court held that a county asserting a lien, for taxes accruing after the offense, in a forfeiture proceeding was an innocent owner under section 881(a)(6), but that the relation back doctrine had vested the title in the United States as of the date of the offense and therefore precluded payment of the tax lien. To support this conclusion, the court quoted the plurality's statement in Buena Vista that "[o]ur decision denies the Government no benefits of the relation back doctrine." Slip op. at 6 (quoting Buena Vista, 113 S. Ct. at 1137). The court has taken this quotation out of context, interpreting it as meaning, in effect, "our decision denies the Government no benefits of the relation back doctrine as is it had been understood, erroneously, in the case law that Buena Vista rejects." The district court simply misunderstands or ignores the Supreme Court's holding. This misinterpretation does not appear to be widely shared by courts applying the Buena Vista analysis of the relation back doctrine in analogous contexts. See, e.g., United States v. Daccarett, 1993 U.S. App. Lexis 23418 at *42-43 (2d Cir. Sept. 10, 1993); United States v. 41741 Nat. Trails Way, 989 F.2d 1089, 1091 (9th Cir. 1993); 2350 N.W. 187 St., 996 F.2d 1141; United States v. One 1990 Lincoln Town Car, 817 F. Supp. 1575, 1579-80 (N.D. Ga. 1993).

see also 21 U.S.C. § 853(c), (n)(6); 18 U.S.C. § 1963(c), (l)(6) (forfeiture and bona fide purchaser defense provisions referring to "interest" in such property). The legislative history and the courts' application of this statutory language also suggest a definition of property interests broad enough to include state and local tax liens on real property.[8]

The Harrison Memorandum suggests two arguments -- one based on the relation back doctrine and another based on the definition of bona fide purchaser -- to support its conclusion that the bona fide purchaser defense does not extend to holders of property interests that consist of liens for state and local taxes for the period after the offense and before a judgment of forfeiture.

A.

The Harrison Memorandum's central argument concerning the relation back doctrine addresses the bona fide purchaser defense no less than the innocent owner defense. See Harrison Memorandum, 15 Op. O.L.C. at 88 (preliminary print). On the interpretation set forth in the Harrison Memorandum, the United States has owned the property since the commission of the offense giving rise to the criminal forfeiture, and no one, including a bona fide purchaser, can later acquire any interest from the former owner.

Although the question is a closer one than in the civil forfeiture context, we conclude that the Supreme Court's decision in Buena Vista rejects this argument as well.[9] We recognize

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[8] See S. Rep. No. 225 at 193, reprinted in 1984 U.S.C.C.A.N. at 3376 (section enacting current 18 U.S.C. § 1963(c) and 21 U.S.C. § 853(c) "allows the use of criminal forfeiture as an alternative to civil forfeiture in all drug felony cases"); id. at 211, reprinted in 1984 U.S.C.C.A.N. at 3394 (property defined as subject to criminal forfeiture under 18 U.S.C. § 1963(a) and 21 U.S.C. § 853(a) is equivalent to property subject to civil forfeiture under 21 U.S.C. § 881(a)); United States v. Reckmeyer, 836 F.2d 200, 205 (4th Cir. 1987) (unsecured creditor who has reduced his claim to judgment and acquired a lien could seek an amendment to a forfeiture order under 21 U.S.C. § 853(n)); United States v. Robinson, 721 F. Supp. 1541, 1545 (D.R.I. 1989) (a leasehold interest ordinarily is a real property interest within the definition in 21 U.S.C. § 853(b)); see also United States v. Monsanto, 491 U.S. 600, 606-09 (1989) (noting breadth of forfeitable property under 21 U.S.C. § 853(a)).

[9] Cf. United States v. Harry, 1993 U.S. Dist. Lexis 11999 at *21-27 (E.D. Iowa May 6, 1993) (drawing on Buena Vista discussion of innocent owners to resolve bona fide purchaser

that the plurality's holding is based on a reading of the civil forfeiture statute (and its innocent owner provisions) and does not address the criminal forfeiture statutes (and their bona fide purchaser provisions). That holding also does not require the plurality to adopt the interpretation of the common law relation back doctrine that the opinion sets forth. Nonetheless, the plurality's discussion of the common law doctrine makes clear that it agrees with the concurrence that the relation back doctrine vests ownership retroactively in the United States only upon entry of a final judgment of forfeiture. Under that reading, if a state or locality establishes that it is a "bona fide purchaser" of an interest in the property by virtue of a tax lien, and does so before a court orders forfeiture, the order of forfeiture will not extend to the lien-holder's interest and, therefore, will not vest title to that interest in the United States.[10]

