U.S. Department of Justice
Executive Office for United States Attorneys

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Assistant United States Attorneys

United States Attorneys' Bulletin

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ATTORNEY GENERAL HIGHLIGHTS

POLICE HIRING

On February 8, 1995, President Clinton and Attorney General Janet Reno announced $434 million in new hiring grants for 6,660 police departments to hire more than 7,115 new officers. COPS Director Joseph Brann and two police officers from recipient jurisdictions joined in the announcement. Those jurisdictions notified to receive grants include 5,430 municipal police departments, 6 county police departments, 1,070 sheriffs' offices, 120 Indian tribal departments, and 34 other law enforcement departments. More than half of the police departments in America are now scheduled to receive grants that will help them hire more officers. Including the 1993-94 Police Hiring Supplement program and the crime bill grants announced last year, more than 8,000 jurisdictions have now received grants to hire more than 16,000 officers.

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OFFICE OF TRIBAL JUSTICE

On January 30, 1995, Attorney General Janet Reno announced the creation of an Office of Tribal Justice in the Department of Justice to improve services to American Indians and Alaskan natives by coordinating Department policies and positions on issues involving both groups. During the National American Indian Listening Conference last May and in subsequent follow-up meetings, tribal leaders expressed a need for greater coordination and communication between the Department and the Indian country. The Office of Tribal Justice was created to fulfill this need. The mission of the Office is:

- to provide a point of contact within the Department to listen to the concerns of Indian tribes and other parties interested in Indian affairs and to communicate the Department's policies to the tribes and the public;

- to promote internal uniformity of Department of Justice policies and litigation positions relating to Indian country; and

- to coordinate with other Federal agencies and with State and local governments on their Indian country initiatives.

Herbert A. Becker, an Assistant United States Attorney from the United States Attorney's office for the District of New Mexico, will serve as the Director. Mr. Becker was born and raised on the Standing Rock Sioux Reservation in North Dakota, and has been a lawyer with the Federal Government for 22 years. The Director will be assisted by two Deputy Directors and an administrative aide from Department components that deal with American Indian issues, as well as a part-time Special Assistant from the Deputy Attorney General's staff.

The Office of Tribal Justice is located in Room 1521, Department of Justice, 9th and Pennsylvania Avenue, N.W., Washington, D.C. 20530. The telephone number is (202)514-8812.

DEATH PENALTY PROTOCOL

On January 27, 1995, Attorney General Janet Reno signed the death penalty protocol and copies were forwarded to all United States Attorneys' offices. The protocol, which affects the *United States Attorneys' Manual* at 9-10.000, sets forth policy and procedures for all Federal cases in which a defendant is charged with an offense subject to the death penalty, regardless of whether the United States Attorney intends to request authorization to seek the death penalty. The protocol specifies that the death penalty shall not be sought without the prior written authorization of the Attorney General.

If you would like a copy, please call the staff of the *United States Attorneys' Bulletin,* (202)514-3572.

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DEPARTMENT OF JUSTICE FY 1996 BUDGET REQUEST

On February 6, 1995, the Department of Justice released its $16.5 billion FY 1996 budget request seeking a 20 percent increase to fulfill its mission to reduce violent crime. The new resources will put 20,000 more police on the street, imprison more violent offenders, provide State and local Government with much needed resources for anti-crime initiatives, and reduce the flow of illegal immigrants into the United States. Nearly 25 percent of the budget, $4 billion, will pay for grants to help States, communities, law enforcement, and citizens form partnerships to fight crime in their own neighborhoods -- a 67 percent increase over 1995. The majority of these grant funds will come from the 1994 crime bill trust fund, which is funded by savings realized by cutting the size of the Federal Government.

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MAJOR CRACKDOWN ON THE CALEXICO/MEXICALI BORDER

On January 13, 1995, at a press conference at the United States Attorney's office in San Diego, Deputy Attorney General Jamie Gorelick announced one of the broadest cooperative operations in United States law enforcement history. In a project dubbed the "Valley Project," initiated by Alan Bersin, the United States Attorney for the Southern District of California, the Federal Government is leading a team of 17 Federal, state, and local law enforcement agencies, including the military, in a crackdown designed to cripple drug smuggling along the Calexico/Mexicali border.

Drug enforcement statistics show that most of the cocaine destined for the United States is seized along the Southwest Border. It is believed that 80 to 90 percent of the cocaine seized in Los Angeles, Riverside, San Bernardino, and Orange Counties over the last two years entered the United States through this corridor. The "Valley Project" will systematically intercept, disrupt, and deter this flow of illegal drugs. The operation already has posted some impressive results. For example, the amount of cocaine seized has tripled, increasing to 2,429 kg seized in December 1994, compared to 885 kg seized in December 1993.

OPERATION GATEKEEPER

On January 4 through 8, 1995, Attorney General Janet Reno, on a tour of California, Arizona, New Mexico, and Texas, announced new resources to secure the Southwest Border and crack down on illegal immigration. In each state, Ms. Reno announced the deployment of new Border Patrol agents, other immigration enforcement personnel, and equipment.

The number of Border Patrol agents at the San Diego/Tijuana border will be increased by 200 this year. These new agents are in addition to the 378 Border Patrol agents hired last year. The new Border agents will be aided by 24 support personnel. Resources that will be deployed in Arizona include 100 new agents; new fences, lights, and roads; additional inspectors for Ports of Entry; two high technology systems (to help INS officials detain and prosecute criminal aliens); criminal alien detention facilities; and financial assistance to the State of Arizona. Border Patrol stations throughout the State of Texas will receive 300 new agents, bringing the total new hires and redeployed agents to 434 over the last two years. Resources that will be deployed in Texas this year include 59 new inspectors; two high technology systems (to help INS officials detain and prosecute criminal aliens); and financial assistance to the State.

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NEW FEDERAL PRISON IN COLORADO

On January 10, 1995, Attorney General Janet Reno officially opened the new Administrative Maximum Security Penitentiary (ADX) in Florence, Colorado. Florence ADX is the first Federal penitentiary in the nation to be designed specifically for dangerous offenders. United States Attorney Henry Solano, District of Colorado, accompanied the Attorney General on a tour of Florence ADX and participated in the ribbon-cutting ceremony.

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DEPUTY ATTORNEY GENERAL GORELICK TESTIFIES ON CONTRACT WITH AMERICA LEGISLATION

On February 3, 1995, Deputy Attorney General Jamie Gorelick testified before the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee concerning Title VIII of H.R. 9, the Job Creation and Wage Enhancement Act of 1995. Ms. Gorelick expressed the Department's strong opposition to legislation, part of the House Republican's Contract with America, that would cripple the Federal Government's ability to investigate possible criminal activity. The topic of the hearing was a "Citizens' Regulatory Bill of Rights" which would require the Government to alert civil and criminal law enforcement targets that they are the subject of investigative activity, and the scope and purpose of the investigation. Ms. Gorelick testified that such a requirement would render wiretaps, undercover agents, and sting operations practically useless; endanger the lives of cooperating witnesses, informants, and agents; and open the gates to widespread witness tampering, destruction of evidence, and obstruction of justice. Her testimony included examples of successful criminal prosecutions that would not have been possible if perpetrators and their counsel had been aware of the investigations. Copies of the testimony are available from the *United States Attorneys' Bulletin* staff, (202)514-3572.

UNITED STATES ATTORNEYS' OFFICES

COMMENDATIONS

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

William Beckerleg (Florida, Southern District), by Joseph P. Salvemini, Assistant Special Agent in Charge, Drug Enforcement Administration, Fort Lauderdale, for his successful litigative efforts which resulted in the seizure of property valued at over $90,000.

Cheryl Bell and **Eduardo Palmer** (Florida, Southern District), by Merlin W. Heye, District Director, Internal Revenue Service, Fort Lauderdale, for their participation and major contributions to the success of the Criminal Tax Trial Summary Witness class.

Thomas J. Bondurant, Jr. (Virginia, Western District), by J. Davitt McAteer, Assistant Secretary for Mine Safety and Health, Department of Labor, Arlington, Virginia, for his outstanding success in the prosecution of the Southmountain Mine explosion case which claimed the lives of eight miners. (For further details, see *United States Attorneys' Bulletin,* Vol. 43, No. 2, Feb. 1, 1995, p. 32.)

Ted Borek (District of Arizona), by Gregory G. Ferris, District Counsel, Department of Veterans Affairs, Phoenix, for his excellent representation and professional skill in successfully resolving a complicated discrimination case.

Robert E. Bulford, Jr., and **David A. Sierleja** (Ohio, Northern District), by Tron W. Brekke, Chief, Public Corruption and Civil Rights Section, Criminal Investigative Division, FBI, Washington, D.C., for their major contributions to the success of an Undercover Agent Training In-Service at the FBI Academy in Quantico, Virginia.

David Bunning (Kentucky, Eastern District), by Bill Burlington, Regional Counsel, Federal Correctional Institution, Federal Bureau of Prisons, Butner, North Carolina, for his outstanding representation and professionalism in the jury trial of a complex Bivens case.

Peter A. Caplan (Michigan, Eastern District), by Marie R. Fuhrmann, Attorney, Law Department, U.S. Postal Service, Chicago, for his vigorous defense of civil suits brought against the U.S. Postal Service.

Darcy A. Cerow (District of Arizona), by C. M. Macho, Postal Inspector in Charge, U.S. Postal Service, Phoenix, for her outstanding success in obtaining the conviction of an individual in a mail fraud scheme which resulted in defrauding American citizens of over $4 million. **Kevin Koelble**, a student extern from Arizona State University, and **Rose Marie Trandicosta**, secretary, provided valuable assistance and support throughout the trial.

Patrick Corbett (Michigan, Eastern District), by Richard J. Hoglund, Special Agent in Charge, U.S. Customs Service, Detroit, for his outstanding efforts in a complex Customs fraud case involving illegal removal of country-of-origin markings from imported merchandise in violation of 19 USC 1304(i).

Bryan Daly and **George Newhouse** (California, Central District), by Richard R. Smith, Special Agent in Charge, Office of Assistant Inspector General for Investigations, Defense Criminal Investigative Service (DCIS), Department of Defense, Los Angeles Field Office, for their outstanding contributions to the recent training conference held in Coronado for DCIS agents from Los Angeles, San Diego, Arizona, New Mexico, and Hawaii.

David DeTar-Newbert (Missouri, Western District), by James D. Persson, Special Agent, Division of Law Enforcement, Fish and Wildlife Service, Department of the Interior, for successfully prosecuting a well known outdoor celebrity and hunting guide for violations of the Lacey Act.

Wilfredo Fernandez (Florida, Southern District), by George B. Clow, III, Special Agent in Charge, FBI, North Miami Beach, for obtaining the conviction of two individuals on charges related to the attempted purchase of a "Stinger" missile.

John M. Fietkiewicz (District of New Jersey), by Louis J. Freeh, Director, FBI, Washington, D.C., for his outstanding efforts in the prosecution of several criminal groups involved in operating massive stock manipulation schemes.

Randall L. Fluke (Texas, Eastern District), received a Certificate of Appreciation from Mark E. Mulvey, Director, Diplomatic Security Service, Department of State, for his valuable assistance in coordinating a multi-district plea agreement in a case involving numerous felonies, including passport fraud, "structuring" financial transactions, harboring a capital murder fugitive, conspiracy, bond-jumping, and failure to appear for trial.

Eric Frieberg, Jody Avergun, and **Lisa Fleishman** (New York, Eastern District), by Michael D. Gambrill, Chief of Police, Baltimore County Police Department, Towson, Maryland, for their invaluable assistance and cooperation in obtaining eight Federal Search and Seizure Warrants in the New York City area.

James G. Genco (District of Connecticut), was presented the Clark R. Bavin Award by Mollie Battie, Director, Fish and Wildlife Service, for his outstanding success in the prosecution of a South African Defense Force rhino horn and weapons supplier. (The defendant was brought to the United States for trial in the first wildlife extradition case in U.S. history.)

Jefferson M. Gray (District of Maryland), by Louis J. Freeh, Director, FBI, Washington, D.C., for his successful prosecution of a long-term, complex, white-collar crime case involving the FBI, the Veterans Administration, and the Internal Revenue Service.

Jefferson M. Gray and **John A. Gephart** (District of Maryland), by Melvin L. Fleming, Supervisory Special Agent, FBI, Baltimore, for their outstanding success in the prosecution of three individuals involved in four bank robberies, three of which were armed robberies with 9mm handguns.

Debra Herzog, Jeffrey Levenson, and **Jeffrey Kaplan** (Florida, Southern District), by George B. Clow, III, Special Agent in Charge, FBI, Miami, for their outstanding prosecutive efforts resulting in the conviction of several individuals involved in a large telemarketing fraud scheme operating in Southern Florida for many years.

Steve Higginson and **Jim Mann** (Louisiana, Eastern District), by K. D. Kell, Inspector in Charge, U.S. Postal Inspection Service, New Orleans, for their professionalism and outstanding legal skill in successfully prosecuting a postal employee who threatened his supervisor with a machine gun.

Lisa Hogan (Florida, Southern District), by Lloyd D. Pike, District Counsel, Jacksonville District Corps of Engineers, Department of the Army, Jacksonville, for her extraordinary efforts and excellent representation of the Government in a suit brought by the citizens of Golden Beach.

Harriet M. Holman (Tennessee, Western District), by K. L. Mulholland, Jr., Medical Center Director, Department of Veterans Affairs, Memphis, for her excellent representation and outstanding leadership in obtaining a favorable settlement of a complex employment discrimination case.

Kyra Jenner (District of Colorado), by John Hensley, Vice President, National Native American Law Enforcement Association, Washington, D.C., for her contribution to the success of the annual training conference held recently in Denver for Native Americans in law enforcement at the tribal, local, State, and Federal levels.

Marcia Johnson and **Steven J. Paffilas** (Ohio, Northern District), by Alan G. Sumberg, Deputy Assistant Chief Counsel, Great Lakes Region, Federal Aviation Administration, Des Plaines, Illinois, for their valuable assistance and successful efforts in deflecting a subpoena served on an employee in a private litigation matter.

Mark Johnson (Florida, Southern District), by Kenneth J. Staab, Director, Metropolitan Organized Crime Intelligence Unit, Fort Lauderdale, for his contributions to the law enforcement profession, and his efforts to reduce organized crime in south Florida.

Neil Karadbil (Florida, Southern District), by George W. Proctor, Director, Office of International Affairs, Criminal Division, Department of Justice, for his outstanding cooperative efforts in responding to a request for legal assistance from the Government of Switzerland.

Dale P. Kelberman and **Stephen Zimmerman** (District of Maryland), by Timothy P. McNally, Special Agent in Charge, FBI, Baltimore, for their outstanding efforts in bringing the trial of a public corruption case to a successful conclusion.

Al Kemp, Art Leach, and **Nina Hunt** (Georgia, Northern District), by Ray A. Shaddick, Special Agent in Charge, U.S. Secret Service, Atlanta, for their assistance and valuable instruction at a two-day seminar on Basic Asset Forfeiture for agents and administrative personnel.

James T. Lacey (District of Arizona), by James D. Burkett, Supervisory Special Agent, FBI, Phoenix, for his exceptional service as the chief prosecutor of the Organized Crime Drug Enforcement Task Force since its inception in 1982, and for his representation in numerous high profile drug and money laundering prosecutions.

James B. Letten (Louisiana, Eastern District), was presented a Certificate of Appreciation by Ronald J. Caffrey, Special Agent in Charge, Drug Enforcement Administration, Metairie, for his success in obtaining the conviction of two individuals involved in the importation and distribution of several thousand kilograms of cocaine.

Michael Magner and **Linda Bizzarro** (Louisiana, Eastern District), by Neil J. Gallagher, Special Agent in Charge, FBI, New Orleans, for their successful prosecution of the Mathieu family and their associates for conspiracy to distribute crack cocaine in New Orleans.

James R. Mann and **Eileen Gleason** (Louisiana, Eastern District), by Louis J. Freeh, Director, FBI, Washington, D.C., for their outstanding efforts in the successful prosecution of a savings and loan bank failure case, which was included on the Department of Justice's Top 100 list.

