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TABLE OF CONTENTS **Page**

TABLE OF CONTENTS

Please send name or address changes to:
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COMMENDATIONS

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

H. Randolph Aderhold, Jr. (Georgia, Middle District), by L. Donell Blanchard, Attorney, Office of Field Legal Services, U.S. Postal Service, Memphis, for his professional legal skill leading to an order of dismissal in a slip and fall case against the Postal Service. Also, by John H. Turner, Director, Food and Drug Administration (FDA), Department of Health and Human Services, Atlanta, for his excellent representation and special services rendered on behalf of FDA in a contempt of injunction action.

Linda A. Akers, United States Attorney for the District of Arizona, and her Assistants, ***Janet Patterson*** and ***Reid Pixler,*** by John C. Decker, Special Agent, Fish and Wildlife Service, Department of the Interior, Washington, D.C., for their continued efforts and strong commitment to the protection of the wildlife and plant resources located in Arizona, and for their continued investigation of criminal activities surrounding wildlife resources.

James R. Allison (District of Colorado), by Linda A. Akers, United States Attorney for the District of Arizona, for his excellent representation and outstanding services as Special Assistant United States Attorney in resolving a complex case for the District of Arizona.

William S. Block and ***Katherine Winfree*** (District of Columbia) by William S. Sessions, Director, FBI, Washington, D.C., for their outstanding leadership of the GOLDNET Task Force, and their successful prosecution of 59 individuals, including three principal subjects convicted on 174 counts of charges ranging from false statements to RICO, and the recovery of $6 million.

John Stuart Bruce (North Carolina, Eastern District), by C. B. Rollins, Regional Director, Naval Investigative Service Mid-Atlantic Region, Department of the Navy, Virginia Beach, for his valuable assistance and special efforts in the successful prosecution of a complex procurement fraud case.

Eileen G. Coffey (North Carolina, Eastern District), by James F. Turner, District Chief, Geological Survey, Water Resources Division, Department of the Interior, Raleigh, for her excellent representation and professionalism in successfully and expeditiously resolving a case on their behalf.

Thomas W. Corbett, United States Attorney for the Western District of Pennsylvania, and ***Staff,*** by Fred T. Goldberg, Jr., Commissioner, Internal Revenue Service, Washington, D.C., for their outstanding success, in cooperation with the Great Lakes Organized Crime Drug Enforcement Task Force, in obtaining indictments and convictions of a highly sophisticated and evasive drug trafficking organization.

Virginia Covington and ***Todd Foster*** (Florida, Middle District), by George W. Proctor, Director, Asset Forfeiture Office, Criminal Division, Department of Justice, Washington, D.C., for their significant contributions to the success of the Advanced OCDETF Forfeiture Conference held in Atlanta, Georgia.

Virginia Covington, Curtis Fallgatter, and ***Paul I. Perez*** (Florida, Middle District), by Bonni G. Tischler, Special Agent in Charge, U.S. Customs Service, Tampa, for their outstanding success in prosecuting a complex case against an engineering company, resulting in forfeited assets valued at $3.3 million.

James M. Deichert (Georgia, Northern District), by Lonnie T. Cooper, Special Agent in Charge, Miami Regional Operations Bureau, Florida Department of Law Enforcement, Miami, for his valuable assistance and special efforts in the investigation and subsequent arrest of members of a narcotics organization tied to Colombia.

Gerald Doyle and ***John Lancaster*** (Texas, Southern District), by Andrew J. Duffin, Special Agent in Charge, FBI, Houston, and Sergeant Steve Vestal, Motor Vehicle Theft Service, Texas Department of Public Safety, Austin, for their outstanding legal skill and professionalism in the successful resolution of the case of two chop shop operators who eluded state prosecution attempts on several occasions.

Kenneth C. Etheridge (Georgia, Southern District), by Lt. Col. William A. Woodruff, Chief, Litigation Division, Office of the Judge Advocate General, Department of the Army, Arlington, Virginia, for his valuable representation and ultimate success in obtaining a favorable verdict in a medical malpractice case.

Edmond Falgowski and ***Kent Jordan*** (District of Delaware), by Marcia E. Mulkey, Regional Counsel and Robert A. Boodey, Special Agent in Charge, Environmental Protection Agency, Philadelphia, for their outstanding cooperative efforts in securing a guilty plea and a significant sentence for environmental violations by a leading Delaware corporation.

Louis V. Franklin, Sr. and ***Rachel Lee*** (Alabama, Middle District), by Thomas Pletcher, Chief of Police, Bay Harbor Islands, Florida, for their special efforts and successful prosecution of four drug traffickers.

Michael F. Gallagher (Florida, Middle District), by David Marshall Nissman, Chief Assistant United States Attorney, District of Virgin Islands, for his outstanding contribution to the successful prosecution of a major drug kingpin operating in the Virgin Islands.

Richard Goolsby (Georgia, Southern District), by William S. Sessions, Director, FBI, Washington, D.C., for his legal guidance and ultimate success in the criminal prosecution of a number of individuals engaged in cocaine trafficking, counterfeiting, arson, and theft.

D. Michael Green (Missouri, Western District), by the Honorable Elmo B. Hunter, Senior Judge, United States District Court, Kansas City, for his excellent presentation of the government's case in a crack cocaine conspiracy prosecution.

Johnathan S. Haub (District of Oregon), was presented a Certificate of Appreciation by Lawrence A. Ladage, Special Agent in Charge, U.S. Customs Service, Seattle, Washington, for his successful prosecution of Operation "Vaquero Se Vaya," the largest heroin prosecution in the history of the Northwest, involving over a thousand kilos of heroin, four states and two foreign countries.

Cynthia Hawkins (Florida, Middle District), by Jennafer W. Moreland, Trial Attorney, Office of International Affairs, Department of Justice, Washington, D.C., for her valuable assistance and diligent efforts during the course of a complex extradition proceeding.

Herbert H. Henry, III and ***Bill L. Barnett*** (Alabama, Northern District), by Dick Thornburgh, Attorney General, Department of Justice, Washington D.C. and Teddy R. Kern, Chief Inspector, Internal Revenue Service, Washington, D.C., for their outstanding leadership role in the formation of a joint task force to investigate a bribery scheme aimed at the IRS, which resulted in a series of successful bribery and tax prosecutions.

Ralph E. Hopkins (Florida, Middle District), by Robert C. Bonner, Administrator, Drug Enforcement Administration, Washington, D.C., for his excellent cooperation in the successful resolution of the Upjohn case, resulting in the largest fine ever obtained in a civil action against a DEA registrant.

Jacquelyn Jess (Kentucky, Eastern District), by Daniel M. Hartnett, Associate Director, Law Enforcement, Bureau of Alcohol, Tobacco and Firearms (ATF), Washington, D.C., for her participation as an instructor at an ATF Certified Fire Investigator Training Course held recently in Leesburg, Virginia. Also, by John A. Gibson, Regional Inspector, Internal Revenue Service, Cincinnati, for her valuable contribution to the success of a practical training exercise recently conducted in Columbus, Indiana.

Gregory W. Kehoe (Florida, Middle District), by William S. Sessions, Director, FBI, Washington, D.C., for his outstanding legal and professional skills, resulting in the conviction of an individual on eight counts of extortion.

James R. Klindt and ***Kimberly A. Selmore*** (Florida, Middle District), by William Biossat, Resident Agent in Charge, U.S. Customs Service, West Palm Beach, for their valuable legal and professional assistance during "Operation No Mas", a 2-year OCDETF investigation into drug smuggling and money laundering violations.

Art Leach (Georgia, Southern District), by George W. Proctor, Director, Asset Forfeiture Office, Criminal Division, Department of Justice, Washington, D.C., for his participation and excellent presentation at the advanced attorney training conference held recently in New Orleans.

William Lucero (District of Colorado), by Robert J. Zavaglia, Chief, Criminal Investigation Division, Internal Revenue Service, Denver, for his excellent support, dedication and resolve in the successful prosecution of the owner/director of one of the largest penny stock firms in the country. Also, by Mark S. Caldwell, Program Co-Director, National Institute for Trial Advocacy, Denver, for his excellent service as a member of the faculty of the Rocky Mountain Regional Program, a basic skills course in trial advocacy for young attorneys.

William H. McAbee (Georgia, Southern District), by Magistrate G. R. Smith, United States District Court, Savannah, for his outstanding efforts and vigorous prosecution of a contempt of court proceeding against a law enforcement official.

Larry A. Mackey (Indiana, Southern District), by Robert J. Gofus, Chief, Criminal Investigation Division, Internal Revenue Service, Indianapolis, for his outstanding success in obtaining a guilty plea of an individual for racketeering, mail fraud and tax evasion, resulting in a 7-year sentence and $3.75 million in restitution, fines and forfeiture.

John Malcolm (Georgia, Northern District), by William S. Sessions, Director, FBI, Washington, D.C., for his significant contribution to the successful outcome of the VanPac murder case involving the assassination of two judges presiding in Alabama and Georgia.

James Martin (Georgia, Northern District), received a certificate of appreciation from Donald F. Bell, Chief, Federal Law Enforcement Training Center, Bureau of Alcohol, Tobacco and Firearms National Academy, Glynco, for his excellent presentation on asset forfeiture at several Advanced Agent Safety and Survival classes at the Training Center.

Janet Martin (District of Arizona), by Mark J. Bensley, Pretrial Services Office, United States District Court, Albuquerque, for her valuable assistance in prosecuting a probation revocation matter resulting in a maximum sentence allowed by law.

Steven A. Nisbet (Florida, Middle District), by Richard W. Sponseller, Associate Director, Financial Litigation Staff, Executive Office for United States Attorneys, Department of Justice, Washington, D.C., for participating in the Criminal Fine and Restitution Enforcement Conference held recently in Tacoma, Washington.

Reid Pixler (District of Arizona), by David S. Wood, Special Agent in Charge, Drug Enforcement Administration, Phoenix, for his significant contribution to the success of a five-division working seminar conducted by the Asset Forfeiture Unit of the Phoenix Division of the Drug Enforcement Administration.

Rudolf A. Renfer, Jr. and ***Sue Beasley*** (North Carolina, Eastern District), by John R. Dunne, Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C., for their successful efforts in prosecuting an action brought under Title II of the Civil Rights Act of 1964.

Daniel C. Rodriguez (Texas, Southern District), by Ronald A. Reams, Director, Office of Investigations, Diplomatic Security Service, Department of State, Washington, D.C., was presented a plaque in appreciation for his supportive efforts and excellent presentation at a complex detention hearing.

Albert W. Schollaert (Pennsylvania, Western District), by Homer D. Byrd, District Counsel, Department of Veterans Affairs, Pittsburgh, for his excellent representation in a medical malpractice action and for obtaining a judgment in favor of the United States.

Ellen W. Slights (District of Delaware), by E. Gordon Robinson, Chief, Branch of Reorganization, Securities and Exchange Commission, Atlanta, for her excellent representation and cooperative efforts in connection with a bankruptcy matter recently filed in Delaware by a major natural gas distributor.

Mary M. Smith (Oklahoma, Western District), received a Certificate of Appreciation from George L. Fields, Jr., Chief, Criminal Investigation Division, Internal Revenue Service, for her outstanding assistance and support in behalf of the law enforcement responsibilities of the Criminal Investigation Division.

Christian Stickan and ***John Siegel*** (Ohio, Northern District), by Robert M. Guttman, Assistant Secretary for Labor-Management Standards, Department of Labor, Washington, D.C., for their legal and professional skill in successfully prosecuting a labor union official for filing false reports under the Labor Management Reporting and Disclosure Act and misusing $400,000 in union funds.

Mark D. Stuaan (Indiana, Southern District), by David F. Ray, Special Agent in Charge, U.S. Secret Service, Louisville, for his legal skill and expertise in obtaining a guilty verdict by a jury on all five counts of assault on a federal agent and counterfeiting.

Thomas P. Swaim (North Carolina, Eastern District), by Cary H. Copeland, Director and Chief Counsel, Executive Office for Asset Forfeiture, Department of Justice, Washington, D.C., for obtaining an outstanding settlement in a recent case, and for serving as "one of our true asset forfeiture pioneers." Also, by Assistant Commander Scott J. Parker, Roanoke-Chowan Drug Task Force, Ahoskie, North Carolina, for his valuable assistance during the seizure process of a 1991 Peach State Mobile Home.

James D. Tierney (District of New Mexico), by Thomas W. Smith, Assistant Special Agent in Charge, Drug Enforcement Administration, Albuquerque, for his outstanding efforts in successfully prosecuting four defendants in a complex drug investigation.

Joseph T. Walbran (District of Minnesota), was presented a Special Recognition Award from the Criminal Investigation Division, Internal Revenue Service, St. Paul, for his significant contribution to the successful prosecution of three individuals involved in a complicated kickback scheme perpetrated on a nationally known discount retailer.

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SPECIAL COMMENDATION FOR ALL UNITED STATES ATTORNEYS

The following is a letter dated October 9, 1991 to Acting Attorney General William P. Barr from Elizabeth E. Smedley, Acting Chief Financial Officer, Department of Energy, Washington, D.C.:

> I would like to take this opportunity to express my appreciation for the support the Department of Justice (DOJ) has provided to the Department of Energy (DOE), Office of Chief Financial Officer. During the past several months, members of my staff have been working with various DOJ United States Attorneys in an effort to collect and/or settle oil overcharge receivables. The receivables were established by DOE as a result of violations of the Mandatory Allocation and Price Regulation and subsequently referred to DOJ.
>
> Working with the DOJ attorneys in the various Districts has been a pleasant experience. The attorneys have been very responsive in providing us with information as to the status of these receivables. Their efforts are truly appreciated and we look forward to working with them in the future.

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SPECIAL COMMENDATION FOR THE VANPAC TASK FORCE

On October 16, 1991, at a White House ceremony, President Bush paid tribute to the VanPac Task Force, named after Judge Robert Vance, a U.S. Court of Appeals Judge for the Eleventh Circuit in Birmingham, Alabama. Judge Vance and Alderman Robert Robinson, a prominent official of the NAACP in Savannah, Georgia, were both killed when they received a package in the mail containing an explosive constructed by a Rex, Georgia man carrying out a vendetta against the federal courts and the civil rights movement. The VanPac investigation was directed by Department of Justice officials, the FBI, the U.S. Marshals Service, and a number of other federal agencies, and led to a verdict of seven life sentences, plus 400 years in prison with no possibility of parole. The President thanked the VanPac team led by Louis Freeh, the chief prosecutor and Assistant United States Attorney for the Southern District of New York, (now a Federal District Judge in Manhattan), and Larry Potts, chief investigator and a Deputy Assistant Director of the FBI. He said, "To both of them and their VanPac colleagues, we owe a debt of gratitude for a job well done."

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SPECIAL COMMENDATION FOR ALL LECC/VICTIM WITNESS COORDINATORS

George J. Terwilliger, III, Principal Associate Deputy Attorney General, commended all LECC Victim-Witness Coordinators for the outstanding work they are doing nationwide in support of our asset forfeiture and equitable sharing programs. He said, "These programs are among the Department's highest priorities and your efforts to build law enforcement cooperation at all levels of government are greatly appreciated. The number one priority of forfeiture has been and continues to be law enforcement. We look to you to continue to help us get this message out and to ensure that there is utmost integrity in all aspects of the program. On the equitable sharing front, we have just surpassed the $800 million figure in total federal forfeiture prceeds and properties shared with State and local law enforcement agencies since the sharing program began in FY 1986. As sharing increases, so does the importance of ensuring that our conduct of the program is above reproach. Thank you for your commitment to enhanced law enforcement cooperation."

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PERSONNEL

On October 30, 1991, ***Richard Cullen*** was appointed Interim United States Attorney for the Eastern District of Virginia.

On September 22, 1991, ***Charles A. Caruso*** was appointed Interim United States Attorney for the District of Vermont.

On October 15, 1991, ***Albert S. Dabrowski*** was appointed Interim United States Attorney for the District of Connecticut.

On October 20, 1991, ***William D. Hyslop*** was appointed the Interim United States Attorney for the Eastern District of Washington.

On September 23, 1991, ***Kevin C. Potter*** was appointed Interim United States Attorney for the Western District of Wisconsin.

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ACTING ATTORNEY GENERAL HIGHLIGHTS

William P. Barr Is Nominated By The President To Be The Next Attorney General

On October 16, 1991, at a White House ceremony, President George Bush made the following announcement:

> Today I am announcing my choice for the Attorney General to lead the Department of Justice. I have chosen an individual who is a thorough professional, a defender of individual rights, and a person absolutely committed to this fight against crime. And he's also been tested by fire, working with several of you as evidenced in the recent events at the Talladega prison. And I was proud of him then, and I am proud today to send Bill Barr's name to the Senate as the next Attorney General of the United States.

Mr. Barr responded:

> It's been a privilege to serve you, Mr. President, these past three years at the Department of Justice. And I'm honored that you have selected me for the position of Attorney General. This is a particular honor to serve a President who is such a strong supporter of law enforcement. It is also a privilege to be nominated to succeed a great Attorney General -- Dick Thornburgh. As this ceremony clearly shows, we have thousands of dedicated and able men and women at the Department of Justice, who do an exceptional job -- day in and day out -- upholding justice and enforcing our laws even-handedly and with integrity. I'm proud to be associated with them and, if confirmed, proud to lead them."

Mr. Barr joined the Department of Justice in April, 1989 as Assistant Attorney General for the Office of Legal Counsel. He was nominated by President Bush in May 1990 to be the Deputy Attorney General, and received Senate confirmation on July 18, 1990. A year later, upon the departure of Attorney General Dick Thornburgh in August, 1991, he became Acting Attorney General.

[Note: See, United States Attorneys' Bulletin, Vol. 39, No. 10, at p. 277, for information concerning the President's reference to the Talladega prison crisis.]

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ATTORNEY GENERAL'S ADVISORY COMMITTEE OF UNITED STATES ATTORNEYS

Subcommittee Update

Attached at the Appendix of this Bulletin as Exhibit A is an updated Subcommittee list of the Attorney General's Advisory Committee.

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DEPARTMENT OF JUSTICE HIGHLIGHTS

Executive Order Issued By The President On Civil Justice Reform

Laurence S. McWhorter, Director, Executive Office for United States Attorneys, and Joseph M. Whittle, Chairman, Attorney General's Advisory Committee, and United States Attorney for the Western District of Kentucky, forwarded to all United States Attorneys an Executive Order signed by President George Bush on October 23, 1991, implementing civil justice reform provisions to apply to all new federal civil cases filed ninety days or more after that date. A copy is attached at the Appendix of this Bulletin as Exhibit B.

This Executive Order is intended to 1) facilitate the just and efficient resolution of civil claims involving the United States Government; 2) encourage the filing of only meritorious civil claims; 3) improve legislative and regulatory drafting to reduce needless litigation; 4) promote fair and prompt adjudication before administrative tribunals; and 5) provide a model for similar reforms of litigation practices in the private sector and in various states.

The President said, "Civil justice reform is absolutely essential to our country's well-being. It is a matter of overcoming the vested interests and changing the status quo to ensure a better and more prosperous life for all Americans."

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The President Calls For Assistance On The Crime Bill

On October 16, 1991, at a White House ceremony, President George Bush addressed "the true experts on crime and justice in this country -- our state and local law enforcement officials." In his statement, he requested assistance in turning the House crime bill around, and stated as follows:

> Your presence here today sends a powerful warning to the Congress that the American people will not accept a crime bill that is tougher on law enforcement than it is on criminals.
>
> . . . Let your representatives know that the House bill. . .is simply unacceptable. Tell them to support the Gekas death penalty amendment. Tell them to vote for the Hyde habeas corpus reform and the Sensenbrenner amendment on the exclusionary rule. And finally, tell them we need the McCollum equal justice act so that we can have a death penalty that works. Tell them our police, prosecutors and people stand behind these key provisions -- they stand behind a strong crime bill. I really believe that this issue transcends party politics. It gets right to the heart of what the American people want. . . Tell them also that it's time for a criminal justice system that allows us to see the truth come out, the guilty punished, the law upheld, and justice done. And that's what I believe our crime bill stands for, and that's what we stand for, and that's what I'd like to see these representatives stand for when the final vote is taken.

[Note: On October 22, 1991, the House of Representatives passed, 305-118, wide-ranging anti-crime legislation that would expand the application of the federal death penalty and authorize more money for local law enforcement agencies. The Senate has indicated an interest in an early House-Senate conference on the bill, although recent developments on the civil rights legislation have delayed scheduling. House and Senate leaders are planning to adjourn before Thanksgiving.]

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ORGANIZED CRIME

Multinational Conference On Asian Organized Crime

On September 26, 1991, Acting Attorney General William P. Barr attended the closing session of the Multinational Conference on Asian Organized Crime in San Francisco. The conference, comprised of eleven Western and Pacific Rim nations, was sponsored by the Department of Justice, and was attended by police officials and prosecutors from Japan, Republic of Korea, Australia, Canada, Hong Kong, Malaysia, Singapore, Thailand, New Zealand, and The Netherlands, as well as the United States. During the three-day conference, significant new proposals were developed to more effectively combat growing drug trafficking and violent offenses by Asian Organized Crime. They include:

-- More intensive efforts against drug trafficking and money laundering, including full implementation of a United Nations convention against illicit drugs.

-- Increasing multinational training and cross assignment of personnel to overcome language barriers to international investigations.

-- More Mutual Legal Assistance Treaties, which enhance cooperation in international cases.

-- Greater cooperation in fugitive arrests and extraditions.

-- Creation of asset forfeiture laws to seize and obtain title to criminally-derived money and property.

-- Greater use of electronic surveillance and long-term undercover investigations.

-- Adoption of laws similar to the Racketeer Influenced and Corrupt Organizations (RICO) statute, which permits effective prosecution to dismantle entire criminal organizations -- not just prosecution of individual gang members.

Acting Attorney General Barr said the most important lesson that law enforcement has learned about organized crime is that it grows malignantly in two ways: through the sworn silence of its members and the terrified silence of its victims. "They not only rob and kill their own compatriots but threaten those who may survive with even greater torment, should they ever speak of their crimes to the police. I can think of no greater impetus for more intensified law enforcement cooperation around the Pacific Rim. It is up to all of us, working together, to help save these law-abiding Asian residents -- many of them now American citizens -- from the grip of this unwarranted terror."

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"Born To Kill" Street Gang Indicted

On September 26, 1991, William P. Barr announced a significant step in the Justice Department's new priority effort to combat Asian organized crime. A federal grand jury in Brooklyn, New York, returned an indictment against ten members of the "Born to Kill" Vietnamese street gang for violent crimes in New York, Connecticut, and Georgia, and for participating in a criminal enterprise violating the Racketeer Influenced and Corrupt Organizations (RICO) statute. Each of the two RICO counts carries a maximum penalty upon conviction of twenty years in prison and a $250,000 fine. The indictment was prepared under the direction of Andrew J. Maloney, United States Attorney for the Eastern District of New York, and returned in U.S. District Court in Brooklyn.

The targets of robbery or extortion offenses included a drug store, jewelry store, and a watch shop in New York City. A health spa and a restaurant were robbed in Bridgeport, and there was also a conspiracy to rob a jewelry store in Rochester and a leather goods store in Copaigue, New York. This indictment supersedes earlier indictments charging six gang members with conspiring to commit four robberies. The founder and leader of the gang is also charged with plotting the bombing of a Manhattan restaurant and illegally possessing firearms.

Acting Attorney General Barr said, "We are determined to protect Asian-Americans, who are often the victims of such organized crime, and all of the people in this country from every organized crime group's heinous crimes. The government is seeking to dismantle entrenched groups and to prevent new groups from growing into organizations of great power and wealth."

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CRIMINAL DIVISION ISSUES

Modification Of Referral Procedures In Espionage Cases

On October 25, 1991, Robert S. Mueller, III, Assistant Attorney General for the Criminal Division, advised all United States Attorneys that effective immediately, the Criminal Division and the FBI have modified existing referral procedures to the United States Attorneys in espionage cases so as to bring the United States Attorneys into the matter at an earlier stage in the investigative process.

Henceforth, unless probable venue cannot yet be determined or other unusual circumstances suggest otherwise, upon learning of information that warrants the commencement of an espionage investigation, the Internal Security Section of the Criminal Division will immediately refer the matter to the appropriate United States Attorney's office for development. Once referred, existing procedures for coordinating the inquiry with the Internal Security Section, as well as obtaining prior approval for initiation of an espionage prosecution as set forth in the United States Attorneys' Manual, USAM 9-2.132, will continue unchanged.

If you have any questions, please call John L. Martin, Chief, Internal Security Section, Criminal Division, at (FTS) 368-1187 or (202) 514-1187.

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CRIME ISSUES

Gang Violence

On October 24, 1991, the Office of Justice Programs (OJP) of the Department of Justice held the third in a series of National Field Studies on Gangs and Gang Violence in Chicago to examine the nature and scope of the gang problem, as well as successful strategies to prevent, disrupt, and control gang activity, violence, and drug trafficking. The Chicago study focused on gang activities in the Chicago metropolitan area and throughout Illinois. Experts from across the state met to discuss federal, state and local collaboration to control gang violence; gang violence in public housing developments; community policing and community-based programs to prevent and suppress gang activity; public/private partnerships to combat gang violence and provide alternatives to gang membership; and correctional programs for gang members. Field studies have already been held in Los Angeles and Dallas. (See, Vol. 39, No. 4, of the United States Attorneys' Bulletin, dated April 15, 1991, at p. 92.)

OJP has undertaken a leadership role to identify and develop solutions to the gang problem, and have made gang control programs one of ten priorities for federal grant funding during FY 1991. They have allocated more than $5 million for a comprehensive program to prevent and suppress illegal gang activity. This emphasis will continue through FY 1992. A broad range of resources will be targeted across the full spectrum of OJP agency functions to confront the gang problem, including policy research, evaluation, program development, demonstration programs, training and technical assistance, and information dissemination, including a new gang data clearinghouse.

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FBI Statistics Regarding Law Enforcement Officers

According to preliminary national figures released by FBI Director William S. Sessions, 41 law enforcement officers were killed feloniously in the line of duty during the first six months of 1991. This year's semi-annual total was one lower than for January through June, 1990, when 42 officers were slain. Firearms continued to be the weapon most used in the slaying of officers. During the first half of this year, handguns were used in 31 of the murders, rifles in 8 and shotguns in 1. Geographically, 17 officers were slain in the Southern States, 11 in the Midwestern States, and 4 each in the Northeastern and Western States. Four officers were killed in Puerto Rico and 1 was killed in the U.S. Virgin Islands.