We also recognize that the concurrence in Buena Vista suggests that the relation back doctrine precludes a bona fide purchaser defense under the criminal statutes where it allows an innocent owner defense under the civil statute. As the concurrence points out, the criminal forfeiture statutes establish a procedure by which a person asserting a bona fide purchaser defense raises that defense after the court has entered an order of forfeiture. See 21 U.S.C. § 853(n); 18 U.S.C. § 1963(l). In contrast, the civil forfeiture process (on both the plurality's and the concurrence's reading) contemplates that a person asserting an innocent owner defense will do so before the court enters an order of forfeiture. As the concurrence sees it, in the former case, the court order already has vested title retroactively in the United States (effective as of the date of the offense) before the "transferee" asserts a claim to be a bona fide purchaser. In the latter case, however, the court will not yet have issued the order vesting title retroactively when the "owner" asserts an innocent owner claim. (The concurrence argues that the civil statute's use of the term "owner" and the criminal statutes' use of "transferee" reflects this distinction and suggests its significance.) On this view, if a transferee's claim to be a bona fide purchaser succeeds and the court amends

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issue under the criminal forfeiture statute).

[10] This conclusion would follow rather simply from the Court's analysis in Buena Vista when the state or locality asserts its bona fide purchaser defense at or before the proceedings in which the court issues an order of forfeiture. The conclusion is less certain under the procedure set forth in the criminal forfeiture statutes, which provides for assertion of bona fide purchaser claims at a hearing held after the court issues an initial order of forfeiture. The remainder of this subsection addresses this issue.

the order of forfeiture, the amendment does not void, retroactively, the initial retroactive vesting of title in the United States. The amendment to the initial order of forfeiture simply effects a new transfer of title to the bona fide purchaser, leaving undisturbed the United States' ownership from the time of the offense to the time of the amendment to the forfeiture order. See Buena Vista, 113 S. Ct. at 1141 (Scalia, J., concurring).

The Buena Vista concurrence fails to establish, however, that the criminal forfeiture statutes' bona fide purchaser defense does not protect liens for state and local tax liabilities incurred after the offense giving rise to the forfeiture. Only the concurrence advances the argument. The plurality does not join in it, and nothing in the dissenting opinion suggests that the dissenters would adopt the concurrence's views.

Further, the concurrence's argument reads too much into the actual, multi-step procedures by which a court adjudicates a criminal forfeiture claim. It thereby overlooks -- or confuses those procedures with -- the more fundamental legal (and fictional) process through which a retroactive transfer of ownership occurs. The better interpretation of the criminal forfeiture statutes is that the procedures of entering an order of forfeiture, holding a hearing at which transferees assert claims to be bona fide purchasers, and amending the order of forfeiture upon successful presentation of such a claim are but phases in a single (if protracted) process for determining what property interest vests, retroactively, in the United States when the court enters its final, amended order of forfeiture. The entire process is the equivalent of the single order of forfeiture in the civil context.

This interpretation fits more easily with the statutory language, especially when that language is read in light of the discussion in Buena Vista of common law relation back doctrine. The criminal forfeiture statutes provide that title in property subject to forfeiture "shall be ordered forfeited to the United States unless the transferee establishes" that he is a bona fide purchaser for value, and that "the United States shall have clear title to [the] property" only "following the court's disposition of all petitions" filed by transferees asserting claims to be bona fide purchasers. 21 U.S.C. § 853(c), (n)(7); 18 U.S.C. § 1963(c), (l)(7) (emphasis added). Such language would seem to suggest that the United States never obtains title from a bona fide purchaser, not that the United States first obtains title and then must give it back. Only after the entry of the final, amended order of forfeiture would ownership vest retroactively in

the United States.[11]

This conclusion also avoids an incongruity that the concurrence's interpretation would create: an innocent owner (under the civil statute) would owe state and local taxes from the moment he or she acquired the property, but a bona fide purchaser for value (under the criminal statutes) would not owe taxes from the time he or she acquired the property until the time the court amended the order of forfeiture.

Finally, the conclusion we reach also is consistent with the statutory distinction between "owner" and "transferee." A person claiming to be a bona fide purchaser is nothing more than a transferee until he or she establishes to the court that he or she is a bona fide purchaser (whether the transferee does so after an initial forfeiture order, as the statute contemplates, or at some earlier stage). Only after the transferee has made this showing is he or she recognized as an owner (indeed, an innocent owner) of a particular type. Similarly, a person claiming to be an innocent owner is recognized as an innocent owner only after he or she proves to the court that he or she meets the standards of innocent ownership. Before that, such a person is, in the eyes of the court, merely a transferee. The civil forfeiture laws simply do not address or refer explicitly to those who assert, but have not yet established, that they are innocent owners.

For these reasons, we do not believe that the concurrence's discussion of the legal significance of the differences between the civil and criminal forfeiture statutes (which, in any case, is unnecessary to its conclusions) is correct.

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[11] Although the statutory language does not fit perfectly with the interpretation adopted here, somewhat imprecise drafting concerning the sequence of events leading to a retroactive vesting of title is, as the Buena Vista concurrence points out, perhaps to be expected in a legal culture familiar with retroactive vesting. See Buena Vista, 113 S. Ct. at 1140 (Scalia, J., concurring).