Diane Marion (Michigan, Eastern District), by James E. Childs, Special Agent in Charge, Office of Inspector General, Defense Criminal Investigative Service, Department of Defense, Arlington, Virginia, for her valuable assistance in successfully prosecuting an individual who stole and wrongfully converted restricted digital software valued at $223 million.

Peter D. Markle, H. Gordon Hall, and **Anthony E. Kaplan** (District of Connecticut), received special achievement awards from the Department of Police Service, New Haven, in recognition of their contributions to the New Haven Police Department and the community in combatting gang violence.

Kari Pedersen (District of Connecticut), was presented an award by the United States Postal Service for her outstanding prosecutive efforts which resulted in the conviction of two individuals who robbed a postal station.

Kari Pedersen, Ronald Apter, and **Joseph Martini** (District of Connecticut), received an award from the Recording Industry Association of America for their successful efforts in the prosecution of persons engaged in the piracy business of sound recordings.

Salvador Perricone and **Patrice Harris Sullivan** (Louisiana, Eastern District), by Louis J. Freeh, Director, FBI, Washington, D.C., for their successful prosecution of several Oak Tree Savings Bank officials responsible for the largest savings bank failure in Louisiana.

Mary S. Rigdon (Michigan, Eastern District), by Dennis F. Hoffman, Chief Counsel, Drug Enforcement Administration (DEA), Washington, D.C., for her successful defense of a DEA agent who was sued in a wrongful death suit filed by the estate of a drug trafficker.

Christine Sciarrino (District of Connecticut), by Everett C. Sammartino, Supervisory Assistant United States Attorney, District of Rhode Island, for her participation as a lecturer at the Regional Financial Litigation Conference held recently in Newport.

Andrew Scoble (California, Northern District), by Dennis DeWitt, Chief of Police, Petaluma Police Department, for his valuable assistance in the investigation and indictment of an immigration case against a gang member and murder suspect.

David Shapiro (District of Arizona), by Colonel F. J. "Rick" Ayars, Director, Arizona Department of Public Safety, Phoenix, for his outstanding success of an Organized Crime Drug Enforcement Task Force investigation entitled "Operation Yellowbird," which resulted in the dismantling of a violent, well established drug organization.

Madeleine Shirley (Florida, Southern District), by Billy G. Salter, Director, Enforcement Training, U.S. Customs Service Academy, Glynco, Georgia, for her excellent presentations on legal concepts and forfeiture ramifications at two recent Asset Forfeiture Investigations Courses.

Jeffrey D. Smith and **Bryan Blaney** (District of New Jersey), by Raisa Otero-Cesario, Assistant Inspector General for Investigations, Department of Transportation, Washington, D.C., for their outstanding success in the prosecution of a contract fraud case at the Federal Aviation Administration Technical Center in Atlantic City.

Alan M. Soloway (District of Connecticut), was presented an award by Ernest F. Dorling, Resident Agent in Charge, Defense Criminal Investigation Service (DCIS), Hartford, and Edward Bradley, Special Agent in Charge, DCIS, New York, for his outstanding assistance and support of the DCIS mission, including three related defense contractor fraud investigations. Also, by Thomas H. McGhie, Regional Inspector General for Investigations, General Services Administration, Boston, for his success in obtaining a $1,350,000 settlement in a case involving failure to honor price reduction clauses in GSA contracts.

Charles Stuckey (District of Oregon), by John F. West, Special Agent in Charge, Office of Inspector General, Defense Criminal Investigative Service, Department of Defense (DOD), Oakland, California, for his successful jury trial and conviction of a DOD contractor for fraud against the Government.

Bonnie Ulrich (District of South Dakota), by John Shaw, Regional Counsel, Federal Bureau of Prisons, Department of Justice, Kansas City, for her excellent representation and outstanding assistance in bringing a civil litigation to a successful conclusion. Law Clerk **Tom Binger** provided valuable assistance throughout the trial.

Nancy Vorpe-Quinlan (Florida, Southern District), by Patrick Tenety, Agent, Major Case Unit, Palm Beach County Sheriff's Office, West Palm Beach, for her outstanding prosecutorial skill in a recent case involving a violent, habitual felony drug offender, as well as many other cases handled in the United States Attorney's office in recent years.

Richard Westling and **Irene Gonzalez** (Louisiana, Eastern District), by Gerard P. Donegan, District Director, Office of Labor-Management Standards, Department of Labor, New Orleans, for their successful prosecution of a false statement and conspiracy to defraud case.

Patrick White (Florida, Southern District), by Jesse A. Wilkerson, U.S. Probation Officer, U.S. District Court, Miami, for his excellent presentation on the Federal justice system at the first meeting of the Life Program for middle school students.

Mark R. Winston (District of New Jersey), by Raisa Otero-Cesario, Assistant Inspector General for Investigations, Department of Transportation, Washington, D.C., for his outstanding success in the prosecution of crimes involving the distribution of counterfeit airplane parts.

Larry Wszalek (Wisconsin, Western District), by Richard A. Dickinson, Senior Resident Agent, Fish and Wildlife Service, Department of the Interior, St. Paul, for his outstanding prosecutorial efforts in a Federal wildlife case which evolved into the felony arrest and conviction of the defendant for drug violations during the course of the trial. Also, by William D. Lock, Assistant Regional Inspector General for Investigations, Department of Health and Human Services, Chicago, for obtaining a jury trial conviction of a convicted felon for possession of a firearm.

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HONORS AND AWARDS

D.C. Bar's Sixth Annual Beatrice Rosenberg Award

On February 17, 1995, Eric Holder, United States Attorney for the District of Columbia, was presented the D.C. Bar's Sixth Annual Beatrice Rosenberg Award. This award, named in memory of a lawyer who dedicated her 35-year legal career to public service, recognizes a member of the D.C. Bar whose career contributions to the Government exemplify the highest order of public service.

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IN MEMORIAM

Denis Buckley
Northern District of Indiana

On January 25, 1995, Denis Buckley, Assistant United States Attorney for the Northern District of Indiana, passed away at the age of 32. Mr. Buckley had been an Assistant United States Attorney in both the Dyer and South Bend offices, serving most recently in the South Bend office with primary responsibilities in the Criminal Division. United States Attorney Jon DeGuilio worked with Denis Buckley for several years and considered him "a wonderful person and a dedicated attorney."

UNITED STATES ATTORNEY APPOINTMENTS

On January 5, 1995, **J. Don Foster** was nominated by President Clinton to serve as United States Attorney for the Southern District of Alabama. On January 25, 1995, Mr. Foster took the oath of office as the Interim United States Attorney for that District.

On February 4, 1995, **Caryl Privett** was appointed by the U.S. District Court to serve as Interim United States Attorney for the Northern District of Alabama.

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ATTORNEY GENERAL'S ADVISORY COMMITTEE OF UNITED STATES ATTORNEYS

Legislative Working Group

Pursuant to a request by the Legislative Working Group of the Attorney General's Advisory Committee (AGAC), more than 40 legislative proposals have been received from United States Attorneys' offices. Recently, Carl Kirkpatrick, United States Attorney for the Eastern District of Tennessee and Chairman of the Legislative Working Group, conducted a meeting of the Group to review the proposals, most of which were submitted by Assistant United States Attorneys and addressed day-to-day courtroom problems.

A number of proposals were referred to subcommittees of the AGAC for further consideration and recommendations, but most were forwarded to the AGAC for its approval. A summary of the proposals with the Working Group's recommendations to the AGAC, and the proposals themselves, have been forwarded to all United States Attorneys. If you have any questions, please call Louis DeFalaise, Counsel to the Director, Executive Office for United States Attorneys, (202)616-2128.

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Violence Against Women Act

On January 26, 1995, Michael Troop, United States Attorney for the Western District of Kentucky and Chair of the Law Enforcement Coordinating/Victim Witness Subcommittee of the AGAC, and Carol DiBattiste, Director, EOUSA, participated in a meeting with Department of Justice components to discuss the Violence Against Women Initiative. The discussion focused on implementation of grant programs; coordination and cooperation among Federal, state, and local law enforcement in the prosecution of violent crimes against women; and the coordination of efforts among Department components to increase public awareness.

Security Working Group

On January 19-20, 1995, the Security Working Group of the AGAC, chaired by Randall K. Rathbun, United States Attorney for the District of Kansas, met to discuss a number of issues and initiatives. Agenda items included mail screening, workplace violence, development of a regional security specialist position, security requirements within leased office spaces and courthouses, planning for future conferences, and parking. For further information, please contact United States Attorney Rathbun, (316)269-6481, or Paula Nasca, Director, Security Programs Staff, EOUSA, (202)616-6878.

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SIGNIFICANT ISSUES/EVENTS

Contact with Represented Persons Case
Western District of Virginia

In early January 1995, a defense attorney in the Western District of Virginia moved to dismiss the indictment in United States v. Campbell. As grounds for the Motion to Dismiss, the defense attorney argued that the Assistant United States Attorney handling the case violated his client's Sixth Amendment rights by authorizing a confidential informant to make undercover contact with the defendant. The Assistant authorized the contact, in accordance with 28 C.F.R. § 77.6(e), to investigate allegations that the defendant was attempting to suborn perjury in this criminal case. Although the Motion to Dismiss did not allege that the Assistant violated any ethical rule on contacts with represented persons, in its response, the United States justified the contact under the Sixth Amendment and 28 C.F.R. § 77, the Department's rule regulating contact with represented persons. Doug Wilson from the Department's Criminal Division, Appellate Section, assisted the United States Attorney's office in preparing the response. On January 27, 1995, the District Court denied the defendant's Motion to Dismiss, ruling that the Sixth Amendment permitted the United States to make undercover contact with the defendant for the purpose of investigating new crimes. The District Court did not address whether the contact was permitted under 28 C.F.R. § 77.6(e). For further information, please call the Legal Counsel's office, Executive Office for United States Attorneys, (202)514-4024.

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Model Federal Victim-Witness Program
Eastern District of Wisconsin

The United States Attorney's office for the Eastern District of Wisconsin has been awarded funding by the Office for Victims of Crime (OVC) to implement a Model Victim-Witness Program. This program will enhance services for Federal victims and witnesses of crime by developing a model for Federal victim/witness programs in United States Attorneys' offices throughout the country. It will bridge the gap between existing and needed services by developing a mechanism to provide immediate, direct crises and critical incident response services to victims and witnesses. The services will include those provided by a victim counselor/advocate, a paralegal assistant, a community drug victim specialist, and a crisis response therapist. The anticipated implementation date is May 1995.

Victim Notification Under the Violent Crime Control Act

On January 23, 1995, Carol DiBattiste, Director, EOUSA, forwarded to all United States Attorneys, attorney supervisors, and Victim Witness Coordinators, a copy of a memorandum prepared by the Administrative Office of the United States Courts (AOUSC) concerning the Violent Crime Control and Law Enforcement Act of 1994.

In cases concerning pretrial release in domestic violence cases, the victim has a right of allocution at any bail, detention, or other release hearing (18 U.S.C. §2263). AOUSC has agreed to make pretrial services' officers primarily responsible for victim notification at this stage of the proceeding. In addition, the victims of such crimes have a right to be heard at sentencing. See Fed.R.Crim.P. 32. Consistent with existing practice, the United States Attorneys' offices will remain primarily responsible for victim notification at sentencing. AOUSC expressly selected the use of the word "primarily" so as not to discourage or displace the cooperative notification efforts in place in many districts. If you would like a copy of this memorandum or have any questions, please contact Nicholas M. Gess, Special Assistant to the Director, (202)616-6484.

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Adverse Decisions Involving Plea Agreements

In Margalli-Olvera v. Immigration and Naturalization Service, 63 U.S.L.W. 2369 (8th Cir. Dec. 6, 1994) and Thomas v. Immigration and Naturalization Service, 35 F.3d 3 (9th Cir. 1994), the appellate courts held that plea agreements entered into by Assistant United States Attorneys effectively barred the Immigration and Naturalization Service (INS) from conducting contested deportation hearings. These decisions are under consideration by Department of Justice Appellate Staff for certiorari in the Ninth Circuit case and panel rehearing in the Eighth Circuit case. Due to the language of these decisions, extra care should be used by Assistant United States Attorneys in drafting plea agreements to avoid any implication that such agreements limit the authority of other governmental agencies to perform their mandated duties, especially the INS. For further information, please contact Kerry A. Kelly, Assistant United States Attorney on detail from the Western District of Oklahoma to EOUSA's Office of Legal Counsel, (202)514-4024.

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Use of Defendant's Statement Made During Plea Negotiations

An agreement by a defendant that inconsistent statements made during the course of plea negotiations could be used against him at trial for impeachment purposes was held enforceable by the United States Supreme Court in U.S. v. Mezzanatto, 1995 U.S.L.W. 15050 (U.S. Jan. 18, 1995). The Supreme Court held there was a presumption that the statutory provisions of Federal Rules of Evidence 410 and Federal Rules of Criminal Procedure 11(e)(6) were subject to waiver by voluntary agreement of the parties, absent an affirmative Congressional intent to preclude waiver. The Court rejected the Ninth Circuit Court of Appeals' analysis that such agreements were per se invalid because Congress failed to expressly provide for waiver of these statutory provisions.

Mezzanatto had been convicted and sentenced to 170 months in prison for possession of methamphetamine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) . At trial, the defendant was cross-examined on prior inconsistent statements made during the course of plea negotiations. The trial court admitted the statements after finding the defendant and his counsel waived the exclusionary provisions of the rules as a precondition to plea negotiations. In upholding such agreements, the Supreme Court noted there existed a presumption that a defendant may knowingly and voluntarily enter an agreement to waive statutory and constitutional rights. Inquiry on a case-by-case basis may be made where such agreements are alleged to have arisen as a product of fraud or coercion. For further information, please contact Kerry A. Kelly, Office of Legal Counsel, (202)514-4024.

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Reporting Requirements for Veterans' Reemployment Rights

On October 13, 1994, the President signed into law H.R. 995, the "Uniformed Services Employment and Reemployment Rights Act of 1994," to be codified at 38 U.S.C. §4301 et seq. The Act codifies the practice under the current law that, if a veteran believes his or her rights under the Act have been violated, he or she may request the Secretary of Labor to investigate the violation. If the Secretary believes a violation has taken place and is unable to work out a resolution of the violation with the employer, then the Secretary refers the matter to the Civil Division of the Department of Justice, which reviews the applicable facts and law. The Civil Division may refer the case to the appropriate United States Attorney to represent the veteran in litigation against the employer. On February 1, 1996 (and annually on February 1 thereafter), the Secretary of Labor must inform Congress of the number of complaints referred by Labor to the Attorney General during the preceding fiscal year. This report must include the nature and status of each case referred to the Department.

The Executive Office for United States Attorneys (EOUSA) will provide the United States Attorneys' offices with a report on the status, including disposition of the cases within their district which fall within the reporting requirements of this new legislation. EOUSA has requested that one individual be appointed to serve as the point person for reviewing these reports in each United States Attorney's office. Any questions regarding this legislation may be directed to Kristin Tolvstad, Assistant United States Attorney on detail from the Southern District of Iowa to the Financial Litigation Staff, EOUSA, (202)616-6444.

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Upcoming Conferences

The **United States Attorneys' Conference** will be held April 10-14, 1995, at the Marriott Rivercenter in San Antonio, Texas. The **Administrative Officers' Conference** will be held on June 19-24, 1995, in Clearwater, Florida.