Ten officers were slain during arrest situations. Among the 10, 4 were involved in drug-related situations; 2 were attempting to prevent robberies or apprehend robbery suspects; 1 was attempting to apprehend burglary suspects; and 3 were attempting arrests for other crimes. Eight officers were slain in ambush situations; 8 were answering disturbance calls when killed; and 7 were slain while investigating suspicious persons or circumstances. Six were slain while enforcing traffic laws, and 2 were killed while handling prisoners. Sixteen officers were wearing body armor at the time of their deaths, and 7 were killed with their own weapons. Law enforcement agencies have cleared 39 of the 41 slayings.

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Project Triggerlock
Summary Report

Significant Activity - April 10, 1991 through September 30, 1991
(In Cases Indicted Since April 10, 1991)

Description	*Count*	*Description*	*Count*
Indictments/Informations.....	2,108	Prison Sentences.....	736 years 1 life sentence
Defendants Charged.....	2,649	Sentenced to prison.....	133
Defendants Convicted.....	538	Sentenced w/o prison or suspended.....	8
Defendants Acquitted.....	18		

"Significant Activity" is defined as an indictment/information, conviction, acquittal or sentencing which occurs during the time period. Numbers are adjusted due to monthly activity, improved reporting and the refinement of the data base. These statistics are based on reports from 94 offices of the United States Attorneys, excluding District of Columbia's Superior Court. [NOTE: All numbers are approximate.]

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ASSET FORFEITURE ISSUES

Policy Regarding Forfeiture By Settlement

Attached at the Appendix of this Bulletin as Exhibit C is a memorandum dated October 31, 1991, from Cary H. Copeland, Director and Chief Counsel, Executive Office for Asset Forfeiture, to all United States Attorneys, and other Department and Agency officials, setting forth general policy regarding forfeiture by settlement. The memorandum discusses 1) monetary amounts; 2) administrative forfeiture by agreement; 3) judicial forfeiture by settlement; 4) acceptance of a monetary amount in lieu of forfeiture; 5) plea agreements affecting forfeitability of assets located abroad; and 6) U.S. Customs Service cases generally.

Your questions or comments should be directed to the Executive Office for Asset Forfeiture, at (FTS) 368-1149 or (202) 514-1149.

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Expediting Delivery Of Equitable Sharing Transfers

On October 1, 1991, Cary H. Copeland, Director and Chief Counsel, Executive Office for Asset Forfeiture, issued a memorandum to all United States Attorneys, and Department of Justice and other agency officials, concerning expediting delivery of equitable sharing transfers. Equitable sharing has been a dramatic success in fostering cooperation with our state and local law enforcement colleagues. Sharing in FY 1991 may reach $300 million, almost fifteen times the $22 million shared in FY 1986. But the explosive growth of sharing has created new management challenges. State and local agencies are increasingly dependent upon sharing proceeds. Expediting the processing of sharing requests, therefore, deserves a high priority, both at headquarters and in the field.

Equitable sharing ceremonies are encouraged but should be scheduled as quickly as possible once the cash and/or tangible property is available for sharing. Accumulating sharing checks and property for purposes of presentation is discouraged where the recipient agency does not concur -- particularly where large amounts of money are involved. Not only are the funds critically important to some agencies; the interest that can be earned on these funds is also available to be used for law enforcement use. [Note: The reference to "All property" at V,A,3 of The Attorney General's Guidelines on Seized and Forfeited Property should read "All cash and property" . . ." A revision will be forthcoming.]

If you have any questions, please contact the Executive Office for Asset Forfeiture at (FTS) 368-1149 or (202) 514-1149.

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POINTS TO REMEMBER

New Civil Division Contact For Civil Penalty Actions

The Federal Programs Branch Monograph, issued March 1991, provides that civil penalty actions under Section 951 of FIRREA (12 U.S.C. §1833A) must be authorized by the Assistant Attorney General for the Civil Division, although cases may be handled either by the United States Attorneys' offices or by the Civil Division.

The contact person for Section 951 referrals has now been changed. Effective immediately, any questions or documents concerning Section 951 civil penalty actions should be directed to David J. Anderson, Director, Federal Programs Branch, Civil Division, (FTS) 368-3354 or (202) 514-3354), or Arthur R. Goldberg, Assistant Branch Director, Federal Programs Branch, Civil Division, (FTS) 368-4783 or (202) 514-4783). Their mailing address is: United States Department of Justice, Civil Division, Federal Programs Branch, Room 3736, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20530.

* * * * *

1992-93 Congressional Fellowship Program

The American Political Science Association has invited the Department of Justice to submit nominations for the 1992-93 Congressional Fellowship Program. Attached at the Appendix of this Bulletin as Exhibit D is an announcement which provides information on qualifications, duration, activities, cost, and nominating procedures for the program.

The ability to relate effectively with the Congress is perceived by Department management as a vital component of an executive's competencies. The Congressional Fellowship Program provides an excellent opportunity for incumbent and potential executives to develop the skills and abilities to understand and work with the Congress. They will attend seminars conducted by leading congressional, governmental, and academic figures throughout the year, while working with Members of the House of Representatives and the Senate, and with congressional committees. Nominees will be precluded from accepting assignment to any congressional committee involved in legislation directly affecting the Department. The Assistant Attorney General, Office of Legislative Affairs, will be involved in the selection of nominees and will advise them regarding committee assignments. This program is considered a long-term detail outside the Department, and, once a nominee is accepted, it will be necessary to request approval of the Deputy Attorney General. A copy of a memorandum issued by the Assistant Attorney General for Administration on May 13, 1988 is included as part of Exhibit D, which provides pertinent information concerning details of employees to organizations outside the Department of Justice.

All Department nominations must be submitted no later than February 7, 1992 to John C. Vail, Director, Personnel Staff, Justice Management Division, Suite 400, Indiana Building, 633 Indiana Avenue, N.W., Washington, D.C. 20531. The telephone number is: (FTS) 368-6788 or (202) 514-6788.

* * * * *

FY 1992 Redress Payments Begin

On October 1, 1991, the Office of Redress Administration (ORA) began making FY 1992 redress payments of $20,000 each to 25,000 eligible Japanese-Americans who were interned during World War II. John R. Dunne, Assistant Attorney General in charge of the Civil Rights Division, said that during the first week of October, 22,800 payments were being disbursed to eligible recipients born between July 1, 1920, and December 31, 1927. Congress allocated $500 million for the program for FY 1992.

Redress payments to eligible Japanese-Americans were authorized by the Civil Liberties Act of 1988. ORA, an office in the Civil Rights Division, administers the redress, or payment, provisions of the Act, identifies and locates all potential recipients, verifies their eligibility, and makes payment to those deemed eligible. No application is required. Last October ORA paid 20,300 people in the first round of payments. This year, due to ORA's extra efforts in case verification, an estimated 22,800 cases will be paid in the first mass mailing of checks. Most of the remaining cases in the current payment group are pending because ORA has not received sufficient documentation to process the case. Once these cases are determined eligible for redress, payments will be disbursed as soon as possible.

Persons who have questions regarding the submission of their documentation are encouraged to call ORA's toll-free Help Line at 1-800-395-4672 (voice) or 1-800-727-1886 (telephone device for the deaf) Monday through Friday, 9:30am to 5:30pm EDT.

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SENTENCING REFORM

Guidelines Sentencing Update

A copy of the Guideline Sentencing Update, Volume 4, No. 9, dated October 10, 1991, and Volume 4, No. 10, dated October 18, 1991, is attached as Exhibit E at the Appendix of this Bulletin.

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Federal Sentencing Guide

Attached at the Appendix of this Bulletin as Exhibit F is a copy of the Federal Sentencing Guide, Volume 2, No. 33, dated September 23, 1991, Volume 2, No. 34, dated October 7, 1991, and Volume 2, No. 35, dated October 21, 1991, which is published and copyrighted by Del Mar Legal Publications, Inc., Del Mar, California.

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SAVINGS AND LOAN ISSUES

Savings And Loan Prosecution Update

On October 10, 1991, the Department of Justice issued the following information describing activity in "major" savings and loan prosecutions from October 1, 1988 through September 30, 1991. "Major" is defined as (a) the amount of fraud or loss was $100,000 or more, or (b) the defendant was an officer, director, or owner (including shareholder), or (c) the schemes involved convictions of multiple borrowers in the same institution.

Informations/Indictments	524
Estimated S&L Losses	$7.442 billion
Defendants Charged	871
Defendants Convicted	661 (93%)
Defendants Acquitted	49 *
Prison Sentences	1,344 years
Sentenced to prison	401 (79%)
Awaiting sentence	164
Sentenced w/o prison or suspended	106
Fines Imposed	$ 12.646 million
Restitution Ordered	$372.092 million

CEOs, Board Chairmen, and Presidents:	
Charged by indictment/ information	106
Convicted	78
Acquitted	7
Directors and Other Officers:	
Charged by indictment/ information	150
Convicted	128
Acquitted	5

All numbers are approximate, and are based on reports from the 94 offices of the United States Attorneys and from the Dallas Bank Fraud Task Force.

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

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LEGISLATION

Omnibus Crime Bill

After heated debate, the House of Representatives passed an omnibus crime bill on October 22, 1991. Please refer to the Department of Justice Highlights section of this Bulletin, at p. 314, for a status report on this important legislation.

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Civil Rights Bill

On October 30, 1991, the Senate passed, 93-5, a major civil rights bill following approval of a large compromise amendment worked out earlier with bill sponsors and the White House. The bill would nullify or modify recent Supreme Court rulings that made it more difficult for workers to win anti-discrimination suits. It would give victims of sexual discrimination the right to sue for limited damages, and would also give victims of sexual, religious and other forms of non-racial discrimination a right to collect compensatory and punitive damages. It is virtually assured that this legislation will be enacted and signed into law before Congress adjourns in late November.

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Tribal Court Jurisdiction

In mid-October, conferees agreed to a permanent extension of trial court jurisdiction to cover certain criminal misdemeanors. This legislation addresses a jurisdictional breach that occurred when the Supreme Court held in Duro v. Reina to restrict tribal court jurisdiction over non-member Indians in such cases. Such breach created a burden for United States Attorneys who became responsible for the disposition of these cases.

The Department of Justice is preparing a signing statement which the President is expected to sign. The statement will stress, among other things, the need for legislation to amend the Indian Civil Rights Act to ensure federal court review for defendants who allege civil rights violations by the tribal courts in the prosecution of these and other cases.

* * * * *

Sale of Government Debt

On October 9, 1991, a representative from the Department of Justice testified in support of H.R. 3218, a bill to authorize agencies to sell delinquent debts owed to the Untied States to private debt collection agencies and related entities. This legislation could provide an additional tool that could be helpful to our overall debt collection efforts. The bill contains appropriate safeguards to preserve the prerogatives of the Attorney General concerning large debts as well as those that are in litigation or the subject of fraud allegations.

The testimony of other witnesses and the comments from Subcommittee members were generally supportive. No information is available about Subcommittee plans for action on the bill.

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Judicial Immunity

On October 3, 1991, Assistant Attorney General Stuart Gerson testified in support of two bills that would restore judicial immunity for actions taken by a state judicial officer in his official capacity. The Supreme Court limited this immunity to permit injunctive relief under 42 U.S.C. §1983 and liability for attorney's fees and costs in Pulliam v. Allen (1984). We support both bills based upon our conviction that a free, fair and independent judiciary cannot be guaranteed unless judicial decisions are freed from all potential for intimidation and outside interference.

Our views were shared in large measure by other hearing witnesses, including Chief Judge Aubrey Robinson, Jr., U.S. District Court, District of Columbia, appearing on behalf of the Judicial Conference; Chief Judge Harry Carrico, Supreme Court of Virginia; and Chief Justice Robert N. C. Nix, Jr., of the Pennsylvania Supreme Court, appearing on behalf of the Conference of Chief Judges. We expect to work with the Subcommittee as they consider suggested revisions to these bills. The companion to H.R. 671 (S. 653) is pending in the Senate Judiciary Committee.

* * * * *

Jury Trials Under The Federal Tort Claims Act

On October 23, 1991, Stephen Bransdorfer, Deputy Assistant Attorney General for the Civil Division, testified before the House Judiciary Subcommittee on Administrative Law and Governmental Relations concerning H.R. 2184, a bill to provide for jury trials in wrongful death actions under the Federal Tort Claims Act (FTCA). Since its enactment in 1946, litigation under the FTCA has been tried to the court alone, although there is a provision for advisory juries. This bill was introduced by Congressman Larry Smith because a constituent lost an FTCA wrongful death action before the court (a federal prison inmate committed suicide).

Mr. Bransdorfer testified in opposition to the bill stating that there is no evidence indicating that the current system does not fully compensate deserving plaintiffs. Moreover, trials before a jury are vastly more expensive in terms of judicial and other litigative resources. The balance struck by Congress in enacting the provision for trials to the court without a jury remains reasonable and appropriate. The members of the Subcommittee did not express a particular concern about existing law nor an interest in pursuing this legislation.

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Federal Tort Claims Act

On October 23, 1991, Stephen Bransdorfer, Deputy Assistant Attorney General for the Civil Division, testified before the House Judiciary Subcommittee on Administrative Law and Governmental Relations concerning H.R. 2731, a bill that would repeal the Federal Tort Claims Act exception for Customs Service activities. This legislation was prompted by a private boat that was damaged during the course of a Customs Service investigation.

The Department of Justice vigorously opposes repeal of the exception because it would oblige the Service to expand its inspection activities in order to protect the United States from improper claims. The Department does not oppose the portion of the bill that would extend the Attorney General's authority to settle damage claims arising from law enforcement activities to the Secretary of the Treasury in order to pay claims for damage to non-commercial entities. This authority, which was recently increased to $50,000, permits reasonable compensation for damages resulting from certain activities, such as inspections and investigations by the Customs Service, the Bureau of Alcohol, Tobacco and Firearms, and the Secret Service. The Department opposes extension of this authority to pay commercial claims related to Customs Service activities because commercial insurance to protect against such damage is affordable and readily available.

Mr. Bransdorfer was accompanied by a Customs Service representative who was prepared to respond to questions about the debilitating impact that this legislation would have on Service operations. The Subcommittee members, however, did not raise any questions and their commitment to act on this bill remains unclear.

* * * * *

Federal Tort Claims Act Coverage Of Community Health Centers

On October 23, 1991, the House judiciary Subcommittee on Administrative Law and Governmental Relations approved H.R. 3591, a bill that would extend the coverage of the Federal Tort Claims Act to Community and Migrant Health Centers. The Department is strongly opposed to this extension because employees of the Centers are not federal employees, subject to the day-to-day control and supervision of the federal government. The Centers are private entities that receive about 40 percent of their funding from HHS grants.

This bill attempts to limit the government's exposure by imposing certain reporting requirements on the Centers and by allowing the Attorney General to exclude entities with poor malpractice records. These efforts do not address our fundamental objections to any scheme that extends the liability of the United States to the acts of individuals who are not federal employees. A letter expressing the Department's views is being prepared and will be forwarded to the full Committee.

* * * * *

Military Medical Malpractice

On October 2, 1991, Assistant Attorney General Stuart Gerson testified before the House Judiciary Subcommittee on Administrative Law and Governmental Relations in opposition to legislation that would authorize service members to sue the United States under the Federal Tort Claims Act for malpractice in certain military medical facilities. Department of Defense General Counsel Terrence O'Donnell joined Mr. Gerson in voicing the Administration's strong opposition to this bill.

Its enactment would disrupt military operations, interfere in discipline and adversely affect morale. Moreover, it would be far less rewarding, despite the monetary promise of litigation, than the existing even-handed, no-fault system of compensation provided to service members. Congressmen Gekas and Schiff indicated that they share our view of the current system, which is partially analogous to a workers' compensation system. The Department of Justice and the Department of Defense will work closely together to supplement the record and assure that other members of the full Committee are well informed before this bill is taken up.

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CASE NOTES

CIVIL DIVISION

Ninth Circuit Upholds Random Drug Testing Program For Navy Civilian Employees Who Hold Top Secret Clearances With Access

The union argued that random drug testing of Navy civilian employees who hold top secret security clearances with access is unreasonable under the Fourth Amendment. A majority of the panel in the Ninth Circuit has held that the Navy may conduct random testing of civilian employees who hold top secret security clearances with access even if their jobs do not require them to work with classified materials regularly. The concurring opinion argued that the court should have affirmed because the record shows it is likely enough that the union's employees may see classified information while on the job to justify random testing.

AFGE Local 1533 v. International Federation of Professional and Technical Engineers (IFPTE), AFL-CIO and CLC, (Sept. 10, 1991). DJ # 35-11-735.

Attorneys: Leonard Schaitman - (FTS) 368-3441 or (202) 514-3441
Lowell V. Sturgill Jr. - (FTS) 368-3427 or (202) 514-3427

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Ninth Circuit Finds Jurisdiction Under Cohen To Review Refusal To Dismiss Bivens Claims Under Feres But Holds That Challenged Activity Was Not "Incident To Military Service"

Plaintiff, a former Air Force major, alleged that three military subordinates entered her office after hours, copied and subsequently disseminated personal notes and mail in an effort to destroy her professional reputation. The defendants had sought to dismiss these claims under the Feres doctrine which bars suits by military personnel where the claimed injury was received "incident to military service." The Ninth Circuit held it had jurisdiction to review the district court's order under the Cohen doctrine, under which otherwise non-reviewable orders may be appealed if the district court order presents a final disposition of an important issue separate from the merits and the order is effectively unreviewable on appeal. The court, however, went on to hold that the Feres doctrine did not apply because the challenged activities of the defendants were not incident to their military service.

Lutz v. Secretary of the Air Force, No. 89-16310 (Sept. 16, 1991). DJ # 145-14-2371.

Attorneys: Barbara L. Herwig - (FTS) 368-5425 or (202) 514-5425
Mark W. Pennak - (FTS) 368-5714 or (202) 514-5714

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Eleventh Circuit En Banc Holds That A Denial Of Summary Judgment On Grounds Of Qualified Immunity Is Immediately Appealable Even If An Additional Damage Claim Will Proceed To Trial Regardless Of The Outcome Of The Appeal

In a suit against individual FAA officials for damages for cancelling his FAA pilot examiner permit, plaintiff alleged several distinct constitutional violations, and defendants moved for summary judgment on grounds of qualified immunity. The district court denied qualified immunity for the property interest/due process claim and also denied summary judgment on a factually separate reputational injury/due process claim because of disputed material facts. We took an immediate appeal on the first claim only. The panel dismissed the appeal for want of appellate jurisdiction, holding that a denial of qualified immunity on some but not all personal liability claims is not an immediately appealable collateral order. The court of appeals, on rehearing en banc, has now held that the policies undergirding qualified immunity would be frustrated if immediate appeal from a denial of a claim of qualified immunity could be defeated in these circumstances.

Green v. Brantley, No. 89-8150 (September 12, 1991). DJ # 157-12C-3395.

Attorneys: Barbara Herwig - (FTS) 368-5425 or (202) 514-5425
Wendy Keats - (FTS) 368-3518 or (202) 514-3518

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False Claims Act Cases

Fifth Circuit Grants Government's Petition For Writ Of Mandamus And Emphasizes That Judicial Review Of Administrative Subpoena In An Enforcement Action Is Limited And Should Be Handled Summarily

The Fifth Circuit granted the government's petition for writ of mandamus and instructed the lower court: (1) to vacate its order which permitted unlimited discovery by Burlington Northern; (2) to promptly address and decide the action for enforcement of the Inspector General's administrative subpoena to Burlington Northern; and (3) pending resolution of the enforcement action, to defer and suspend all activity, specifically including discovery, in a consolidated suit by Burlington Northern to enjoin enforcement of the subpoena. The Fifth Circuit stressed that judicial review of an administrative subpoena in an enforcement action is limited and is to be handled summarily. It also emphasized that exceptional circumstances must exist before involuntary depositions of high agency officials are permitted. In addition, the court declared that prior to final resolution of the subpoena enforcement action, the railroad could not maintain an action seeking, inter alia, an injunction of the subpoena.

In Re: Office Of Inspector General, Railroad Retirement Board, 933 F.2d 276 (5th Cir. 1991)

Attorney: John Hoyle - (FTS) 368-3547 or (202) 514-3547

On remand, the district court quashed the subpoena, holding that the Inspector General was improperly attempting to perform a function (tax audits of railroads) that the agency itself should perform, and that the Inspector General's late justification that he was performing a spot-check of the agency's enforcement of the tax statute was unconvincing.

Burlington Northern Railroad Co. v. Office of Inspector General, Railroad Retirement Board, (N.D. Texas July 18, 1991).

Attorney: Karen Stewart - (FTS) 368-2849 or (202) 514-2849

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Southern District of Alabama Holds That False Claims Act Action Is Not Subject To Automatic Stay In Bankruptcy

Following In Re Commonwealth Cos., 913 F.2d 518 (8th Cir. 1990), and rejecting contrary authority, the court held that a False Claims Act action is an exercise of the United States' police or regulatory power and therefore is not subject to the automatic stay in bankruptcy.

In Re Selma Apparel Corp., Civ. No 91-0385-B-C (S.D Ala. Oct. 1, 1991).

Attorney: Steve Segreto - FTS 367-0404 or (202) 307-0404

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Recent Decisions in Qui Tam Cases

60 Day Period During Which Complaint Is Under Seal And Government May Elect To Intervene

United States of America, ex rel. Paddy Kalish v. James H. Desnick, 765 F. Supp. 1352 (N.D. Ill. 1991) (60 day period in which complaint remains under seal is not necessarily congruent with period in which government can decide whether to intervene; 60 day election period starts upon receipt of complaint and written disclosure; statement seeking extension must contain specifics to establish good cause).

Attorney: Harold Malkin - (FTS) 367-0196 or (202) 307-0196

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ENVIRONMENT AND NATURAL RESOURCES DIVISION

National Environmental Policy Act (NEPA) Challenge To The U.S. Department Of Agriculture's (USDA) Germplasm Preservation Program Dismissed For Failure To Establish Cause Of Action Subject To The Administrative Procedure Act (APA) Review

Several organizations and individuals interested in issues relating to biodiversity and the effects of modern agricultural practices on survival of species challenged USDA's germplasm preservation program under NEPA. The program is a state-federal cooperative effort to maintain, propagate and distribute "new and valuable seeds and plants." In response to an initial threat of a NEPA challenge from the plaintiffs, USDA prepared an environmental assessment on the program and concluded that it did not have significant environmental impacts. The plaintiffs then sought to enjoin the program, arguing that its day-to-day operations triggered a NEPA obligation which had not been fulfilled by its environmental assessment and FONSI (Finding Of No Significant Impact).

The district court granted summary judgment for USDA, holding that the plaintiffs had failed to identify a particular "major federal action" triggering NEPA obligations. The Court of Appeals affirmed, but held that by failing to identify a particular agency action by which they had been injured, the plaintiffs had failed to establish a cause of action for judicial review under section 702 of the APA, and instructed that the case be dismissed for lack of subject matter jurisdiction. The opinion contains a lengthy but inconclusive discussion of the D.C. Circuit's "informational standing" cases, suggesting that the idea of basing standing under NEPA, solely on a lack of desired information, is inappropriate; but proceeds to decide the case on other grounds. To add to the general confusion, Judge Buckley, dissenting, argued that issuance of a FONSI is agency action entitling plaintiffs to judicial review and strongly supports informational injury as a basis for standing.

Foundation on Economic Trends v. Lyng, D.C. Cir. No. 90-5097 (September 6, 1991) (Buckley, Williams and Randolph)

Attorneys: Ann Peterson - (FTS) 368-3888 or (202) 514-3888
J. Carol Williams - (FTS) 368-5313 or (202) 514-5313

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Environmental Protection Agency's (EPA) Recovery Claims Under The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) Held Not Discharged By Bankruptcy Reorganization

On our appeal, the Third Circuit has reversed the district court's holding that EPA's cost recovery claims under CERCLA were discharged upon consummation of Penn Central Transportation Company's bankruptcy reorganization plan in 1978. The effect of the district court's ruling would have been to foreclose the United States from suing the reorganized Penn Central Corporation, for the cleanup costs successor, stemming from the activities of its predecessor.

In reversing the district court, the court of appeals accepted our argument, derived from Schweitzer v. Contrasolidated Rail Corp., 758 F.2d 936 (ed Cir. 1985), that the United States had no "claim" within the meaning of the Bankruptcy Act (the predecessor to the current Bankruptcy Code) that could have been discharged, because CERCLA did not even exist at any time during the pendency of the reorganization proceedings. The court agreed with the United States that the government cannot be expected to have asserted its claim during those proceedings and its rights, which were later created by CERCLA's passage in 1980, were consequently not extinguished by consummation of Penn Central's reorganization in 1978. The court of appeals further agreed that the reorganized corporation is the appropriate entity to be sued.

In re Penn Central Transportation Co., 3d Cir.
Nos. 90-1676, 90-1677, 90-1678, (September 19, 1991)
(Mansmann, Nugaard, Roney)

Attorneys: Vicki L. Plaut (argued) - (FTS) 368-2813 or (202) 514-2813
Dirk D. Snel - (FTS) 368-4400 or (202) 514-4400

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Forest Service Properly Adopted The Federal Energy Regulatory Commission's Finding Of No Significant Impact In Connection With Licensing Of Hydroelectric Project In National Forest

LaFlamme petitioned for review of a Federal Energy Regulatory Commission (FERC) decision that reinstated a license for construction of a hydroelectric power plant in El Dorado National Forest. FERC's initial licensing order was vacated because the Commission had not prepared an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) before issuing the license. Our client, the Forest Service, was not involved in the initial license proceeding or in the first round of NEPA litigation. The Forest Service was named as a respondent in the second round because of its comments on FERC's EA. The Forest Service disappointed project opponents by retracting some highly critical comments on FERC's EA in exchange for the licensee's dismissal of a challenge to a special use permit that the Forest Service had issued for the project.