Moreover, the legislative history of the criminal forfeiture provisions also seems to support the interpretation set forth in this Memorandum. It refers to bona fide purchaser claims, raised after the initial forfeiture order, as "in essence, . . . challenges to the validity of the order of forfeiture," and, when successful, as "render[ing] that portion of the order of forfeiture reaching [the bona fide purchaser's] interest invalid." S. Rep. No. 225 at 208, reprinted in 1984 U.S.C.C.A.N. at 3391 (emphasis added).

B.

The Harrison Memorandum also states that state and local tax authorities cannot "qualify as bona fide purchasers for value" under the criminal forfeiture statutes. Harrison Memorandum, 15 Op. O.L.C. at 88 (preliminary print). The Memorandum does not set forth the basis for this conclusion. The Buena Vista plurality and concurrence have nothing to say about this issue and, thus, do not require a reversal of the Harrison Memorandum. Although the matter is not free from doubt, we believe that the stronger argument is that state and local tax lien-holders are not "bona fide purchasers."

The courts have not adopted a clear and uniform view of how to interpret "bona fide purchaser" under the criminal forfeiture statutes. See, e.g., United States v. Lavin, 942 F.2d 177, 182-89 (3d Cir. 1991) (bona fide purchaser acquires interest through volitional, advertent and, generally, commercial transaction; victim of embezzlement acquired interest through unwitting and inadvertent tortious action of another and therefore was not a bona fide purchaser); United States v. Reckmeyer, 836 F.2d 200, 206-08 (4th Cir. 1987) (bona fide purchaser includes a general, unsecured creditor of defendant who gave value to defendant in arms'-length transaction with expectation that he would receive equivalent value in the future, and whose interest must have been in some part of the forfeited property because debtor's entire estate had been forfeited); cf. United States v. Campos, 859 F.2d 1233, 1237-38 (6th Cir. 1988) (general, unsecured creditor is not a bona fide purchaser, because he does not have a legal interest in the forfeited property); Torres v. $36,256.80 U.S. Currency, 1993 U.S. Dist. Lexis 9107 at *19-23 (S.D.N.Y. July 7, 1993) (similar to Campos; also pointing out significance, for general, unsecured creditor, of unusual circumstance in Reckmeyer that entire estate had been seized); United States v. Mageean, 649 F. Supp. 820, 824, 829 (D. Nev. 1986) (definition of bona fide purchaser cannot be "stretch[ed]" to include tort claimants, but "there is no reason that a good-faith provider of goods and services," although an unsecured creditor, "cannot be a bona fide purchaser"), aff'd without opinion, 822 F.2d 62 (9th Cir. 1987); see also United States v. 3181 S.W. 138th Place, 778 F. Supp. 1570, 1574-75 (S.D. Fla. 1991) (civil forfeiture case stating that locality is not bona fide purchaser by virtue of tax lien), vacated on other grounds, 996 F.2d 1141 (11th Cir. 1993); S. Rep. No. 225 at 201, 209, reprinted in 1984 U.S.C.C.A.N. at 3384, 3391.

We are aware of no case that has decided the precise question at issue here. We acknowledge that some of the claims that courts have rejected are weaker than those presented by tax liens, and that at least one court has pointed to a primary purpose of the criminal forfeiture statutes' relation back

provisions that would not be served by denying the bona fide purchaser defense to holders of liens for state and local taxes. See Reckmeyer, 836 F.2d at 208 ("Congress's primary concern in adopting the relation-back provision was to make it possible for courts to void sham or fraudulent transfers that were aimed at avoiding the consequences of forfeiture"). Nonetheless, we have found no authority that has construed bona fide purchaser broadly enough to encompass such a tax lien-holder.

A state or locality does provide something of value, in the form of government services, in return for the interest it acquires in property (ultimately in the form of a lien) by virtue of its taxing authority. This exchange, however, does not fit the transactional, arms'-length exchange of values contemplated in the case law and suggested by the statutory phrase "bona fide purchaser for value."[12]

Therefore, we do not reverse the Harrison Memorandum's conclusion that the bona fide purchaser provisions cannot be relied upon to require payment of state and local tax liens.[13]

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[12] See, e.g., Lavin, 942 F.2d at 185-86 (Congress derived bona fide purchaser exception "from hornbook commercial law" principle of protecting the "innocent purchaser for valuable consideration" which had developed at common law "in order to promote finality in commercial transactions and thus to . . . foster commerce"); Reckmeyer, 836 F.2d at 208 (scope of bona fide purchaser provision "construed liberally" is to protect "all persons who give value to the defendant in an arms'-length transaction with the expectation that they would receive equivalent value in return").