Relocations of United States Attorneys' Offices

The following are new addresses for United States Attorney's offices that have recently relocated:

United States Attorney's office
Eastern District of Michigan
211 W. Fort, Suite 2300
Detroit, Michigan 48226
Telephone: (313)226-9100

United States Attorney's office
Middle District of Louisiana
Federal Courthouse, Suite 208
777 Florida Street
Baton Rouge, Louisiana 70801
Telephone: (504)389-0561

United States Attorney's office
Southern District of Iowa
U.S. Courthouse Annex, Suite 286
110 E. Court Avenue
Des Moines, Iowa 50309-2053
Telephone: (515)284-6257

United States Attorney's office
Western District of Virginia
310 Cummings Street
Abingdon, Virginia 24210
Telephone: (703)628-4161

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SIGNIFICANT CASES

Landmark Drug Conspiracy Conviction in Alaska
District of Alaska

On January 17, 1995, an Anchorage, Alaska, jury returned a guilty verdict in the largest drug conspiracy ever investigated in the District of Alaska. John T. Pierson was convicted of conspiracy to distribute in excess of 2,000 kilograms of cocaine, and two counts of using the telephone to facilitate drug trafficking. Pierson used his trucking business to distribute cocaine from Los Angeles and Seattle to New Jersey for members of the Cali cartel. Pierson and Gerald Plunk established a cocaine transportation route from Columbia to Alaska. Plunk loaded recreational vehicles and airplanes with cocaine and delivered them to New Jersey, while Pierson used tractor trailers. This case was the first narcotics-related wiretap investigation in Alaska. Plunk's case was severed after the Ninth Circuit rendered a landmark double jeopardy decision in U.S. v. $405,089.23, 33 F.3d 1210 (9th Cir. 1994). Plunk is awaiting the Ninth Circuit's decision concerning whether the uncontested administrative seizure of his Rolex watch and several small items constitutes double jeopardy and mandates a dismissal of the indictment. The case was prosecuted by AUSA Suzanne Hayden.

Tohono O'Odham Nation Employee Indicted for Embezzling Funds
District of Arizona

On January 11, 1995, a former employee of the Tohono O'Odham Nation, an Indian tribal organization in the State of Arizona, was indicted. Emilio G. Dutari of Tucson was charged with wire fraud and misapplication/embezzlement of Indian tribal funds. Without the consent or authorization of the Tohono O'Odham Nation, Dutari transferred a total of $2,712,000 in four wire transfers from a Nation's account to a bank in Athens, Texas. He distributed approximately $600,000 to a friend for personal use, and approximately $2.1 million to three other friends for investment in a dude ranch in Texas. Assistant United States Attorney Thomas Fink is prosecuting this case. If you would like a copy of the indictment, please call the *United States Attorneys' Bulletin* staff, (202)514-3572.

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$18.5 Million Fine Imposed Against a Defense Contractor
Central District of California

On January 10, 1995, Lucas Western, Inc., a subsidiary of Lucas Industries, plc, a British corporation with annual sales of over $4 billion, pled guilty to 37 counts of submitting false statements to the Department of Defense and paid a fine of $18.5 million. Lucas Western, Inc. (Lucas) falsely certified to the Defense Department that gearboxes it manufactured had been fully inspected when, in fact, many required inspections had not been performed. The charges focus on faulty gearboxes for two military programs: 1) the Airframe Mounted Accessory Drive (AMAD) gearbox for the Navy's F/A-18 aircraft; and 2) the Azimuth Drive Unit (ADU) gearbox for the Army's Multiple Launch Rocket System. Lucas admitted that on the AMAD and ADU programs, it routinely failed to perform required inspections and tests, knowingly falsified quality records, sold non-conforming parts to the Government, used faulty test equipment, and made unauthorized repairs without advising the Government. Assistant United States Attorneys Bryan D. Daly and Kimberly A. Dunne prosecuted the case.

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$26 Million Dollars in Counterfeit Currency Seized
Northern District of California

On January 7, 1995, the Secret Service and the Fremont Police Department arrested three men and seized over $26 million in counterfeit currency. James C. DePalma of San Jose had a 1992 counterfeit currency conviction. DePalma and two others, all employees of Thomson Lithograph, used the press equipment after hours without the owner's knowledge. Assistant United States Attorney John Kennedy is in charge of the prosecution of the case.

Teledyne Industries Pleads Guilty
Southern District of Florida

On January 26, 1995, Teledyne Industries, Inc., pled guilty to charges that it illegally exported cluster bomb components from the United States for use by Iraq during its war with Iran during the 1980s. Between August 1982 and October 1989, Teledyne conspired with Carlos Cardoen, a Chilean arms manufacturer and industrialist, to violate the Arms Export Control Act and the Export Administration Act. The May 1993, indictment charged that Cardoen and Teledyne agreed to avoid legal restrictions on the export of certain military components from the United States to both Chile and Iraq in order to pursue profitable sales of an export-controlled munitions product, ordnance-grade zirconium. The indictment alleges that Cardoen was using zirconium in cluster bombs he was selling to the Iraqi Air Force. During the Iran-Iraq war, from approximately 1982 through 1988, the United States did not allow the export of any United States-origin munitions to either Iraq or Iran in order to avoid compromising American neutrality in that war. Teledyne admitted that it knowingly made false statements in its export license applications when it claimed that the zirconium would be used for civilian purposes. Teledyne has agreed to pay an approximately $4 million fine. Assistant United States Attorneys Frank Tamen and Eduardo Palmer prosecuted this case.

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Illegal Ozone-Depleting Chemicals Seized
Southern District of Florida

On January 18, 1995, a Miami grand jury indicted two individuals on charges of smuggling in excess of 100 tons of ozone depleting chemicals known as "CFC-12" into the United States. This is the largest criminal prosecution of illegally imported ozone depleting chemicals. This is also the first known instance in which the Clean Air Act has been used against individuals illegally importing these chemicals into the United States. As U.S. law tightens the availability and imposes substantial excise taxes on these chemicals used in automobile air conditioners, a black market has developed to smuggle in untaxed CFCs. Assistant United States Attorney Thomas A. W. FitzGerald is prosecuting this case.

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Guilty Plea in Advance Fee Loan Application Scheme
Northern District of Georgia

On January 5, 1995, John Delgrosso of AJD Financial in Riverdale, Georgia, pled guilty to 11 counts of mail and wire fraud in connection with an advance fee loan application scheme. Delgrosso placed advertisements in newspapers and journals throughout the United States offering loans to the public. In response to the advertisements, individuals called AJD Financial's toll-free number to inquire about loans. Telemarketers hired by Delgrosso answered the calls and informed customers that a lender had been found to handle their loan requests and instructed customers to send to AJD Financial a processing fee in amounts varying from $185 to $1,100 by an overnight delivery service. As a result of this scheme, over 1,000 persons sent processing fees to AJD Financial totalling in excess of $300,000. None received loans. Assistant United States Attorney David C. Nutter prosecuted the case.

Lockheed Pleads Guilty to Foreign Corrupt Practices Act Violations
Northern District of Georgia

On January 27, 1995, Lockheed Corporation pled guilty to conspiring to violate the bribery provisions of the Foreign Corrupt Practices Act (FCPA) and conspiring to falsify its books, records, and accounts by failing to accurately and fairly reflect the disposition of Lockheed Corporation assets. Lockheed Corporation conspired to violate the FCPA by corruptly making a $1 million payment to Dr. Leila I. Takla, a member of the Peoples' Assembly of the Arab Republic of Egypt, for the purpose of influencing Takla to assist Lockheed in obtaining a contract for the sale of three C-130-H-30 Hercules aircraft to Egypt in 1989. The contract was valued at approximately $79 million and was funded by U.S. aid in grant money administered by the Department of Defense under the Foreign Military Financing program. On October 11, 1990, following negotiations with Dr. Takla, Lockheed paid $1 million by wire transfer to Dr. Takla's Swiss account in Zurich, and characterized this payment as a "Termination Fee." Lockheed admitted that the $1 million payment to Dr. Takla was not a termination payment but was, in fact, a payment made to Dr. Takla for her influence in assisting Lockheed in obtaining the 1989 C-130 contract. As part of the plea agreement, Lockheed has agreed to pay the United States a total of $24.8 million. Of this amount, $21.8 million is to be paid in criminal fines and $3 million in resolution of civil claims by the Department of Justice. Assistant United States Attorneys Martin J. Weinstein and Nicolette Templer are prosecuting this case.

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Generic Drug Executive Sentenced for Obstructing FDA Regulations
District of Maryland

On January 9, 1995, Frederick Shainfeld, former senior Vice President of Halsey Drug Company, Inc., Brooklyn, New York, was sentenced to 18 months of imprisonment and fined $5,000.00 for obstructing a U.S. Food and Drug Administration (FDA) inspection of the company. Shainfeld and four other executives were indicted July 12, 1993, on charges of conspiracy to impede FDA's regulatory function, interstate distribution of adulterated and unapproved new drugs, making false statements to the FDA, and obstruction of an FDA inspection. Shainfeld admitted that he and others created and gave to FDA inspectors records that fraudulently misrepresented certain research and development batch sizes the FDA required to ensure that a company can, in fact, manufacture production quantities of a drug according to the approved formula. Halsey made smaller batches, then falsely claimed they were the required size. When the FDA investigated, Shainfeld and others ordered employees to create false inventory records to hide the fact that Halsey had insufficient raw materials to make the batches in the size they represented. Halsey also added unapproved ingredients to certain drugs and falsified records to cover up those additions. This investigation was conducted by the United States Attorney's office in the District of Maryland and the Office of Consumer Litigation of the Department of Justice.

Massachusetts Man Indicted for Threatening the Life of President Clinton
District of Massachusetts

On January 18, 1995, a 26-year-old Uxbridge, Massachusetts, man was indicted for threatening the life of President Clinton while he was vacationing at Martha's Vineyard Island in August 1994. The man was arrested at Woods Hole after he allegedly told ferry boat operators he was traveling to the island to kill the President. Assistant United States Attorney Victor A. Wild is prosecuting the case.

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John C. Salvi III Indicted on Gun Charges
District of Massachusetts

On January 4, 1995, a Federal grand jury in Boston charged John C. Salvi III with two counts of transporting a firearm in interstate commerce with the intent to commit a felony with that firearm in violation of Title 18, U.S.C. § 924(b). On each count, the defendant faces a maximum penalty of 10 years of imprisonment and a fine of $250,000. In the first count, Salvi was charged with knowingly transporting a Ruger model 10/22 semi-automatic .22 caliber rifle and ammunition from Hampton, New Hampshire, to Brookline, Massachusetts, with intent to injure, intimidate, and interfere with any person obtaining or providing reproductive health services. In the second count, Salvi was charged with transporting the firearm from Brookline, Massachusetts, to Norfolk, Virginia, for the same purpose. The United States Attorney's office for the Eastern District of Virginia, the Norfolk, Virginia Commonwealth Attorney, and a number of law enforcement agencies provided invaluable assistance in this matter.

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Grand Jury Returns Major Racketeering and Associated Crimes Indictment
District of Massachusetts

On January 10, 1995, a Federal grand jury charged seven defendants with two counts each of violating the Racketeer Influenced and Corrupt Organizations (RICO) statute, and with extortion, violations of the Travel Act, and conspiracy and loan sharking. The indictment states that "continuously between 1965 and the present there existed in the District of Massachusetts and elsewhere a criminal organization known by various names, including 'La Cosa Nostra' [and] 'The Mafia'" and "continuously between 1970 and the present there existed in the District of Massachusetts a criminal organization known by various names, including 'The Winter Hill Gang'." The indictment alleges a multi-faceted conspiracy among members of the Winter Hill Gang and La Cosa Nostra. The case is being prosecuted by Assistant United States Attorneys Fred M. Wyshak, Jr., Brian T. Kelly, and James D. Herbert.

Daughter of Malcolm X Indicted in Murder for Hire Case
District of Minnesota

On January 12, 1995, Qubilah Shabazz, daughter of the late Malcolm X, was charged with using the telephone and traveling interstate in the course of hiring another person to murder Minister Louis Farrakhan, leader of the Nation of Islam. The indictment charges eight counts of use of an interstate commerce facility--in this case, the telephone--in the course of a murder for hire scheme, and one count of interstate travel in connection with the murder for hire plot. According to the indictment, Shabazz traveled from New York, her former residence, to Minnesota and that, after arriving in Minnesota, she made a partial payment to the person she hired to kill Farrakhan. Assistant United States Attorney Jeanne Graham, Chief of the Violent and General Crimes Section, and Assistant United States Attorney Andrew Dunne are prosecuting this case. If you would like a copy of the indictment, please call the *United States Attorneys' Bulletin* staff, (202)514-3572.

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Major Insurance Fraud Indictment
Eastern District of New York

On December 28, 1994, Steven Genovese was indicted for defrauding several insurance companies of almost $1 million over a five-year period. According to the indictment, Genovese caused fraudulent applications for millions of dollars worth of life and disability insurance to be submitted to the victim insurance companies, which resulted in payment to Genovese as the agent of hundreds of thousands of dollars of commissions. The insurance companies later learned that many of the premium payments submitted by Genovese in order to generate the commissions were drawn on accounts controlled by him and the applicants, which contained insufficient funds. Assistant United States Attorney Stanley J. Okula, Jr., is prosecuting this case.

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Alien Smuggling Ring
Southern District of New York

On January 4, 1995, five defendants were charged with conspiring to smuggle women from Thailand into the United States and compelling them to engage in prostitution at a Chinatown brothel to repay their debt to the smugglers. The complaint alleges that the defendants induced the women to come to the United States by promising well-paying restaurant jobs to enable them to pay the cost of the trip. After they arrived, they discovered the promised jobs did not exist and they were held against their will. The defendants are all Thai nationals who allegedly participated in the kidnapping and alien smuggling conspiracies in various roles. Assistant United States Attorney Tai H. Park is prosecuting this case.

29 Defendants Charged in International Car Theft Organization
Southern District of New York

On January 31, 1995, 29 defendants, including an employee of the New York State Department of Motor Vehicles, were charged with being part of a sophisticated international car theft organization that stole over $8,000,000 worth of automobiles in the New York City metropolitan area over the last two years. According to the complaint, members of the organization based in the Dominican Republic obtained from corrupt Government officials hundreds of authentic "certificates of origin" that had accompanied expensive vehicles exported from the United States to that country. These certificates, which were supposed to be filed with the Dominican Government, were passed on to conspirators in New York City who ordered that cars be stolen of the make, model, and year described on the certificates. The organization's thieves then scouted city streets, parking garages, and suburban malls throughout the New York metropolitan area looking for a "match." It is charged that "matches" were stolen, usually while parked and unoccupied and brought to locations in the Bronx and elsewhere, where their vehicle identification number (VIN) plates, various VIN-bearing stickers placed throughout the cars, and, in most cases, even VINS etched in remote areas of the cars, are re-tagged to match the VINS on the authentic certificates. The cars were then sold through domestic car dealerships to innocent purchasers throughout the United States, or exported to conspirators in the Dominican Republic. Assistant United States Attorneys John P. Coffey and Richard J. Sullivan are prosecuting this case.

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Major Narcotics Importer Pleads Guilty
District of Puerto Rico

One of the main importers of narcotics in Puerto Rico, Vladimir Collazo Leon, pled guilty to two counts of possession, importation, and distribution of narcotics. The United States forfeited over $2,000,000 in cash and properties in this case. Leon is awaiting sentencing. Assistant United States Attorney Edwin Vazquez is prosecuting this case.

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Housing Project Drug Traffickers Indicted
District of Puerto Rico

Thirteen defendants were charged with distribution and possession with intent to distribute narcotics. Residents from the Augustin Stahl Housing Project, located in the vicinity of an elementary school in Aguadilla, expressed concern about the rampant sale of narcotics, including heroin and cocaine, and the discharge of firearms in the housing project. Assistant United States Attorney Jeanette Mercado-Rios is prosecuting this case.

Political Figure Guilty of Bank Fraud
District of Puerto Rico

Following a seven-week trial, Franklin Delano Lopez, an influential member of local and national politics, was found guilty on five counts of submitting false documents to Federally insured financial institutions and two counts of wire fraud. Mr. Lopez was sentenced to 63 months confinement and a 3-year term of supervised release. He was also ordered to make restitution of $1,636,481 to two financial institutions. Assistant United States Attorneys Epifano Morales and Miguel Pereira are prosecuting this case.

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Former Lawyer Indicted in Drug Conspiracy
District of Puerto Rico

A prominent political figure and disbarred member of the local and Federal bar, Antonio Cordova Gonzalez, and eight co-defendants were indicted on 19 counts charging conspiracy to import and distribute marijuana and heroin. Gonzalez was also charged with aiding and abetting in the unlawful possession of a firearm with an obliterated serial number. United States Attorney Guillermo Gil and Assistant United States Attorney Edwin Vazquez are prosecuting this case.