LaFlamme argued that the Forest Service was obligated to prepare its own EA and that both EAs should have concluded that an EIS was required. The Ninth Circuit upheld both FERC's FONSI and the Forest Service's right, as a cooperating agency, to limit its role in the NEPA process. "[W]hen a lead agency prepares environment statements, there is no need for other cooperating agencies involved in the action or project to duplicate that work." This represents a modest extension of the CEQ regulations, which do not explicitly apply the concept of lead and cooperating agencies to the preparation of EAs.

Laflamme v. Federal Energy Regulatory Commission, 9th Cir.
No. 90-70448 (September 30, 1991) (Schroeder, Norris, Brunetti)

Attorneys: Jeffrey Kehne - (FTS) 368-2767 or (202) 514-2767
Robert Klarquist - (FTS) 368-2713 or (202) 514-2713

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Challenge To The Bureau Of Land Management's (BLM) Designation Of Area As Roadless On Ground It Was Ultra Vires Not Barred By Six-Year Statute Of Limitations In 28 U.S.C. 1401(a)

Pursuant to section 603(a) of the Federal Land Management Policy Act (FLMPA), the Bureau of Land Management (BLM) in 1979 determined that a part of the California desert was "roadless" and designated it as Wilderness Study Area #243. The designation was published in the Federal Register, and a 30-day period was provided to file a protest. No one did. Wind River filed mining claims in 1982 and 1983, and then restaked new claims in 1985 after the earlier claims were deemed abandoned. In 1986 Wind River sought to have the designation declared invalid because of its claim that a road bisects the area. BLM disagreed, holding that the alleged road was a "way" and that Wind River's challenge came too late. Wind River filed suit in 1989, asserting that the designation was ultra vires and arbitrary and capricious because the roadless area was in fact roaded. The district court held that the suit was barred by the six-year statute of limitations in 28 U.S.C. 2401(a).

The Ninth Circuit reversed and remanded. First of all, the court agreed that 28 U.S.C. 2401(a) applies to actions for judicial review brought pursuant to the Administrative Procedures Act. The court cited Sierra Club v. Penfold, 857 F.2d 1307 (9th Cir. 1988) and Shiny Rock Mining Corp. v. United States, 906 F.2d 1362 (9th Cir. 1990), and held that they controlled this question despite an earlier case which appeared to reach the contrary conclusion (United States v. Webb, 655 F.2d 977 (9th Cir. 1981)). However, the court of appeals disagreed with the district court's holding that Wind River's "right of action first accrued" when BLM published its designation in the Federal Register in 1979. In both Penfold and Shiny Rock, the Ninth Circuit held that the accrual date was the date of Federal Register notice to the world. However, the court here distinguished those cases on the ground that they were "procedural" challenges. [Penfold barred a claim that a BLM regulation was promulgated with inadequate NEPA compliance; and Shiny Rock barred a claim that a withdrawal of Forest Service land from mineral entry was procedurally deficient.] According to the court, the fact that Wind River claimed the WSA designation was "ultra vires" changes the accrual analysis: "If a person wishes to challenge a mere procedural violation in the adoption of a regulation or other agency action, the challenge must be brought within six years of the decision. Similarly, if the person wishes to bring a policy-based facial challenge to the government's decision, that too must be brought within six years of the decision. * * * If, however, a challenger contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than six years following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger. * * * The government should not be permitted to avoid all challenges to its actions, even if ultra vires, simply because the agency took the action long before anyone discovered the true state of affairs." The court then held that Wind River's right of action accrued in 1987 when BLM rejected its claim.

The court thus makes a distinction between (1) "procedural or policy-based facial challenges," which accrue upon Federal Register publication; and (2) "substantive" challenges to agency action as being "ultra vires" or "in excess of constitutional or statutory authority," which accrue only when the agency applies the decision. Even if one accepts this distinction, it seems difficult to accept that Wind River's claim -- that the roadless area is really a roaded area -- falls in the latter category. Even if the area is roaded, it does not follow that BLM's erroneous contrary determination was ultra vires. Hence, it appears that the court is really making a distinction between procedural challenges [i.e., you did not do things correctly when making your decision] and substantive challenges [i.e., your decision is wrong].

Wind River Mining Corporation v. United States,
9th Cir. No. 90-55731 (October 8, 1991)
(Nelson, O'Scannlain, Trott)

Attorneys: Blake A. Watson - (FTS) 368-2855 or (202) 514-2855
John A. Bryson - (FTS) 368-2740 or (202) 514-2740

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TAX DIVISION

Supreme Court Grants Certiorari In Firearms Excise Tax Case

On October 7, 1991, the Supreme Court granted the Government's petition for certiorari in Thompson Center Arms v. United States. This case presents the question whether a package unit consisting of a pistol and a kit that enables the pistol to be easily and quickly converted into a short-barrel rifle constitutes a "firearm" within the meaning of Section 5845(a)(3) of the Internal Revenue Code.

The Federal Circuit held that prior assembly was required to trigger the tax under these circumstances. The Government thereafter sought review in the Supreme Court, citing a conflict among the circuits on the prior assembly issue as well as the adverse impact of the Federal Circuit's decision on enforcement of the nation's firearms laws.

* * * * *

Supreme Court Grants Certiorari To Resolve Conflict Among The Circuits On The Taxability Of Back Pay Awards For Statutory Discrimination Claims Against An Employer

On October 7, 1991, the Supreme Court granted the Government's petition for certiorari in United States v. Therese Burke, et al. Taxpayers were three employees of the Tennessee Valley Authority (TVA) who received payments as part of the settlement of an action brought against TVA under Title VII of the Civil Rights Act of 1964. In this action, taxpayers alleged that TVA discriminated against female employees when it increased the salaries of employees in certain male-dominated job categories but did not increase the salaries of employees in certain female-dominated job categories. TVA agreed to pay $5,000,000 in settlement of the claim, to be divided among affected employees. Taxpayers brought this refund action asserting that the amounts received in the settlement were excludable from gross income under Section 104(a)(2) of the Internal Revenue Code because they were received on account of personal injuries.

The District Court concluded that the amounts received represented back pay under Title VII and held that a Title VII back pay award is not damages for personal injury for purposes of Section 104(a)(2). The Sixth Circuit reversed, holding that gender discrimination is a personal injury and that taxpayers' loss of salary was merely a consequence of the personal injury. The Sixth Circuit's decision is in direct conflict with the Fourth Circuit's decision in Thompson v. Commissioner, 866 F.2d 709 (4th Cir. 1989), which held that back pay received under Title VII and the Equal Pay Act is not excludable from gross income under Section 104(a)(2).

The issue in this case has substantial continuing administrative importance because thousands of individuals have received back pay under Title VII and other employment discrimination statutes.

* * * * *

Continental Airlines Bankruptcy Involves Substantial Tax Claim

The Internal Revenue Service recently filed a proof of claim in excess of $175 million in the Continental Airlines bankruptcy proceeding. The bulk of the claim relates to excise taxes imposed under Section 4971 of the Internal Revenue Code for failure to meet the minimum funding standards of a defined benefit pension plan. The Tax Division anticipates litigation regarding whether this excise tax is entitled to priority or whether it should be treated as a general unsecured penalty claim.

The Sixth Circuit recently addressed this issue in In re Mansfield Tire & Rubber Co., where it held that an excise tax imposed under Section 4971 is entitled to priority and may not be treated as a general unsecured claim. The Sixth Circuit also held that a tax under Section 4971 was not subject to equitable subordination in the absence of inequitable conduct on the part of the Government.

* * * * *

Fifth Circuit Rules On What Constitutes A Valid Statutory Notice Of Deficiency

On October 11, 1991, in Pearce and Broussard v. Commissioner, the Fifth Circuit reversed the Tax Court and held that the Internal Revenue Service failed to make a valid determination of a deficiency, thereby invalidating its notice of deficiency to the taxpayer. The Fifth Circuit recently held in Portillo v. Commissioner, 932 F.2d 1128, 1132 (1991), that, in order for the IRS's determination with respect to a deficiency to be valid, there must be "thoughtful and considered determination that the United States is entitled to an amount not yet paid."

In this case, Mr. Matherne, the individual whose tax liability was at issue, timely filed his 1982 income tax return. The IRS sent the return back to him, retaining only a copy of the return's first page which listed the taxpayer's filing status and number of exemptions. The IRS subsequently determined that Mr. Matherne had not filed a return for 1982 and issued notices of transferee liability to Mr. Matherne's widow and daughters. These notices of transferee liability failed to take into account not only the fact that a return had been filed for 1982 but also information contained on the first page of the 1982 return that the IRS had retained. The Fifth Circuit found the Service's actions in this case did not constitute a "thoughtful and considered" process of determination and ruled that the notice of deficiency was invalid. The Tax Division is considering whether to seek rehearing.

* * * * *

Eighth Circuit Grants Rehearing En Banc In Important Estate Tax Case That Could Generate A Direct Conflict Between Appellate Decisions

On September 20, 1991, the Eighth Circuit ordered rehearing en banc in Irvine v. United States on January 6, 1992. The Government previously prevailed in this federal gift tax case by a split decision. On August 10, 1990, the Eleventh Circuit reached this same result with respect to a related taxpayer in Ordway v. United States, 908 F.2d 890 (11th Cir. 1990). These cases each involve a beneficiary of a trust created in 1917 by Lucius Ordway, one of the principal founders of the 3M Company. Each taxpayer filed a disclaimer with respect to his interest in the trust's corpus when the trust terminated in 1979, and not upon learning of his interest in the trust (1931 and 1951, respectively.)

The district court in each case held that the disclaimer was not a transfer subject to the federal gift tax because the trust interest was created prior to the imposition of the gift tax in 1932 and thus a disclaimer of that interest could not be a transfer subject to the gift tax. Both the Eighth Circuit and the Eleventh Circuit reversed, concluding that the disclaimer was itself a taxable transfer regardless of when the trust was created and that the partial disclaimer was taxable because it was not made within a reasonable time after taxpayer learned of the interest as required by Jewett v. Commissioner, 455 U.S. 305 (1982). The taxpayer in Ordway has filed a petition for writ of certiorari.

* * * * *

Eleventh Circuit Reverses Dismissal Of Scientologist's Claim For Deductions For Payments Made To The Church Of Scientology

On October 22, 1991, the Eleventh Circuit reversed the favorable judgment of the District Court in George W. Powell v. United States, and remanded the case for further proceedings. This is a sequel to Hernandez v. Commissioner, 490 U.S. 680 (1989), where the Supreme Court held that payments to the Church of Scientology for "auditing" and "training" sessions failed to qualify as deductible charitable contributions (even assuming that the sessions had a spiritual or religious content) because the payments were part of a quid pro quo exchange.

Powell did not contend that his payment to the Church of Scientology differed in any material respect from the payments that the Supreme Court held were not deductible in Hernandez. Rather, he claimed that the Internal Revenue Service engages in "administrative inconsistency," violative of the religious safeguards of the United States Constitution, when it disallows charitable deductions for payments to the Church of Scientology, but permits charitable deductions for payments made as an integral aspect of other religions, e.g., tithes paid by Mormons for admission to temple, payments made by Jews for attendance at High Holy Day services, pew rents collected from Protestants, and stipends submitted by Catholics for the saying of masses. The taxpayers in Hernandez advanced similar claims of unequal treatment, but the Supreme Court rejected these claims for lack of evidence that payments to other religions are structured as part of an inflexible quid pro quo arrangement as are the payments to the Church of Scientology.

This is the first appellate test among several pending cases concerning the deductibility of payments to the Church of Scientology. The Tax Court in Teagarden v. Commissioner, and the United States District Court for the Southern District of New York in Nieves v. United States, have also indicated that the plaintiffs in those cases have stated cognizable claims by alleging that the IRS's denial of their charitable contribution deductions results from invidious enforcement of Section 170 of the Internal Revenue Code.

* * * * *

ADMINISTRATIVE ISSUES

Organizational Changes In The Executive Office For United States Attorneys

Laurence S. McWhorter, Director, Executive Office for United States Attorneys, has made the following announcements concerning reassignments and organizational changes:

Office of Legal Education

The FY 1992 appropriation provides for the relocation of the Office of Legal Education to South Carolina. As of November 1, 1991, ***Richard L. DeHaan*** will serve as Project Manager for this move and will work closely with ***Wayne Rich, Acting Deputy Director, EOUSA,*** and ***Amy Lecocq, Director, Office of Legal Education***, to assure that the outstanding work of the Office of Legal Education continues in this fiscal year, and to also assure that the facilities and programs developed in South Carolina will live up to the high standards of the Department of Justice.

Administrative And Information Management Services, EOUSA

Michael Bailie, Associate Director, Information Management, EOUSA, will serve as Acting Deputy Director of Administrative Services and Information Management Services until such time as a permanent replacement is selected.

Security Programs, EOUSA

C. Madison Brewer has been designated as EOUSA's Security Program Manager and will be responsible for the implementation of the Security Programs of the Offices of the United States Attorneys. Security is an important concern and ***Mr. Brewer*** will assure that we are fully responsive to the needs of the United States Attorneys and the Department of Justice.

Office Of Legal Counsel

The following functions of EOUSA were transferred to the Office of Legal Counsel under the direction of ***Deborah Westbrook***: all functions and responsibilities of the Attorney Hiring Staff; all support staff security adjudication functions; and all grievance administration, adverse actions programs and labor management relations.

These changes were made in order to centralize these responsibilities under one individual. As United States Attorneys' offices have grown in size, so too has the workload in each of these areas. The goal in implementing this reorganization is to ensure consistency of the approach taken by EOUSA with regard to the many sensitive issues which regularly arise in each of these functional areas.

Personnel Management Staff

The EOUSA Personnel Management Staff, under the direction of ***Gail Williamson***, will retain responsibility in its new Employee Benefits and Recognition Programs Branch for the following:

- Awards and Recognition Programs;

- Performance Management Programs, including assistance to Districts in the development of performance improvement plans required when withholding support staff within-grade increases and attorney administrative pay increases.

- Workers Compensation Program;

- Employee Suggestion Program;

- Voluntary Leave Transfer Program;

- Trouble-shooting assistance on leave administration, life insurance questions, and federal retirement programs; and

- Coordination of information for the federal health benefits and Thrift Savings Plan programs.

* * * * *

CAREER OPPORTUNITIES

District Of The Virgin Islands

Terry M. Halpern, United States Attorney for the District of the Virgin Islands, has several openings for experienced criminal trial attorneys. According to Ms. Halpern, it is not all palm-fringed beaches, sunshine and turquoise seas. They are unique in that the Assistant United States Attorneys prosecute all federal crimes, as well as murder, rape and armed robbery in federal court. Experience with drug trafficking, fraud and public corruption cases would be helpful.

If you are interested in a challenging and dynamic environment, you may call United States Attorney Halpern in St. Thomas at (809) 774-5757 and fax resume to (809) 774-3474. The mailing address is: PO Box 1440, Charlotte Amalie, St. Thomas, Virgin Islands, 00804-1440. Please note that Assistant United States Attorneys receive a tax-free 12 1/2 percent cost of living adjustment in this District.

* * * * *

United States Marshals Service

The Office of Attorney Personnel Management, Department of Justice, is seeking an experienced attorney for the Office of Legal Counsel, United States Marshals Service. The attorney's duties will include serving as agency counsel and rendering assistance to United States Attorneys' offices in federal court cases involving the United States Marshals Service. These duties include the preparation of litigation reports and participation in discovery, trial, and appellate matters. In addition, the attorney will investigate and adjudicate administrative claims filed against the Marshals Service including personnel and labor relations; civil, tort and criminal law; prisoner rights; Freedom of Information/Privacy Acts; government forfeitures; and will represent the Marshals Service in administrative proceedings before the Merit Systems Protection Board, Equal Employment Opportunity Commission, and Federal Labor Relations Authority.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least three years of post-J.D. experience. Applicants must submit a resume to: Gerald M. Auerbach, Chief, Legal Counsel, United States Marshals Service, 600 Army Navy Drive, Arlington, Virginia 22202. Current salary and years of experience will determine the appropriate grade and salary levels. The possible range is GM-15 ($44,348 - $57,650) to GM-15 ($61,643 - $80,138). This advertisement will be open until filled.

* * * * *

Legal And Information Systems Staff, Justice Management Division

The Office of Attorney Personnel Management, Department of Justice, is recruiting an Attorney Advisor for the Legal and Information Systems Staff, Justice Management Division. The primary responsibility is to instruct Federal attorneys in the use of the Justice Retrieval and Inquiry System (JURIS), the Department's automated legal research system. The position requires extensive travel throughout the United States.

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. Automated legal research experience and/or public speaking experience is preferred. Applicants should submit a resume and Standard Form-171 to: James M. Gallagher, Assistant Director, Legal Research and Training Service, Department of Justice, Room 129, 425 I Street, N.W., Washington, D.C. 20530. Current salary and years of experience will determine the appropriate grade and salary levels. The possible range is GS-12 ($37,294 - $48,481). This advertisement is in anticipation of future vacancies.

* * * * *

APPENDIX

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

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

Effective Date	Annual Rate	Effective Date	Annual Rate	Effective Date	Annual Rate
10-21-88	8.15%	01-12-90	7.74%	04-05-91	6.26%
11-18-88	8.55%	02-14-90	7.97%	05-03-91	6.07%
12-16-88	9.20%	03-09-90	8.36%	05-31-91	6.09%
01-13-89	9.16%	04-06-90	8.32%	06-28-91	6.39%
02-15-89	9.32%	05-04-90	8.70%	07-26-91	6.26%
03-10-89	9.43%	06-01-90	8.24%	08-23-91	5.68%
04-07-89	9.51%	06-29-90	8.09%	09-20-91	5.57%
05-05-89	9.15%	07-27-90	7.88%	10-17-91	5.42%
06-02-89	8.85%	08-24-90	7.95%		
06-30-89	8.16%	09-21-90	7.78%		
07-28-89	7.75%	10-27-90	7.51%		
08-25-89	8.27%	11-16-90	7.28%		
09-22-89	8.19%	12-14-90	7.02%		
10-20-89	7.90%	01-11-91	6.62%		
11-16-89	7.69%	02-13-91	6.21%		
12-14-89	7.66%	03-08-91	6.46%		

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

* * * * *

UNITED STATES ATTORNEYS

DISTRICT	U.S. ATTORNEY
Alabama, N	Frank W. Donaldson
Alabama, M	James Eldon Wilson
Alabama, S	J. B. Sessions, III
Alaska	Wevley William Shea
Arizona	Linda A. Akers
Arkansas, E	Charles A. Banks
Arkansas, W	J. Michael Fitzhugh
California, N	William T. McGivern
California, E	George L. O'Connell
California, C	Lourdes G. Baird
California, S	William Braniff
Colorado	Michael J. Norton
Connecticut	Albert S. Dabrowski
Delaware	William C. Carpenter, Jr.
District of Columbia	Jay B. Stephens
Florida, N	Kenneth W. Sukhia
Florida, M	Robert W. Genzman
Florida, S	Dexter W. Lehtinen
Georgia, N	Joe D. Whitley
Georgia, M	Edgar Wm. Ennis, Jr.
Georgia, S	Hinton R. Pierce
Guam	Frederick Black
Hawaii	Daniel A. Bent
Idaho	Maurice O. Ellsworth
Illinois, N	Fred L. Foreman
Illinois, S	Frederick J. Hess
Illinois, C	J. William Roberts
Indiana, N	John F. Hoehner
Indiana, S	Deborah J. Daniels
Iowa, N	Charles W. Larson
Iowa, S	Gene W. Shepard
Kansas	Lee Thompson
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Kentucky, W	Joseph M. Whittle
Louisiana, E	Harry A. Rosenberg
Louisiana, M	P. Raymond Lamonica
Louisiana, W	Joseph S. Cage, Jr.
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Maryland	Richard D. Bennett
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Michigan, W	John A. Smietanka
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Mississippi, N	Robert Q. Whitwell
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Missouri, W	Jean Paul Bradshaw

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Nebraska	Ronald D. Lahners
Nevada	Leland E. Lutfy
New Hampshire	Jeffrey R. Howard
New Jersey	Michael Chertoff
New Mexico	Don J. Svet
New York, N	Frederick J. Scullin, Jr.
New York, S	Otto G. Obermaier
New York, E	Andrew J. Maloney
New York, W	Dennis C. Vacco
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10/09/91

EXHIBIT A

ATTORNEY GENERAL'S ADVISORY COMMITTEE OF UNITED STATES ATTORNEYS

SUBCOMMITTEES

Child Pornography/Obscenity Subcommittee

Margaret P. Currin, Eastern District of North Carolina, Chairman
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John F. Hoehner, Northern District of Indiana
Wayne A. Budd, District of Massachusetts (Liaison)

EXHIBIT
B

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release October 23, 1991

EXECUTIVE ORDER

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CIVIL JUSTICE REFORM

WHEREAS, the tremendous growth in civil litigation has burdened the American court system and has imposed high costs on American individuals, small businesses, industry, professionals, and government at all levels;

WHEREAS, several current litigation practices add to these burdens and costs by prolonging the resolution of disputes, thus delaying just compensation and encouraging wasteful litigation;

WHEREAS, the harmful consequences of these litigation practices may be ameliorated by encouraging voluntary dispute resolution, limitations on unnecessary discovery, judicious use of expert testimony, prudent use of sanctions, improved use of litigation resources, and, where appropriate, modified fee arrangements;

WHEREAS, the United States sets an example for private litigation by adhering to higher standards than those required by the rules of procedure in the conduct of Government litigation in Federal court, and can continue to do so without impairing the effectiveness of its litigation efforts;

WHEREAS, improving the quality of legislation and regulation to eliminate ambiguities in drafting would reduce uncertainty and unnecessary litigation; and,

WHEREAS, improving the quality of administrative adjudications would reduce the time and resources expended during the administrative process.

NOW, THEREFORE, I, GEORGE BUSH, by the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 31 of title 28, United States Code, and section 301 of title 3, United States Code, and in order to facilitate the just and efficient resolution of civil claims involving the United States Government, to encourage the filing of only meritorious civil claims, to improve legislative and regulatory drafting to reduce needless litigation, to promote fair and prompt adjudication before administrative tribunals, and to provide a model for similar reforms of litigation practices in the private sector and in various states, hereby order as follows:

Section 1. Guidelines to Promote Just and Efficient Government Civil Litigation. To promote the just and efficient resolution of civil claims, those Federal agencies and litigation counsel that conduct or otherwise participate in civil litigation on behalf of the United States Government in Federal court shall respect and adhere to the following guidelines during the conduct of such litigation:

(a) Pre-filing Notice of a Complaint. No litigation counsel shall file a complaint initiating civil litigation without first making a reasonable effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement, or confirming that the referring agency that previously handled the dispute has made a reasonable effort to notify the disputants and to achieve a settlement or has used its conciliation processes.

(b) Settlement Conferences. As soon as practicable after ascertaining the nature of a dispute in litigation, and throughout the litigation, litigation counsel shall evaluate settlement possibilities and make reasonable efforts to settle the litigation. Such efforts shall include offering to participate in a settlement conference or moving the court for a conference pursuant to Rule 16 of the Federal Rules of Civil Procedure in an attempt to resolve the dispute without additional civil litigation.

(c) Alternative Methods of Resolving the Dispute in Litigation. Litigation counsel shall make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial.

(1) Whenever feasible, claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal or structured Alternative Dispute Resolution (ADR) process or court proceeding. At the same time, litigation counsel should be trained in dispute resolution techniques and skills that can contribute to the prompt, fair, and efficient resolution of claims. Where such benefits may be derived, and after consultation with the agency referring the matter, litigation counsel should suggest the use of an appropriate ADR technique to the private parties.

(2) It is appropriate to use ADR techniques or processes to resolve claims of or against the United States or its agencies, after litigation counsel determines that the use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims.

(3) Litigation counsel shall neither seek nor agree to the use of binding arbitration or any other equivalent ADR technique. A technique is equivalent to binding arbitration if an agency is bound, without exercise of that agency's discretion, to implement the determination arising from the ADR technique. The requirements of this paragraph shall be interpreted in a manner consistent with section 4(b) of the Administrative Dispute Resolution Act, Public Law 101-552, 104 Stat. 2736 (1990). Practice under Tax Court Rule 124 shall be exempt from this provision.

(d) Discovery. To the extent practicable, litigation counsel shall make every reasonable effort to streamline and expedite discovery in cases under counsel's supervision and control.

(1) Disclosure of Core Information. In those cases where discovery will be sought, litigation counsel shall, to the extent practicable, make reasonable efforts to agree with other parties mutually to exchange a disclosure statement containing core information relevant to the dispute and to stipulate to an order memorializing such agreement. For purposes of this subsection, "core information" means the names and addresses of people having information that is relevant to the proffered claims and defenses, and the location of documents most relevant to the case. This guideline to disclose core information shall not apply in cases while a dispositive motion is pending.

(2) Review of Proposed Document Requests. Each agency within the executive branch shall establish a coordinated procedure for the conduct and review of document discovery undertaken in litigation directly by that agency when that agency is litigation counsel. The procedure shall include, but is not necessarily limited to, review by a senior lawyer prior to service or filing of the request in litigation to determine that the request is not cumulative or duplicative, unreasonable, oppressive, unduly burdensome or expensive, taking into account the requirements of the litigation, the amount in controversy, the importance of the issues at stake in the litigation, and whether the documents can be obtained from some other source that is more convenient, less burdensome, or less expensive.

(3) Discovery Motions. Before petitioning a court to resolve a discovery motion or petitioning a court to impose sanctions for discovery abuses, litigation counsel shall attempt to resolve the dispute with opposing counsel. If litigation counsel makes a discovery motion concerning the dispute, he or she shall represent in that motion that any attempt at resolution was unsuccessful or impracticable under the circumstances.

(e) Expert Witnesses. Litigation counsel shall make every reasonable effort to present only reliable expert testimony before a court.

(1) Widely accepted theories. Litigation counsel shall refrain from presenting expert testimony from experts who base their conclusions on explanatory theories that are not widely accepted. For purposes of this subsection, a theory is widely accepted if it is propounded by at least a substantial minority of the experts in the relevant field.

(2) Expertise in the field. Litigation counsel shall present expert testimony only from those experts whose knowledge, background, research, or other expertise lies in the particular field about which they are testifying.

(3) Expert disclosure. Litigation counsel shall offer to engage in mutual disclosure of expert witness information for those experts that a party expects to call as expert witnesses at trial, provided, and to the extent, that the other parties agree to make comparable disclosures of any expert witnesses they expect to call at trial.