[13] The Harrison Memorandum also found that payment of liens for state and local taxes, accruing after the offense, was not within the Attorney General's discretionary authority under 28 U.S.C. § 524(c)(1)(D) ("payment of valid liens . . . against property that has been forfeited") or 28 U.S.C. § 524(c)(1)(E) (payments "in connection with remission or mitigation procedures relating to property forfeited"). We reach the same conclusion through a different analysis. A tax lien-holder who establishes that he or she is an innocent owner under the civil forfeiture statute or a bona fide purchaser under the criminal statutes is protected from the operation of the relation back doctrine, and need not rely on the Attorney General's discretionary payment of a valid lien or remission or mitigation of a forfeiture that has not occurred with respect to the lien-holder's interest. See S. Rep. No. 225 at 207-08, 217, reprinted in 1984 U.S.C.C.A.N. at 3390-3391, 3400; Lavin, 942 F.2d at 185 (bona fide purchaser provisions designed to require protection previously left to discretion of Attorney General). If the tax lien-holder fails to establish that he or she is protected by one of these defenses to

III.

For the reasons set forth above, we reach the following conclusions: In civil forfeiture proceedings (under 21 U.S.C. § 881), the United States may -- and, indeed, must -- pay liens for state and local taxes accruing after the commission of the offense leading to forfeiture and before the entry of a judicial order of forfeiture, if the lien-holder establishes, before the court enters the order of forfeiture, that it is an innocent owner of the interest it asserts. In criminal forfeiture proceedings (under 18 U.S.C. § 1963 or 21 U.S.C. § 853), however, the United States may not pay such liens because state and local tax lien-holders are not bona fide purchasers for value of the interests they would assert, and therefore do not come within any applicable exception to a statute that, upon entry of a court's final order of forfeiture, vests full ownership retroactively in the United States as of the date of the offense.

Please let us know if we may be of further assistance.

Walter Dellinger
Assistant Attorney General

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forfeiture, there can be no "valid lien" for taxes to be paid and no forfeited interest (in the form of tax liabilities) for the Attorney General to "remi[t] or mitigat[e]." Because ownership of the property will have vested in the United States as of the commission of the offense, state and local authorities cannot (absent a congressional waiver of immunity from state and local taxation that we do not find in 28 U.S.C. § 524 or elsewhere) levy taxes on such property after the date of the offense any more than they could levy taxes on a federal courthouse or post office.

Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

EXHIBIT C

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VOLUME 6 • NUMBER 6 • NOVEMBER 29, 1993

Offense Conduct

CALCULATING WEIGHT OF DRUGS

Tenth Circuit affirms converting powdered cocaine into cocaine base for sentencing where facts showed that object of the conspiracy was to convert powder to crack. Defendant was convicted of eleven drug-related counts, including conspiracy to distribute cocaine base, distribution of cocaine, and manufacture of cocaine base. The presentence report stated that defendant had distributed both cocaine powder and cocaine base. In determining what amounts and kinds of cocaine to attribute to defendant for sentencing, the probation officer concluded that the intent of the conspirators was to distribute the cocaine as cocaine base, and recommended converting the amount of powdered cocaine involved to cocaine base. The sentencing court agreed, finding that the conspirators routinely converted powder cocaine to crack and provided "cooking" instructions for coconspirators when necessary. The court sentenced defendant based on the quantity of cocaine base—after the conversion—ultimately distributed, and defendant appealed.

The appellate court affirmed: "According to U.S.S.G. 2D1.4 (1991) [now consolidated into § 2D1.1], '[i]f a defendant is convicted of a conspiracy or an attempt to commit an offense involving a controlled substance, the offense level shall be the same as if the object of the conspiracy or attempt had been completed.' The district court made the factual determination that the cocaine powder involved in the conspiracy was routinely converted to crack. The eventual conversion was foreseeable to, if not directed by, Mr. Angulo-Lopez. Under the Guidelines, it is proper to sentence a defendant under the drug quantity table for cocaine base if the record indicates that the defendant intended to transform powdered cocaine into cocaine base. . . . The record supports the district court's findings that Mr. Angulo-Lopez intended the powdered cocaine to be converted into crack."

See also U.S. v. Paz, 927 F.2d 176, 180 (4th Cir. 1991) (where "a defendant is convicted of conspiracy to manufacture crack, but the chemical seized was cocaine, the district court must . . . approximate the total quantity of crack that could be manufactured from the seized cocaine"); *U.S. v. Haynes*, 881 F.2d 586, 592 (8th Cir. 1989) (for defendant convicted of conspiracy to distribute cocaine, evidence supported finding that defendant sold crack, not cocaine powder, and it was proper to convert seized powder cocaine and currency into crack cocaine for sentencing).

U.S. v. Angulo-Lopez, No. 92-6370 (10th Cir. Oct. 26, 1993) (Brorby, J.).

See *Outline* at II.B.3.