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Five Indicted in Diesel Fuel Excise Tax Fraud Scheme
Northern District of Texas

On January 27, 1995, five people were charged with tax evasion, wire fraud, and money laundering in connection with a scheme to defraud the U.S. Treasury of more than $1.3 million in diesel fuel excise taxes during 1989 and 1990. The defendants, who owned and operated Hebco Petroleum, Inc., a wholesale motor fuel distributor in Dallas, bought more than 10 million gallons of diesel fuel tax-free from suppliers. They then resold the diesel fuel to various customers at a price that included excise tax. The excise taxes were never paid over to the Government. The Tax Division of the Department of Justice and the Internal Revenue Service are prosecuting this case.

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Major Tax Fraud Conspiracy Indictment Unsealed
Southern District of Texas

On January 11, 1995, a 56-count indictment was unsealed charging eight defendants with conspiracy to file approximately 800 false 1990 Federal income tax returns, and filing false returns against various individuals. The false returns sought unwarranted refunds of approximately $1.8 million by claiming that the filers had purchased large quantities of diesel fuel and that they were entitled to claim an Earned Income Credit, a tax benefit primarily designed to assist low-income wage earners. This case was prosecuted by Department of Justice tax attorney Floyd Miller.

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

EOUSA STAFF UPDATE

On February 13, 1995, Carol DiBattiste, Director, EOUSA, announced that Iden Martyn, Assistant United States Attorney for the Northern District of Ohio, has been selected to serve as Deputy Director for Programs. Ms. DiBattiste thanked all applicants who applied for the position. Mr. Martyn replaces Richard Sponseller, who joined the United States Attorney's office for the Eastern District of Virginia.

Lynne Solien, former Assistant United States Attorney from the Western District of Wisconsin, was selected to serve as Associate Director of the Financial Litigation Staff.

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CONTACT WITH REPRESENTED PERSONS

On January 27, 1995, the U.S. District Court for the Western District of Virginia ruled in United States v. Campbell that the Sixth Amendment permits the United States to make undercover contact with the defendant for the purpose of investigating new crimes. For a summary of this case, please refer to the United States Attorneys' Offices section of this Bulletin, p. 64.

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PREVENTION OF SEXUAL HARASSMENT SEMINAR

On January 18-19, 1995, in keeping with the Attorney General's initiative to develop a comprehensive Plan for the Prevention of Sexual Harassment, EOUSA sponsored a training program in Washington, D.C., for approximately 90 Contact Persons from all United States Attorneys' offices. Carol DiBattiste, Director of EOUSA, opened the seminar with a brief discussion on the prevention of sexual harassment at which time she reaffirmed EOUSA's and the Offices of the United States Attorneys' commitment to maintaining a workplace free from sexual harassment. EOUSA's plan features the designation of one Contact Person in each of the United States Attorney's offices, and EOUSA, who are responsible for hearing and making inquiry into allegations of sexual harassment within their respective offices. Juliet Eurich, Legal Counsel, has been appointed as EOUSA's Sexual Harassment Coordinator with overall responsibility for providing assistance and guidance to Contact Persons. For further information concerning this program, please call the Legal Counsel's office, (202)514-4024.

VIDEO TELECONFERENCING

On January 19, 1995, the Telecommunication and Technology Development Staff (TTD), Executive Office for United States Attorneys, in their role as Executive Agent for Video Teleconferencing, conducted a Department-wide meeting to discuss the results of their Video Teleconferencing Pilot. TDD briefed the attendees on the status of new video services and presented details of their efforts to develop Department-wide procurement vehicles through two existing Department of Defense (DOD) contracts, a U.S. Army Corps of Engineers contract and a U.S. Air Force contract. In addition, TDD discussed the status of an 8A contract they are developing and the status of the associated requests to the General Services Administration (GSA) for specific Delegations of Procurement Authorities for Video Teleconferencing Systems. TDD requested each Department organization that is interested in video teleconferencing to provide their requirements to TDD to ensure that all DOJ components' procurement objectives could be incorporated in one request to GSA.

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CASE MANAGEMENT AND OFFICE AUTOMATION STAFF QUARTERLY STATUS REPORT

In an effort to keep all United States Attorneys informed of EOUSA's efforts to improve office automation and case management, on February 3, 1995, Carol DiBattiste, Director, EOUSA, forwarded to all United States Attorneys, First Assistant United States Attorneys, and Administrative Officers a quarterly status report. The report on office automation discusses EAGLE, JCON, PC upgrades, WordPerfect, printers, windows, Email, security, servers, maintenance, litigation support, computer publications, and other activities. The report on case management discusses the currently automated case management systems, the new U.S. Attorneys' Caseload Management System (LIONS), new collection systems, assets tracking, USA-5, Departmental case management systems, and the Grand Jury Tracking System. Copies of this status report is available from your District Administrative Officer.

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PRE-APPROVED COMPUTER HARDWARE AND SOFTWARE

Delegation of Procurement Authority to the United States Attorneys' offices includes the purchase of computer hardware and software. A list of hardware and software items which are approved for purchase without further approval from the Office Automation Staff is available from your District Administrative Officer. Please note that such purchases may be made by those who have been delegated authority to sign purchase orders; however, this delegation does not constitute approval of additional funds or does not preclude the requirement to adhere to other policies that are in place. Requests to purchase computer hardware or software that are not included on the list must be submitted in writing, or via electronic mail, to the Assistant Director, Office Automation Staff, EOUSA, (202)616-6969 or AEX02(CSLOAN).

1995 MAXIMUM EMPLOYEE CONTRIBUTION TO THE THRIFT SAVINGS PLAN

The 1995 limit on employee contributions to their Thrift Savings Plan (TSP) accounts is $9,240. The Internal Revenue Service has announced the same maximum employee contribution limit as last year. This limit could have important consequences for employees participating in the TSP who are covered by the Federal Employees' Retirement System (FERS) and whose pay in calendar year 1995 will exceed $92,400. We also need to remember that geographic locality pay adjustments (which vary between 3.74 and 8.53 percent) are considered "pay" for purposes of TSP contributions and for determining whether an employee's salary exceeds $92,400. It is important that such employees are aware of the limit since TSP will not accept any contributions exceeding $9,240 (or any Government matching contributions related to them).

Participating FERS employees earning more than $92,400 during 1995 **could lose** some agency matching contributions (not the agency automatic one percent contribution) if, by contributing up to 10 percent of their adjusted gross pay each pay period to TSP, they reach the $9,240 maximum contribution before the end of the calendar year. This is true because a FERS participant only receives agency matching contributions on the first five percent of adjusted gross pay contribution each pay period. If a participant reaches the annual limit before the end of the calendar year, the contributions (and agency matching contributions) will stop. As a result, the participant would not get the full amount of agency matching contributions that he or she could have received **if employee contributions had continued over every pay period throughout the entire calendar year.** If you are one of these employees, you may want to adjust your TSP contribution amount during the May 15 through July 31, 1995, open season by submitting a Form TSP-1, Election Form. Please contact your Personnel Officer for a copy of TSP Bulletin 95-4. Questions concerning this matter should be directed to your servicing Personnel Specialist or Administrative Officer.

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OFFICE OF LEGAL EDUCATION

James A. Hurd, Jr., Director, Office of Legal Education (OLE), is pleased to announce OLE's projected course offerings for the months of March through July 1995 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 (DOJ) divisions. LEI provides legal education programs to all Executive Branch attorneys, paralegals, and support personnel, and to paralegal and support personnel in the United States Attorneys' offices (USAOs).

AGAI Courses

The courses listed below are tentative only. OLE will send Email announcements approximately 8 weeks prior to each course to all United States Attorneys' offices and DOJ divisions officially announcing each course and requesting nominations.

March 1995

Date	Course	Participants
1-3	Computer Crimes	AUSAs, DOJ Attorneys
7-9	Financial Litigation for AUSAs	AUSAs
20-28	Criminal Trial Advocacy	AUSAs, DOJ Attorneys
21-23	Affirmative Civil Enforcement	AUSAs, DOJ Attorneys

April 1995

4-6	Civil Chiefs	USAO Civil Chiefs
4-6	Advanced Money Laundering	AUSAs, DOJ Attorneys
10-13	Health Care Fraud	AUSAs, DOJ Attorneys
12-14	Attorney Supervisors	AUSAs
18-20	Computer Assistance in Complex Litigation	AUSAs, DOJ Attorneys
24-29	Asset Forfeiture Advocacy	AUSAs, DOJ Attorneys
25-28	Evidence for Experienced Litigators	AUSAs, DOJ Attorneys

May 1995

1-5	Appellate Advocacy	AUSAs, DOJ Attorneys
2-5	Death Penalty	AUSAs, DOJ Attorneys
9-12	Complex Prosecutions	AUSAs, DOJ Attorneys
16-19	Environmental Crimes	AUSAs, DOJ Attorneys

May 1995 (Cont'd.)

Date	Course	Participants
22-25	Asset Forfeiture Federal Practice	AUSAs, DOJ Attorneys
24-26	Prison Litigation	AUSAs, DOJ Attorneys

June 1995

5-9	Advanced Civil Trial	AUSAs, DOJ Attorneys
6-8	Advanced Bankruptcy	AUSAs, DOJ Attorneys
6-9	Advanced Narcotics	AUSAs, DOJ Attorneys
13-15	Affirmative Civil Enforcement	AUSAs, DOJ Attorneys
19-23	Criminal Federal Practice	AUSAs, DOJ Attorneys
20-22	Ninth Circuit Asset Forfeiture Component	AUSAs, DOJ Attorneys
27-30	Public Corruption	AUSAs, DOJ Attorneys

July 1995

11-14	Violent Crime	AUSAs, DOJ Attorneys
17-21	Advanced Criminal Trial	AUSAs, DOJ Attorneys
18-20	Second Circuit Asset Forfeiture Component	AUSAs, DOJ Attorneys
18-21	Advanced Evidence (Civil)	AUSAs, DOJ Attorneys
25-28	Complex Prosecutions	AUSAs, DOJ Attorneys
31-8/4	Advanced Civil Trial	AUSAs, DOJ Attorneys

August 1995

Date	Course	Participants
9-11	Attorney-Supervisors	AUSAs
15-17	Alternative Dispute Resolution	AUSAs, DOJ Attorneys
15-18	Evidence for Experienced Litigators	AUSAs, DOJ Attorneys
16-18	Criminal Chiefs (Large)	USAO Criminal Chiefs
21-9/1	Civil Trial Advocacy	AUSAs, DOJ Attorneys
22-24	Third Circuit Asset Forfeiture Component	AUSAs, DOJ Attorneys
23-25	Criminal Chiefs (Small and Medium)	USAO Criminal Chiefs
29-31	First Assistant United States Attorneys	USAO First Assistants

LEI Courses

LEI offers courses designed specifically for paralegal and support personnel from USAOs **(indicated by an * below).** Approximately 8 weeks prior to each course, OLE sends an Email to all USAOs announcing the course and requesting nominations. Nominations are sent to OLE via FAX, and student selections are made. OLE funds all LEI course costs for paralegals and support staff personnel from USAOs.

Other LEI courses offered for all Executive Branch attorneys (except AUSAs), paralegals, and support personnel are officially announced via mailings, sent every 4 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 as **Appendix A.** 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 3 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 *).

March 1995

Date	Course	Participants
6-8	Law of Federal Employment	Attorneys
8	Introduction to the Freedom of Information Act	Attorneys, Paralegals
9-10	Federal Administrative Process	Attorneys
13	Ethics and Professional Conduct	Attorneys
13-17*	Legal Support Staff	USAO Paralegals
14-17	Examination Techniques	Attorneys
21-23*	Bankruptcy for Support Staff	USAO Support Staff
24	Legal Writing	Attorneys
29-31	Attorney Supervisors	Attorneys
30-31	Evidence	Attorneys

April 1995

3-7*	Experienced Paralegal	USAO Paralegals
4-6	Trial Preparation	Attorneys
10-11	Legislative Drafting	Attorneys
12	Americans with Disabilities Act	Attorneys
12-13	Wetlands Regulation and Enforcement	Attorneys

April 1995 (Cont'd.)

Date	Course	Participants
18-19	Freedom of Information Act for Attorneys and Access Professionals	Attorneys, Paralegals
19-20	Federal Acquisition Regulations	Attorneys
20	Privacy Act	Attorneys, Paralegals
24-28*	Advanced Legal Secretary	USAO Legal Secretaries

May 1995

8-10	Law of Federal Employment	Attorneys
8-12	Research and Writing Refresher for Paralegals	Paralegals
11	Freedom of Information Act Forum	Attorneys, Paralegals
16-18	Negotiation Skills	Attorneys
22	Ethics for Litigators	Attorneys
25	Computer Assisted Legal Research	Attorneys, Paralegals
31-6/2	Natural Resources	Attorneys

June 1995

1-2	Agency Civil Practice	Attorneys
5	Statutes and Legislative Histories	Attorneys, Paralegals

June 1995 (Con't.d)

Date	Course	Participants
6-7	Freedom of Information Act for Attorneys and Access Professionals	Attorneys, Paralegals
8	Privacy Act	Attorneys, Paralegals
6-8	Advanced Bankruptcy	Attorneys
12-16*	Civil Paralegal	USAO Paralegals
20-22	Discovery	Attorneys
23	Advanced Freedom of Information Act	Attorneys, Paralegals
26-30*	Advanced Legal Secretary	USAO Legal Secretaries
27	Legal Writing	Attorneys
28-30	Attorney Supervisors	Attorneys

July 1995

6-7	Alternative Dispute Resolution	Attorneys
10-14*	Basic Paralegal	USAO Paralegals
12-13	Freedom of Information Act for Attorneys and Access Professionals	Attorneys, Paralegals
14	Privacy Act	Attorneys, Paralegals
21	Legal Writing	Attorneys
24	Ethics and Professional Conduct	Attorneys
24-28*	Appellate Paralegal	USAO, DOJ Paralegals
31-8/8*	Financial Litigation Paralegal	USAO Paralegals

August 1995

9-10	Evidence	Attorneys
14	Fraud, Debarment, and Suspension	Attorneys
14-18*	Legal Support Staff	USAO Paralegals
15-18	Examination Techniques	Attorneys
21-22	Federal Administrative Process	Attorneys
23	Introduction to Freedom of Information Act	Attorneys, Paralegals

Office of Legal Education Contact Information

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Deputy Director	David Downs
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Assistant Director (AGAI-Criminal)	Angel Moreno
Assistant Director (AGAI-Civil & Appellate)	Tom Majors
Assistant Director (AGAI-Asset Forfeiture and Financial Litigation)	Kathy Stark
Assistant Director (LEI)	Donna Preston
Assistant Director (LEI-Paralegal and Support)	Donna Kennedy

DEPARTMENT OF JUSTICE HIGHLIGHTS

ANTITRUST DIVISION

Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division

On February 1, 1995, the Antitrust Division named Gary R. Spratling as the Division's Deputy Assistant Attorney General for Criminal Enforcement. Mr. Spratling, a career prosecutor with more than 20 years of antitrust experience, succeeds Joseph H. Widmar in the top career position in the Division. For the past 11 years, Mr. Spratling has been Chief of the Division's San Francisco Field Office. He has been the recipient of numerous awards, including two of the highest honors awarded by the Department: the John Marshall Award (1988) and the Presidential Rank Award (1991).

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Illegal Price Fixing in the Toy Industry

On January 31, 1995, the Department of Justice reached a settlement with Playmobil USA Inc., one of the nation's largest specialty toy companies, that will stop the company from fixing resale prices of its toys sold to retail stores. Playmobil, whose parent company is Geobra Brandstatter GmbH & Co. KG., of Germany, is one of the leading specialty toy companies in the United States with annual sales of more than $18 million. Playmobil agreed to end its illegal price fixing efforts after the Antitrust Division charged that the practices eliminated competition among retail stores. This is the Administration's second case filed by the Department of Justice involving vertical price fixing.

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Major Settlement in Natural Gas Industry

On January 12, 1995, El Paso Natural Gas Company, which operates the largest gas pipeline system in the San Juan Basin of New Mexico and Colorado, settled an antitrust case that will prevent it from requiring gas well owners to purchase metering equipment along with natural gas gathering services from El Paso. At the same time, a proposed consent decree was filed that, if approved by the court, would settle the suit. The settlement could lower the cost of natural gas production saving millions of dollars.