(4) Ban on contingency fees. The amount of compensation paid to an expert witness shall not be linked to a successful outcome in the litigation.

(f) Sanctions. Litigation counsel shall take steps to seek sanctions against opposing counsel and opposing parties where appropriate.

(1) Litigation counsel shall evaluate filings made by opposing parties and, where appropriate, shall petition the court to impose sanctions against those responsible for abusive practices.

(2) Prior to filing a motion for sanctions, litigation counsel shall submit the motion for review to the sanctions officer, or his or her designee, within the litigation counsel's agency. Such officer or designee shall be a senior supervising attorney within the agency, and shall be licensed to practice law before a State court, courts of the District of Columbia, or courts of any territory or Commonwealth of the United States. The sanctions officer or designee shall also review motions for sanctions that are filed against litigation counsel, the United States, its agencies, or its officers.

(g) Improved Use of Litigation Resources. Litigation counsel shall employ efficient case management techniques and shall make reasonable efforts to expedite civil litigation in cases under that counsel's supervision and control. This includes but is not limited to:

(1) making reasonable efforts to negotiate with other parties about, and stipulate to, facts that are not in dispute;

(2) reviewing and revising pleadings and other filings to ensure that they are accurate and that they reflect a narrowing of issues, if any, that has resulted from discovery;

(3) requesting early trial dates where practicable; and,

(4) moving for summary judgment in every case where the movant would be likely to prevail, or where the motion is likely to narrow the issues to be tried.

(h) Fees and Expenses. To the extent permissible by law, in civil litigation involving disputes over Federal contracts pursuant to 41 U.S.C. 601 et seq., or in any civil litigation initiated by the United States, litigation counsel shall offer to enter into a two-way fee shifting agreement with opposing parties to the dispute, whereby the losing party would pay the prevailing party's fees and costs, subject to reasonable terms and limitations. The Attorney General shall review the legal authority for entering into such agreements.

Sec. 2. Principles to Enact Legislation and Promulgate Regulations Which Do Not Unduly Burden the Federal Court System.

(a) General Duty to Review Legislation and Regulations. Within current budgetary constraints and existing executive branch coordination mechanisms and procedures established in OMB Circular A-19 (legislation) and Executive Order No. 12291 (regulation), each agency that is promulgating new regulations, reviewing existing regulations, developing legislative proposals concerning regulations, and developing new legislation shall adhere to the following requirements:

(1) The agency's proposed legislation and regulations shall be reviewed by the agency to eliminate drafting errors and needless ambiguity.

(2) The agency's proposed legislation and regulations shall be written to minimize needless litigation.

(3) The agency's proposed legislation and regulations shall provide a clear and certain legal standard for affected conduct rather than a general standard, and shall promote simplification and burden reduction.

(b) Specific Issues for Review. In conducting the reviews required by subsection (a), each agency formulating proposed legislation and regulations shall make every reasonable effort to ensure:

(1) that the legislation --

(A) Specifies whether all causes of action arising under the law are subject to statutes of limitations;

(B) Specifies in clear language the preemptive effect, if any, to be given to the law;

(C) Specifies in clear language the effect on existing Federal law, if any, including all provisions repealed or modified;

(D) Provides a clear and certain legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction;

(E) Specifies whether private arbitration and other forms of private dispute resolution are appropriate under enforcement and relief provisions, subject to constitutional requirements;

(F) Specifies whether the provisions of the law are constitutionally severable, if appropriate;

(G) Specifies in clear language the retroactive effect, if any, to be given to the law;

(H) Specifies in clear language the applicable burdens of proof;

(I) Specifies in clear language whether it grants private parties a right to sue and, if so, the relief available and the conditions and terms for any authorized award of attorney's fees, if any;

(J) Specifies whether State courts have jurisdiction under the law and, if so, whether and under what conditions an action would be removable to Federal court;

(K) Specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(L) Sets forth the standards governing the assertion of personal jurisdiction, if any;

(M) Defines key statutory terms, either explicitly or by reference to other statutes that explicitly define those terms;

(N) Specifies whether the legislation applies to the Federal Government or its agencies;

(O) Specifies whether the legislation applies to States, territories, the District of Columbia, and the Commonwealths of Puerto Rico and of the Northern Mariana Islands; and,

(P) Addresses other important issues affecting clarity and general draftsmanship of legislation set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

(2) that the regulation --

(A) Specifies in clear language the preemptive effect, if any, to be given to the regulation;

(B) Specifies in clear language the effect on existing Federal law or regulation, if any, including all provisions repealed or modified;

(C) Provides a clear and certain legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction;

(D) Specifies in clear language the retroactive effect, if any, to be given to the regulation;

(E) Specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(F) Defines key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items;

(G) Addresses other important issues affecting clarity and general draftsmanship of regulations set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

(c) Certification of Compliance for Agency Legislation or Regulations. When transmitting such draft legislation or regulation to the Office of Management and Budget ("OMB"), the agency must certify that (i) it has reviewed such draft legislation or regulation in light of this section, and (ii) either the draft legislation or regulation meets the applicable standards provided in subsections (a) and (b) of this section, or it is unreasonable to require the particular piece of draft legislation or regulation to meet one or more of those standards. Where the standards are not met, the agency certification must include an explanation of the reasons for the departure from the standards. Recommendations and cost-benefit analyses under subsection (d) of this section shall be included in the agency certification required by this subsection.

(d) One-Way Fee Provisions. Each agency shall review, and shall perform a cost-benefit analysis on, all provisions of any legislation or regulation that the agency proposes which provide for an award for attorney's fees in favor of only one class of parties, including those statutes which require the Government to pay a prevailing private party's attorney's fees. The agency shall recommend against enactment of the fee shifting provisions

of such legislation if the costs significantly outweigh the benefits, or if the legislation does not define the fees and costs covered by the statute or detail when an award of fees and costs would be appropriate. Such agency recommendations shall be presented to OMB through the Circular A-19 legislative coordination and clearance process and included in the agency certification required under subsection (c) of this section.

Sec. 3. Principles to Promote Just and Efficient Administrative Adjudications. In order to promote just and efficient resolution of disputes, an agency that adjudicates administrative claims shall, to the extent reasonable and practicable, and when not in conflict with other sections of this order, implement the recommendations of the Administrative Conference of the United States, entitled "Case Management as a Tool for Improving Agency Adjudication," as contained in 1 C.F.R. 305.86-7 (1991).

Sec. 4. Coordination by the Department of Justice.

(a) The Attorney General shall coordinate efforts by Federal agencies to implement sections 1 and 3 of this order.

(b) To implement the principles and purposes announced by this order, the Attorney General is authorized to issue guidelines implementing sections 1 and 3 of this order for the Department of Justice. Such guidelines shall serve as models for internal guidelines which may be issued by other agencies pursuant to this order.

Sec. 5. Definitions. For purposes of this order:

(a) The term "agency" shall be defined as that term is defined in section 451 of title 28, United States Code, except that it shall exclude all departments and establishments in the legislative or judicial branches of the United States.

(b) The term "litigation counsel" shall be defined as the trial counsel or the office in which such trial counsel is employed, such as the United States Attorney's Office for the district in which the litigation is pending or a litigating division of the Department of Justice. Special Assistant United States Attorneys are included within this definition. Those agencies authorized by law to represent themselves in court without assistance from the Department of Justice are also included in this definition, as are private counsel hired by any Federal agency to conduct litigation on behalf of the agency or the United States.

Sec. 6. No Private Rights Created. This order is intended only to improve the internal management of the executive branch in resolving disputes, conducting litigation in a reasonable and just manner, and reviewing legislation and regulations. This order shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its agencies, its officers, or any other person. This order shall not be construed to create

any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order. Nothing in this order shall be construed to obligate the United States to accept a particular settlement or resolution of a dispute, to alter its standards for accepting settlements, to forego seeking a consent decree or other relief, or to alter any existing delegation of settlement or litigating authority.

Sec. 7. Scope.

(a) No Applicability to Criminal Matters or Proceedings in Foreign Courts. This order is applicable to civil matters only. It is not intended to affect criminal matters, including enforcement of criminal fines or judgments of forfeiture. This order does not apply to litigation brought by or against the United States in foreign courts or tribunals.

(b) Application of Notice Provision. Notice pursuant to subsection (a) of section 1 is not required (i) in any action to seize or forfeit assets subject to forfeiture or in any action to seize property; (ii) in any bankruptcy, insolvency, conservatorship, receivership, or liquidation proceeding; (iii) when the assets that are the subject of the action or that would satisfy the judgment are subject to flight, dissipation, or destruction; (iv) when the defendant is subject to flight; (v) when, as determined by litigation counsel, exigent circumstances make providing such notice impracticable or such notice would otherwise defeat the purpose of the litigation, such as in actions seeking temporary restraining orders or preliminary injunctive relief; or (vi) in those limited classes of cases where the Attorney General determines that providing such notice would defeat the purpose of the litigation.

(c) Application of Alternative Dispute Resolution and Core Disclosure Provisions. Subsections (c) and (d)(1) of section 1 of this order shall not apply (i) to any action to seize or forfeit assets subject to forfeiture, or (ii) to any debt collection case (including any action for civil penalties or taxes) involving an amount in controversy less than $100,000.

(d) Additional Guidance as to Scope. The Attorney General shall have the authority to issue further guidance as to the scope of this order, except section 2, consistent with the purposes of this order.

Sec. 8. Conflicts with Other Rules. Nothing in this order shall be construed to require litigation counsel or any agency to act in a manner contrary to the Federal Rules of Civil Procedure, Tax Court Rules of Practice and Procedure, State or Federal law, other applicable rules of practice or procedure, or court order.

Sec. 9. Privileged Information. Nothing in this order shall compel or authorize the disclosure of privileged information, sensitive law enforcement information, information affecting national security, or information the disclosure of which is prohibited by law.

Sec. 10. Effective Date. This order shall become effective 90 days after the date of signature. This order shall not apply to litigation commenced prior to the effective date.

GEORGE BUSH

THE WHITE HOUSE,
October 23, 1991.

# # #

EXHIBIT C

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

October 31, 1991

MEMORANDUM

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

FROM: Cary H. Copeland CHC
Director and Chief Counsel

SUBJECT: Policy Regarding Forfeiture by Settlement

I. General Policy

Settlements to forfeit property are encouraged as a way to conserve resources of both the United States and claimants where the ends of justice will be served. The following principles must be observed in negotiating and structuring settlements.

A. There must be a statutory basis for the forfeiture of the property and sufficient facts to satisfy the elements of the statute.

B. All settlements must be negotiated in consultation with the seizing agency. The agency's input is essential as a claimant may be merely seeking another opportunity to bargain while having no legitimate innocent ownership interest in the property.

C. A United States Attorney cannot settle a forfeiture action involving property that is subject to administrative forfeiture unless there has been a claim and cost bond filed and the seizing agency has forwarded the matter for judicial action. However, when property is seized for administrative forfeiture and no claim

and cost bond has been filed, the seizing agency may consent to judicial forfeiture of such property. The claimant must agree to the forfeiture of all assets in a single judicial settlement.

D. A United States Attorney has authority to settle those judicial forfeiture actions involving property located in his or her judicial district. To settle forfeiture actions involving property located in another judicial district, the United States Attorney handling the forfeiture must notify the United States Attorney in the district where the property is located.

E. The government may initiate a settlement of a criminal forfeiture action in conjunction with the criminal charges against the defendant which provide the cause of action against the property. The government may initiate such offers to settle criminal forfeiture cases with criminal charges. However, the government should not tie civil forfeiture of property to a reduction in charges or dismissal of charges just to gain the advantage of civil forfeiture. Settlement of a civil forfeiture case should not be used to leverage a criminal plea or vice versa.

The settlement of a civil forfeiture for property under a plea agreement disposing of criminal charges against the defendant should not be drafted to provide that if the plea agreement is violated by either party, both the civil forfeiture and the criminal charges are reinstated. If the claimant/defendant is giving up his right, title and interest to property in a civil forfeiture action, that should be filed to dispose of the civil forfeiture action separately and should be documented independently of the plea agreement.

F. Settlements should not provide for unsecured partial payments except upon the approval of the Asset Forfeiture Office, Criminal Division, in consultation with the U.S. Marshals Service. Partial payments will be authorized only in exceptional circumstances. In addition, settlements shall not provide for payment of criminal fines, taxes or other debts owed the United States (e.g. SBA or student loans) with forfeited assets.

G. The settlement should state that the defendant-claimant may not re-acquire the forfeited property directly or indirectly through family members or others acting in concert with him or her.

II. Monetary Amounts

United States Attorneys can accept or reject offers in compromise in all civil or criminal cases in which the difference between the proposed settlement and the claim does not exceed $200,000. Also, after consultation with the Asset Forfeiture Office, Criminal Division, United States Attorneys can close a pending forfeiture case (other than by compromise or entry of judgment) where the gross amount of the original forfeiture sought is $200,000 or ten (10) percent of the original forfeiture or more.[1]

III. Administrative Forfeiture by Agreement

The following procedures apply to cases where a claim and bond has been filed and the case is referred to the United States Attorney, but a settlement is reached and the claim withdrawn. It is the Department's policy that these cases should proceed administratively.

A. The settlement should be reduced to writing and include specific reference to the withdrawal of the claim; and

B. The case should be promptly referred back to the seizing agency.

1. Where the Claim to All the Property is Withdrawn

Where the claimant agrees to withdraw the claim to all the property, the case can be referred back to the agency for administrative forfeiture. Re-publication of the notice of the administrative forfeiture action is not necessary. Provided publication occurred prior to filing of claim and cost bond.

2. Where the Claim to Only Part of the Property is Withdrawn

The seizing agency shall administratively forfeit that portion of the property not claimed and release the remainder to the claimant consistent with the

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[1] Effective March 1, 1991, the Attorney General increased the settlement and compromise authority delegated to the Assistant Attorneys General of the litigating divisions by amending Subpart Y, Part O, Title 28 of the Code of Federal Regulations, §§ 0.160, 0.164, 0.165, and 0.168. A revision to Directive No. 116 is being made to conform with the increased monetary amounts set forth in Subpart Y, Part O. You will be advised when this revision is effective.

settlement. Re-publication of the notice of the administrative forfeiture action is not necessary.

3. **Agency Contacts**

William R. Schroeder
Unit Chief, Legal Forfeiture Unit
Legal Counsel Division
Federal Bureau of Investigation
Phone: (202) 393-4323
Fax: (202) 347-1748

William J. Snider
Forfeiture Counsel, Office of Chief Counsel
Drug Enforcement Administration
Phone: FTS 367-8555 (202) 307-8555
Fax: (202) 307-7641

IV. Judicial Forfeiture by Settlement

A. Civil Forfeiture

Any settlement that purports to "forfeit" the property binds only the parties to it and forfeits only that interest in the property that the claimant possesses. The following procedures must be followed to ensure that a valid and complete civil judicial forfeiture by settlement occurs:

1. A civil verified complaint for forfeiture of the property must be filed in the U.S. District Court to establish the Court's jurisdiction.

2. A warrant of arrest in rem must be executed against the property.

3. All known parties in interest must be given written notice, and notice by publication must be made.

4. After ten (10) days, if no claim has been filed pursuant to Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims, a default judgment must be sought pursuant to Rule 55, Federal Rules of Civil Procedure.

5. The Court must issue an Order of Forfeiture that incorporates the terms of the settlement and specifically identifies the assets to be forfeited.

B. Criminal Forfeiture

In any plea settlement, a defendant claimant can only consent to forfeit that interest in the property that belongs to

him or her. A settlement that purports to "forfeit" the property can only bind the parties to it and transfers only that interest which the defendant-claimant possesses.

The following procedures must be followed to ensure that a valid forfeiture results from a plea settlement:

1. The indictment or information or a bill of particulars must identify the property in a forfeiture count.

2. The settlement to forfeit property must be in writing.

3. The United States Attorney must comply with the requirements applicable to third party interests (e.g., 21 U.S.C. § 853(n)(1-7), including notice of the forfeiture and the right of third parties to obtain an adjudication of their interests in the property. (See also, Forms for Criminal Forfeiture).

4. The Court must issue a Final Order of Forfeiture that incorporates the settlement and addresses, if necessary, any third party claims.

Note: Substitute assets can only be forfeited when the applicable statute permits it and when all statutory requirements have been met, (e.g., 18 U.S.C. §§ 982(b)(1)(A) and 1963(m) and 21 U.S.C. § 853 (p). Approval of the Asset Forfeiture Office, Criminal Division is required.

V. Acceptance of a Monetary Amount in lieu of Forfeiture

A monetary amount instead of forfeiture of property in civil or criminal judicial forfeiture actions can be accepted pursuant to 19 U.S.C. § 1613(c). The following procedures must be followed:

1. A civil complaint against the property or an indictment or information alleging the defendant's interest in the property naming the property must be filed.

2. A written settlement that incorporates the language of § 1613(c) must be filed with and approved by the Court.

3. The United States Marshals Service will accept this Court approved settlement and deposit the money (and share it where appropriate) in the same manner as the proceeds of sale of a forfeited item.

VI. Plea agreements affecting Forfeitability of assets located abroad

In drafting plea agreements, prosecutors should ensure that defendants agree to cooperate fully in identifying, repatriating, and forfeiting their tainted assets, regardless of where they may have been transferred or hidden. To achieve this end, the plea agreement may provide for polygraph examinations of the defendant regarding his or her domestic and foreign holdings.

A defendant's ability to assist in the repatriation and forfeiture of assets located abroad may be limited by the laws of the foreign government where the assets are located. For example, the United States frequently requests foreign governments to restrain or freeze forfeitable assets such as bank accounts. Once in place, such a restraint cannot be lifted except by the foreign authority which issued it. Even in such cases, however, a plea agreement should still require the defendant to cooperate to the extent possible in any forfeiture[2] efforts.

1. A civil complaint against the property or an indictment or information naming the property and alleging the defendant's interest in the property must be filed.

2. A written settlement that incorporates the language of § 1613(c) must be filed with and approved by the Court.

3. The U.S. Marshals Service will accept this Court approved settlement and deposit the money (and share it where appropriate) in the same manner as the proceeds of sale of a forfeited item.

4. Monies received in lieu of forfeiture must be transferred to the U.S. Marshals Service's District Office in custody of the asset being returned.

5. In cases where the U.S. Customs Service, the Postal Inspection Service, or the National Marine Fisheries Service is the primary federal investigative agency, the U.S. Marshals Service shall deposit the money, deduct expenses (if any) incurred with respect to the property being returned, deduct the approved equitable shares attributable to other federal agencies participating in the Department of Justice Assets Forfeiture Fund, and transfer the balance by refund to the above Services, as appropriate. Each Service will be responsible for

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[2] Reference United States Attorney Manual 9-16.600.

sharing with participating State and local agencies in these cases.

VI. U.S. Customs Service Cases Generally

Although the Customs Service has its own Asset Forfeiture program and procedures, forfeiture by settlement in Customs cases will generally also follow the above policy. Please contact the Customs Regional or District Counsel in your area if there are any questions on the settlement of Customs cases.

cc: George J. Terwilliger, III
Principal Associate Deputy
Attorney General

EXHIBIT D

FEDERAL EXECUTIVES

The American Political Science Association announces the 1992-93

Congressional Fellowship Program

WHO: Senior-level federal executives

WHY: To learn more about the legislative process through direct participation.

HOW: A comprehensive three-week orientation period; full-time assignments as legislative aides in the House of Representatives and Senate; seminar program with leading congressional, governmental and academic figures.

QUALIFICATIONS: Minimum grade GS-13 or equivalent at time of application; at least two years of federal service in the executive branch; interest in the legislative process and public affairs; demonstrated commitment to public service; adaptability to new, diverse working environments; and relevance of a congressional experience to long-term career goals.

THE FELLOWSHIP YEAR: Orientation begins November 1992; office assignments run December 1992 through August 15, 1993.

STIPEND: None; Federal Fellows receive their regular salaries from their agencies during the fellowship year.

NOMINATING PROCEDURE: Federal agencies may nominate up to three candidates to APSA by March 1, 1992. Nominations are submitted through the agency's headquarters-level training officer or coordinator for executive development. All candidates who pass initial screening by APSA will be invited to an interview in May 1992. The APSA interview panel will announce the names of those selected as Congressional Fellows by June 1, 1992. For each candidate, the department or agency must submit six copies each of the following:

- a detailed resume (SF171);
- an assessment of the nominee's executive potential and need for training by the supervisor(s) or agency Executive Resources Board; and
- a statement by the nominee presenting a need for the training, the relevance of the training to career goals, and how the training will be utilized by the agency.

TRAINING AGREEMENT: For each candidate, a department or agency should submit a training agreement and reimbursement form which must include the following:

- a document number
- a correct billing address
- signature of authorizing officer
- proper amount to be invoiced by APSA ($4,000 per participant) ($4,000 plus $2,250 for Foreign Affairs Fellows)

FOREIGN AFFAIRS FELLOWS: Agencies with substantial activity with foreign governments are invited to nominate candidates for the Foreign Affairs Fellows section of the Congressional Fellowship Program. Foreign Affairs Fellows attend an intensive eight-week course, "Congress and National Policy," at the Paul H. Nitze School of Advanced International Studies in Washington from September to November and then join the other Fellows for the regular Congressional Fellowship Program. (Nominations are not accepted for the Foreign Affairs segment only.)

FOR MORE INFORMATION: Contact your agency's headquarters-level training officer or coordinator for executive development or Congressional Fellowship Program, American Political Science Association, 1527 New Hampshire Avenue, NW, ~~Washington, DC 20036~~; (202-483-2512)

AMERICAN POLITICAL SCIENCE ASSOCIATION
CONGRESSIONAL FELLOWSHIP PROGRAM

EASY READ COPY

Details of Employees to Organizations
Outside the Department of Justice

May 13, 1988

Heads of Department Components

/s/ Harry H. Flickinger
Harry H. Flickinger
Assistant Attorney General
for Administration

Since March 22, 1984, you have been required to obtain the approval of the Deputy Attorney General (DAG) before details of employees outside the Department can be effected or extended. The purpose of this memorandum is to inform you of an additional blanket exception to the detail procedures which was recently approved by the DAG, as well as to remind you of the instructions on the procedures required when requesting approval on such details.

On April 19, 1988, the DAG granted a blanket exception to the detail procedures for details of Department attorneys to State and local governments under the Cross-Designation Program (Attachment 1). However, please remember that components must still request the approval of the Director, Office of Attorney Personnel Management, for a Department attorney to be appointed as a State or local prosecutor under this Program. Without such approval, the appointment of the attorney and the validity of the litigation could be questioned.

The Justice Management Division (JMD) is responsible for receiving your detail requests and obtaining the required concurrence of the DAG. This memorandum consolidates and replaces all previous memoranda on this subject. The following procedures are mandatory for details to organizations outside the Department. (Exceptions to the procedures are discussed under 3 below.)

1. Any proposed detail (or extension of same) of a Department of Justice (DOJ) employee to an organization or office outside the Department for 30 days or more must be submitted for approval by the DAG through JMD.

2. For coverage purposes, the term "detail" means any work assignment of a DOJ employee to another Federal agency in either the executive, legislative, or judicial branches of government or to local, state, or international organizations. "Detail" also includes temporary developmental assignments such as:

a. An Intergovernmental Personnel Act (IPA) assignment;

b. Participation in either the Congressional Fellowship of Legis programs;

c. Participation in the President's Executive Exchange Program; and

d. A Senior Executive Service sabbatical.

3. The following detail situations are excepted from this required procedure:

a. Details to the Federal Law Enforcement Training Center (FLETC) in Glynco, Georgia;

b. Details to the INTERPOL General Secretariat in St. Cloud, France;

c. Details to the National Narcotic Border Interdiction System (NNBIS);

d. Short or long term training and/or educational programs, such as university studies, participation at the Industrial College of the Armed Forces or National War College, and executive or middle management training in various government facilities;

e. Presidential Management Intern rotational assignments which do not exceed 90 days; and

f. Details to State and local governments under the Cross-Designation Program.

4. Requests for approval are to be submitted under signature of the requesting department component head to my office and must include the following information:

a. Employee name, title, and grade;

b. Organization from which detail is proposed;

c. Organization to which detail is proposed;

d. Proposed beginning date;

e. Proposed expiration date;

f. Reimbursable or nonreimbursable arrangements; and

g. Purpose of detail and individual/organization benefits.

5. If the proposed detail is nonreimbursable, you must certify that it meets the criteria for nonreimbursable details as outlined in Comptroller General (CG) decision B-211373, dated March 20, 1985. Copies of Federal Personnel Manual Letter 300-31, which summarizes the CG decision, and the decision itself are attached for your information (Attachment 2). The requirements of this paragraph do not apply to temporary developmental assignments effected under the following programs, for which there are specific legislative authorities permitting nonreimbursable assignments: the Intergovernmental Personnel Act (5 U.S.C. § 3373) and the Senior Executive Service sabbatical program (5 U.S.C. § 3396(c)).

You should ensure that all appropriate officials of your organization are informed of the requirements of this memorandum so that details will not be effected prior to DAG concurrence.

Questions concerning this procedure should be directed to me or Warren Oser, Director, Personnel Staff, Justice Management Division, on (~~633-3221~~) 514-6788.

Attachments

Guideline Sentencing Update

FEDERA

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

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

VOLUME 4 • NUMBER 10 • OCTOBER 18, 1991

Departures

MITIGATING CIRCUMSTANCES

Ninth Circuit affirms downward departure based on "youthful lack of guidance." Defendant was convicted of conspiracy to distribute cocaine and rock cocaine. His guideline range of 360 months to life partly resulted from inclusion in the criminal history score of a 1979 manslaughter conviction when he was 17 years old, but for which he was sentenced as an adult. The district court, however, found mitigating circumstances and departed to impose a 17-year sentence. As the appellate court described it: "The mitigating circumstance in this case may fairly be characterized as 'youthful lack of guidance.' Lack of guidance and education, abandonment by parents and imprisonment at age 17 constitute the elements of this mitigating circumstance. . . . [T]he district court departed downward because it believed that Floyd's youthful lack of guidance had a significant effect both on his past criminality and on his commission of the present offense. Thus, the district court thought (i) that Floyd's criminal history category significantly overrepresents the actual seriousness of his past criminality; and (ii) Floyd's base offense level overrepresents the actual seriousness of his criminality in the commission of the present offense."