DRUG QUANTITY—MANDATORY MINIMUMS

U.S. v. Watch, No. 91-8671 (5th Cir. Nov. 5, 1993) (Barbour, Chief Dist. J.) (Vacating defendant's conviction, remanding for repleading: District court violated Fed. R. Crim. P. 11 by not informing defendant that, although his indictment purposely omitted alleging drug quantity in order to avoid the mandatory minimum sentences under 21 U.S.C. § 841(b), he could still be subject to a mandatory term after the Guidelines' calculation of quantity. "Because statutory minimum sentences are incorporated in the quantity-based Guidelines, the government is prevented from avoiding application of the statutory minimum sentences prescribed in § 841(b)(1)(A) and (B) by simply failing to include a quantity allegation in an indictment or information in hopes of having the less severe penalty range of § 841(b)(1)(C) applied by default. The failure to include a quantity allegation in an indictment or information has no effect whatsoever on the determination of the appropriate sentence under the Guidelines."

"At the time of Watch's guilty plea, he was not guaranteed application of the sentence range provided for in § 841(b)(1)(C), as represented by the government and accepted by the district court, because the quantity of drugs involved in the offense had yet to be determined. While the district court was not required to calculate and explain the applicable sentence under the Guidelines before accepting Watch's guilty plea . . . . we find that the district court was required to inform Watch of any possible statutorily required minimum sentences he might face as a result of application of the quantity-based Guidelines. . . . The practical consequence of this determination is that a prudent district judge hearing a plea from a defendant charged under an indictment or information alleging a § 841(a) violation but containing no quantity allegation may simply walk a defendant through the statutory minimum sentences prescribed in § 841(b), explaining that a mandatory minimum may be applicable and that the sentence will be based on the quantity of drugs found to have been involved in the offense with which the defendant is charged.").

See *Outline* at II.A.3 and IX.A.2.

Departures

SUBSTANTIAL ASSISTANCE

Ninth Circuit affirms sentence below statutory minimum in absence of substantial assistance motion as remedy for government's breach of plea agreement. Defendant pled guilty to a drug count under an agreement with the government. In exchange for defendant's cooperation in providing information and testifying against his cousin, the government agreed to inform the district court of his cooperation and "to recommend to the sentencing court that defendant be sentenced to the minimum period of incarceration required by the Sentencing Guidelines." Defendant's guideline range was 41–51 months, but he was sentenced to the applicable five-year mandatory minimum after the government refused to move under 18 U.S.C. § 3553(e) for a lower sentence. Defendant did not appeal, but later moved under 28 U.S.C.

§ 2255 to vacate his conviction or correct his sentence. The district court found that the government had breached the plea agreement by not making a § 3553(e) motion and that its continued refusal to recommend departure was in bad faith. The court changed defendant's sentence to 41 months, which it concluded was the sentence called for by the plea agreement.

The appellate court affirmed. The issue here was "what the defendant reasonably understood to be the terms of the agreement when he pleaded guilty.... As with other contracts, provisions of plea agreements are occasionally ambiguous; the government 'ordinarily must bear responsibility for any lack of clarity.'" The term "minimum period of incarceration required by the Sentencing Guidelines" was ambiguous because it could be taken to mean the computed guideline range or, as the government argued, the mandatory minimum term, which under § 5G1.1(b) becomes "the guideline sentence."

The appellate court was also persuaded by the fact that, to accept the government's position, it would have to conclude that defendant agreed to cooperate in exchange for no benefit. At the time of the agreement all the sentencing factors were known, and "the parties should have been aware that De la Fuente's guideline sentencing range of 41–51 months would lie entirely below the statutory minimum of 60 months. By providing for a sentencing recommendation in this circumstance, the parties must surely have envisioned a sentence below the statutory minimum. Otherwise, the provision would have served no purpose.... We are unwilling to impute to the government the level of cynicism and bad faith implicit in negotiating an agreement under which it persuaded a defendant to help convict his relative by offering what appeared to be a reduced sentence but in fact offered him no benefit. Even if we believed that the government in fact acted in such an unfair manner in this case, we would decline to acknowledge and reward such conduct in light of the high standard of fair dealing we expect from prosecutors."

U.S. v. De la Fuente, No. 92-10719 (9th Cir. Oct. 27, 1993) (Reinhardt, J.).

See *Outline* at VI.F.1.b.ii.

Determining the Sentence

Supervised Release

U.S. v. Chukwura, No. 92-8737 (11th Cir. Nov. 1, 1993) (Hatchett, J.) (Affirmed: As a condition of supervised release, the district court had authority to order deportation of foreign national who was already subject to deportation. 18 U.S.C. § 3583(d) "plainly states that if a defendant is subject to deportation, a court may order a defendant deported 'as a condition of supervised release.' The statute then provides that if the court decides to order the defendant's deportation, it then 'may order' the defendant delivered to a 'duly authorized immigration official' for deportation.... The language is unequivocal and authorizes district courts to order deportation as a condition of supervised release, any time a defendant is subject to deportation." The appellate court also held that defendant was not denied a deportation hearing: "The Sentencing Guidelines specifically require sentencing courts to address many of the factors that arise at regular INS deportation hearings. While we do not require district courts, contemplating whether to order a defendant deported, to conduct an INS type hearing, we are confident that in this case the sentencing hearing met those requirements.").