CIVIL DIVISION

Commercial Litigation Branch Newsletter

The Corporate/Financial Litigation Group, Commercial Litigation Branch, Civil Division, has initiated an electronic mail bankruptcy newsletter. Distributed to every United States Attorney's office nationwide, it provides summaries of recent and topical cases, legislation, and other matters of interest to Assistant United States Attorneys practicing in bankruptcy.

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Two Blue Cross Blue Shield Settlements

On January 18, 1995, the Civil Division announced two major settlements with Blue Cross Blue Shield of Michigan, Inc.:

Blue Cross Blue Shield Inc. will pay the United States $27.6 million to settle civil claims it improperly billed and submitted false documentation to the Government as the fiscal intermediary of the Medicare program in Michigan. The settlement resolves a qui tam complaint, United States ex rel. Darcy Flynn v. Blue Cross Blue Shield of Michigan, that was filed in U.S. District Court in Baltimore on August 4, 1992. The complaint alleged that Blue Cross Blue Shield defrauded the Government by performing cursory and inadequate audits. When the Health Care Financing Administration (HCFA) asked to review specific audits, Blue Cross Blue Shield "corrected" the audits and backdated revised work papers to conceal the fact that the original audits were inadequate and poorly done. HCFA concluded that Blue Cross Blue Shield was performing its audits responsibly when, in fact, they were not identifying hospital payment claims that did not qualify for Medicare reimbursement, causing the improper payment of Federal funds to the hospitals.

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Blue Cross Blue Shield of Michigan paid the United States $24 million to settle a lawsuit charging that it unlawfully billed the Government's Medicare program for thousands of medical insurance claims that should have been paid from private insurance funds. This settlement resolves a suit (United States v. Blue Cross Blue Shield of Michigan) the Department filed against Blue Cross under the Medicare Secondary Payer (MSP) laws in U.S. District Court in Detroit in 1989. MSP laws require private insurers such as Blue Cross to pay primary benefits in certain circumstances where a person has medical insurance under both Medicare and an employer health plan; for example, when a person age 65 or older continues to work and receives health coverage through his or her employer. An audit by the Office of the Inspector General of the Department of Health and Human Services found that Blue Cross paid thousands of dual-coverage claims from the Medicare Trust Fund rather than from its private insurance funds. The settlement resolves a longstanding dispute between the Health Care Financing Administration and Blue Cross over the extent of the company's liability for such Medicare payments.

Case Summaries

In re Federated Department Stores, Nos. 93-3745 & 93-4168 (Jan. 17, 1995)[6th Cir.; Bankr. S.D. Ohio; S.D. Ohio]

The bankruptcy court had appointed Shearson Lehman Brothers, as a financial advisor to Federated Department Stores, the debtor in one of the largest Chapter 11 bankruptcy cases ever filed. This appointment was made over the objections of the U.S. Trustee, who argued that Shearson was disqualified because Shearson's extensive financial connections with the debtor rendered it not "disinterested," as required by the Bankruptcy Code. The U.S. Trustee appealed Shearson's appointment to the district court. The debtor's plan of reorganization was confirmed, and Shearson filed an application with the bankruptcy court for fees for its services. The bankruptcy court approved the fee application, awarding Shearson over $6.75 million. The U.S. Trustee appealed the fee award to the district court, claiming retention was invalid. The district court concluded that the U.S. Trustee's challenge to Shearson's retention was moot, because Shearson had completed its employment. The district court also concluded that it had discretion to award fees to Shearson.

The Sixth Circuit found that Shearson's appointment was invalid and required Shearson to disgorge part of the fees it had collected. The Court of Appeals decided that the U.S. Trustee's challenge to Shearson's retention presented a live issue because of its "collateral consequences" for the compensation appeal. The Court held that Shearson's financial connections with the debtor meant Shearson could not meet the Code's standard of "disinterestedness." Therefore, the panel reversed the order retaining Shearson as "not a valid appointment." Analyzing the Bankruptcy Code provisions authorizing the award of fees, the Court found that a valid appointment "is a prerequisite to an award of compensation." Since Shearson had not been appointed validly, the Court required Shearson to partially disgorge its fees for the benefit of the estate. However, citing the "peculiar and unique circumstances" of the case, the Court created an "equitable" exception to the rule it announced, allowing Shearson to retain the portion of its fees relating to the time before the first Sixth Circuit decision discussing the standards for disinterestedness.

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Gilbert v. Shalala, Nos. 93-1399 & 94-1125 (Jan. 17, 1995)[10th Cir.; D. Col.]

Plaintiffs, social security claimants whose claims were denied and who did not appeal the denial, allege that the denial notices they received violated due process because the notices were misleading concerning when and how a claimant can appeal the denial of a social security claim. The district court dismissed their cases for lack of Article III standing because plaintiffs failed to prove that they relied on the notices to their detriment. The court also held that plaintiff Neal's case is moot because the Social Security Administration had extended the deadline for appealing his claim for reasons unrelated to his lawsuit and granted him back benefits.

Noting that the standing issue is one of first impression in the Tenth Circuit, the court held that plaintiffs must show they detrimentally relied on the allegedly misleading language in their denial notices. Since plaintiffs did not make that showing on the record, the court affirmed the grant of summary judgment for the Government. The court also affirmed the denial of attorney's fees to plaintiff Neal because the position of the United States concerning his claim was substantially justified. In so ruling, the court noted that the Government "was reasonable in its position that the denial notices were constitutionally adequate."

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Lowell V. Sturgill Jr. - (202)514-3427

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Raines v. Shalala, No. 93-3557 (Jan. 11, 1995)[7th Cir.; N.D. Ill.]

William Raines successfully appealed the denial of social security disability and supplemental security income benefits to district court, which reversed and remanded the case to the Secretary of Health and Human Services for further review under sentence four of 42 U.S.C. § 405(g). On remand, the Secretary awarded benefits and Raines petitioned for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). The district court awarded fees at prevailing market rates of $175.00 per hour, finding that Raines' attorney's special expertise in social security law justified an enhancement above the statutory fee cap of $75.00 an hour. Attorney's fees were also awarded for the post-remand hearings, holding that the Supreme Court's decision in Shalala v. Schaefer, 113 S. Ct. 2625 (1993), which made clear that administrative proceedings following a sentence four remand were not compensable under the EAJA, should not apply retroactively to this case. The Secretary appealed and the Seventh Circuit [Meskill (by designation), Coffey and Ripple, J.J.] has now reversed.

On appeal, the Secretary argued that, under Pierce v. Underwood, 487 U.S. 552 (1988), social security benefits law could not constitute a "specialized" practice within the meaning of the EAJA, and urged the court to adopt the views of the Tenth and D.C. Circuits, which require skills or expertise above and beyond an attorney's knowledge of a particular area of law. Although the Seventh Circuit declined to hold that an identifiable practice specialty in a field of general American law could never justify an enhanced rate, it agreed that Pierce requires a showing that the specialty involves specialized legal skills above those possessed or easily acquired by members of the bar. Applying this test, it concluded that social security law could not, in itself, be considered such a specialized area, going into conflict with the Ninth Circuit. The Seventh Circuit also held that the district court had erred in failing to apply Schaefer retroactively to the post-remand proceedings in light of Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510 (1993), which holds that when the Supreme Court applies a rule of Federal law to the parties before it, that rule must be given full retroactive effect in all cases still pending at the time of its decision.

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Citizens Commission on Human Rights v. Food and Drug Administration,
No. 93-55818 (Jan. 18, 1995) [9th Cir.; C.D. Cal.]

Plaintiff, Citizens Commission on Human Rights, an entity affiliated with the Church of Scientology, filed a FOIA request seeking all Food and Drug Administration (FDA) records pertaining to the drug Prozac. Although the FDA produced approximately 10,000 pages of responsive records, it withheld thousands of other documents under Exemption 4 as confidential, commercial information submitted by Eli Lilly, the manufacturer of Prozac. After plaintiff filed its action, Lilly intervened to defend the agency's withholding decision. The FDA moved for summary judgment and submitted a Vaughn index, prepared largely by Lilly, which described approximately 325,000 pages of responsive records. The district court held that the Vaughn index was sufficient and upheld the agency's decision to withhold the documents.

On appeal, plaintiff challenged the sufficiency of the agency's search for responsive records, the adequacy of the Vaughn index, the district court's refusal to permit discovery, and the decision on the merits. The Ninth Circuit affirmed the district court's disposition of all the significant issues in the case. The court upheld the sufficiency of the agency's search for responsive documents and rejected plaintiff's contention that the FDA's inability to account for the whereabouts of missing volumes of potentially responsive documents demonstrated that its search was inadequate. It also held that the Vaughn index gave the district court an adequate basis to determine whether the documents were exempt from disclosure and gave the requester a meaningful opportunity to address that question. Because the FDA had determined which records to withhold, the court concluded that the agency could properly allow Lilly to prepare much of the Vaughn index. The court also rejected plaintiff's argument that the index was inadequate because it summarized entire volumes of records rather than individual documents. Because the Vaughn index was sufficient, the court held that plaintiff was not entitled to discovery and that the agency had met its burden to show that the withheld documents were exempt.

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Assassination Archives and Research Center v. Department of Justice,
No. 93-5310 (Jan. 20, 1995) [D.C. Cir.; D.D.C.]

Plaintiff, Assassination Archives and Research Center, brought an action under the Freedom of Information Act (FOIA) seeking release of FBI records pertaining to a named individual and the assassination of President Kennedy. Initially, the FBI produced portions of the two responsive documents it located but withheld the remaining portions based on Exemption 7 of FOIA. After the suit was filed, Congress passed the JFK Assassination Records Collection Act. Plaintiff then asserted that the withheld materials should be released under the JFK Act as well as under FOIA. The district court granted summary judgment for the Department holding that the JFK Act does not create a private right of action and that the substantive standards governing release of records under the JFK Act do not supersede FOIA's disclosure standards in actions brought under FOIA.

The D.C. Circuit affirmed the district court's decision and held that the JFK Act does not explicitly create a private right of action and that implying such a right of action would undermine the system for implementing the statute that Congress created. The court also rejected plaintiff's contention that in FOIA actions concerning records subject to the JFK Act, the standards governing release of records under the JFK Act should control rather than the standards governing the FOIA. The court concluded that Congress explicitly addressed the relationship between the JFK Act and the FOIA and did not determine that the substantive standards in the JFK Act should supersede the FOIA.

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CIVIL RIGHTS DIVISION

The following is an update of significant issues and cases occurring in the Civil Rights Division and the United States Attorneys' offices. If you have questions concerning these issues or cases, please call Poli Marmolejos, Special Assistant to the Assistant Attorney General, Civil Rights Division, (202)307-3111.

Fair Housing Act Opinion

On January 20, 1995, the Office of Legal Counsel of the Department of Justice issued a Memorandum clarifying the legal relationship between Department attorneys and persons on whose behalf the United States institutes civil actions pursuant to the Fair Housing Act. In Fair Housing cases, Department attorneys do not enter into an attorney-client relationship when they undertake a matter on behalf of a complainant or when they file a pattern or practice case seeking damages for aggrieved persons. OLC also stated that Government attorneys do not have a "fiduciary duty" to the complainant.

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National Voter Registration Act

On January 23, 1995, the Civil Rights Division filed lawsuits against the States of Illinois and Pennsylvania because of their failure to comply with the National Voter Registration Act of 1993 (NVRA). These cases are the Department's first enforcement actions under the NVRA, which went into effect on January 1, 1995. Under the NVRA, States must provide individuals with voter registration forms at motor vehicle offices, State social services agencies, and by mail; States must also refrain from purging voters for failure to vote. On January 23, 1995, the Division also filed an expedited Answer, Counterclaim and Third-Party Complaint in Wilson v. United States, California's challenge to the constitutionality of the NVRA. In addition, on January 24, the State of South Carolina filed suit challenging the constitutionality of the NVRA and seeking a preliminary injunction preventing its implementation. Condon v. Reno. The Division similarly filed an expedited Answer, Counterclaim, and Third Party Complaint seeking compliance with the NVRA.

The NVRA was signed by President Clinton into law in May 1993. Shortly thereafter, the Department of Justice notified all States of their obligation under the law. Since that time the Department has been working with State officials to ensure that they voluntarily complied. Under the NVRA, States must make the voter registration process easier for its citizens by providing opportunities for people to register at various public places.

Although the law went into effect on January 1, 1995, three states--Arkansas, Virginia, and Vermont--have been provided additional time to comply in order to afford them the opportunity to amend their State constitutions. Four states--Minnesota, North Dakota, Wisconsin, and Wyoming--are exempt from the law because they already had same day or no requirement for voter registration prior to passage of the Act. The Civil Rights Division is continuing to monitor implementation of the NVRA in other States to ensure full compliance and to determine if similar legal action is necessary to bring about compliance.

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Americans with Disabilities Act (ADA)

On January 4, 1995, the Department of Justice announced that they have made an agreement with Dollar Rent A Car regarding rental cars with respect to persons with disabilities. Dollar has agreed to modify a policy that prevented people with disabilities from renting a car even if they intended that the car be driven by a licensed companion. Under a previous agreement, Dollar required the licensed driver to be the financially responsible party. That policy made it impossible for people with disabilities who cannot drive to rent cars, even when a licensed driver accompanied them.

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On January 11, 1995, the Department of Justice announced an agreement that a Connecticut dental office that allegedly refused to treat persons with AIDS will pay $29,000 in damages and penalties. The agreement resolves a complaint filed by the Legal Aid Society of Hartford County alleging that a man had contacted the dental office, scheduled an appointment, and indicated that he had AIDS. The day before the scheduled appointment, the dental office called him to cancel his appointment stating that they would not treat patients with AIDS. Under the agreement, the dental office will no longer discriminate on the basis of a disability, will pay $20,000 in compensatory damages to the complainant's estate and $9,000 in civil penalties to the U.S. Treasury, will publicize its policy of non-discrimination, and will train its staff in the appropriate treatment of patients with HIV and AIDS.

Title III of the ADA prohibits discrimination against persons with disabilities in places of public accommodation, such as medical offices. Testing positive for HIV and having AIDS are both considered disabilities under the ADA. The Centers for Disease Control and Prevention and the American Dental Association have issued policy guidelines stating there is no medical justification for excluding persons from dental or orthodontic treatment solely on the basis of their HIV-positive or AIDS status. Both organizations recommend the use of "Universal Precautions," infection control procedures to prevent the transmission of bloodborne diseases, including HIV, in the health care setting.

Freedom of Access to Clinic Entrances Act (FACE)

On January 18, 1995, the Department of Justice filed suit under the Freedom of Access to Clinic Entrances Act (FACE) against three North Dakota residents and a Minnesota resident who allegedly blocked a women's health clinic in Fargo or followed members of its staff. In its complaint, the Justice Department alleged that Ronald D. Shaw and Timothy Lindgren and a group of unidentified persons blocked access to the Fargo Women's Health Organization by constructing a barrier made of cars and scrap metal. It alleged that the two individuals locked themselves to the cars so that the vehicles could not be moved without injuring them. The complaint also alleges that some individuals intimidated members of the clinic's staff by continuously following, chasing, or shouting at them. This is the fourth civil action filed under the law signed by President Clinton in May of 1994. United States Attorney John T. Schneider and Assistant United States Attorney Lynn Crooks of the District of North Dakota, and Iris Goldschmidt of the Civil Rights Division, Department of Justice, are prosecuting this case.

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Case Summaries

United States v. Koon & Powell, Nos. 93-50561, 50562, 50608, and 50609 (Rodney King case) (Jan. 12, 1995)[9th Cir.]

On January 12, 1995, the Ninth Circuit denied the petition for rehearing and suggestion for rehearing en banc in United States v. Koon & Powell. Nine judges dissented from the refusal to rehear the case en banc. Judge Reinhardt, writing for the dissenting judges, asserted that the panel erred in vacating the downward departures ordered by the district judge. Judge Reinhardt asserted that the district judge acted within his discretion in sentencing the defendants to terms below the applicable Sentencing Guidelines range. The United States filed an opposition to the petition for rehearing and suggestions for rehearing en banc. Assistant United States Attorney Lawrence Middleton of the Central District of California, and Barry Kowalski, Civil Rights Division, Department of Justice, are prosecuting this case.