The appellate court held that "use of youthful lack of guidance as a mitigating circumstance is not precluded by any provision of the [Sentencing Reform] Act or the Guidelines." The government argued that two sections in Chapter 5 of the Guidelines preclude the mitigating circumstances used here. Section 5H1.6, p.s., for example, states that "[f]amily ties and responsibilities and community ties are not ordinarily relevant in determining whether" to depart. The court concluded, however, that this section "recommend[s] against relying on the present existence of family obligations as a basis for departure because they reflect the Congressional concern that convicted criminals with family ties not receive lighter sentences than convicted criminals without such ties. . . . To construe a provision clearly intended to prohibit heavier sentences for people lacking family ties as prohibiting lighter sentences for such people is imputing to Congress an intent it has not manifested."

"In any case, the district court did not depart downward because Floyd presently lacks family ties, but departed, in part, because he was abandoned by his parents as a youth. The provision recommending against departure based on the present existence of family obligations does not even speak to a departure based on the absence of family guidance at an earlier age. . . . [T]he mitigating circumstance of youthful lack of guidance refers to a past condition that may have led a convicted defendant to criminality. That both mitigating circumstances involve the presence or absence of familial relationships should not obscure this basic difference between them—a difference which is sufficient to place youthful lack of guidance outside the purview of U.S.S.G. § 5H1.6 and to make it a mitigating factor that is not prohibited under Chapter Five, Part H of the Guidelines."

The court also held that the district court's reference to defendant's lack of education did not conflict with § 5H1.2, p.s., which states that "[e]ducational and vocational skills are not ordinarily relevant" to departure decisions: "[T]he district court merely referred to lack of education in support of its finding that Floyd lacked guidance as a youth. A provision recommending against departure based on educational level does not speak to a departure based on youthful lack of guidance. In any case, however, in passing 28 U.S.C. § 994(e), Congress was preoccupied with ensuring that people who lack educational skills do not receive heavier sentences than people who do have such skills. . . . To use this provision to prohibit a downward departure based on youthful lack of guidance would be, once again, to impute to Congress an intent it never manifested."

The court concluded that because the Guidelines do not prohibit departure based on youthful lack of guidance, it would use the "general background rule," as summarized in § 1B1.4, that "the court may consider, without limitation, any information concerning the background, character, and conduct of the defendant, unless otherwise prohibited by law. . . . We thus decline the invitation to place additional limitations on mitigating circumstances based on personal characteristics of the defendant and hold that a district court may consider youthful lack of guidance in determining the appropriate sentence."

U.S. v. Floyd, No. 89-50295 (9th Cir. Sept. 25, 1991) (Norris, J.).

U.S. v. Gonzalez, No. 90-1704 (2d Cir. Sept. 23, 1991) (Oakes, C.J.) (relying on *U.S. v. Lara*, 905 F.2d 599 (2d Cir. 1990), affirming downward departure to 33 months from minimum guideline term of 96 months on basis of extreme vulnerability to assault in prison for 19-year-old defendant who was "extremely small and feminine looking, and . . . had the appearance of a fourteen or fifteen year old boy"; rejecting government arguments, court held that evidence of bisexuality (as was the case in *Lara*) was not necessary, that defendant need not have been previously victimized or threatened, and that prison conditions may present permissible basis for departure) (Winter, J., dissenting).

CRIMINAL HISTORY

U.S. v. Morrison, No. 89-2284 (7th Cir. Oct. 10, 1991) (Flaum, J.) (reversing upward departure to category VI based on district court's belief that, because one of defendant's prior convictions was for a "brutal, execution-style murder," place-

ment in category II "seriously underestimated" the severity of that crime; appellate court held that Sentencing Commission "consciously chose to award defendants three criminal history points for every [felony conviction], regardless of the nature of the underlying offense conduct. *See* § 4A1.1. To sanction the district court's upward departure would fly in the face of that choice, and invite sentencing courts to create their own weighing schemes for prior criminal convictions.").

Aggravating Circumstances

U.S. v. Uccio, 940 F.2d 753 (2d Cir. 1991) (kidnapping and assault of co-conspirator undertaken in furtherance of offense was proper ground for upward departure pursuant to § 5K2.4, p.s.—that section is not limited to actions against innocent bystanders or targets of the crime).

Adjustments

Obstruction of Justice

Fourth Circuit holds obstruction of justice enhancement may not be applied to testifying defendant's denial of guilt that is not believed by jury. Defendant, charged with conspiracy to distribute cocaine, "took the stand and denied everything." After the government's "devastating rebuttal," the jury convicted the defendant. Her offense level was increased for obstruction of justice because the trial court found she testified untruthfully at the trial. As the appellate court noted, "[c]ommitting or suborning perjury has always been identified as 'obstruction of justice' in the Guidelines Commentary. U.S.S.G. § 3C1.1, comment. (n.1(c)) (Nov. 1989); *Id.*, comment. (n.3(b)) (Nov. 1990)." Every other circuit to consider the issue has upheld the constitutionality of applying § 3C1.1 to untruthful testimony. *See U.S. v. Contreras*, 937 F.2d 1191, 1194 (7th Cir. 1991); *U.S. v. Batista-Polanco*, 927 F.2d 14, 22 (1st Cir. 1991); *U.S. v. Matos*, 907 F.2d 274, 276 (2d Cir. 1990); *U.S. v. Barbarosa*, 906 F.2d 1366, 1369–70 (9th Cir.), *cert. denied*, 111 S. Ct. 394 (1990); *U.S. v. Wallace*, 904 F.2d 603, 604–05 (11th Cir. 1990); *U.S. v. Keys*, 899 F.2d 983, 988–89 (10th Cir.), *cert. denied*, 111 S. Ct. 160 (1990); *U.S. v. Wagner*, 884 F.2d 1090, 1098 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 1829 (1990); *U.S. v. Acosta-Cazares*, 878 F.2d 945, 953 (6th Cir.), *cert. denied*, 110 S. Ct. 255 (1989).

The Fourth Circuit, however, held that applying the enhancement in this situation unconstitutionally impinged on defendant's right to testify: "[W]e fear that this enhancement will become the commonplace punishment for a convicted defendant who has the audacity to deny the charges against him. The government maintained at oral argument that every defendant who takes the stand and is convicted should be given the obstruction of justice enhancement.... It disturbs us that testimony by an accused in his own defense, so basic to justice, is deemed to 'obstruct' justice unless the accused convinces the jury."

"We are not satisfied that there are enough safeguards in place to prevent this enhancement from unfairly coercing defendants, guilty or innocent, into remaining silent at trial. Other circuits have reviewed the district court's finding of untruthfulness under a 'clearly erroneous' standard.... Of course, in light of the jury's verdict of guilt, the district court's finding will never be 'clearly erroneous' where the verdict is sustainable; if the verdict cannot be supported, the sentencing finding will of course be moot."

"The rigidity of the guidelines makes the § 3C1.1 enhancement for a disbelieved denial of guilt under oath an intolerable burden upon the defendant's right to testify in his own behalf."

U.S. v. Dunnigan, No. 90-5668 (4th Cir. Aug. 30, 1991) (Hall, J.) (as amended Sept. 12, 1991).

U.S. v. Thompson, No. 90-1305 (7th Cir. Sept. 18, 1991) (Flaum, J.) (improper to give enhancement to defendants who, during presentence investigations, falsely denied they had used drugs while on bail during the course of trial—revised Application Note 1 to § 3C1.1, effective Nov. 1, 1990, states that "defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision," and thus "makes clear" that previous holding to the contrary in *U.S. v. Jordan*, 890 F.2d 968, 973 (7th Cir. 1989), should not be followed; however, enhancement for lying to probation officer about violation of condition of release while awaiting sentencing was proper—information in respect to presentence or other investigation for court "comprises a broader range of inquiries than those pertaining to the defendant's guilt or innocence," and the court "unquestionably had a legitimate interest in monitoring [defendant's] compliance with the release conditions it had imposed").

Criminal History

Career Offender Provision

U.S. v. Stinson, No. 90-3711 (11th Cir. Oct. 4, 1991) (Edmondson, J.) (illegal weapons possession by a convicted felon "by its nature, presented a serious potential risk of physical injury to another," U.S.S.G. § 4B1.2, comment. (n.2(B)), and is therefore "crime of violence" for career offender purposes). *Accord U.S. v. O'Neal*, 910 F.2d 663 (9th Cir. 1990).

Probation and Supervised Release

Revocation of Probation

U.S. v. Williams, No. 91-1219 (8th Cir. Sept. 6, 1991) (per curiam) (because sentence following probation revocation must be one that was available at time of original sentencing, court may not use new guideline chapter seven, effective Nov. 1, 1990, for defendants originally sentenced before that date).

Revocation of Supervised Release

U.S. v. Fallin, No. 91-1017 (8th Cir. Sept. 23, 1991) (per curiam) (for defendant who violated supervised release after Nov. 1, 1990, court "should have considered the policy statements in chapter seven of the guidelines when sentencing Fallin after the revocation of his supervised release"; court's error was harmless, however, because this was defendant's second, identical violation, and "[g]iven Fallin's blatant defiance of the court-ordered terms of his supervised release, we believe the district court properly sentenced Fallin to an appropriate term of imprisonment within the statutory maximum.... Thus, no useful purpose would be served by remanding Fallin's case to the district court for resentencing.").

Guideline Sentencing Update

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VOLUME 4 • NUMBER 9 • OCT. 10, 1991

Constitutional Challenges

Tenth Circuit holds that the Double Jeopardy Clause may be violated when a conviction is based on conduct that was used to increase a Guidelines sentence in a prior case. Defendant was convicted in South Dakota for distributing methamphetamine. The court included as relevant conduct 963 grams found in a search of defendant's Utah residence, which raised his offense level by two, and imposed a two-level enhancement for possessing weapons during a drug offense for weapons found during the same search. Defendant was sentenced to the statutory maximum of 240 months, within the guideline range but five months higher than the guideline maximum if the 963 grams had been excluded.

The government then prosecuted defendant in Utah federal court for possession with intent to distribute the same 963 grams of methamphetamine and for being a felon in possession of firearms (the same weapons used to enhance the South Dakota sentence). Defendant appealed after the district court refused his motion to dismiss the indictment, but the Tenth Circuit affirmed, holding that because defendant had not been charged in South Dakota for these offenses the Double Jeopardy Clause's ban on multiple *prosecutions* was not implicated. Also, because defendant had not yet been convicted and punished, his claim based on the Clause's ban against multiple *punishments* was not ripe for review. *U.S. v. Koonce*, 885 F.2d 720, 722 (10th Cir. 1989). Defendant was found guilty on both charges, and sentenced to 97 months on the drug charge and 12 months on the weapons charge, to be served concurrently with the South Dakota sentence. He also received a 6-year term of supervised release, to be concurrent with the 5-year South Dakota term.

The appellate court held that the Utah sentence for possession violated the "punishment component" of double jeopardy, basing its conclusion on three factors. First: "In both the Utah proceeding and the South Dakota proceeding, defendant was punished for the exact same conduct, the possession of Utah methamphetamine with intent to distribute. Absent evidence that Congress intended such double punishment, this runs afoul of the Double Jeopardy Clause."

Second, the court determined that "there is no evidence that Congress intended that an individual who distributes a controlled substance should receive punishment both from an increase in the offense level under the Guidelines in one proceeding and from a conviction and sentence based on the same conduct in a separate proceeding." The court found "strong support" for this conclusion in the Guidelines themselves. Under the "grouping" procedure of the multiple counts guideline, "had the government charged Koonce in the South Dakota district court with two separate counts—one based upon the methamphetamine mailed to [South Dakota] and one based upon the methamphetamine found in [Utah]—he would have received a sentence identical to the one that was imposed in the South Dakota prosecution . . . . It is difficult to believe that Congress would have intended the punishment to be larger if the government chose to proceed with two different proceedings . . . than if it chose to consolidate all of the counts in one proceeding."

Lastly, the sentence for the Utah offense violates the punishment component of the Double Jeopardy Clause "even though the sentence runs concurrently with the South Dakota sentence." Following *Ball v. U.S.*, 470 U.S. 856, 864–65 (1985), the court reasoned that punishment includes "all of the consequences that flow from a conviction without limiting the concept of punishment to incarceration time, fines, and other penalties and restraints explicitly ordered by the court," and thus "the absence of an additional prison sentence does not render the second conviction constitutional."

On the firearms charge, however, the Double Jeopardy Clause was not triggered because, under the test in *Blockburger v. U.S.*, 284 U.S. 299, 304 (1932), defendant was not punished in the different courts for the same offense. Although the weapons enhancement and the felon in possession offense "both require proof of possession of a firearm, U.S.S.G. 2D1.1(b)(1) requires proof that the firearm was possessed . . . during the commission of the drug offense, while U.S.C. 922(g) requires proof that the accused was a felon at the time he possessed the firearm."

U.S. v. Koonce, No. 90-4081 (10th Cir. Sept. 23, 1991) (Ebel, J.).

Sentencing Procedure

Evidentiary Issues

Sixth Circuit holds that courts should conduct an evidentiary hearing in accordance with the Confrontation Clause when disputed evidence could increase the Guideline sentence. In each of three cases that were consolidated for appeal, "the defendant pleaded guilty to a drug offense and the District Court was required to increase his sentence significantly under the Guidelines because the Court found on the basis of disputed facts that he had committed other drug offenses for which he had not been convicted. In each case the other offenses were proved by the hearsay testimony—often double or triple hearsay—of out-of-court declarants who remain unidentified. In each case the sentences were increased under the 'relevant conduct' or other similar provisions of the Guidelines, and in each case the defendant has

objected that the testimony causing his sentence to be increased is unreliable." For two defendants, the disputed evidence was used to significantly increase the amount of drugs and to impose role in the offense enhancements; the other had his criminal history score increased from category I to VI.

The appellate court noted a conflict between the two circuits that have specifically addressed whether factfinding under the Guidelines is subject to the Confrontation Clause. The Eighth Circuit held that "the Confrontation Clause, which operates independently of the rules of evidence, does apply." *U.S. v. Fortier*, 911 F.2d 100, 103 (8th Cir. 1990). The Third Circuit declined to apply the Clause to sentencing, but did hold that a heightened standard of scrutiny is required for factual findings and hearsay when a court "departs upwards dramatically" from the guideline range. *U.S. v. Kikumura*, 918 F.2d 1084, 1102–03 (3d Cir. 1990). The Sixth Circuit agreed with the Eighth, finding that because of "the vast difference between the formal, fact-based system of sentencing under the new code and the old informal system, . . . the reliability of the district courts' findings of fact must be tested under the principles established by the Confrontation Clause."

"This should not present a serious problem for district courts in most cases. In cases that go to trial, disputed facts can usually be resolved on the basis of the facts presented at trial, facts subject to the test of the Confrontation Clause. In guilty plea situations, the facts are usually undisputed and can often be stipulated before the sentencing hearing under § 6B1.4 of the Guidelines. In the cases in which there is a disputed material fact, the government can decide whether it will attempt to prove the fact under the Confrontation Clause. In each such case the government can decide whether it will seek to enhance the sentence otherwise prescribed by the new code by proffering and attempting to prove such disputed facts. Upon receiving the government's proffer, district courts may decide whether the government's proffer of facts—if proved—would constitute grounds requiring an increased sentence. If the district court rejects the proffer as immaterial, it should sentence the defendant on the basis of the undisputed facts of the charged offense, the defendant's criminal history, and any other aggravating or mitigating factor provided for in the code. If the district court decides that the proffered evidence in dispute would constitute grounds for an increased sentence, it should then conduct an evidentiary hearing in accordance with the Confrontation Clause."

U.S. v. Silverman, No. 90-3205 (6th Cir. Sept. 17, 1991) (Merritt, C.J.) (Wellford, Sr. J., dissenting).

Burden of Proof

U.S. v. Restrepo, No. 88-3207 (9th Cir. Oct. 4, 1991) (en banc) (Wiggins, J.) (By 7–4 vote, court held that, "for factors enhancing a sentence under Sentencing Guideline § 1B1.3(a)(2)," including uncharged conduct, "due process does not require a higher standard of proof than preponderance of the evidence to protect a convicted defendant's liberty interest in the accurate application of the Guidelines. We emphasize that the preponderance of the evidence standard is a meaningful one that requires the judge to be convinced 'by a preponderance of the evidence that the fact in question exists.' . . . It is a "'misinterpretation [of the preponderance test] that it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted.'") (dissenting opinions by Judges Pregerson and Norris, concurring opinion by Judge Tang).

Offense Conduct

Drug Quantity

Sixth Circuit holds that non-distributable, poisonous by-products should not be included in weight of methamphetamine "mixture." Defendants were convicted on several charges related to illegal manufacture of methamphetamine. The district court based their sentences on the entire weight of the unfinished "mixture" containing "a detectable amount" of methamphetamine, *see* U.S.S.G. § 2D1.1(c) (note at end of Drug Quantity Table), that was found in a "Crockpot." Defendants argued that using the entire amount of the mixture was irrational because only a much smaller amount of methamphetamine could have been produced and the mixture as found contained only a small amount of methamphetamine along with unreacted chemicals and by-products that are poisonous if ingested.

The appellate court agreed: "As *Chapman* [*v. U.S.*, 111 S. Ct. 1919 (1991)] makes clear, 'Congress clearly intended the dilutant, cutting agent, or carrier medium to be included in the weight of those drugs for sentencing purposes. . . .' *Id.* at 1924. By diluting the drug with some other substance, the distributor is increasing the amount of the drug he has available to sell to consumers and therefore is appropriately subject to punishment for the entire weight of the mixture. Such is clearly not the case here. If the Crockpot contained only a small amount of methamphetamine mixed together with poisonous unreacted chemicals and by-products, there would have been no possibility that the mixture could be distributed to consumers. At this stage of the manufacturing process, the defendants were not attempting to increase the amount of methamphetamine they had available to sell by adding a dilutant, cutting agent, or carrier medium, but rather were attempting to distill methamphetamine from the otherwise uningestable by-products of its manufacture."

The court remanded "for the district court to conduct an evidentiary hearing on this issue. If, as we suspect, the defendants are correct in their assertions as to the chemical properties of the contents of the Crockpot, it would be inappropriate for the district court to include the entire weight of the mixture for sentencing purposes. Instead, the district court would be limited to the amount of methamphetamine the defendants were capable of producing. *See* Guidelines Manual, § 2D1.1, comment. (n.12)." The Eleventh Circuit recently reached a similar result when it held that the "unusable" portion of a mixture containing cocaine should not be included in the offense level computation. *U.S. v. Rolande-Gabriel*, 938 F.2d 1231 (11th Cir. 1991) (4 GSU #8).

U.S. v. Jennings, No. 90-3503 (6th Cir. Sept. 16, 1991) (Martin, J.).

EXHIBIT F

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

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IN THIS ISSUE:

Guideline Sentences, Generally

3rd Circuit holds Fifth Amendment implicated by denial of reduction for acceptance of responsibility. (115)(480) Defendant pled guilty to unarmed robbery, but refused to admit that he possessed a weapon during the robbery. Defendant contended that it violated his Fifth Amendment self-incrimination rights for the district court to deny him a reduction for acceptance of responsibility based upon his denial of the gun possession. The 3rd Circuit agreed that the denial of a reduction for acceptance of responsibility constitutes a penalty. Thus, defendant had a Fifth Amendment right to refuse to answer questions at any point during the sentencing process in response to questions about his use of a gun and he could not be denied an acceptance of responsibility reduction for electing to exercise that privilege. However, defendant neither invoked the privilege nor did the district court tell defendant that if he invoked the privilege he would be denied the reduction. Thus, defendant's statements were not compelled, but voluntary, and could be used against him. Judge Garth, dissenting in part, thought defendant's Fifth Amendment rights had been violated. *U.S. v. Frierson*, __ F.2d __ (3rd Cir. Oct. 1, 1991) No. 90-3382.

7th Circuit upholds Drug Quantity Table's treatment of marijuana plants. (115)(250) The Drug Quantity Table in section 2D1.1 provides that in an offense involving marijuana plants, if the offense involved 50 or more plants, each plant is to be treated as equivalent to one kilogram of marijuana, and if the offense involved less than 50 plants, each plant is to be treated as equivalent to 100 grams of marijuana. Defendant contended that this violated due process because (a) the decision to set 50 plants as the cut-off mark was unconstitutionally arbitrary, and (b) the equivalencies were nonsensical since the average yields of each plant was far less than the weight assigned to each plant. The 7th Circuit upheld the Drug Quantity Table against these constitutional challenges. The arguments were based on the assumption that the weights assigned to each plant must represent a scientifically correct yield. Defendant was challenging

SECTION

100 Pre-Guidelines Sentencing, Generally
105 Cruel and Unusual Punishment

110 Guidelines Sentencing, Generally
115 Constitutionality of Guidelines
120 Statutory Challenges To Guidelines
125 Effective Date/Retroactivity
130 Amendments/Ex Post Facto
140 Disparity Between Co-Defendants
145 Pre-Guidelines Cases

150 General Application Principles (Chap. 1)
160 More Than Minimal Planning (§ 1B1.1)
165 Stipulation to More Serious Offense (§ 1B1.2)
170 Relevant Conduct, Generally (§ 1B1.3)
180 Use of Commentary/Policy (§ 1B1.7)
185 Information Obtained During Cooperation Agreement (§ 1B1.8)
190 Inapplicability to Certain Offenses (§ 1B1.9)

200 Offense Conduct, Generally (Chapter 2)
210 Homicide, Assault, Kidnapping (§ 2A)
220 Theft, Burglary, Robbery, Commercial Bribery, Counterfeiting (§ 2B)
230 Public Officials, Offenses (§ 2C)
240 Drug Offenses, Generally (§ 2D)
(For Departures, see 700-746)
242 Constitutional Issues
245 Mandatory Minimum Sentences
250 Calculating Weight or Equivalency
255 Telephone Counts
260 Drug Relevant Conduct, Generally
265 Amounts Under Negotiation
270 Dismissed/Uncharged Conduct
275 Conspiracy/"Foreseeability"
280 Possession of Weapon During Drug Offense, Generally (§ 2D1.1(b))
284 Cases Upholding Enhancement
286 Cases Rejecting Enhancement
290 RICO, Loan Sharking, Gambling (§ 2E)
300 Fraud (§ 2F)
310 Pornography, Sexual Abuse (§ 2G)
320 Contempt, Obstruction, Perjury, Impersonation, Bail Jumping (§ 2J)
330 Firearms, Explosives, Arson (§ 2K)
340 Immigration Offenses (§ 2L)
345 Espionage, Export Controls (§ 2M)
350 Escape, Prison Offenses (§ 2P)
355 Environmental Offenses (§ 2Q)
360 Money Laundering (§ 2S)
370 Tax, Customs Offenses (§ 2T)
380 Conspiracy/Aiding/Attempt (§ 2X)
390 "Analogies" Where No Guideline Exists (§ 2X5.1)

400 Adjustments, Generally (Chapter 3)
410 Victim-Related Adjustments (§ 3A)
420 Role in Offense, Generally (§ 3B)
430 Aggravating Role: Organizer, Leader, Manager or Supervisor (§ 3B1.1)
440 Mitigating Role: Minimal or Minor Participant (§ 3B1.2)
450 Abuse of Trust/Use of Special Skill (§ 3B1.3)
460 Obstruction of Justice (§ 3C)
470 Multiple Counts (§ 3D)

SECTION

480 Acceptance of Responsibility (§ 3E)
485 Cases Finding No Acceptance Of Responsibility
490 Cases Finding Acceptance Of Responsibility

500 Criminal History (§ 4A)
(For Criminal History Departures, see 700-746)
520 Career Offenders (§ 4B1.1)
540 Criminal Livelihood (§ 4B1.3)

550 Determining the Sentence (Chapter 5)
560 Probation (§ 5B)
570 Pre-Guidelines Probation Cases
580 Supervised Release (§ 5D)
590 Parole
600 Custody Credits
610 Restitution (§ 5E4.1)
620 Pre-Guidelines Restitution Cases
630 Fines and Assessments (§ 5E4.2)
650 Community Confinement, Etc. (§ 5F)
660 Concurrent/Consecutive Sentences (§ 5G)
680 Double Punishment/Double Jeopardy
690 Specific Offender Characteristics (§ 5H)

700 Departures, Generally (§ 5K)
710 Substantial Assistance Departure § 5K1)
720 Downward Departures (§ 5K2)
721 Cases Upholding
722 Cases Rejecting
730 Criminal History Departures (§ 5K2)
733 Cases Upholding
734 Cases Rejecting
740 Other Upward Departures (§ 5K2)
745 Cases Upholding
746 Cases Rejecting

750 Sentencing Hearing, Generally (§ 6A)
755 Burden of Proof
760 Presentence Report/Objections/Waiver
770 Information Relied On/Hearsay
772 Pre-Guidelines Cases
775 Statement of Reasons

780 Plea Agreements, Generally (§ 6B)
790 Advice\Breach\Withdrawal (§ 6B)
795 Stipulations (§ 6B1.4) *(see also § 165)*

800 Appeal of Sentence (18 USC § 3742)
810 Appealability of Sentences Within Guideline Range
820 Standard of Review *(See also substantive topics)*

860 Death Penalty
862 Special Circumstances
864 Jury Selection in Death Cases
865 Aggravating and Mitigating Factors
868 Jury Instructions

900 Forfeitures, Generally
910 Constitutional Issues
920 Procedural Issues, Generally
930 Delay In Filing/Waiver
940 Return of Seized Property/Equitable Relief
950 Probable Cause
960 Innocent Owner Defense

Congress' decision to determine a defendant's sentence based upon the number of plants involved, rather than their weights or actual yields. The Drug Quantity Table reflected Congress' decision to use the 50th plant as the indicator of culpability and participation in the drug marketplace. *U.S. v. Webb*, __ F.2d __ (7th Cir. Oct. 4, 1991) No. 90-3493.

8th Circuit rules denial of credit for acceptance of responsibility was not a Fifth Amendment violation. (115) (485) Defendants argued that they were denied a reduction for acceptance of responsibility because they refused to discuss their cases pending appeal of their convictions. They contended that the district court interpreted their refusal to discuss their case as unwillingness to accept responsibility for their conduct, and that this violated their Fifth Amendment right against self-incrimination. The 8th Circuit rejected this challenge, noting that numerous other Circuit courts have held that the acceptance of responsibility provisions do not violate the Fifth Amendment. *U.S. v. Lyles*, __ F.2d __ (8th Cir. Oct. 1, 1991) No. 90-2359.