See *Outline* at V.C.

General Application Principles

Relevant Conduct

U.S. v. Wishnefsky, No. 93-3009 (D.C. Cir. Oct. 29, 1993) (Ginsburg, J.) (Affirmed: Criminal conduct that occurred outside five-year statute of limitations may be considered as relevant conduct under the Guidelines. District court properly included amounts embezzled from 1980–1986 as "part of the same course of conduct or common scheme or plan" in calculating loss caused by defendant convicted of embezzlement during 1987–1990.).

See *Outline* at I.A.4 and II.D.4.

U.S. v. Sykes, No. 92-2984 (7th Cir. Oct. 22, 1993) (Rovner, J.) (Remanded: Following test for "similarity, regularity, and temporal proximity," it was error to include as relevant conduct fourth fraud count that was dismissed as part of the plea agreement. Without more, general similarity of defendant's attempts to obtain money or credit by using false name and social security number does not comprise "same course of conduct or common scheme or plan" under § 1B1.3(a)(2). Here, defendant's acts, four frauds in a 32-month period, were "not sufficiently repetitive to enable us to call her conduct 'regular'"; the conduct in the fourth count occurred 14 months after the third; and "the acts charged in count IV differ in significant respects from the earlier conduct.").

See *Outline* at I.A.2.

Adjustments

Multiple Counts

U.S. v. Lombardi, 5 F.3d 568 (1st Cir. 1993) (Affirmed: It was proper to group defendant's three mail fraud counts separately from two counts of money laundering (for depositing in a bank the insurance proceeds that were received as a result of the same frauds). The fraud and money laundering counts could not be grouped together under § 3D1.2(a) or (b) because they involved distinct acts and different victims. Defendant contended that all counts should be grouped under § 3D1.2(c) because the knowledge that the money laundered funds were derived from mail fraud "embodies conduct that is treated as a specific offense characteristic" in the money laundering guideline. The appellate court held, however, that "[t]he 'conduct' embodied in the mail fraud counts is the various acts constituting the frauds, coupled with the requisite intent to deceive; the 'specific offense characteristic,' in U.S.S.G. § 2S1.2(b)(1)(B), is knowledge that the funds being laundered are the proceeds of a mail fraud. It happens that Lombardi's knowledge of the funds' source derives from the fact that he committed the frauds, but that does not make the fraudulent acts the same thing as knowledge of them." To hold otherwise would allow a defendant to "get exactly the same total offense level whether the defendant committed the mail fraud or merely knew that someone else had committed it.").

See *Outline* at III.D.1.

Acceptance of Responsibility

U.S. v. Aldana-Ortiz, 6 F.3d 601 (9th Cir. 1993) (per curiam) (Affirmed: Nov. 1992 amendment to U.S.S.G. § 3E1.1(b) providing for possible three-point reduction is not retroactive.).

See *Outline* at III.E.4.

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Offense Conduct

DRUG QUANTITY—MANDATORY MINIMUMS

Ninth Circuit holds that, for mandatory minimum sentences, conspiracy drug amounts should be determined under Guidelines' reasonable foreseeability analysis, regardless of amounts specified in the indictment. Defendants were convicted of conspiracy to distribute cocaine and heroin. The conspiracy count specified that at least one kilogram of heroin and five kilograms of cocaine were involved in the conspiracy, and the sentencing court ruled that it was not free to determine whether defendants were responsible for smaller amounts for purposes of the statutory minimum under 21 U.S.C. § 841(b)(1)(A).

The appellate court held this was error and remanded for one defendant (the error was held harmless for the other defendant). The mandatory sentence under "§ 841(a) does not alter the court's responsibility to assess a defendant's 'individual . . . level of responsibility' for the amount of drugs involved in an offense by determining, in accord with the Guidelines, the amount that the defendant 'could reasonably foresee . . . would be involved' in the offense of which he was guilty."

"The sentencing court's responsibility to determine the quantity of drugs attributable to a defendant is not altered by the fact that the amount involved in a drug conspiracy is specified in the indictment. Quantity is not an element of a conspiracy offense. . . . The drug amount attributable to a defendant for purposes of sentencing is not established merely by looking to the amount of drugs involved in the conspiracy as a whole, '[u]nder the Guidelines each conspirator, for sentencing purposes, is to be judged not on the distribution made by the entire conspiracy but on the basis of the quantity of drugs which he reasonably foresaw or which fell within "the scope" of his particular agreement with the conspirators.' . . . [I]t is not relevant for sentencing purposes whether or not an indictment specifies the amount alleged in the conspiracy."