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United States v. Board of Educ. of the Township of Piscataway, Nos. 94-5090 and 94-5112 (Jan. 24, 1995)[3rd Cir.]

On January 24, 1995, the Third Circuit heard oral argument in United States v. Board of Educ. of the Township of Piscataway. The Civil Rights Division brief as amicus curiae urged reversal of the District Court's ruling that the Piscataway School Board violated Title VII of the Civil Rights Act by retaining a black business education teacher rather than an equally qualified white teacher. Reversing the position the United States advocated in the District Court, the Civil Rights Division argued in their brief that the School Board's use of race as one of a number of factors in deciding whom to retain between two teachers equal in seniority, qualifications, and performance -- even absent a finding by the Board of past discrimination or a manifest underrepresentation of black teachers employed by the Board -- is permissible under Title VII as a means to ensure faculty diversity within the business education department of Piscataway High School.

In re Grand Jury Proceedings, Kinamon v. United States, No. 93-15596 (Jan. 19, 1995)[9th Cir.)

On January 19, 1995, the Ninth Circuit issued its decision in In re Grand Jury Proceedings, Kinamon v. United States. In the course of investigating an arrest made by appellant, a police officer, for possible civil rights violations, a Federal grand jury issued a subpoena seeking a copy of a police department internal investigation report on the incident. Appellant moved to quash on the ground that the report was based on his immunized compelled statements. The District Court denied the motion, stating that appellant was not entitled to any immunity for his statements and that a grand jury was not a criminal proceeding. The Civil Rights Division argued on appeal that the District Court did not abuse its discretion in denying the motion to quash, since appellant's compelled statements and any fruits of those statements would be redacted from the report before it was presented to the grand jury, and since appellant's right not to have immunized statements used against him would, in any event, be fully protected by a Kastigar hearing if he is later indicted. The Court of Appeals reversed and remanded, finding the District Court's stated reasons for denying the motion incorrect as a matter of law and instructing the District Court to reconsider the need for a hearing in light of the correct legal standards. The court did not consider the Civil Rights Division's alternative arguments for affirmance.

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McKennon v. Nashville Banner Co., No. 93-1543(Jan. 23, 1995)[S.Ct.]

On January 23, 1995, the Supreme Court issued its decision in McKennon v. Nashville Banner Co. The Court of Appeals, relying on the doctrine of "after-acquired evidence," had granted summary judgment to an employer charged with age discrimination based on evidence about the employee's misconduct that the employer discovered after the employment decision was already made but which provided non-discriminatory support for the employment decision under review. The Supreme Court did away with the "after-acquired evidence" defense, holding that while after-acquired evidence may be relevant to the extent of back-pay relief, it may not be used to absolve an employer completely from discriminatory employment actions. The Court's decision reflected the position the Civil Rights Division advanced in their amicus brief.

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United States v. Commonwealth of Virginia (VMI), Nos. 94-1667 and 94-1712 (Jan. 26, 1995)[4th Cir.]

On January 26, 1995, the Fourth Circuit adopted the District Court's decision approving the Commonwealth's proposed remedial plan creating a separate military-style education program for women at Mary Baldwin College, called the Virginia Women's Institute for Leadership. The Civil Rights Division had argued that the program at Mary Baldwin College does not satisfy the Commonwealth's obligations under the Equal Protection Clause because it does not provide women VMI's unique educational methodology and rests on impermissible group generalizations and stereotypes.

The Fourth Circuit rejected this view, and found that the Commonwealth of Virginia had an important and legitimate interest in offering single-sex education to both genders, and that the VMI and Mary Baldwin programs were "sufficiently comparable" to pass scrutiny under the Equal Protection Clause. It remanded the case with instructions to the District Court to review the implementation of the program to ensure that it was run by a competent administrator, adequately funded, well-promoted, and subject to continuing review.

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ENVIRONMENT AND NATURAL RESOURCES DIVISION

$1.5 Million Fine for Illegal Toxic Waste Disposal

On January 3, 1995, a manufacturing company in Tampa, Florida, was fined a statutory maximum $1.5 million for the illegal disposal of toxic wastes that led to the deaths of two nine-year-old boys. The company was also placed on five years probation and ordered to develop an effective environmental compliance program. In June 1992, two boys climbed into a dumpster outside the plant and were overcome by toxic fumes from toluene wastes, a cleaning solvent, which the company had been unlawfully disposing of in the dumpster. On July 13, 1994, the company became the first corporate defendant to ever plead guilty to a charge of knowing endangerment under the Resource, Conservation and Recovery Act (RCRA), the Federal law that regulates the handling and disposal of hazardous waste. The case was investigated jointly by the FBI and the Environmental Protection Agency; it was prosecuted by Assistant United States Attorney Dennis I. Moore of the Middle District of Florida, and Special Assistant United States Attorney W. Bruce Pasfield of the Environmental Crimes Section of the Department of Justice.

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Wolf Reintroduction Program in the District of Wyoming

On January 3, 1995, a Federal district court in Wyoming rejected a request by the American Farm Bureau Federation to stop the Department of the Interior from carrying out its plan to reintroduce the gray wolf into Yellowstone National Park and central Idaho. The Farm Bureau, in conjunction with the Mountain States Legal Foundation, challenged the legality of the plan, and argued that it will suffer severe economic losses if the wolves are introduced because they will destroy the farmers' livestock. In denying the request, the court found that the Farm Bureau had failed to prove their claim that the reintroduction of wolves will result in irreparable injury to Farm Bureau members. The court found that livestock losses from wolf attacks are expected to be minimal when compared with other causes of depredation, and that such losses would not cause irreparable harm to plaintiffs' business interests. The court found that plaintiffs' claims of injury were speculative and anecdotal.

Landmark Air and Water Pollution Settlement

In a major settlement that will help reduce air and water pollution in the northern regions of Michigan and Wisconsin, the Copper Range Company has agreed to curb the mercury, lead, and cadmium output from its smelting plant in White Pine, Michigan, and to pay $4.8 million for civil penalties and environmental projects under a settlement announced by the Department of Justice and Environmental Protection Agency. The settlement also offers relief for local Native Americans whose blood contains elevated levels of mercury from air pollution. The settlement resolves a 1992 Clean Air Act suit brought by the National Wildlife Federation and Michigan United Conservation Clubs that was later joined by the United States, Michigan, and Wisconsin. The $4.8 million payment, which will be divided among the United States and the two states, makes the agreements one of the largest Clean Air Act settlements on record.

Case Summaries

The following is an update of recently decided cases worked on jointly by the Environmental Crimes Section (ECS) of the Environment and Natural Resources Division and the United States Attorneys' offices:

U.S. v. Wayne Evans (D.Az.)(CAA)(Dec. 15, 1994)

Wayne Evans, a project manager for Huntington Construction, Inc., who was indicted in Tucson on August 11, 1993, on two counts under the Clean Air Act (CAA) and one count of making false statements in violation of 18 USC §1001, was found not guilty. The charges stemmed from violations of the National Emission Standards for Hazardous Air Pollutants during a demolition project.

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Marty Woelfle, ECS - (202)272-9891

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U.S. v. Robert L. Vandiver (W.D.Ark.)(CWA)(Dec. 19, 1994)

Robert Vandiver pled guilty to a one-count Clean Water Act (CWA) misdemeanor information, charging him with the negligent discharge of pollutants into a publicly owned wastewater treatment plant in violation of the local pretreatment ordinance. Vandiver was co-owner/operator and chief engineer of Byron Valve Machine Company, Inc. (BVM), of Siloam Springs, Arkansas, a manufacturer of brass and aluminum refrigeration components. As BVM's responsible corporate officer, Vandiver presided over BVM's manufacturing processes. Vandiver was sentenced to six months probation and a fine of $4,000.

Attorneys: AUSA Mark Webb - (501)783-5125
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U.S. v. OEA, Inc. (D.Col.)(RCRA)(Dec. 13, 1994)

As a result of a guilty plea to a six-count Resource Conservation and Recovery Act information, OEA, Inc., a Government contractor, was sentenced to a $2.25 million fine, reduced by $1.1 million for OEA's payment to the State of Colorado as penalties for the same conduct. The plea agreement was filed on April 28, 1994, in which OEA pled guilty to charges stemming from the illegal transportation, treatment, disposal, and storage of hazardous waste. OEA generated hazardous reactive and ignitable wastes in its business which produces small explosive devices for the Department of Defense, NASA, and the auto industry. It is the largest United States manufacturer of the airbag initiator, a device that inflates automobile airbags. Under the settlement, OEA agreed to spend another $3 million on pollution prevention and "waste minimization" projects approved by the Colorado Health Department. The Federal criminal and State civil suits against OEA followed a series of incidents from 1989 to 1991 when employees were injured while they worked with, or were disposing of, explosive chemicals and hazardous wastes.

Attorney: AUSA John Haried - (303)844-3885

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U.S. v. Regency Cruises, Inc. (M.D.Fla.)(APPS)(Dec. 7, 1994)

Regency Cruises, Inc., entered a guilty plea to a two-count information for violations of the Act to Prevent Pollution from Ships (APPS). According to the terms of the agreement, Regency will pay a $50,000 fine on Count One and a $250,000 fine on Count Two. The company will be placed on probation for a period of one year, during which time they will be required to: 1) pay the full fine amount; 2) institute a program to prevent and detect future violations of environmental laws, including the expenditure of $100,000 to outfit their vessels with equipment to prevent future discharges of plastics: 3) take out ads in the *St. Petersburg Times*, the *Tampa Tribune*, and *Florida Environments* apologizing for their violations; and 4) pay a special assessment of $200. The plea agreement (the second under APPS) stems from the illegal disposal of plastics from two separate Regency vessels during voyages in January and February 1993.

Attorneys: Bruce Pasfield, ECS - (202)272-9853
AUSA Julie Thomas - (813)274-6000

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U.S. v. David William Pendleton (M.D.Fla.)(CWA)(Dec. 15, 1994)

David Pendleton was sentenced to one year of probation and a $1,000 fine for illegally filling wetland on his property to build a gazebo. Pendleton entered a guilty plea on October 17 to a misdemeanor Clean Water Act information. Between late 1993 and May 1994, Pendleton filled the wetland with, among other things, bags of friable asbestos. He did not have a permit from the Army Corps of Engineers authorizing the fill.

Attorney: AUSA Kim Selmore - (904)232-2682

U.S. v. David R. Webb Co., Inc. (S.D.Ind.)(CWA)(Nov. 29, 1994)

The David R. Webb Co. pled guilty to a Clean Water Act felony information and was sentenced in accordance with the plea agreement. The corporation pled guilty to the knowing discharge of pollutants (industrial wastewater) from a point source to U.S. waters that conveyed to the Blue River. It is sentenced to a $1.1 million fine, all but $100,000 suspended, subject to conditions that the company pays $250,000 in restitution to the Indiana Department of Environmental Management, $250,000 in restitution to the Fish and Wildlife Damage Account of the Indiana Department of Natural Resources, and $25,000 in restitution to the United States for cleanup. The corporation also must perform site remediation; develop and implement an environmental compliance program to educate its personnel; and place a one-half page ad in the local Edinburgh newspaper and the *Indianapolis Star,* informing the public of its violations.

Attorney: AUSA Mark Stuaan - (317)226-6333

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U.S. v. Crescent Ship Services, Inc., et al. (E.D.La.)(APPS/OPA)(Dec. 15, 1994)

In the first prosecution of individuals for violation of the Act to Prevent Pollution from Ships (APPS) and conspiracy to violate APPS and the Oil Pollution Act of 1990, an information was filed against Crescent Ship Services, Inc. (CSS); its president and owner, Frederick G. Willhoft, Jr.; and two top managers, Lewin Pizani, Jr., and Eric M. Willhoft. CSS; Willhoft, Jr.; and Pizani are charged with conspiracy to violate APPS and the Oil Pollution Act of 1990. Eric Willhoft is charged with a substantive count under APPS.

CSS operates a river launch boat business on the Mississippi River, owns and operates approximately 12 ships or crew boat vessels, four barges, and has four launch sites on the river. Pizani is the top manager and port captain of CSS. Eric Willhoft was a manager, dispatcher, and captain at one CSS launch site. The Bill of Information states that CSS crew boats routinely discharged waste oil into the Mississippi River. The Bill of Information further states that the defendants routinely discharged garbage generated by CSS ships, including wooden pallets, used metal vessel parts and equipment, and sheets of plastic shrink wrap. Among other things, the Information states that Gordon Willhoft, the president and owner of CSS, allegedly directed employees to dump garbage and other solid waste at "Gordon's Reef," a euphemism for the middle of the Mississippi River.

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Richard Udell, ECS - (202)272-4456

U.S. v. Roger Williamson (S.D.Ohio)(CWA)(Dec. 28, 1994)

In Cincinnati, in the first guilty plea for illegal discharge of pollutants from vessels operating on inland waterways, Roger Williamson, port engineer for M/G Transport Services, Inc. (a towboat operation), pled guilty to a violation of the Clean Water Act for the negligent discharge of pollutants consisting of plastic, glass, and metal into the Ohio River. One of Williamson's duties was to arrange for the proper disposal of pollutants generated on M/G's towboats. According to the plea agreement, Williamson knew or should have known that from January 1992 to February 1993, it was M/G's practice to routinely discharge plastic, glass, and metal trash overboard into the Ohio, Mississippi and other rivers of the United States. The plea agreement further states that the few invoices for proper disposal of waste were grossly insufficient to account for the volume of waste generated on M/G's towboats. The plea agreement with Williamson provides that he will fully cooperate with the Government's on-going criminal investigation of M/G Transport and its managing officers.

Attorneys: Claire Whitney, ECS - (202)272-9861
Jim Miskiewicz, ECS - (202)272-8496

* * * * *

U.S. v. Richard Wayne and Charles W. Geiger (D.Ore.)(RCRA)(Dec. 21, 1994)

A 22-count indictment charged Richard Wayne Hill, president/CEO of Environmental Pacific Corporation (EPC) (a battery storage and cracking operation) and Charles W. Geiger, plant manager at EPC's Amity facility, with mail fraud, wire fraud, false statements, and violations of the Resource Conservation and Recovery Act (RCRA) laws. Wayne Hill is charged with 12 counts of mail fraud, two counts of wire fraud, and three counts under RCRA for illegal transportation and storage of hazardous waste. Charles Geiger is charged with 10 counts of mail fraud, two counts of wire fraud, and five counts of making false statements to the Government. The indictment charges that from January 1988 until May 1992, the defendants were involved in a scheme to defraud generators and transporters of hazardous waste by representing that hazardous waste lithium and other batteries were being disposed of through recycling and reclamation when, in fact, EPC did not have the technology or ability for such a process. The defendants are charged with transporting the hazardous and characteristic waste batteries to a warehouse that had no permit for the storage of hazardous waste, transporting hazardous waste batteries under the auspices that they were non-hazardous, and using the mails and interstate wire facilities throughout the country to transmit fraudulent "Certificates of Reclamation," and to bill and obtain payment for the fictitious services. Most of the defrauded generators and transporters were under Government contract to dispose of hazardous and other wastes generated by the Department of Defense, including the hazardous waste lithium and other battery components. The investigation was conducted jointly by the Defense Criminal Investigative Service, the FBI, and the Oregon State Police.