2nd Circuit rules that conspiracy continued past effective date of guidelines. (125)(380) Defendant and others imported a kilogram of heroin into the United States in April of 1987. However, they were unable to dispose of it despite several different attempts, the last of which occurred the summer of 1989. The 2nd Circuit affirmed the application of the guidelines to defendant's conspiracy, ruling that the conspiracy continued past the November 1, 1987 effective date of the guidelines. The goal of the conspiracy was not merely to import the heroin but to sell it and distribute the proceeds. Thus, the conspiracy did not end in May, 1987 when the heroin was imported. *U.S. v. Azeem*, __ F.2d __ (2nd Cir. Sept. 30, 1991) No. 90-1635.

6th Circuit rules that defendants waived ex post facto challenge by failing to raise it below. (130)(800) Defendants were charged with a conspiracy and continuing criminal enterprise which ended October 11, 1988. Effective October 15, 1988, the guidelines were amended to increase the base offense level for a continuing criminal enterprise from 32 to 36. Defendants' plea agreements and presentence reports reflected a base offense level of 36, and the district court sentenced them accordingly. The 6th Circuit ruled that defendants had waived their ex post facto challenge to their sentence by failing to raise the issue below. The district court's failure to address the asserted misapplication of the guidelines was not "plain error" because both sides agreed at sentencing that the October 1988 guidelines were applicable. Judge Jones dissented, believing that defendants could not be bound by an unlawful sentence because of a plea agreement. *U.S. v. Nagi*, __ F.2d __ (6th Cir.) No. 89-2130.

11th Circuit rules that felon in possession of firearm is a crime of violence, rejecting ex post facto claim. (130) (520) The district court ruled that possession of a firearm by a felon was a crime of violence, and accordingly sentenced defendant as a career offender. 11th Circuit precedent in effect when defendant committed his offense provided that crimes of violence are a generic category of offenses which typically present a risk of injury to a person or property. Defendant contended that it violated the ex post facto clause to sentence him under the career offender guideline, section 4B1.2, as amended at the time he was sentenced. The 11th Circuit rejected the ex post facto argument, finding defendant's sentence was not enhanced by the amendment; rather, a felon's possession of a firearm was, by its nature, a crime of violence. This conclusion satisfied the standard under the previous version of the guidelines. *U.S. v. Stinson*, __ F.2d __ (11th Cir. Oct. 4, 1991) No. 90-3711. *[Editor's note: Effective November 1, 1991, the Sentencing Commission has amended Application Note 2 to section 4B1.2 to state that "[t]he term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon."]*

7th Circuit finds no breach of plea agreement in government's introduction of evidence concerning other misconduct. (140)(790) Defendant contended that the government breached his plea agreement by informing the district court at his sentencing hearing that he had violated his bond by being arrested for drunk driving, and that he had concealed his ownership of an automobile from his probation officer. The government used this information to justify its decision to suggest only a small downward departure. A co-defendant, who was responsible for distributing 4,500 pounds of marijuana, received a 15-year sentence, while defendant, who

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was responsible for 2,000 pounds of marijuana, received an 11-year sentence. The 7th Circuit rejected this contention. The fact that a co-defendant is treated differently is not a ground upon which the appellate court can review a sentence that conforms with the guidelines. *U.S. v. Brown*, __ F.2d __ (7th Cir. Sept. 30, 1991) No. 90-2382.

General Application Principles (Chapter 1)

5th Circuit vacates sentence in excess of statutory maximum. (150)(340)(470) Defendant was convicted of three counts of violating the Hostage Taking Act and nine counts involving smuggling illegal aliens. The district court sentenced him to 168 months imprisonment on each of the 12 counts, each term to run concurrently. The 5th Circuit vacated the sentence because the statutory maximum for each of the nine counts involving illegal aliens was 60 months. The court refused to consider the government's argument that the sentence of 168 months was permissible under guidelines sections 3D1.4 and 3D1.5, which permit consecutive sentences, because the district court did not state that it was aggregating the sentences. It stated only that the sentences were to run concurrently. *U.S. v. Carrion-Caliz*, __ F.2d __ (5th Cir. Sept. 27, 1991) No. 90-2809.

11th Circuit holds that defendant who burned boat for insurance fraud stipulated to arson offense. (165)(330) Defendant pled guilty to fraud and deceit in connection with burning a boat in order obtain insurance benefits. The district court sentenced him under the arson guidelines, rather than the fraud guidelines, because it found that defendant had stipulated to the more serious arson offense. The 11th Circuit ruled that the facts in defendant's plea agreement specifically established the more serious offense of arson, and thus guideline section 1B1.2 authorized the sentencing court to sentence defendant under guideline section 2K1.4, the arson guideline. A district court is not required to find that a case is "atypical" before applying section 1B1.2. The district court also correctly determined that under guideline section 2K1.4, defendant's base offense level was 20, because he created a substantial risk of death or serious bodily injury. The court could conclude that the firefighters faced a substantial risk of death or serious bodily injury. *U.S. v. Day*, __ F.2d __ (11th Cir. Oct. 4, 1991) No. 91-3432.

2nd Circuit rejects consideration of foreign crime as "relevant conduct." (170)(260)(500) Defendant was convicted of importing one kilogram of heroin into the United States from Pakistan. In calculating defendant's base offense level, the district court included three kilograms of heroin that defendant and others delivered from Pakistan to Cairo, Egypt. The 2nd Circuit ruled that although the Cairo transaction was part of the same course of conduct as the offense of conviction, it should not have been included in the determination of defendant's base offense level because it was not a crime against the United States. Guideline section 1B1.3 does not explicitly address the issue of foreign crimes and activities. However, under guideline sections 4A1.2(n) and 4A1.3(a), foreign sentences may not be used in computing a defendant's criminal history category, but may be used for upward departures from the otherwise applicable range. Moreover, considering foreign crimes would burden courts by requiring them to distinguish between activities that violate both domestic and foreign law and those which violate only domestic or only foreign law. *U.S. v. Azeem*, __ F.2d __ (2nd Cir. Sept. 30, 1991) No. 90-1635.

3rd Circuit affirms enhancement based on dismissed counts in robbery case. (170)(220)(780) Pursuant to a plea agreement, defendant pled guilty to unarmed robbery, while armed robbery and car theft counts were dismissed. Nonetheless, the district court increased defendant's base offense level by three under guideline section 2B3.1 because defendant possessed a firearm during the robbery. The 3rd Circuit upheld the enhancement, finding the guidelines require relevant conduct to be considered in determining specific offense characteristics, even though such conduct underlies a count dismissed in a plea bargain. Following the 11th Circuit's decision in *U.S. v. Scroggins*, 880 F.2d 1204 (11th Cir. 1989), the court rejected defendant's claim that this rendered his plea bargain meaningless. Prior to his plea, the government gave defendant a copy of a case describing a sentence enhancement for possession of a weapon during a robbery, so any expectation that the district court would not rely on the weapon was unfounded. Moreover, the plea bargain was not entirely empty because the car theft count was dismissed. *U.S. v. Frierson*, __ F.2d __ (3rd Cir. Oct. 1, 1991) No. 90-3382.

9th Circuit, en banc, holds that preponderance of evidence standard applies at sentencing. (170)(275)(755) In a 7-4 opinion written by Judge Wiggins, the 9th Circuit, sitting *en banc*, upheld the preponderance of evidence standard of proof at sentencing. The majority noted that every circuit that has considered the question has applied this standard. The court noted that *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986), recognized that there may be an exception to the general rule "when a sentencing factor has an extremely disproportionate effect on the sentence relative to the offense of conviction." But here, the judge found that in addition to the 37 grams of cocaine involved in the counts of conviction, defendant was responsible for 65 grams associated with the conviction of his codefendant. The 9th Circuit found that increasing the guideline range from 12 to 20 months for these additional amounts was simply not "a tail which wags the dog of the substantive offense." Judge Tang concurred separately, and Judges Pregerson, Norris, Hug and D. Nelson dissented. *U.S. v. Restrepo*, __ F.2d __ (9th Cir. Oct. 4, 1991) No. 88-3207 (*en banc*).

4th Circuit upholds sentence to 500 hours of community service. (180)(650) Defendant's guideline range was zero to six months. Because the court found that defendant did not "need incarceration" it sentenced him to three years of probation with the condition of 500 hours of community service. Defendant contended that this requirement was unreasonable in light of guideline section 5F1.3, which suggests that community service in excess of 400 hours generally should not be imposed. The 4th Circuit upheld the 500 hours of community service requirement. Assuming that the failure to follow this commentary was a sentence outside the guideline range, this portion of defendant's sentence was not unreasonable. *U.S. v. Graham*, __ F.2d __ (4th Cir. Sept. 24, 1991) No. 90-5070.

Offense Conduct, Generally (Chapter 2)

6th Circuit upholds valuation of infringing videocassettes based upon amount paid for legitimate videocassettes. (220) Defendant was convicted of duplicating and distributing copyrighted movies. He argued that the district court erred in using the actual amount he paid for legitimate videocassettes to determine the appropriate value of the infringing tapes for sentencing purposes. He contended that the district court should have used the lower prices reflected in a readily available retail catalog instead, but he did not offer any evidence to suggest that he purchased any videocassettes at the lower price or that he was even aware of the catalog. The 6th Circuit found that defendant offered "a plausible argument," but that there was no clear error. *U.S. v. Cohen*, __ F.2d __ (6th Cir. Aug. 6, 1991) No. 91-1131.

10th Circuit rules drug transaction was part of same course of conduct as offense of conviction. (260) Defendant and his brother were charged with various drug charges, and defendant eventually pled guilty to one count of distributing 57 grams of cocaine. In calculating defendant's offense level, the court included 447 grams of cocaine which were sold by defendant's brother, allegedly at defendant's request. The 10th Circuit affirmed, ruling that the transaction was part of the same course of conduct as the offense of conviction. Count 1, which was dismissed pursuant to a plea agreement, charged that defendant and his brother conspired to distribute cocaine in the area during the same time period. The record supported the finding that defendant was involved in the 447-gram transaction, and that it was part of the same overall scheme as the offense of conviction. *U.S. v. Ruth*, __ F.2d __ (10th Cir. Sept. 24, 1991) No. 90-3167.

8th Circuit affirms consideration of drugs not included in indictment and sold by co-conspirator. (270) Defendant contended that the district court erred in determining the amount of drugs for which he was responsible by (a) considering the aggregate amount of drugs instead of the lesser amount charged in the indictment, (b) considering the sales of a co-conspirator, because she received drugs from and sold drugs for persons other than defendant, and (c) basing the amount of drugs on incredible testimony. The 8th Circuit affirmed the district court's drug calculation. The sentencing court is not limited by the amount of drugs seized and may sentence according to its estimation based on trial testimony. There was sufficient evidence in the trial transcript to support the district court's determination. *U.S. v. Duckworth*, __ F.2d __ (8th Cir. Oct. 1, 1991) No. 91-1029.

7th Circuit affirms determination of amount of conspiracy's marijuana attributable to defendant. (275) Defendant argued that 501 kilograms of marijuana were improperly attributed to him. The weight based on quantities co-conspirators and other witnesses claimed they distributed to defendant. Defendant contended that some of the marijuana came from other sources or was not properly attributable to the conspiracy. The 7th Circuit upheld the calculation, finding that the district court carefully considered the evidence on this question, and then concluded that defendant should be held responsible for the 501 kilograms of marijuana he personally received. The district court's conclusion "was a reasonable product of a thorough inquiry into the facts relating to the scope of [defendant's] involvement in [this particular] distribution network." *U.S. v. Brown*, __ F.2d __ (7th Cir. Sept. 30, 1991) No. 90-2382.

6th Circuit reverses firearm enhancement based on possession of weapon in acquitted count. (286) Defendant was charged with conducting several different drug transactions and with carrying a firearm during a drug trafficking offense. He was acquitted of one of the drug transactions and the firearms charge. The transaction for which he was acquitted was the only transaction in which there was evidence that a firearm was involved. The 6th Circuit reversed an enhancement under guideline section 2D1.1(b) based upon defendant's possession of a firearm during a drug trafficking offense. The court assumed without deciding that defendant did not need to be convicted of the underlying substantive drug crime in which the weapon was involved for the enhancement to apply. However, the sentencing judge made no finding that the weapon involved in the acquitted count was also involved in the convicted counts. *U.S. v. Brown*, __ F.2d __ (6th Cir. Oct. 10, 1991) No. 90-5845.

California District Court declines to base "loss" on total amount of loans obtained by fraud. (300) Defendant conspired to present falsified loan applications to purchase homes for himself and his coconspirators and their relatives. There was no expectation that any of the loans would go into default. In fact, some of the homes were later sold at a profit, and other loans were in good standing, secured by more than enough equity to cover them. District Judge Shubb refused to increase the offense level by the amount of the loans, absent some showing that this was the actual, in-

tended, probable or expected loss. The court pointed out that the background notes to the bribery section, 2B4.1, state that if a bank officer agrees to take a $25,000 bribe to approve a $250,000 loan, the offense level is based on the "greater of the $25,000 bribe and the savings in interest over the life of the loan compared with alternative loan terms." The court reasoned that if "the full amount of the loan is not used to increase the offense level in cases where the bank officer approves the loan pursuant to a bribe, it would make little sense to use the full amount of the loan to increase the offense level where the officer causes the loan to be approved through fraud." *U.S. v. Hughes*, __ F.Supp. __ (E.D. Cal. July 10, 1991) No. CRS-90-0386-WBS.

4th Circuit rules that defendant who lied to grand jury could not be sentenced as accessary after the fact. (320)(380) Defendant was charged with two counts relating to a bombing incident at the bank where defendant was employed, and one count of lying to the grand jury concerning his presence at the bank shortly before the bombing occurred. He was acquitted of the explosives charges and convicted of the false declaration charge. He was sentenced under guideline section 2J1.3(c), which provides that if the offense involved perjury in respect to a criminal offense, the "accessory after the fact" guideline, section 2X3.1, should be applied if the resulting offense level is greater than the perjury guideline. Although the 4th Circuit found that defendant's perjury was "in respect to a criminal offense," it held that guideline section 2X3.1 was not applicable because defendant was not an accessory after the fact. He was charged as a principal in the bombing at the bank, and his perjury was intended to protect himself, rather than others. Judge Widener dissented. *U.S. v. Pierson*, __ F.2d __ (4th Cir. Oct. 7, 1991) No. 90-5399.

11th Circuit affirms upward departure for damage to government property, disruption of governmental function and endangerment of public. (350)(745) Defendants were convicted of attempting to help a prisoner escape from prison by landing a helicopter in the prison exercise yard. The attempt failed when, after picking up the prisoner, the helicopter crashed. The 11th Circuit affirmed a 10-level upward departure based on the damage to government property, more than minimal planning, disruption of governmental function and endangerment of the public welfare. The one-level increase for damage to government property was justified by the damage to the prison fence. There was a significant disruption of the prison's function as a result of the attempted escape. In addition to a lockdown of the facility and an extra count of prisoners, local, state and federal law enforcement personnel, paramedics, a Medivac helicopter and firefighting equipment were called to the crash scene. The four-level departure for endangerment to public welfare was justified by the risk involved in flying a helicopter into a small, fenced, occupied prison exercise yard. *U.S. v. Kramer*, __ F.2d __ (11th Cir. Oct. 11, 1991) No. 89-6229.

2nd Circuit rules district court had authority to depart downward based on atypical money laundering crime. (360)(721) On several occasions, one defendant sent cocaine to his co-defendant from Alaska via Express Mail. The co-defendant then sold the cocaine, converted the proceeds into a money order, and sent it to defendant. Money orders totalling $3,320 were purchased. Defendants were convicted of drug offenses and money laundering. The 2nd Circuit held that the district court mistakenly believed that it lacked authority to depart downward based on the atypical nature of the money laundering offense. Defendants did not use the financial transactions to conceal a serious crime; the money orders were simply used pay for illegal drugs. Although defendants' conduct fell within the words of Money Laundering Act, the terms of the relevant commentary showed that their conduct fell well outside the "heartland" of such cases. *U.S. v. Skinner*, __ F.2d __ (2nd Cir. Sept. 30, 1991) No. 91-1112.

5th Circuit reverses downward departure for defendant who failed to report "clean money." (360)(722) Defendant was convicted of importing more than $10,000 without reporting it. Defendant contended that the money was derived from legitimate business sources in Mexico. The district court departed downward based on (a) the lack of showing that the funds were criminally derived, and (b) its determination that defendant's conduct was not what the currency reporting requirements were designed to address. The 5th Circuit reversed. Guideline section 2S1.3(b)(1) provides for a five-level increase in offense level if defendant knew or believed that the funds were criminally derived. "Therefore, the guidelines fix the base offense level on an assumption that the defendant did not know or believe that the funds were criminally derived. Accordingly, a downward departure from the base offense level for 'clean money' is erroneous." Moreover, the purposes of the currency reporting requirements go beyond detecting monies derived from criminal activity. Unreported but legitimately derived money could be the subject of future income tax or regulatory evasion. *U.S. v. O'Banion*, __ F.2d __ (5th Cir. Oct. 1, 1991) No. 90-2675.

Adjustments (Chapter 3)

6th Circuit affirms that copyright infringer was supervisor. (430) Defendant, a video store owner, was convicted of duplicating and distributing copyrighted movies. The 6th Circuit upheld a two-level enhancement under section 3B1.1 based upon his supervisorial role over an individual who printed labels for the movies. Although the individual was not formally charged, the district court found on the basis of his testimony that he had engaged in culpable behavior. He testified that he acted at the direction of defendant, printed labels and knew that his behavior was wrong. *U.S. v. Cohen*, __ F.2d __ (6th Cir. Aug. 6, 1991) No. 91-1131.

7th Circuit reverses managerial enhancement based solely upon defendant's middleman status. (430) The district court gave defendant a two-level enhancement under section 3B1.1 for being a manager because defendant was a distributor in a drug ring. Although some of his buyers bought the drug for their personal use, others resold the drugs. The 7th Circuit reversed, holding that a defendant's middleman status alone was an insufficient basis for an enhancement under section 3B1.1. A defendant's control over others was a more crucial factor. Here, there was no evidence that defendant played a supervisorial role in the offense. *U.S. v. Brown*, __ F.2d __ (7th Cir. Sept. 30, 1991) No. 90-2382.

7th Circuit rules that defendant was manager, but not leader, of drug ring. (430) The 7th Circuit held that defendant should only have received a three-level enhancement under section 3B1.1(b) for being a manager or supervisor of a drug ring, rather than a four-level enhancement under section 3B1.1(a) for being a leader or organizer of the ring. In imposing the enhancement, the district court noted that defendant was "an organizer, leader, manager or supervisor" without properly distinguishing among these classifications. The record revealed that defendant was only a manager in the marijuana distribution scheme, which was at all times organized and controlled by another individual. *U.S. v. Brown*, __ F.2d __ (7th Cir. Sept. 30, 1991) No. 90-2382.

8th Circuit upholds leadership enhancement for defendant who supplied drugs and extended credit to dealers. (430) The 8th Circuit affirmed a three-level enhancement based upon defendant's leadership role in the offense. There was evidence that defendant supplied several "mid-level drugs dealers," and that defendant had extended credit to at least some of the individuals for their drug purchases. *U.S. v. Duckworth*, __ F.2d __ (8th Cir. Oct. 1, 1991) No. 91-1029.

11th Circuit upholds leadership role of defendants who engineered escape attempt. (430) Defendant and his brother were involved in a conspiracy to free the brother from federal prison. Defendant contended that he served a relatively minor role, acting only as his brother's messenger. In contrast, the government contended that defendant supervised the other co-conspirator's activities, provided all of the necessary cash, engaged in frequent coded telephone conversations with his brother and directed the escape operations from the outside. The 11th Circuit affirmed a four-level increase under guideline section 3B1.1(a) for both defendant and his brother based upon their leadership role in the escape scheme. The district court's factual findings concerning their roles in the offense were not clearly erroneous. *U.S. v. Kramer*, __ F.2d __ (11th Cir. Oct. 11, 1991) No. 89-6229.

1st Circuit rejects minor or minimal role reduction despite "paucity of evidence" linking defendant to crimes. (440) The 1st Circuit found that defendant failed to meet the "heavy burden" of persuading it that the district court erred in denying him a reduction for being a minor or minimal participant. True, there was not a great deal of evidence linking him to the drug trafficking crime for which he was convicted. "But the paucity of evidence [did] not compel the conclusion that [defendant] was only minimally involved in the crimes." Two judges and two trial juries were convinced that defendant possessed crack and cocaine. *U.S. v. Arache*, __ F.2d __ (1st Cir. Sept. 27, 1991) No. 90-1874.

6th Circuit rejects minor role reduction for defendant even though he was less culpable than other participants. (440) Defendant claimed he was entitled to a reduction based on his minor role in a drug conspiracy because his two co-defendants were the principal operators of the operation. The 6th Circuit upheld the denial of the reduction, even if defendant was less culpable than the other defendants. The district court found that defendant was heavily involved in the conspiracy. Defendant distributed 250 to 500 grams of cocaine every week, received the cocaine from a runner and paid the runner for the drugs. Defendant indicated that he sold a quarter kilogram of cocaine every six days for $6,500, making $1,000 profit each time. These facts demonstrated that the conspiracy relied upon defendant to move large quantities of cocaine every week. *U.S. v. Nagi*, __ F.2d __ (6th Cir.) No. 89-2130.

1st Circuit holds district court must apply obstruction enhancement for defendant's perjury. (460) At sentencing, the district court found that defendant committed perjury at a hearing on his motion to withdraw his guilty plea. However, the court declined to impose an enhancement under guideline section 3C1.1 for obstruction of justice because the perjury was committed before a judge, not a jury, and the perjury was "hopelessly transparent." The 1st Circuit reversed, holding that where a defendant perjures himself before the court, the court is without discretion and must impose the two-point enhancement for obstruction of justice. Perjury need not be likely to be successful in order to warrant the enhancement. The fact that the perjury was before a judge rather than a jury was not relevant. *U.S. v. Austin*, __ F.2d __ (1st Cir. Oct. 8, 1991) No. 91-1245.

6th Circuit upholds obstruction enhancement for intimidation of government witness. (460) Defendant received an obstruction of justice enhancement based on charges that he intimidated and threatened a government witness. The 6th Circuit affirmed the enhancement. The district court heard both defendant and the witness on this issue, and found the witness to be more credible than defendant. *U.S. v. Brown*, __ F.2d __ (6th Cir. Oct. 10, 1991) No. 90-5845.

7th Circuit finds obstruction where defendant gave co-defendant cash and securities for "safe-keeping." (460) When defendant learned that the police were investigating a drug distribution ring in which he was involved, he gave $35,000 in cash and securities to a co-conspirator "for safekeeping."

Defendant testified at his sentencing hearing that the money was given to his co-conspirator to use in his defense if necessary. The 7th Circuit affirmed an enhancement for obstruction of justice under guideline section 3C1.1 based upon this conduct. The court agreed that turning over physical evidence of a crime to another individual for safekeeping once that person is on notice that there is a criminal investigation in progress meets the definition of obstruction. There was no merit to defendant's claim that the enhancement should only have been granted on the money laundering charge, and not the drug trafficking charge. Both the cash and securities were proceeds of drug sales and thus evidence relevant to the drug trafficking charge. *U.S. v. Brown*, __ F.2d __ (7th Cir. Sept. 30, 1991) No. 90-2382.

7th Circuit upholds obstruction enhancement based upon false testimony. (460) The 7th Circuit summarily rejected defendant's challenge to an enhancement under section 3C1.1 for obstruction of justice. Defendant (a) falsely denied under oath that he had a criminal record, and (b) falsely denied under oath that he ever purchased drugs from the conspiracy. These statements went beyond the simple denial of guilt protected by the "exculpatory no" doctrine. *U.S. v. Brown*, __ F.2d __ (7th Cir. Sept. 30, 1991) No. 90-2382.

11th Circuit affirms obstruction enhancement based upon hearsay evidence that defendant threatened co-conspirator. (460)(770) Defendant's presentence report alleged that defendant threatened a co-conspirator and his family early in the planning stages of their conspiracy if the co-conspirator failed to follow through with their plan, and threatened him again while they were in prison awaiting sentencing. Defendant denied the allegations at the sentencing hearing and the co-conspirator did not testify. Nonetheless, the district court gave defendant a two-level enhancement for obstruction of justice based upon these allegations. The 11th Circuit found no error in the enhancement, despite the district court's reliance upon the hearsay statements in the presentence report. Circuit case law clearly permitted the court to consider reliable hearsay evidence at sentencing. Application note 2 to guideline section 3C1.1, which requires that suspect testimony and statements be evaluated in a light most favorable to the suspect, did not require the district court to credit defendant's testimony on this matter. *U.S. v. Kramer*, __ F.2d __ (11th Cir. Oct. 11, 1991) No. 89-6229.

7th Circuit, en banc, rules firearm counts should have been grouped together. (470) Defendant pled guilty to being a felon in possession of a firearm and possession of an unregistered firearm. The district court refused to group the two counts together, finding that his offenses were victimless crimes that involved different and distinct harms to society. The 7th Circuit reversed. It found that since the offenses were neither specifically included or excluded from the list of offenses to be grouped under guideline section 3D2.2, the guidelines mandate a determination according to the facts of the case. Here the two firearms counts were "so closely intertwined" as to require grouping. Under 18 U.S.C. section 922(g), felons are prohibited from possessing or registering firearms. Section 5861 makes it illegal for any person to possess a firearm that is not registered to him. Therefore, whenever a felon possesses a firearm, he will always violate both statutes. "The harm to society was unitary--one felon had one firearm." Judge Baum, with whom Judges Wood, Coffey, Manion and Kanne joined, dissented, arguing that none of the guideline sections supported grouping and that the case-by-case approach followed by the majority was in conflict with the language of the guidelines. *U.S. v. Bruder*, __ F.2d __ (7th Cir. Sept. 27, 1991) No. 90-1931 (*en banc*).