U.S. v. Castaneda, No. 92-30077 (9th Cir. Oct. 5, 1993) (Nelson, J.).

See *Outline* at II.A.2 and 3 and summary of *Irvin* in 6*GSU* #2.

CALCULATING WEIGHT OF DRUGS—MIXTURES

U.S. v. Palacios-Molina, No. 92-2887 (5th Cir. Oct. 27, 1993) (Johnson, J.) (Remanded: Weight of liquid that cocaine was dissolved in for transport should not be included. "The cocaine in the present case was not a usable substance while it was mixed with the liquid in the bottles. Only after the liquid was distilled out would it be ready for either the wholesale or retail market. . . . Thus, as this liquid was not part of a marketable mixture, it is not implicated under the market-oriented analysis in *Chapman [v. U.S.*, 111 S.Ct. 1919 (1991)] and should not have been considered part of a mixture . . . under § 2D1.1. . . . For sentencing purposes, the method of transporting the drugs is unimportant. Rather, it is the amount of that commodity trafficked that counts.").

U.S. v. Killion, No. 92-3130 (10th Cir. Oct. 13, 1993) (Alley, Dist. J.) (Affirmed: Holding that *Chapman v. U.S.*, 111 S.Ct. 1919 (1991), did not change circuit precedent for determining weight of amphetamine precursor mixture: "we today again hold that so long as a mixture or substance contains a detectable amount of a controlled substance, its entire weight, including waste by-products of the drug manufacturing process, may be properly included in the calculation of a defendant's base offense level under § 2D1.1."). *Accord U.S. v. Innie*, No. 92-50239 (9th Cir. Oct. 5, 1993) (O'Scannlain, J.) (for methamphetamine).

See *Outline* at II.B.1, summaries of *Newsome* and *Nguyen* in 6*GSU* #3, *Johnson* in 6*GSU* #2, and list of amendments below.

LOSS

U.S. v. Lowder, No. 92-6378 (10th Cir. Sept. 17, 1993) (Kelly, J.) (Affirmed: It was proper to include in the loss calculation the interest that could have been earned on fraudulently obtained funds where defendant had guaranteed investors a 12% rate of return. Section 2F1.1, comment. (n.7), states that loss does not include "interest the victim could have earned on such funds had the loss not occurred," which the appellate court interpreted "as disallowing 'opportunity cost' interest, or the time-value of money stolen from victims. Here, however, Defendant defrauded his victims by promising them a guaranteed interest rate of 12%. He induced their investment by essentially contracting for a specific rate of return. He also sent out account summaries, showing the interest accrued on their investment. This is analogous to a promise to pay on a bank loan or promissory note, in which case interest may be included in the loss. *See U.S. v. Jones*, 933 F.2d 353 (6th Cir. 1991) (interest properly included in loss calculation where defendant defrauded credit card issuers).").

See *Outline* at II.D.2.b.

Departures

CRIMINAL HISTORY

U.S. v. Carr, No. 92-3767 (6th Cir. Sept. 28, 1993) (Ryan, J.) (Remanded: Extent of upward departure for defendant whose criminal history category was VI should not have been calculated by using hypothetical category IX based on 20 criminal history points. Although this methodology was previously accepted, the Nov. 1992 amendment to § 4A1.3, p.s., "disapprove[d] of this method . . . . Thus, instead of hypothesizing a criminal history range more than VI, the Guidelines require a sentencing court to look to the other axis and consider available ranges from higher offense levels." Here, defendant's "offense level would have to be increased from 18 to 21" to receive the sentence imposed. If the district court resentences defendant to the same sentence using offense level 21, "it must demonstrate why it found the sentence imposed by each intervening level to be too lenient.").

See *Outline* at VI.A.4.

U.S. v. Carrillo-Alvarez, 3 F.3d 316 (9th Cir. 1993) (Remanded: Departure above criminal history category VI for defendant with 19 criminal history points was improper because his "criminal history is simply not serious enough to justify a departure." Under § 4A1.3, p.s., "a court should not depart unless the defendant's record is 'significantly more serious' than that of other defendants in the same criminal history category.... However, defendants in category VI are by definition the most intractable of all offenders. The record does not reflect that Carillo, among all those in that criminal history category, has a criminal record so serious, so egregious, that a departure is warranted.... The sheer number of a defendant's criminal history points is not, so to speak, the point. A sentencing court must look, rather, to the defendant's overall record.... We emphasize, as does the Sentencing Commission, that a departure from category VI is warranted only in the highly exceptional case.").
See *Outline* at VI.A and A.4.