Attorneys: Janet Loduca, ECS - (202)272-4574
Howard Stewart, ECS - (202)272-9897
AUSA Robert Ross - (503)727-1000

U.S. v. West Indies Transport, Inc., et al. (WIT) (D.VIs.)(CWA/RHA/ODA)(Dec. 19, 1994)

In St. Thomas, after six hours of deliberation, a Federal jury returned a verdict of guilty against all defendants on all counts charged in a 15-count indictment. Convicted of environmental laws, visa fraud, conspiracy, and the first charges ever brought under the territory's racketeering statute were West Indies Transport Co., Inc.; WIT Equipment Co., Inc.; and W. James Oelsner, owner and president of both companies. Oelsner and his companies engaged in a myriad of environmental crimes, including violations of the Clean Water Act (four counts), the Ocean Dumping Act (two counts), and the Rivers and Harbors Act (one count). They were convicted of depositing raw sewage and pollutants from dry docking operations within 150 feet of the desalinization intake pipes of the island's municipal power plant which produces most of the island's drinking water. The environmental violations, and visa and tax fraud, served as the predicate acts for the racketeering charge. The defendants, convicted on six counts of visa fraud, brought in Filipino laborers after illegally obtaining "crewmen" visas for the purposes of doing drydock work on dead vessels and other shore-based operations.

The investigation was conducted jointly by the Department of State Diplomatic Security Service, the Environmental Protection Agency, the U.S. Coast Guard, the FBI, the Army Corps of Engineers, and the Virgin Islands Department of Planning and Natural Resources. The corporations face potential financial penalties in excess of $1 million dollars. In addition to the financial penalties, defendant W. James Oelsner faces a potential prison sentence of up to 60 years.

Attorney: AUSA David Nissman - (809)774-5757

* * * * *

U.S. v. Donald Lee Rogers(D.Kan.)(RCRA/CERCLA)(Dec. 15, 1994)

A four-count indictment charged Donald Lee Rogers, president, CEO, director, and shareholder of the Kantex Corporation (an electronic component manufacturer) with violations of the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Rogers is charged with the knowing storage and disposal of hazardous waste without a permit, transportation of hazardous waste without a manifest, and failure to report the release of hazardous waste into the environment. The indictment alleges that from 1990 through August 1993, Rogers operated several companies involved in printed circuit board manufacturing, and that sometime in late 1992, he transported corrosive, toxic spent etchant solutions from one of his facilities in Olathe, Kansas, to another facility in Kansas City, Missouri, without a manifest required under RCRA for such shipment. The indictment further states that in 1993, he stored and disposed of the same type of hazardous waste at a facility in DeSoto, Kansas, without a permit or interim status under RCRA. The illegal disposal of characteristic hazardous waste results in a further charge under CERCLA for failure to report the release to the U.S. Emergency Response Agency.

Attorneys: USA Randall K. Rathbun - (316)269-6481
Marty Woelfle, ECS - (202)272-9891

OFFICE OF JUSTICE PROGRAMS

Office of Juvenile Justice and Delinquency Prevention

The Office of Juvenile Justice and Delinquency Prevention (OJJDP) recently sent every United States Attorney a copy of OJJDP's newest publication "Reducing Youth Violence: A Summary of Programs and Initiatives," and the "Compilation of State Firearm Codes that Affect Juveniles," prepared by the National Criminal Justice Association. These materials provide valuable information to assist States and local jurisdictions in responding to the epidemic of youth gun violence. OJJDP is the Federal component congressionally mandated to lead the effort to address the public safety issues of juvenile crime and youth victimization. In 1994, OJJDP published 46 documents on juvenile justice issues. If you have any questions, please call (202)307-5911.

* * * * *

OFFICE OF THE SOLICITOR GENERAL

Case Summaries

Brown, Secretary of Veterans Affairs v. Gardner, No. 93-1128, Decided December 12, 1994

Fred Gardner, a veteran of the Korean conflict, received surgical treatment in a Veterans Affairs ("VA") facility for an injury unrelated to his prior military service. After the surgery, Gardner experienced additional pain which allegedly was the result of the surgery. He claimed disability benefits under 38 U.S.C. 1151, which provides that the VA will compensate for "an injury, or an aggravation of an injury" that occurs "as a result of hospitalization, medical, or surgical treatment" provided by the VA, so long as the injury was "not the result of such veteran's own willful misconduct * * * ."

The VA and the Board of Veterans' Appeals denied Gardner's claim for benefits because, in interpreting Section 1151, the VA's regulation, 38 C.F.R. 3.358(c)(3), covers injuries only if they resulted from "carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault" on part of the VA, or from the occurrence of an "accident," defined as an "unforeseen, untoward" event. The Court of Veterans Appeals reversed, holding that Section 1151 did not authorize the regulation's adoption of a fault-or-accident requirement, and the Federal Circuit affirmed.

The Supreme Court affirmed in a unanimous opinion by Justice Souter. The Government suggested that the fault requirement was implicit in the term "injury." While the Court acknowledged that "injury" could have a connotation of fault, the existence of possible alternative definitions was not sufficient to create ambiguity. Instead, ambiguity is measured from the statutory context, and after reviewing the usage of the term in surrounding passages, the Court determined that it was virtually impossible to read "injury" to include fault. The Government also suggested that the phrase "as a result of" signifies a proximate cause requirement that incorporated a fault test. The Court declined to impose such an implausible reading to the words, finding that natural reading of the phrase was to require a causal connection, not a demonstration of fault.

The Court noted that the existence of an implicit fault requirement was also contradicted by the existence of an explicit exclusion for accidents caused by the fault of the veteran, invoking the canon of statutory construction that where Congress includes language in one section of a statute but omits it in another section of the same Act, it is presumed that Congress acted intentionally.

* * * * *

Tome v. United States, No. 93-6892, Decided January 10, 1995

This case involved a criminal prosecution for sexual abuse of a child. The six-year-old victim, whose parents were divorced, testified at trial that her father had sexually abused her. Cross-examination by the defense sought to establish that the child had a motive to fabricate the charges because of her desire to live with her mother. The prosecution, relying on Rule 801(d)(1)(B), then presented six witnesses who recounted statements made by the child describing the abuse.

Rule 801(d)(1)(B) of the Federal Rules of Evidence provides that a prior statement of a testifying witness "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive" is not hearsay. The question presented was whether out-of-court consistent statements made after the alleged fabrication, or after the alleged improper influence or motive arose, are admissible under Rule 801(d)(1)(B).

Justice Kennedy, writing for a five-Justice majority, held that such statements are not admissible. The Court first noted that it was a longstanding principle of the common law that a prior consistent statement had no relevance in refuting a charge of recent fabrication or improper influence or motive unless the statement was made before the source of the bias, influence, or motive arose. The Court then determined that Rule 801(d)(1)(B) embodied the temporal requirement of the common law. Prior consistent statements are admitted under Rule 801(d)(1)(B) as substantive evidence only to rebut a specific type of impeachment, i.e., an express or implied charge of recent fabrication or improper influence or motive. The Court found that a temporal requirement makes particular sense for that limited form of impeachment (as opposed, e.g., to impeachment of character), since "[a] consistent statement that predates the motive is a square rebuttal of the charge that the testimony was contrived as a consequence of that motive." Slip op. at 7. The Court conceded that some consistent statements postdating an alleged motive or fabrication might have a degree of probative force as rebuttal, but it reasoned that, without the temporal requirement, it would make no sense for the drafters of Rule 801(d)(1)(B) to have confined the Rule to the form of impeachment at issue. Moreover, the language of the Rule is very similar to the language used in many of the common law cases describing the pre-motive requirement.

Justice Breyer, joined by Chief Justice Rehnquist and Justices O'Connor and Thomas, dissented.

TAX DIVISION

Case Summaries

United States v. Robert E. Cseplo, (Dec. 13, 1994)[6th Cir.]

On December 13, 1994, the Sixth Circuit held that where the defendant skimmed income from a corporation and was responsible for understating both the income of the corporation and his personal income, "tax loss" for purposes of the Sentencing Guidelines consisted of the aggregate of the corporate "tax loss" and the personal "tax loss," without any reductions or offsets based on the amount of the skim or the amount of the corporate "tax loss." In so holding, the Court rejected dictum in United States v. Harvey, 996 F.2d 919 (7th Cir. 1993), to the effect that, in determining total "tax loss," the amount of personal "tax loss" to be added to the corporate "tax loss" had to be calculated by reducing the amount of personal income understated by the amount of corporate "tax loss" and not simply by applying the personal tax rate to the amount of personal gross income understated.

The Tax Division believes that the decision in Cseplo conforms to the plain language of the guidelines and represents a more sensible approach to the calculation of "tax loss" than does the decision in Harvey. Consequently, it is the position of the Division that the Cseplo formula for calculating "tax loss" should be followed in the corporate skim situation. This case was briefed and argued by John M. Siegel, Assistant United States Attorney for the Northern District of Ohio, (216)622-3600.

* * * * *

John L. Kane v. United States, (Dec. 29, 1994)[Fed.Cir.)

On December 29, 1994, the Federal Circuit affirmed the favorable decision of the Court of Federal Claims in John L. Kane v. United States, holding that disability retirement payments to a Federal judge were not excludable from gross income. Taxpayer, after 11 years as a Federal district judge, took a disability retirement under 28 U.S.C. Section 372(a) after being diagnosed as suffering from a condition of stress known as sleep apnea. Section 372(a) states that a Federal judge who becomes permanently disabled from performing his duties may retire from regular active service and, during the remainder of his lifetime, shall receive the salary of his office, if he has served at least ten years. Taxpayer claimed that the disability payments were excludable under Internal Revenue Code Section 104(a)(1) as amounts received under a workmen's compensation act or a statute in the nature of a workmen's compensation act. The Federal Circuit determined that taxpayer's disability retirement payments were not excludable from gross income under Section 104(a)(1) because Section 372(a) was not a workmen's compensation act or a statute in the nature of a workmen's compensation act.

SENTENCING GUIDELINES

GUIDELINE SENTENCING UPDATE

Appendix B is the Guideline Sentencing Update, Volume 7, No. 4, dated January 6, 1995. It 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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CAREER OPPORTUNITIES

ENVIRONMENT AND NATURAL RESOURCES DIVISION
ENVIRONMENTAL CRIMES SECTION

The Environmental Crimes Section (ECS) of the Environment and Natural Resources Division invites Assistant United States Attorneys to apply for a one-year detail to the ECS office in Washington, D.C. Trial attorneys at ECS prosecute environmental criminal cases throughout the United States. Anyone who is interested in applying should contact Gregory Linsin on (202)272-9892, or at Environmental Crimes Section, Environment and Natural Resources Division, P.O. Box 23985, Washington, D.C. 20026-3985, Email: SS56 (C$LINSIN).

The Environmental Crimes Section has a duty attorney who is available to answer questions about environmental criminal matters. The telephone number is (202)272-9875.

* * * * *

CIVIL RIGHTS DIVISION
EMPLOYMENT LITIGATION SECTION

The Office of Attorney Personnel Management, U.S. Department of Justice, is seeking attorneys experienced in litigation, preferably in employment discrimination, for the position of Trial Attorney in the Civil Rights Division's Employment Litigation Section (ELS), in Washington, D.C. In enforcing Federal fair employment laws and regulations, including Title VII of the Civil Rights Act of 1964, as amended, the ELS conducts investigations and brings lawsuits against state and local Government employers and Federal contractors to challenge employment policies and practices that discriminate against individuals and/or protected groups. The ELS has a diverse practice in district courts throughout the country, including cases initiated through internal ELS investigations or referrals from other Federal agencies, often with complex trials and negotiated settlements. The positions require travel for extended periods of time.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least one year of post-J.D. experience. Experience in employment discrimination or related litigation is desirable. Applicants must submit a current OF 612 (Optional Application for Federal Employment) or resume, writing sample, and current performance appraisal to U.S. Department of Justice, Civil Rights Division, P.O. Box 65310, Washington, D.C. 20035-5310, Attn: CRD-EMP.

Current salary and years of experience will determine the appropriate salary level from GS-12 ($43,356-$56,362) to GS-15 ($71,664-$93,166). These positions are open until March 31, 1995, or until filled. No telephone calls, please.

* * * * *

IMMIGRATION AND NATURALIZATION SERVICE

ASSOCIATE GENERAL COUNSEL CHIEF OF THE ENFORCEMENT DIVISION

The Office of Attorney Personnel Management is seeking an experienced attorney for the position of Associate General Counsel, Chief of the Enforcement Division, in the Office of the General Counsel in the Immigration and Naturalization Service in Washington, D.C. The incumbent will supervise the Enforcement Division in the Office of the General Counsel. As such, he or she will serve as a senior advisor to the General Counsel and to Headquarters' operational components on issues relating to the Service's enforcement functions.

The Enforcement Division is responsible for issues arising out of deportation hearings. It also is responsible for rendering legal advice on issues involving criminal law, criminal procedure, and criminal aliens, and it oversees criminal prosecutions and litigation brought by incarcerated criminal aliens. Additionally, the Enforcement Division is responsible for the criminal alien program (including the institutional hearing program), asset forfeitures, undercover operations, search and seizure issues, and requests for pardons and clemency. The incumbent will supervise a staff of approximately seven attorneys and one support person. The incumbent also will provide guidance and direction on enforcement-related issues to approximately 380 attorneys stationed throughout the country.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least six years of post-J.D. experience. They also must have extensive litigation experience, extensive experience handling complex legal and policy issues, and extensive knowledge of either immigration law or criminal law. Applicants must submit a resume and writing sample by March 10, 1995, to Office of the General Counsel, Immigration and Naturalization Service, 425 I Street, N.W., Room 6100, Washington, D.C. 20536, Attn: Robert S. Finkelstein, Chief, Management Division.

The position is at the GS-15 level, with a salary range between $71,664 and $93,166.

[NOTE: Assistant United States Attorneys are encouraged to apply for this position despite the closing date of March 10, 1995, indicated above. Interested applicants, please contact Mr. Finkelstein on AMICUS, Fax (202)514-4055, or by calling (202)514-3197.]

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

Nomination Form

APPENDIX A

Legal Education Institute
600 E Street, NW
Room 7600
Washington, D.C. 20530

Telephone: (202) 616-6700
FAX: (202) 616-6476
(202) 616-6477

LEI COURSE CONTACT:

Return Mailing Address: Must be typed and fit into the box below

	LEI USE ONLY	
	ACCEPTED	NOT SELECTED

COURSE

Course Name	Course Date(s)	Course Location

NOMINEE

Name	Title

Office, Agency, or Department	Phone Number

QUESTIONNAIRE

1. Has the nominee applied for this course in the past and not been selected?

   Yes No (please circle) If yes, how many times?

2. What percentage of nominee's work involves the subject(s) of the course?

3. Indicate the level of skill or knowledge nominee has in this area:

   Novice Intermediate Advanced (please circle)

4. How many years has the nominee worked in this area?

5. What training/prerequisite courses has the nominee had in this area?

6. If necessary, please indicate any special considerations:

SUPERVISOR

Name	Title

Phone Number	Number of Nominees Submitted	Order of Preference of this Nominee

APPENDIX B

Guideline Sentencing Update

a publication of the Federal Judicial Center *volume 7, number 4, January 6, 1995*

Departures

Mitigating Circumstances

Ninth Circuit holds that departure is warranted for "sentencing entrapment." Defendant was the target of a sting operation in which a confidential informant and undercover agent induced him to sell 10,000 doses of LSD. The evidence indicated that defendant had never engaged in a drug deal anywhere near this size and that he was pressured into selling more than the 5,000 doses he was willing to sell, but the jury rejected defendant's entrapment defense. The district court expressed dissatisfaction with the guideline minimum of 151 months but concluded it had no ground for departure.

The appellate court reversed, holding that under these circumstances a departure for sentencing entrapment, or "sentence factor manipulation," would be proper. The Guidelines were amended after defendant's sentencing to allow the possibility of departure in a reverse sting, *see* §2D1.1, comment. (n.17) (Nov. 1993). Although this was not a reverse sting, the court concluded that the amendment "shows that the Sentencing Commission is aware of the unfairness and arbitrariness of allowing drug enforcement agents to put unwarranted pressure on a defendant in order to increase his or her sentence without regard for his predisposition, his capacity to commit the crime on his own, and the extent of his culpability. Our conclusion that a finding of sentencing entrapment is warranted in the instant case is motivated by the same concerns, and, as such, is fully consistent both with the Amendment and with the sentencing factors prescribed by Congress."