3rd Circuit holds section 3E1.1 requires defendant to accept responsibility for relevant conduct. (480) Defendant pled guilty to unarmed robbery, but was found, despite his denials, to possess a gun during the robbery. The district court relied upon his denials of gun possession to deny him a reduction for acceptance of responsibility. The 3rd Circuit held that guideline section 3E1.1 authorizes the sentencing court to consider related conduct as well as conduct constituting the offense of conviction in determining whether a defendant has accepted responsibility. *U.S. v. Frierson*, __ F.2d __ (3rd Cir. Oct. 1, 1991) No. 90-3382.

3rd Circuit gives plenary review to whether section 3E.1 requires acceptance of conduct beyond offense of conviction. (480)(820) Defendant argued that section 3E1.1 requires only that he accept responsibility for the specific acts constituting the offense of conviction. The 3rd Circuit found that this was a legal question subject to plenary review. *U.S. v. Frierson*, __ F.2d __ (3rd Cir. Oct. 1, 1991) No. 90-3382.

1st Circuit affirms denial of acceptance of responsibility reduction despite guilty plea where defendant lied under oath. (485) Defendant claimed that he was entitled to a reduction for acceptance of responsibility because he confessed to his crimes. The 1st Circuit affirmed the denial of the reduction despite defendant's guilty plea. The sentencing judge commented on a number of occasions that he had observed defendant and remained unconvinced that defendant held any remorse regarding his crimes, much less accepted meaningful responsibility for the significance of the crimes. Moreover, defendant's claim of acceptance of responsibility was incompatible with the fact that he lied under oath during the hearing on his motion to withdraw his guilty plea. *U.S. v. Austin*, __ F.2d __ (1st Cir. Oct. 8, 1991) No. 91-1245.

10th Circuit denies reduction because defendant refused to accept responsibility for dismissed counts. (485) The 10th Circuit affirmed the district court's decision to deny defendant a reduction for acceptance of responsibility. "A guilty plea to one count of a multi-count indictment does not necessarily entitle a defendant to a reduced offense level based upon acceptance of responsibility." Defendant appeared to

have accepted responsibility for his acts underlying the count of conviction, and "little more." *U.S. v. Ruth*, __ F.2d __ (10th Cir. Sept. 24, 1991) No. 90-3167.

7th Circuit, en banc, rules rehabilitative conduct justifies acceptance of responsibility reduction but not downward departure. (490)(722) During the nine-month period between his offense and sentencing, defendant obtained employment, changed associates, improved his living situation and reduced his alcohol consumption. Defendant contended that the district court mistakenly believed that it could not depart downward on the basis of his rehabilitation because it had already given him a two-point reduction for acceptance of responsibility. The 7th Circuit agreed with the district court that defendant's rehabilitative conduct was "equivalent" to acceptance of responsibility. Therefore, because defendant's conduct had already been taken into consideration by the guidelines, no departure was justified. *U.S. v. Bruder*, __ F.2d __ (7th Cir. Sept. 27, 1991) No. 90-1931 (*en banc*).

Criminal History (§ 4A)

11th Circuit holds that felon's possession of a firearm is inherently a crime of violence for career offender purposes. (520) The 11th Circuit held that a felon's possession of a firearm is "by its nature" a crime of violence for career offender purposes. The court found that guideline section 4B1.2(1)(ii) and application note 2, as amended, clearly provide that a sentencing court need not consider the facts underlying a particular offense, assuming such an inquiry is permissible. If the offense "by its nature" presents a serious risk of violence, then the offense is a crime of violence, whether or not the violence actually materialized. Relying upon legislative history and the 9th Circuit's opinion in *U.S. v. O'Neal*, 910 F.2d 663 (9th Cir. 1990), the court concluded that a felon's possession of a firearm was such an offense. Dicta in the recent panel decision of *U.S. v. Briggman*, 931 F.2d 705 (11th Cir. 1991), suggesting the opposite was not controlling. *U.S. v. Stinson*, __ F.2d __ (11th Cir. Oct. 4, 1991) No. 90-3711. *[Editor's note: Effective November 1, 1991, the Sentencing Commission has amended Application Note 2 to section 4B1.2 to state that "[t]he term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon."]*

7th Circuit reverses pre-guidelines restitution order for acquitted counts. (620) In a pre-guidelines case, defendant was charged with five counts of taking bank funds with intent to steal them and with conspiracy to defraud a federally insured bank. He was convicted of conspiracy and three of the bank theft charges, and acquitted of two of the bank theft charges. The 7th Circuit found it was error to order defendant to pay restitution for all five fraudulent loan transactions when he had been acquitted of two of the counts. The court rejected the government's contention that all five transactions were part of a unitary scheme and that because defendant was convicted of conspiracy, he could be ordered to pay restitution on the full amount of loss caused by the overall scheme. The jury's acquittal of the two bank theft counts must be taken as a judgment that the conspiracy did not include the acts charged in the acquitted counts. *U.S. v. Kane*, __ F.2d __ (7th Cir. Oct. 2, 1991) No. 90-3318.

4th Circuit reviews departure from guideline fine range under same standard as other departures. (630)(700)(820) The 4th Circuit held that it was appropriate to review the district court's upward departure from the guideline fine range under the same standard of review as other departures. Consequently, the court must first review *de novo* the statement of reasons offered by the district court for the departure to determine whether it identified a factor not adequately considered by the sentencing commission. Second, the court then reviews the sufficiency of the evidence to support the stated factor under the clearly erroneous standard. Finally, the court must determine whether the district court abused its discretion in determining that the factor is sufficiently important such that a sentence outside the guideline range should result and that the extent of the departure is reasonable. *U.S. v. Graham*, __ F.2d __ (4th Cir. Sept. 24, 1991) No. 90-5070.

4th Circuit prohibits upward departure from guideline fine range based upon a defendant's wealth. (630)(690)(746) The 4th Circuit reversed an upward departure from the guideline fine range which was based on defendant's wealth. Guideline section 5H1.10 provides that a defendant's socio-economic status is "not relevant" in determining a defendant sentence, and monetary wealth or the lack thereof is typically an accurate indicator of socio-economic wealth. Moreover, the Sentencing Commission adequately considered a defendant's ability to pay in formulating the fine guidelines, since a district court is expressly authorized to impose a fine below the minimum fine range when a defendant is unable to pay the minimum fine. In addition, "to permit an upward departure based on a defendant's ability to pay a greater fine would be tantamount to holding that the district court may impose any fine amount it determined the defendant's economic situation would permit, thereby effectively nullifying the fine guideline." *U.S. v. Graham*, __ F.2d __ (4th Cir. Sept. 24, 1991) No. 90-5070.

5th Circuit holds additional fine under guideline section 5E1.2(i) need not fall within guideline range. (630) Defendant received two fines totalling $26,000. The first fine was an offense-based fine under guideline section 5E1.2(c)(1)(A) in the amount of $2,200, and the second was an additional fine of $23,800 under guideline section 5E1.2(i) to covers the costs of defendant's incarceration and supervision. The 5th Circuit affirmed the fines, even though defendant's guideline range for fines was $2,000 to 20,000. Defendant misunderstood the difference between the straight fine and the addi-

tional fine. The $2,200 fine was at the lower end of the guideline range. The additional fine, to cover the costs of supervision and incarceration, was mandatory unless defendant carried the burden of satisfying the court that assessment should be lowered or waived. *U.S. v. Francies*, __ F.2d __ (5th Cir. Oct. 10, 1991) No. 91-8053.

5th Circuit upholds $20,000 fine despite defendant's claim that he had net worth of $3,000 to $5,000. (630) The presentence report concluded that defendant had a net wealth of $478,000. Accordingly, the district court imposed a $20,000 fine, which was within the guideline range. Defendant contended that he only had a net worth of $3,000 to $5,000 and that he had commenced bankruptcy proceedings two weeks prior to trial. The 5th Circuit upheld the fine, rejecting defendant's contention that the court only considered his financial statement. The record reflected that the court reviewed the evidence and elicited comments from defendant at the sentencing hearing on the status of the respective assets listed in the presentence report. It determined that there was sufficient equity in the assets to enable defendant to pay the fine currently. *U.S. v. O'Banion*, __ F.2d __ (5th Cir. Oct. 1, 1991) No. 90-2675.

10th Circuit upholds $12,500 fine. (630) Defendant complained that the district court erred in assessing him a $12,500 fine when there was no evidence that he was able to pay the fine. The 10th Circuit upheld the fine. Here, the district court imposed the minimum fine based upon defendant's financial profile and his future earning potential. At the time of his arrest, defendant had considerable assets, including an expensive car, an expensive boat, a house in Texas and $25,000 in cash. Although some, but not all, of defendant's assets were seized in a forfeiture proceeding, a loss of assets obtained in an illegal activity does not insulate a defendant from a fine. Further, defendant had considerable earning potential as a "wizard" auto mechanic. *U.S. v. Ruth*, __ F.2d __ (10th Cir. Sept. 24, 1991) No. 90-3167.

11th Circuit holds that enhancement for failure to appear does not bar later prosecution for failure to appear. (680) Defendant received a two-level enhancement for failing to appear at a sentencing hearing on her credit card conviction. She was subsequently prosecuted and entered a conditional guilty plea for failing to appear at the hearing. The 11th Circuit held that the enhancement did not constitute punishment for her failure to appear. Adopting the reasoning of the 7th Circuit in *U.S. v. Troxell*, 887 F.2d 830 (7th Cir. 1989), the court found that the court's consideration of her failure to appear did not amount to sentencing her for the offense. The consideration went only to the appropriate severity of the penalty of the credit card offense. *U.S. v. Carey*, __ F.2d __ (11th Cir. Sept. 30, 1991) No. 91-7379.

1st Circuit rules court was aware of extent of its ability to depart downward based on defendant's poor health. (690)(810) Defendant argued that the district court misunderstood the extent to which it could depart downward based on her poor health. First, she contended that the court ruled that guideline section 5H1.4 allows only two choices: a sentence within the guideline range, or no imprisonment at all. The 1st Circuit rejected this argument, noting that although the sentencing judge stated that defendant's condition did not justify a sentence of no imprisonment, this was in direct response to the argument that defendant should not be incarcerated at all. The 1st Circuit also rejected defendant's argument that the district mistakenly believed that guideline section 5K2.0 did not furnish a basis for departure independent of section 5H1.4. There was no way that defendant's physical impairment could be ordinary for purposes of section 5H1.4 and, at the same time, sufficiently out of the ordinary to justify a departure under section 5K2.0. Because the district court understood its authority to depart and exercised its discretion not to, the appellate court lacked jurisdiction to review the matter. *U.S. v. Hilton*, __ F.2d __ (1st Cir. Oct. 7, 1991) No. 91-1423.

Departures Generally (§ 5K)

4th Circuit refuses to review failure to depart downward despite government motion. (710)(810) Defendant argued that the district court erred in refusing to depart downward based upon his substantial assistance after the government moved for such a departure. The 4th Circuit held that the district court was aware of its ability to depart based upon his assistance, but chose not to follow the recommendation of the government. Accordingly, the decision was not reviewable by the court of appeals. *U.S. v. Graham*, __ F.2d __ (4th Cir. Sept. 24, 1991) No. 90-5070.

10th Circuit refuses to review district court's failure to grant government's section 5K1.1 motion. (710)(800) Defendant claimed that the district court abused its discretion in denying the government's motion under guideline 5K1.1 for a downward departure. The 10th Circuit ruled that it lacked jurisdiction to consider this claim. The language in guideline section 5K1.1 clearly states that the district court's decision to depart is discretionary. *U.S. v. Munoz*, __ F.2d __ (10th Cir. Oct. 7, 1991) No. 91-7018.

4th Circuit affirms that defendant's diminished capacity justified downward departure. (721) The 4th Circuit affirmed the district court's decision to depart downward under guideline section 5K2.13 based upon defendant's diminished capacity. The record contained the testimony and written report of a "highly credentialed psychiatrist" that indicated that defendant was suffering from a significantly diminished mental capacity. The government's only evidence on the issue was a page from a textbook. There also was sufficient evidence that defendant's diminished capacity was a contributing factor in the commission of the offense. The psy-

chiatrist testified without contradiction that defendant "had no conscious control over the things that were going on inside of him to a certain limit," and that the disease impaired his ability to cope with stress, which "led him to act out in this self destructive fashion." *U.S. v. Glick*, __ F.2d __ (4th Cir. Oct. 8, 1991) No. 91-5505.

4th Circuit holds that extensive planning indicated that defendant's crime was not a single act of aberrant behavior. (722) Over a 10-week period, defendant sent five letters containing misappropriated confidential information to his employer's competitor. He also devised a code to use to communicate with the competitor through a national trade journal. At his home, police found equipment stolen from the employer and a list of the names and addresses of the competitor's officers. This was defendant's first offense, and the district court departed downward, ruling that defendant's crime was a single act of aberrant behavior. The 4th Circuit reversed, holding that the extensive planning, number of actions, and length of time involved indicated that defendant's crime was not a single act of aberrant behavior. Aberrant behavior means something more than a first offense. It suggests "a spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning because an act which occurs suddenly and is not the result of a continued reflective process is one for which the defendant may be arguably less accountable." *U.S. v. Glick*, __ F.2d __ (4th Cir. Oct. 8, 1991) No. 91-5505.

8th Circuit rules that sexual abuse of daughters justified upward departure. (733) Defendant, who ran a day-care center, was convicted of sexually abusing two girls, aged three and four. The district court departed upward in part because of the repetitive nature of defendant's crimes: nine years earlier defendant had abused his own daughters. The 8th Circuit affirmed this as a grounds for departure. Guideline section 4A1.3(e) expressly permit upward departures where prior similar adult criminal conduct not resulting in a criminal conviction exists. *U.S. v. Fawbush*, __ F.2d __ (8th Cir. Oct. 7, 1991) No. 90-5496.

1st Circuit affirms criminal history departure where defendant committed offense while released on bail. (733) Defendant was arrested in July 1989 on cocaine charges. While released on bail, he was arrested and convicted of heroin charges, and sentenced to six months imprisonment. Upon his release, he was deported, and the cocaine charges remained pending. Defendant was subsequently arrested and pled guilty to reentering the United States illegally. The 1st Circuit affirmed an upward departure from criminal history category III to IV pursuant to guideline section 4A1.3(d). Defendant contended that criminal history category III did not seriously underrepresent his criminal history because conviction of the cocaine charge probably would have resulted in a probationary sentence for which only one additional criminal history point would have been assigned. However, defendant's argument did not consider that the instant offense was the second offense defendant committed while on bail on the cocaine charges. Thus, category III did seriously underrepresent the seriousness of defendant's criminal history and his likelihood of recidivism. *U.S. v. Madrid*, __ F.2d __ (1st Cir. Oct. 4, 1991) No. 91-1195.

8th Circuit rules evidence insufficient to justify departure for severe psychological injury to sexual abuse victims. (746) The 8th Circuit ruled that there was insufficient evidence to justify a departure under guideline section 5K2.3 based upon the severe psychological injury suffered by defendant's sexual abuse victims. The record contained no evidence that either victim suffered harm greater than that normally resulting from sexual abuse. The only evidence was that one of the victims was participating in individual and group therapy. The record did not indicate that in departing upward, the district court relied on any evidence by a psychologist or similar professional. *U.S. v. Fawbush*, __ F.2d __ (8th Cir. Oct. 7, 1991) No. 90-5496.

8th Circuit rules guidelines adequately consider age of sexual abuse victims. (746) Defendant was convicted of sexually abusing two girls, aged three and four. The court departed upward in part based upon the extremely young age of the victims. The 8th Circuit reversed, ruling that the guidelines adequately considered the age of the victims. Under section 2A3.1(b)(2)(A), defendant had already received a four-level increase in offense level because the victims were under the age of 12. These four points increased the sentencing range by three to four years. Given this "dramatic increase," the victims' ages were adequately considered. *U.S. v. Fawbush*, __ F.2d __ (8th Cir. Oct. 7, 1991) No. 90-5496.

Sentencing Hearing (§ 6A)

8th Circuit remands where court denied opportunity for allocution. (750) The 8th Circuit vacated defendant's sentence because the district court denied defendant the opportunity for allocution as required by Fed. R. Crim. P. 32(a)(1)(C). The rule is not satisfied by allowing counsel to speak and the defendant is not required to indicate that he wishes to address the court. *U.S. v. Brown*, __ F.2d __ (8th Cir. Sept. 24, 1991) No. 91-1013.

8th Circuit vacates sentence because district court failed to resolve issue of disputed fact. (760) Defendant was arrested after a government agent delivered 3,000 pounds of marijuana to a place where defendant had arranged for prospective purchasers of the marijuana to meet. Although the presentence report recommended that defendant be sentenced on the basis of the full 3,000 pounds, defendant argued that he should be sentenced on the basis of 1,000 pounds, because there was no reliable evidence that he agreed to purchase the 3,000 pounds or that he was capable of arranging for pur-

chasers for that amount. The district court indicated that the jury had made its determination, and that "it was not for this court to make that decision." Defendant was then sentenced on the basis of the full 3,000 pounds. The 8th Circuit vacated the sentence because the court failed to resolve an issue of disputed fact. The indictment did not specify drug quantity, nor did the jury find defendant guilty of conspiracy to distribute any particular quantity of marijuana. *U.S. v. Brown*, __ F.2d __ (8th Cir. Sept. 24, 1991) No. 91-1013.

11th Circuit rules failure to append written record of its findings to presentence report does not require resentencing. (760) Defendants alleged that the district court did not resolve all of the disputed facts or state that it was not relying on the dispute facts in sentencing. The 11th Circuit found that the district court did adequately resolve factual disputes as required by Fed. R. Crim. 32(c)(3)(D). This rule does require that a written record of such findings and determinations be appended to the presentence report. The government acknowledged that the district court's findings of record had not yet been made a part of the presentence report. However, the court found that this was a "ministerial matter" which could be remedied on remand without resentencing. *U.S. v. Kramer*, __ F.2d __ (11th Cir. Oct. 11, 1991) No. 89-6229.

6th Circuit holds that Confrontation Clause applies to sentencing hearing. (770) Defendants each pled guilty to charges involving small amounts of drugs. In each case, their sentences were increased significantly based on the court's determination that they were involved with larger quantities of drugs. The relevant conduct was proven by hearsay testimony—often double or triple hearsay—of unidentified declarants. The 6th Circuit vacated the sentences, holding that in resolving disputed facts which "have a measurable effect on the applicable punishment," the reliability of the district court's findings of fact must be tested under the principles established by the Confrontation Clause. The Supreme Court case of *Williams v. New York*, 337 U.S. 241 (1949), upholding the general use of hearsay in the sentencing process, was decided under the old sentencing system. The guidelines introduced an adversary sentencing hearing and the need for precise and accurate findings of disputed facts. Section 6A1.3, which states that sentencing judges are not restricted to information which would be admissible at trial, must be read in light of the evidentiary limitations of the Confrontation Clause. Senior Judge Wellford dissented, arguing that the Confrontation Clause issue was not properly before the appellate court, and that even if it was, the majority's decision was contrary to established law. *U.S. v. Silverman*, __ F.2d __ (6th Cir. Sept. 17, 1991) No. 90-3205.

11th Circuit finds no plain error in district court's failure to sentence defendant at bottom of guideline range. (775)(800) The 11th Circuit rejected defendant's claim that the district court erred in sentencing him within the guideline range without stating why it did not sentence him at the bottom of his guideline range, as recommended by the government in his plea agreement. After imposing sentence, the district court asked the parties whether there were any objections to the sentence imposed or the findings of the court. Defendant's counsel stated there were none, which waived defendant's current objection. There was no plain error in defendant's sentencing proceeding. *U.S. v. Webb*, __ F.2d __ (11th Cir. Sept. 30, 1991) No. 90-8868.

Plea Agreements, Generally (§ 6B)

3rd Circuit articulates standards for reviewing claim that government breached plea agreement. (790)(820) Defendant contended that the government breached its plea agreement with him. The 3rd Circuit articulated the standard of review of such a claim. There are three questions to be determined, each with a different standard of review. First, the court must determine the facts of the case, i.e. what are the terms of the agreement and the conduct of the government. The appellate court's review of those findings is limited by the "clearly erroneous" standard. Second, the court must determine whether the government's conduct violated the terms of the plea agreement. This is a question of law and the appellate court's review is plenary. Finally, if a violation occurred, the court must determine an appropriate remedy. The case must be remanded for either resentencing or withdrawal of the guilty plea. *U.S. v. Hayes*, __ F.2d __ (3rd Cir. Oct. 8, 1991) No. 91-3152.

3rd Circuit rules that government violated promise not to recommend a specific sentence. (790) Defendant's plea agreement provided that the government would make no specific sentencing recommendation. In the government's written response to defendant's objections to the presentence report, it stated that "the government advocates a sentence within the standard range of the guidelines as to Count One (a range of 57 to 60 months incarceration) . . . and a lengthy period of incarceration on the nonguidelines counts . . . ." At the sentencing hearing, the government on two occasions stated that it believed that a lengthy term of incarceration was appropriate. The 3rd Circuit ruled that the government breached the plea agreement's promise not to recommend a specific sentence. The identification of 57 to 60 months incarceration to the exclusion of a fine or probation "clashe[d] with the plain language of the agreement itself as well as with the defendant's request for probation." The case was remanded for the district court to determine whether the appropriate remedy was specific performance of the plea agreement or withdrawal of the plea. *U.S. v. Hayes*, __ F.2d __ (3rd Cir. Oct. 8, 1991) No. 91-3152.

6th Circuit rules government did not breach its promise to make no sentencing recommendation. (790) Defendant's plea agreement contained a promise by the government to

"make no recommendation" as to his sentence. He contended that the government breached this promise by opposing a sentence reduction for acceptance of responsibility and supporting an increase for his role as a manager in the offense. The 6th Circuit concluded that the government's actions did not constitute a breach of the plea agreement. Moreover, the district court offered defendant an opportunity to withdraw his plea and he refused. Since the remedy for a breached plea agreement is either specific performance or withdrawal of the plea, there was no error in the district court proceeding. *U.S. v. Silverman*, __ F.2d __ (6th Cir. Sept. 17, 1991) No. 90-3205.

6th Circuit holds providing evidence of defendant's additional drug activity did not violate plea agreement. (790) Defendant claimed that the government violated his plea agreement by presenting to the court evidence of his drug activity outside the count of conviction. The plea agreement contained a promise by the government not to file additional charges in return for defendant's acceptance of a maximum potential sentence of 20 years and a substantial fine. The 6th Circuit rejected defendant's claim, finding it indistinguishable from the claim in *U.S. v. Ykema*, 887 F.2d 697 (6th Cir. 1989). There the 6th Circuit held that the government's action in supplying information regarding defendant's additional involvement in drug activity did not violate the plea agreement. *U.S. v. Silverman*, __ F.2d __ (6th Cir. Sept. 17, 1991) No. 90-3205.

9th Circuit reverses for failure to warn that defendant could not withdraw plea if government's sentence recommendation was rejected. (790) The government agreed to recommend the minimum mandatory sentence, and to recommend that only the amount of cocaine charged in the count of conviction be considered, and promised not to seek any upward adjustment. In taking the plea, the district court said the recommendations in the plea agreement would bind it in determining the sentence, but did not mention that under Rule 11(e)(2), Fed. R. Crim. P., the defendant would not have the right to withdraw his plea if the court rejected the government's recommendation. At sentencing, the court rejected the recommendation of 120 months and sentenced defendant to 180 months in prison. On appeal, the government conceded that the court erred in failing to notify the defendant that he would have no right to withdraw his plea, but argued that the error was harmless. The 9th Circuit disagreed, holding that the error could not be harmless unless the record affirmatively showed that the defendant possessed the requisite knowledge. The record here was "wholly insufficient to make that showing." *U.S. v. Graibe*, __ F.2d __ (9th Cir. Oct. 9, 1991) No. 90-50416).

Appeal of Sentence (18 U.S.C. 3742)

4th Circuit rules that Chairman of Sentencing Commission is not required to recuse himself. (800) Prior to oral argument on defendant's appeal, defendant moved that 4th Circuit Judge Wilkins recuse himself because he was presently the Chairman of the United States Sentencing Commission. The 4th Circuit panel unanimously denied defendant's motion for recusal. The court agreed with the conclusion of Chief Judge Breyer of the 1st Circuit, a former member of the Sentencing Commission, that it was proper for a judge-commissioner to participate in appeals of "typical" guideline cases, unless the case involved "a serious legal challenge" to the guidelines themselves. The court rejected defendant's suggestion that a judge-commissioner would be improperly influenced by his knowledge of the guideline promulgation process. In ruling on a guideline issue, a judge-commissioner, like all judges, would be required to consider only the guidelines, policy statements, and official commentary of the Sentencing Commission. The court also found that a judge-commissioner's role in subsequently amending the guidelines would not effect his ability to be impartial. *U.S. v. Glick*, __ F.2d __ (4th Cir. Oct. 8, 1991) No. 91-5505.

5th Circuit reviews challenge to fine that was not raised below under plain error standard. (820) Defendant appealed the district court's imposition of $26,000 in fines, although neither defendant nor his counsel objected to the imposition of the fines when imposed. The 5th Circuit noted that a defendant may not raise on appeal a matter not first presented to the trial court, absent plain error. "Plain error requires a mistake so blatant and fundamental as to constitute a miscarriage of justice." *U.S. v. Francies*, __ F.2d __ (5th Cir. Oct. 10, 1991) No. 91-8053.

9th Circuit denies rehearing en banc in murder case, but three judges dissent. (865) Judges Trott, Kozinski and T. Nelson dissented from the 9th Circuit's refusal to rehear this case *en banc*, arguing that the panel misapplied the holding of the Supreme Court in *Walton v. Arizona*, 110 S.Ct. 3047, 3057 (1990) in striking down Idaho's statutory aggravating circumstance of "utter disregard for human life" as unconstitutionally vague. The dissenters argued that the panel opinion created a different rule for Idaho than the Supreme court established for Arizona. *Creech v. Arave*, 928 F.2d 1481 (9th Cir. 1991), *amended*, __ F.2d __ 91 D.A.R. 12683 (9th Cir. Oct. 16, 1991), (Judges Trott, Kozinski and T. Nelson dissenting from denial of rehearing *en banc*).