Aggravating Circumstances

U.S. v. Schweitzer, No. 92-5713 (3d Cir. Sept. 16, 1993) (Stapleton, J.) (Remanded: For defendant convicted of conspiring to bribe a public official to secure confidential information from the Social Security Administration, it was error for the district court to base an upward departure partly on defendant having given multiple media interviews "as well as telling about what he had done and, on the Oprah Winfrey Show, how much money he got out of it, and bragging or predicting that he would get probation." There were other factors that warranted departure, such as defendant's "corruption of a government function" and the "loss of public confidence," see § 2C1.1, comment. (n.5), but "it was inappropriate for the district court ... to take into account Schweitzer's media efforts to call attention to the alleged ease of acquiring confidential information held by the government," "a situation that is unquestionably a matter of public concern.").
See *Outline* generally at VI.B.2.

Determining the Sentence

Fines

U.S. v. Norman, 3 F.3d 368 (11th Cir. 1993) (per curiam) (Remanded: "Section 5E1.2(i)'s plain language imposing costs of imprisonment and supervision as an additional fine amount supports the holding of the courts in *Labat, Corral,* and *Fair* that such additional fine may not be imposed unless a [punitive] fine pursuant to § 5E1.2(a) is also imposed."). *Contra U.S. v. Favorito*, No. 92-50465 (9th Cir. Sept. 28, 1993) (Brunetti, J.) (Affirmed: Adopting *U.S. v. Turner*, 998 F.2d 534, 538 (7th Cir. 1993) [6 *GSU* #2]: "The district court did not err in imposing a fine of costs of imprisonment without imposing a separate punitive fine.").
See *Outline* at V.E.2.

Adjustments

Abuse of Position of Trust

U.S. v. Lamb, No. 92-2846 (7th Cir. Aug. 27, 1993) (Coffey, J.) (Remanded: It was error to refuse to give § 3B1.3 adjustment for abuse of trust to defendant letter carrier who pled guilty to embezzlement of U.S. mail. "Based on the facts in the case before us, we conclude that a government employee who takes an oath to uphold the law (as does a mail carrier) and who performs a government function for a public purpose such as delivery of the U.S. mail, is in a position of trust."). *See also* U.S.S.G. § 3B1.3, comment. (n.1) (Nov. 1993) ("because of the special nature of the United States mail an adjustment for an abuse of a position of trust will apply to any employee of the U.S. Postal Service who engages in the theft or destruction of undelivered United States mail").
See *Outline* at III.B.8.

Probation and Supervised Release

Revocation of Probation for Drug Possession

U.S. v. Alese, No. 93-1198 (2d Cir. Sept. 28, 1993) (per curiam) (Remanded: "We think the most reasonable interpretation of [18 U.S.C.] § 3565(a) is that a person found to have committed a narcotics-related violation of probation is to be sentenced to a prison term that is at least one-third the length of the maximum prison term to which she could originally have been sentenced." Thus, defendant whose original guideline range was 2–8 months should be resentenced "to a prison term of not less than 2 2/3 months and not more than eight months.").
See *Outline* at VII.A.2 and summary of *Sosa* in 6 *GSU* #2.

Rehearing En Banc Granted:

U.S. v. Aguilar, 994 F.2d 609 (9th Cir. 1993) [5 *GSU* #14].
See *Outline* at VI.C.1.e and h, 4.a.

Note to readers: Because the next *Guideline Sentencing: An Outline of Appellate Case Law* will not be issued until February 1994, we include here a list of *Outline* sections that will be significantly affected by some of the Nov. 1993 Guidelines amendments. This list is designed solely to alert readers to these changes, not to explain them, and does not include all of the new amendments.

Outline Section - Amendment

II.B.1 - The definition of "mixture or substance" in § 2D1.1, comment. (n.1), was revised. Also, a new method for determining the weight of LSD is set forth in § 2D1.1(c)(n.*) and comment. (n.18). Note that these amendments are retroactive under § 1B1.10, p.s.

II.B.3 - A new definition of "cocaine base" is provided in § 2D1.1(c)(n.*).

II.D.1 - § 2B1.1, comment. (n.2), now states that loss does not include interest that could have been earned on stolen funds.

II.E and III.B.6 - § 1B1.1, comment. (n.4), now directs that adjustments from different guideline sections are to be applied cumulatively, absent instruction to the contrary.

III.B.6 - § 3B1.1, comment. (n.2), was added to clarify that the aggravating role adjustment only applies to one who controls other participants, but that an upward departure may be warranted for one who controls only property, assets, or activities.

III.B.8.a - The definition of an abuse of position of trust in § 3B1.3, comment. (n.1), was reformulated.

IV.A.3 - § 4A1.2, comment. (n.6), was amended to clarify that the guideline and commentary are not meant to enlarge a defendant's right to collaterally attack a prior conviction.

U.S. Department of Justice
Executive Office for U.S. Attorneys
Office of Legal Education

Nomination Form

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NOMINEE

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Office, Agency or Department Name	**Phone Number**	

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