"In this case, Judge Ideman found that Staufer was a user and sometime seller of LSD, but that he sold only to personal friends and had never engaged in a deal even approaching the magnitude of the transaction for which he was convicted. The court recognized that . . . he was not predisposed 'to involve himself in what turned out to be, from the standpoint of the Sentencing Guidelines, an immense amount of drugs.' We are persuaded that 'sentencing entrapment may be legally relied upon to depart under the Sentencing Guidelines,' . . . and, based on the district court's findings, we conclude that Staufer was so entrapped in this case."

U.S. v. Staufer, 38 F.3d 1103, 1107–08 (9th Cir. 1994) (Beezer, J., dissenting).

See *Outline* at VI.C.4.c.

Sixth Circuit rejects downward departure for white-collar defendant's community ties and charitable deeds. Defendant and others were indicted on 33 counts relating to the sale of adulterated orange juice. He pled guilty to one count and faced a sentence of 30–37 months. Based on "a substantial number of letters" praising defendant, the district court found that defendant's "community ties, civic and charitable deeds, and prior good works merited a substantial downward departure" and sentenced defendant to 12 months of home confinement and a $250,000 fine.

The appellate court remanded, holding that "it is usual and ordinary, in the prosecution of similar white-collar crimes involving high-ranking corporate executives such as Crouse, to find that a defendant was involved as a leader in community charities, civic organizations, and church efforts. . . . [T]he Sentencing Guidelines already considered the nature of white-collar crime and criminals when setting the offense levels that govern this offense. Furthermore, the Guidelines reward defendants who have lived previously lawful lives by setting substantially lower sentencing ranges for them than those suggested for past offenders. . . . The record shows that Crouse has performed many fine deeds in his life and has won the devotion and admiration of people whom he has helped and who have honored him with positions of community leadership. However, he also has derived well over $1 million in income from . . . the adulteration scheme."

U.S. v. Kohlbach, 38 F.3d 832, 838–39 (6th Cir. 1994).

See *Outline* at VI.C.1.a.

First Circuit rejects departure based on comparison of defendant's charitable work and community service to that of "the typical bank robber." Defendant was convicted of several counts relating to a bank robbery. The district court departed under §5H1.11 because defendant's "charitable work and community service stood apart from what one would expect of 'the typical bank robber.'" The court noted that "[i]f this was a securities fraud case or bank fraud case, probably the downward departure would not be appropriate."

The appellate court remanded, noting at the outset that "a defendant's record of charitable work and community service falls into the discouraged-feature category of justifications for departure."

Guideline Sentencing Update is distributed periodically to inform judges and other judicial branch personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Guidelines. *Update* refers to the Sentencing Guidelines and policy statements of the U.S. Sentencing Commission, but is not intended to report Commission policies or activities. *Update* should not be considered a recommendation or official policy of the Center; any views expressed are those of the author.

Therefore "departure is warranted only if the 'nature and magnitude' of the feature's presence is unusual or special," and "a court must ask 'whether the case differs from the ordinary case in which those [discouraged] features are present.'" Here, the district court "did not compare Bonasia's history of charitable and community service to the histories of defendants from other cases who similarly had commendable community service records. . . . [T]he court erred by restricting the scope of its comparison to only bank robbery cases. A court should survey those cases where the discouraged factor is present, without limiting its inquiry to cases involving the same offense, and only then ask whether the defendant's record stands out from the crowd."

U.S. v. DeMasi, – F.3d – (1st Cir. Oct. 26, 1994).

See *Outline* at VI.C.1.a.

Seventh Circuit holds departure for family responsibilities may be allowed in extraordinary cases. The district court was inclined to depart for defendant's family responsibilities but concluded that *U.S. v. Thomas*, 930 F.2d 526 (7th Cir. 1991) (*Thomas I*), prohibited it. The appellate court remanded. "Because our sister circuits have uniformly rejected *Thomas I*'s interpretation of section 5H1.6 both before and after the November 1, 1991 amendment, and because that amendment omits the language on which *Thomas I* specifically relied, we hold today that a district court may depart from an applicable guideline range once it finds that a defendant's family ties and responsibilities or community ties are so unusual that they may be characterized as extraordinary. Any other reading would be inconsistent with the plain language of section 5H1.6 in that it would render meaningless the Commission's use of the phrase 'not ordinarily relevant.'"

U.S. v. Canoy, 38 F.3d 893, 906 (7th Cir. 1994).

See *Outline* at VI.C.1.a.

Tenth Circuit holds prison overcrowding cannot be basis for downward departure. Among other reasons, the district court justified a downward departure on the basis of prison overcrowding after finding that federal prisons are operating at 148% of capacity. The appellate court reversed. "In [28 U.S.C. §] 994(g), Congress directed the Sentencing Commission, not the courts, to consider prison capacities. While the Commission is directed to take into account prison overcrowding in devising its overall guideline scheme, prison capacity is not an appropriate consideration for courts in determining the sentences of individual defendants."

U.S. v. Ziegler, 39 F.3d 1058, 1063 (10th Cir. 1994).

See *Outline* generally at VI.C.5.b.

Substantial Assistance

Eleventh Circuit holds that where district court accepted plea agreement that obligated government to move for Rule 35(b) reduction, it may not reject the motion without hearing evidence. Defendant's plea agreement effectively obligated the government to file a Rule 35(b) motion if it determined that his post-sentence cooperation warranted an additional reduction in sentence. Eventually the government did file a motion, with a request for an evidentiary hearing, but the evidence of defendant's cooperation was not set forth in the motion for security reasons. The district court denied the motion and defendant appealed.

The appellate court allowed the appeal, finding that "if the motion is made pursuant to a plea agreement, the rights of the defendant are implicated by the district court's refusal to hear evidence of a defendant's substantial assistance. If the defendant were not permitted to appeal, he or she would be effectively without recourse to enforce a breached plea agreement." The court then remanded for an evidentiary hearing, holding that in these circumstances the refusal to grant a hearing had "effectively prevented the government from presenting its Rule 35 motion [and] forced a breach of the plea agreement." The court noted that the need for a hearing arose from the particular facts of this case and that "[i]n some instances a written motion outlining the defendant's cooperation may suffice to satisfy the plea agreement."

U.S. v. Hernandez, 34 F.3d 998, 1000–01 & n.6 (11th Cir. 1994).

See *Outline* at VI.F.4.

Aggravating Circumstances

Ninth Circuit reverses departure based on "the danger of violence associated with a fraudulent drug sale." Defendant pled guilty to distribution of cocaine, possession of cocaine with intent to distribute, and to carrying a firearm in connection with a drug trafficking crime under 18 U.S.C. §924(c). Because he was attempting to cheat the buyers (who were really undercover agents), he sold much less than the negotiated amount—only about 25 grams of cocaine was contained in three kilogram-sized bricks. With only 25 grams of cocaine actually involved, defendant's guideline maximum was 16 months. However, the district court held that departure was warranted because of a greater likelihood of violence during an attempted drug fraud than in an "honest" drug sale. Defendant was sentenced to 25 months, plus the mandatory consecutive 60-month sentence on the firearm charge.

The appellate court reversed, concluding that the risk of violence was accounted for by the § 924(c) conviction. "Possession of a gun . . . is dangerous precisely—and only—because it may be used when one drug trafficker tries to cheat or rob another or when law enforcement officials try to apprehend a drug trafficker. . . . The fact that an attempted fraud occurs in any given transaction adds little, if anything, to the risk already reflected in section 924's mandatory sentencing provisions. . . . Because that danger is taken into account in the mandatory consecutive sentence under section 924(c)(1), it should not also be reflected in Zamora's sentence on the distribution charge." The court noted that it expressed no view whether departure would be warranted in a similar case where the defendant was not also subject to a sentence under §924(c)(1).

U.S. v. Zamora, 37 F.3d 531, 533–34 (9th Cir. 1994) (Rymer, J., dissenting).

See *Outline* generally at VI.B.2.a.

Criminal History

Third Circuit holds that downward departure for career offender may include departure by offense level as well as criminal history category. The district court held that career offender status overstated defendant's criminal history and departed under §4A1.3 by lowering defendant's criminal history category, but concluded that it could not also lower defendant's offense level. The appellate court remanded: "Because career offender status enhances both a defendant's criminal history category and offense level, . . . a sentencing court may depart in both under the proper circumstances."

U.S. v. Shoupe, 35 F.3d 835, 837–38 (3d Cir. 1994) (Alito, J., dissenting).

See *Outline* at VI.A.3.a.

Offense Conduct

Calculating Weight of Drugs

Third Circuit holds that government bears ultimate burden of proof on intent and capability regarding negotiated amounts. For the calculation of negotiated drug amounts under §2D1.1, comment. (n.12), the appellate court agreed with the circuits that have held that once the government meets its initial burden of proving the amount under negotiation, defendant then has the burden of showing lack of both intent and reasonable capability. However, the ultimate burden of persuasion "remains at all times with the government. Thus, if a defendant puts at issue his or her intent and reasonable capability to produce the negotiated amount of drugs by introducing new evidence or casting the government's evidence in a different light, the government then must prove either that the defendant intended to produce the negotiated amount of drugs or that he or she was reasonably capable of doing so." The court concluded that "it is more reasonable to read Note 12, in its entirety, as addressing how a defendant's base offense level may be determined in the first instance when a drug transaction remains unconsummated, for it is important to bear in mind that calculating the amount of drugs involved in criminal activity neither aggravates nor mitigates a defendant's sentence; rather, it provides the starting point." The court added that "a district court must make explicit findings as to intent and capability."

U.S. v. Raven, 39 F.3d 428, 434–37 (3d Cir. 1994).

See *Outline* at II.B.4.a.

Drug Quantity—Relevant Conduct

Fifth Circuit holds that amended guideline method for calculating weight of LSD does not apply retroactively to mandatory minimum calculation. Defendant sought resentencing after the method of calculating LSD quantities under the Guidelines was amended and made retroactive. The district court denied the motion, holding that the amendment could not be applied retroactively because defendant was subject to a 10-year statutory minimum sentence.

The appellate court affirmed. "We conclude that the district court's ruling is correct based on a logical reading of the policy statement to §2D1.1(c). This policy statement provides that the new approach to calculating the amount of LSD 'does not override the applicability of "mixture or substance" for the purpose of applying any mandatory minimum sentence (*see Chapman*; §5G1.1(b)).' U.S.S.G. §2D1.1, comment. (backg'd). The *Chapman* citation refers to *Chapman v. U.S.*, 500 U.S. 453 . . . (1991), in which the Supreme Court held that the term 'mixture or substance' in 21 U.S.C. §841(b) required the weight of the carrier medium for LSD to be included for purposes of determining the mandatory minimum sentence. . . . A common sense interpretation of this policy statement leads to the inescapable conclusion that the mandatory minimum of §841, calculated according to *Chapman*, overrides the retroactive application of the new guideline."

U.S. v. Pardue, 36 F.3d 429, 431 (5th Cir. 1994) (per curiam). *Accord U.S. v. Mueller*, 27 F.3d 494, 496–97 (10th Cir. 1994); *U.S. v. Boot*, 25 F.3d 52, 54–55 (1st Cir. 1994). *Contra U.S. v. Stoneking*, 34 F.3d 651, 652–55 (8th Cir. 1994) [7 *GSU* #3].

See *Outline* at I.E, II.A.3, and II.B.1.

Adjustments

Obstruction of Justice

Ninth Circuit affirms there was sufficient nexus between crime of conviction and reckless endangerment. Defendant committed an armed bank robbery. He abandoned his stolen getaway car on the same day, then four days later carjacked a taxicab. Local sheriffs were alerted after the carjacking and tried to capture defendant, who led them on a 30-minute chase, drove straight at a police car, and caused another police car to crash. The district court imposed a §3C1.2 enhancement for reckless endangerment during flight, finding that the car chase was part of the effort to avoid apprehension for the bank robbery as well as the carjacking. Defendant appealed, claiming there was no "nexus" between the bank robbery—the offense of conviction—and his reckless behavior. Because the government did not challenge the assertion that §3C1.2 requires such a nexus, the appellate court "assume[d] without so holding" that a nexus is required. The court affirmed.

"A sufficient nexus exists to warrant enhancement under U.S.S.G. §3C1.2 if a substantial cause for the defendant's reckless escape attempt was to avoid detection for the crime of conviction. In applying the nexus test, we look to the state of mind of the defendant when he recklessly attempted to avoid capture, not to why the police were pursuing him. The factors of geographic and temporal proximity give some indication of causation, but are not controlling determinates, particularly when the defendant's state of mind is established. On the day of his escape attempt and capture, Duran informed an agricultural worker that he had stolen a taxicab and robbed a bank. Thus, one of the reasons he initiated the dangerous car chase was the bank robbery. The district court found the car chase was 'in efforts to avoid apprehension due to his commission of the bank robbery, as well as stealing the motor vehicle.' The district court's findings are not clearly erroneous. There was sufficient nexus between the bank robbery and the car chase."

U.S. v. Duran, 37 F.3d 557, 559–60 (9th Cir. 1994).

See *Outline* at III.C.3.

Supervised Release

Revocation of Supervised Release

Fifth Circuit holds that need for rehabilitation may be considered in setting sentence after revocation. Defendant's three-year term of supervised release was revoked for drug possession under 18 U.S.C. §3583(g). He was thus subject to a minimum term of one year in prison, and the district court determined the maximum sentence allowed under §3583(e)(3) was two years. The court imposed the maximum, citing defendant's need for drug rehabilitation as a reason for the length of the sentence.

The appellate court affirmed. "We now hold that the language of 18 U.S.C. §3583(g), and the purposes and intent behind the statute, is best served by permitting a district judge to consider a defendant's need for rehabilitation in arriving at a specific sentence of imprisonment upon revocation of supervised release. While we do not decide whether rehabilitative needs can be used to determine whether to *impose* imprisonment as an initial matter, once imprisonment is mandated by 18 U.S.C. §3583(g) rehabilitative needs may be considered to determine the length of incarceration within the sentencing range."

U.S. v. Giddings, 37 F.3d 1091, 1096–97 (5th Cir. 1994).

See *Outline* at VII.B.1 and 2.

APPENDIX
C

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APPENDIX
D

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
01-12-90	7.74%	06-28-91	6.39%	12-11-92	3.72%	05-27-94	5.28%
02-14-90	7.97%	07-26-91	6.26%	01-08-93	3.67%	06-24-94	5.31%
03-09-90	8.36%	08-23-91	5.68%	02-05-93	3.45%	07-22-94	5.49%
04-06-90	8.32%	09-20-91	5.57%	03-05-93	3.21%	08-19-94	5.67%
05-04-90	8.70%	10-18-91	5.42%	04-07-93	3.37%	09-16-94	5.69%
06-01-90	8.24%	11-15-91	4.98%	04-30-93	3.25%	10-14-94	6.06%
06-29-90	8.09%	12-13-91	4.41%	05-28-93	3.54%	11-11-94	6.48%
07-27-90	7.88%	01-10-92	4.02%	06-25-93	3.54%	12-09-94	7.22%
08-24-90	7.95%	02-07-92	4.21%	07-23-93	3.58%	01-06-95	7.34%
09-21-90	7.78%	03-06-92	4.58%	08-20-93	3.43%	02-03-95	7.03%
10-27-90	7.51%	04-03-92	4.55%	09-17-93	3.40%		
11-16-90	7.28%	05-01-92	4.40%	10-15-93	3.38%		
12-14-90	7.02%	05-29-92	4.26%	11-17-93	3.57%		
01-11-91	6.62%	06-26-92	4.11%	12-10-93	3.61%		
02-13-91	6.21%	07-24-92	3.51%	01-07-94	3.67%		
03-08-91	6.46%	08-21-92	3.41%	02-04-94	3.74%		
04-05-91	6.26%	09-18-92	3.13%	03-04-94	4.22%		
05-03-91	6.07%	10-16-92	3.24%	04-01-94	4.51%		
05-31-91	6.09%	11-18-92	3.76%	04-29-94	5.02%		

Note: For a cumulative list of Federal civil postjudgment interest rates effective October 1, 1982, through December 19, 1985, see Vol. 34, No. 1, p. 25, of the United States Attorneys' 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. For a cumulative list of Federal civil postjudgment interest rates effective October 21, 1988 through December 15, 1989, see Appendix G of Vol. 43, No. 1, of the United States Attorneys' Bulletin, dated January 1, 1995.