Forfeiture Cases

11th Circuit holds failure to request stay or post bond, combined with sale of forfeited property, deprived it of jurisdiction. (920) In a civil forfeiture action against property jointly owned by claimant and her husband, the district court entered a forfeiture order in favor of the government. Claimant filed a timely notice of appeal, but failed to seek a

stay of the district court's order. Claimant did file a lis pendens against the property. Shortly after the 10-day automatic stay expired, the property was sold by the U.S. Marshal. The 11th Circuit held that the failure to request a stay or post a supersedeas bond, combined with the subsequent sale of the property under court order to a third party, deprived the appellate court of in rem jurisdiction. The filing of a notice of lis pendens did nothing to alter this outcome. Lis pendens is merely a notice of pending litigation. It informed prospective purchasers that they should look to the litigation to determine when and if it was safe to purchase the property. Here, the district court's order specifically gave the government the right to dispose of the property after the expiration of the automatic stay. *U.S. v. Certain Real and Personal Property Belonging to Ronald Jerome Hayes*, __ F.2d __ (11th Cir. Oct. 4, 1991) No. 90-7232.

2nd Circuit holds it was error to permit government to amend its forfeiture complaint to conform to proof at trial. **(960)** In February, the government filed an action against property partially owned by claimant, seeking forfeiture based upon drug activity at the property, which was uncovered by a police raid the previous July. Claimant asserted an innocent owner defense, alleging that she was unaware of the drug activities. The tape recording of an incriminating conversation which took place that February between claimant and a tenant of the property was introduced at trial. Over defendant's objections, the jury was then instructed that it could consider defendant's knowledge of illegal activities as of the date of the February seizure, rather than as of the July raid. The district court granted the government's informal motion to amend its complaint to conform to the evidence pursuant to Fed. R. Civ. P. 15(b). The 2nd Circuit reversed. The original complaint and answer, and the government's opening statement focused entirely on activity prior to the July raid. Only in the government's summation did a theory of forfeiture based upon drug activity after July arise. Defendant was prejudiced by the amendment, since it was not until after the conclusion of the trial that the district court recognized the issue. *U.S. v. Certain Real Property and Premises, Known as 8890 Noyac Road, Noyac, New York*, __ F.2d __ (2nd Cir. Oct. 3, 1991) No. 90-6231.

2nd Circuit instructs district court to comply with recent decision concerning innocent owner defense. **(960)** The district court instructed the jury that in order to be an innocent owner, claimant must prove two things: (a) that she did not have actual knowledge of drug activity at her property; and (b) that she did not consent to the illegal drug activity. After this instruction the 2nd Circuit decided *U.S. v. 141st Street Corp.*, 911 F.2d at 878 (2nd Cir. 1990) which held that a claimant may avoid forfeiture by establishing either that she had no knowledge of the narcotics activity or, if she had knowledge, that she did not consent to it. The case was remanded on other grounds, and in the event of a new trial, the district court was directed to give an instruction consistent with *141st Street Corp. U.S. v. Certain Real Property and Premises, Known as 8890 Noyac Road, Noyac, New York*, __ F.2d __ (2nd Cir. Oct. 3, 1991) No. 90-6231.

11th Circuit finds genuine issue of fact concerning claimant's knowledge of husband's drug activity. **(960)** The government brought a civil forfeiture action against property jointly owned by claimant and her husband, which was used by her husband as a drop-off point for cocaine deliveries. The district court denied claimant's motion for summary judgment. The 11th Circuit dismissed claimant's appeal for lack of jurisdiction, but then ruled that if it had jurisdiction, it would affirm the district court's denial of the summary judgment motion. Claimant failed to show there was no issue of fact as to her innocent owner status. Defendant was present when the police arrived to search the home but elected to leave during the search. The evidence also indicated that defendant's husband used the home regularly for illegal drugs. This raised an inference that the claimant was not entirely ignorant of the circumstances surrounding her husband's activities. *U.S. v. Certain Real and Personal Property Belonging to Ronald Jerome Hayes*, __ F.2d __ (11th Cir. Oct. 4, 1991) No. 90-7232.

REHEARING EN BANC

(130)(170)(275)(755) *U.S. v. Restrepo*, 903 F.2d 648 (9th Cir. 1990), *on rehearing en banc*, __ F.2d __ (9th Cir. Oct. 4, 1991) No. 88-3207.

AMENDED OPINIONS

(520)(733) *(U.S. v. Hines*, __ F.2d __ (4th Cir. July 31, 1991) amended, __ F.2d __ (4th Cir. Aug. 23, 1991) No. 90-5514.

(865) *Creech v. Arave*, 928 F.2d 1481 (9th Cir. 1991), *amended on denial of rehearing en banc*, __ F.2d __ 91 D.A.R. 12683 (9th Cir. Oct. 16, 1991), (Judges Trott, Kozinski and T. Nelson dissented from denial of rehearing *en banc*).

Federal Sentencing and Forfeiture Guide
NEWSLETTER

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

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IN THIS ISSUE:

Cruel and Unusual Punishment

8th Circuit upholds life sentence for drug offense against 8th Amendment challenge. (105)(245) The 8th Circuit rejected defendant's claim that his life sentence without the possibility of parole for his drug felony violated the 8th Amendment. The court found that proportionality review was not required in light of the Supreme Court's recent decision in *Harmelin v. Michigan*, 111 S.Ct. 2680 (1991), and that the 8th Amendment only forbids sentences that are grossly disproportionate. Here, Congress reasonably determined that offenses involving the distribution of cocaine base were at the root of some of the gravest problems facing the country. Defendant's sentence was not grossly disproportionate to his offense. *U.S. v. Johnson*, __ F.2d __ (8th Cir. Sept. 3, 1991) No. 90-5309.

3rd Circuit upholds career offender guidelines against due process and 8th Amendment challenges. (105)(520) Defendant contended that classifying him as a career offender violated due process because at the time he committed the predicate offenses he was unaware of the effect that the convictions would have on future sentences. He further argued that the classification was cruel and unusual punishment because it did not consider his drug addiction and was not proportionate to the offenses. The 3rd Circuit upheld the career offender classification, finding defendant was essentially claiming that his prior pleas were involuntary because he was not informed of the effect they might have on his later sentencing. Due process only requires that defendant be informed of the direct consequences of his plea. The effect of a conviction on sentencing for a later offense is a collateral consequence. With regard to the 8th Amendment, the Supreme Court concluded in *Harmelin v. Michigan*, 111 S.Ct. 2680 (1991) that the 8th Amendment only forbids sentences that are grossly disproportionate to the crime. Defendant's three concurrent 210-month prison sentences were not grossly disproportionate to his three drug offenses. *U.S. v. Salmon*, __ F.2d __ (3rd Cir. Sept. 17, 1991) No. 90-3355.

SECTION

100 Pre-Guidelines Sentencing, Generally
105 Cruel and Unusual Punishment

110 Guidelines Sentencing, Generally
115 Constitutionality of Guidelines
120 Statutory Challenges To Guidelines
125 Effective Date/Retroactivity
130 Amendments/Ex Post Facto
140 Disparity Between Co-Defendants
145 Pre-Guidelines Cases

150 General Application Principles (Chap. 1)
160 More Than Minimal Planning (§ 1B1.1)
165 Stipulation to More Serious Offense (§ 1B1.2)
170 Relevant Conduct, Generally (§ 1B1.3)
180 Use of Commentary/Policy (§ 1B1.7)
185 Information Obtained During Cooperation Agreement (§ 1B1.8)
190 Inapplicability to Certain Offenses (§ 1B1.9)

200 Offense Conduct, Generally (Chapter 2)
210 Homicide, Assault, Kidnapping (§ 2A)
220 Theft, Burglary, Robbery, Commercial Bribery, Counterfeiting (§ 2B)
230 Public Officials, Offenses (§ 2C)
240 Drug Offenses, Generally (§ 2D)
(For Departures, see 700-746)
242 Constitutional Issues
245 Mandatory Minimum Sentences
250 Calculating Weight or Equivalency
255 Telephone Counts
260 Drug Relevant Conduct, Generally
265 Amounts Under Negotiation
270 Dismissed/Uncharged Conduct
275 Conspiracy/"Foreseeability"
280 Possession of Weapon During Drug Offense, Generally (§ 2D1.1(b))
284 Cases Upholding Enhancement
286 Cases Rejecting Enhancement
290 RICO, Loan Sharking, Gambling (§ 2E)
300 Fraud (§ 2F)
310 Pornography, Sexual Abuse (§ 2G)
320 Contempt, Obstruction, Perjury, Impersonation, Bail Jumping (§ 2J)
330 Firearms, Explosives, Arson (§ 2K)
340 Immigration Offenses (§ 2L)
345 Espionage, Export Controls (§ 2M)
350 Escape, Prison Offenses (§ 2P)
355 Environmental Offenses (§ 2Q)
360 Money Laundering (§ 2S)
370 Tax, Customs Offenses (§ 2T)
380 Conspiracy/Aiding/Attempt (§ 2X)
390 "Analogies" Where No Guideline Exists (§ 2X5.1)

400 Adjustments, Generally (Chapter 3)
410 Victim-Related Adjustments (§ 3A)
420 Role in Offense, Generally (§ 3B)
430 Aggravating Role: Organizer, Leader, Manager or Supervisor (§ 3B1.1)
440 Mitigating Role: Minimal or Minor Participant (§ 3B1.2)
450 Abuse of Trust/Use of Special Skill (§ 3B1.3)
460 Obstruction of Justice (§ 3C)
470 Multiple Counts (§ 3D)

SECTION

480 Acceptance of Responsibility (§ 3E)
485 Cases Finding No Acceptance Of Responsibility
490 Cases Finding Acceptance Of Responsibility

500 Criminal History (§ 4A)
(For Criminal History Departures, see 700-746)
520 Career Offenders (§ 4B1.1)
540 Criminal Livelihood (§ 4B1.3)

550 Determining the Sentence (Chapter 5)
560 Probation (§ 5B)
570 Pre-Guidelines Probation Cases
580 Supervised Release (§ 5D)
590 Parole
600 Custody Credits
610 Restitution (§ 5E4.1)
620 Pre-Guidelines Restitution Cases
630 Fines and Assessments (§ 5E4.2)
650 Community Confinement, Etc. (§ 5F)
660 Concurrent/Consecutive Sentences (§ 5G)
680 Double Punishment/Double Jeopardy
690 Specific Offender Characteristics (§ 5H)

700 Departures, Generally (§ 5K)
710 Substantial Assistance Departure § 5K1)
720 Downward Departures (§ 5K2)
721 Cases Upholding
722 Cases Rejecting
730 Criminal History Departures (§ 5K2)
733 Cases Upholding
734 Cases Rejecting
740 Other Upward Departures (§ 5K2)
745 Cases Upholding
746 Cases Rejecting

750 Sentencing Hearing, Generally (§ 6A)
755 Burden of Proof
760 Presentence Report/Objections/Waiver
770 Information Relied On/Hearsay
772 Pre-Guidelines Cases
775 Statement of Reasons

780 Plea Agreements, Generally (§ 6B)
790 Advice\Breach\Withdrawal (§ 6B)
795 Stipulations (§ 6B1.4) *(see also § 165)*

800 Appeal of Sentence (18 USC § 3742)
810 Appealability of Sentences Within Guideline Range
820 Standard of Review *(See also substantive topics)*

860 Death Penalty
862 Special Circumstances
864 Jury Selection in Death Cases
865 Aggravating and Mitigating Factors
868 Jury Instructions

900 Forfeitures, Generally
910 Constitutional Issues
920 Procedural Issues, Generally
930 Delay In Filing/Waiver
940 Return of Seized Property/Equitable Relief
950 Probable Cause
960 Innocent Owner Defense

Guideline Sentencing, Generally

2nd Circuit affirms sentence in excess of six months despite original order which limited imprisonment to six months. (110) After defendant violated an injunction, the district court issued an order to show cause why he should not be held in criminal contempt, and punished by not more than six months in custody. Since defendant was a fugitive, he was never served with this order. After authorities located him, a new judge issued a new order to show cause, which did not limit the term of imprisonment. At the time of the plea, the court informed defendant that he was facing a term of imprisonment in excess of six months. Defendant was sentenced to 37 months. On appeal, he claimed that this violated due process. The 2nd Circuit upheld the sentence, noting that the original order expired when defendant failed to appear. He was arrested on the subsequent order, which did not limit the term of imprisonment. *U.S. v. Lohan*, __ F.2d __ (2nd Cir. Sept. 23, 1991) No. 90-1637.

2nd Circuit conforms sentence to oral pronouncement. (110) Although the district court orally sentenced defendant to a term of 86 months, the written judgment erroneously said 87 months. The 2nd Circuit granted defendant's request, unopposed by the government, to amend the judgment to conform with the oral pronouncement. *U.S. v. Castro-Vega*, __ F.2d __ (2nd Cir. Sept. 16, 1991) No. 90-1087.

9th Circuit holds that "rule of lenity" applies when interpreting the guidelines. (110) The 9th Circuit held that the "rule of lenity requires that we infer the rationale most favorable to the appellants and construe the guidelines accordingly." Accordingly, the defendant's sentence was reversed. *U.S. v. Martinez*, __ F.2d __ (9th Cir. Oct. 1, 1991) No. 89-50529.

10th Circuit affirms that defendant committed acts in furtherance of conspiracy after his 18th birthday. (125)(380) Defendant became involved in a drug conspiracy as a juvenile. Although he turned 18 during the course of the conspiracy, he contended that there was no evidence that he remained involved in the conspiracy after his 18th birthday, and therefore the district court had no jurisdiction over him because he was a juvenile. The 10th Circuit rejected the argument, noting that even though defendant moved out of state on his 18th birthday, he came back for a visit. Two police officers testified that several weeks after defendant moved, they observed him and a co-defendant apparently selling cocaine. This testimony was corroborated by a statement that a co-defendant made to an undercover police officer. *U.S. v. Harris*, __ F.2d __ (10th Cir. Sept. 11, 1991) No. 90-5038.

2nd Circuit applies guidelines to violation of April 1987 injunction. (125) Defendant was convicted of criminal contempt as a result of his violation of an injunction issued in April 1987, before the guidelines became effective. The 2nd Circuit rejected defendant's claim that the guidelines did not apply to his offense. The crime for which defendant was convicted and sentenced was not the conduct leading to the injunction, but his continuing violations of that injunction from July 1987 through 1988. The guidelines apply to that crime, and their application to it did not constitute an ex post facto application of the law. *U.S. v. Lohan*, __ F.2d __ (2nd Cir. Sept. 23, 1991) No. 90-1637.

9th Circuit gives amendment no weight where it simply changed existing law, rather than clarifying earlier law. (130) The 9th Circuit held that a subsequent amendment "may be entitled to substantial weight in construing earlier law when it plainly serves to clarify rather than change the existing law." In this case however, "the circumstances surrounding the relevant guideline and its amendment failed to make clear that the amendment's purpose was merely to clarify rather than to alter pre-existing law. Therefore the court gave "no weight" to the subsequent amendment in interpreting the prior guideline. *U.S. v. Martinez*, __ F.2d __ (9th Cir. Oct. 1, 1991) No. 89-50529.

General Application Principles (Chapter 1)

3rd Circuit upholds reliance on cocaine in acquitted count. (170)(275) Defendant was convicted of a drug conspiracy

running from August 9, through September 6, 1989, but was acquitted of aiding and abetting a transaction which took place on August 10, 1989. The 3rd Circuit found no error in including the cocaine involved in the August 10 transaction in the calculation of defendant's offense level, despite his acquittal. A conspirator is responsible for the acts of his co-conspirators during the course of the conspiracy. *U.S. v. Salmon*, __ F.2d __ (3rd Cir. Sept. 17, 1991) No. 90-3355.

9th Circuit holds that amount of losses in counts dismissed pursuant to a plea bargain may not be considered as "relevant conduct." (170)(300)(780) Pursuant to a plea bargain, defendant pled guilty to one count of mail fraud and one count of use of a fictitious name. The government agreed to drop other counts which referred to similar fraudulent transactions that occurred on different dates. At sentencing, the district court relied on the losses in the dismissed counts in establishing the base offense level, as required by the "relevant conduct" section 1B1.3(a)(2). The 9th Circuit reversed, relying on *U.S. v. Castro-Cervantes*, 927 F.2d 1079 (9th Cir. 1991), which "held that a court may not rely on dismissed charges in calculating the defendant's sentence." *U.S. v. Fine*, __ F.2d __ (9th Cir. Oct. 1, 1991) No. 90-50280.

Offense Conduct, Generally (Chapter 2)

8th Circuit affirms enhancements for engaging in conduct evidencing intent to carry out threat and obstruction of justice. (210)(460) Defendant told the mother of a thirteen-year-old girl that he was returning to Nebraska to take the girl away, and that she had been "bought and paid for." When he returned to Nebraska, he told friends that the authorities were looking for him and that he wanted to paint his car so it would not be recognized. He asked them to hide him until 3:08 p.m. when school let out. Defendant eventually pled guilty to transmitting in interstate commerce a telephone communication containing a threat to kidnap. While incarcerated, defendant attempted to place numerous collect calls to the girl's residence. Defendant denied that he intended to kidnap the girl. The 8th Circuit upheld an enhancement under section 2A6.1(a) for engaging in conduct evidencing an intent to carry out the threat, and under section 3C1.1 for obstruction of justice. Judge Heaney, dissenting in part, did not believe defendant's phone calls after his arrest constituted an attempt to obstruct justice. Since the girl's family never accepted the calls, the court could only speculate as to why defendant called. *U.S. v. Hill*, __ F.2d __ (8th Cir. Sept. 4, 1991) No. 90-2517.

4th Circuit calculates offense level based on benefit received from bribe rather than amount of bribe. (230) Defendant conspired to pay $400,000 to a U.S. Maritime Administration Official for the opportunity to purchase a ship for substantially less than its market value. The district court calculated the offense level under section 2C1.1 on the basis of the $400,000 bribe. The 4th Circuit reversed, holding that the offense level should have been calculated on the basis of the expected benefit from the bribe, rather than the amount of the bribe. Application note 2 to section 2C1.1 requires the offense level to be based on the greater of the amount of the bribe or the value of the benefit received from the bribe. There was no dispute as to the figures for each, since defendant stipulated in his plea agreement that the amount of the bribe was $400,000 and the benefit to be derived from the conspiracy was between three and five million dollars -- the difference between the fair market value of the vessel and the amount for which it would have been sold to the conspirators. *U.S. v. Kant*, __ F.2d __ (4th Cir. Sept. 26, 1991) No. 91-5269.

8th Circuit rejects constitutional challenge to drug equivalency table. (240) Defendant claimed that the drug equivalency table had no rational basis and that use of the table resulted in disparate treatment of black and white defendants. The 8th Circuit summarily rejected these claims, since neither was raised in the district court. Moreover, the court recently rejected these arguments in *U.S. v. House*, 939 F.2d 659 (8th Cir. 1991), and *U.S. v. Johnson*, __ F.2d __ (8th Cir. Sept. 3, 1991) No. 90-5309. *U.S. v. McDile*, __ F.2d __ (8th Cir. Sept. 26, 1991) No. 91-1131.

10th Circuit rules that conviction based on drugs used to enhance prior sentence violated double jeopardy. (240)(680) In sentencing defendant for distributing 443 grams of methamphetamine mailed from Utah to South Dakota, the South Dakota district court considered 963 grams of methamphetamine found in defendant's Utah house. Thereafter, federal charges were brought in Utah for the same 963 grams. Defendant was found guilty and sentenced to 97 months, to run concurrently with his South Dakota methamphetamine sentence. The 10th Circuit held that this violated double jeopardy. Defendant had already been punished in South Dakota for the methamphetamine possession by reason of the increase in offense level and guideline range. There was no evidence that Congress intended to punish the same conduct twice. In fact, the procedure for grouping offenses under the sentencing guidelines suggests that Congress intended for quantities of illegal drugs to be aggregated into one punishment. The fact that the two sentences ran concurrently did not change the analysis. *U.S. v. Koonce*, __ F.2d __ (10th Cir. Sept. 23, 1991) No. 90-4081.

8th Circuit finds that court was aware of its authority to depart downward. (245)(660)(700) Defendant was convicted of one drug count and one count of using a firearm during a drug trafficking offense in violation of 18 U.S.C. section 924(c)(1). A silencer was found among the weapons seized from defendant, but he was not charged with it because it was defective. As a result, defendant's mandatory minimum

sentence was five years, rather than 30. The government moved for a downward departure for substantial assistance, and the district court decreased the sentence from five years to three years on the drug charge, but imposed a five-year consecutive sentence on the firearm charge. The 8th Circuit rejected the claim that the court was unaware that it could sentence below the five-year minimum. After weighing the assistance defendant had provided and the benefit he received from the prosecution's decision not to press the silencer charge, the court simply chose not to depart further. The district court also did not commit error in imposing consecutive sentences. The law clearly requires the firearms sentence to run consecutive to, and not concurrent with, any other sentence imposed. *U.S. v. Cames*, __ F.2d __ (8th Cir. Sept. 19, 1991) No. 90-3091.

8th Circuit holds section 851 notice must be filed before jury selection begins. (245) After the jury was selected, but not sworn, the government filed an amended information alleging two prior drug offenses for sentence enhancement purposes as required by 21 U.S.C. section 851. The 8th Circuit held that a section 851 notice must be filed prior to jury selection. "Such an interpretation allows the defendant ample time to determine whether he should enter a plea or go to trial, and plan his trial strategy with full knowledge of the consequences of a potential guilty verdict." If the government encounters difficulty discovering prior convictions, section 851 allows it to seek a postponement of the trial. *U.S. v. Johnson*, __ F.2d __ (8th Cir. Sept. 3, 1991) No. 90-5309.

11th Circuit reverses downward departure from mandatory minimum based on age and heart condition. (245)(722) The district court calculated defendant's guideline range at 78 to 97 months, and sentenced him to 78 months. However, since defendant was involved with in excess of 50 grams of cocaine, the statutory minimum sentence was 10 years. The district court justified a departure from the minimum sentence based on defendant's advanced age and heart condition. The 11th Circuit reversed, holding that the only authorization for a departure from a mandatory minimum sentence is when the government moves for a departure based upon a defendant's substantial assistance. This was not such a case. *U.S. v. Hall*, __ F.2d __ (11th Cir. Sept. 25, 1991) No. 90-3074.

5th Circuit upholds determination of drug quantity despite new evidence. (250)(800) The 5th Circuit upheld the district court's calculation of defendant's sentence on the basis of 32.5 grams of phenylacetone, based on the testimony of two co-conspirators and a DEA chemist. For the first time on appeal, defendant provided the court with "an impressive scientific explanation" of precursor chemicals, theoretical yields, and the dramatic difference between phenylacetone and phenylacetic acid. Defendant contended that the calculations of the government's expert witness were erroneous and alleged other errors. The appellate court refused to consider these arguments and evidence, as they were not produced at the sentencing hearing. Defendant's only alternative was to show, if he could, that his attorney's failure to produce this evidence constituted ineffective assistance. Such a claim could not be resolved on direct appeal. *U.S. v. Bounds*, __ F.2d __ (5th Cir. Sept. 20, 1991) No. 89-4665.

6th Circuit refuses to base sentence on total weight of methamphetamine and poisonous by-products. (250) Defendants were arrested while in the process of "cooking" a batch of methamphetamine. Defendants contended that it was error to calculate their sentence based upon the total weight of the mixture, 4180 grams, rather than the approximately 100 grams of methamphetamine that would have been produced if the chemicals had been allowed to react completely. The 6th Circuit agreed that to the extent the mixture consisted of a small amount of methamphetamine and poisonous chemicals and by-products not intended for ingestion, it would be improper to use the total weight to calculate defendants' sentences. As the Supreme Court made clear in *Chapman v. United States*, 111 S.Ct 1919 (1991), Congress intended any dilutant, cutting agent, or carrier medium to be included for sentencing purposes, since this increases the amount of drug available to consumers. But this was not the case here. *U.S. v. Jennings*, __ F.2d __ (6th Cir. Sept. 16, 1991) No. 90-3503.

7th Circuit affirms sentencing defendant on the basis of total weight of Dilaudid tablets. (250) The 7th Circuit affirmed the district court's decision to sentence defendant on the total weight of the Dilaudid tablets he sold to an undercover agent, rather than the net weight of the drug in the tablets. Circuit court and Supreme Court precedent hold that it is rational to measure the quantity of drugs according to their "street weight" in the diluted form in which they are sold, rather than according to the net weight of the active ingredient. The D.C. Circuit has recently applied this reasoning to the drug Dilaudid. *U.S. v. Blythe*, __ F.2d __ (7th Cir. Sept. 18, 1991) No. 90-2867.

8th Circuit affirms calculating drug quantity by random selection of samples. (250) Defendant challenged the district court's ruling that he was involved with in excess of 50 grams of cocaine base, since the government tested only 43 of the 87.2 grams seized from defendant's two houses for cocaine. The remaining substance was merely weighed. The 8th Circuit rejected the argument that the government was required to test all of the seized substance. The government chemist randomly selected and analyzed approximately 43 grams of the seized substance, all of which tested positive for the presence of cocaine base. Testimony indicated that the untested substance appeared to be cocaine base. This was sufficient to support the district court's findings. *U.S. v. Johnson*, __ F.2d __ (8th Cir. Sept. 3, 1991) No. 90-5309.

8th Circuit affirms sentencing defendant for the five kilograms he promised to supply. (265) Defendant contended

that he should not have been sentenced for the five kilograms of cocaine which he never delivered, but rather for the two and one-half gram sample which he supplied. He argued that he never intended to produce the full five kilograms, but instead was going to steal the buyer's money. The 8th Circuit affirmed the sentence for the entire five kilograms. Defendant promised to find five kilograms on at least two occasions. He had a government informant come to Florida help complete the deal. When the informant got there, defendant told him he was still working toward their goal. The district court's findings of intent and capability were not clearly erroneous. *U.S. v. Riascos*, __ F.2d __ (8th Cir. Sept. 16, 1991) No. 91-1018.

7th Circuit vacates because court failed to determine whether drugs in conspiracy were foreseeable to defendants. (275) At defendant's sentencing hearing, the government asserted that defendant was "convicted beyond a reasonable doubt of being a member of this conspiracy. Just on general conspiracy theory, he is responsible for all the conduct involved in this conspiracy." The district court apparently agreed and sentenced defendant on the basis of the total quantity of drugs attributable to the parties named in the conspiracy indictment. The 7th Circuit vacated, because the district court failed to determine what quantity of drugs involved in the conspiracy were foreseeable to defendant as required by guideline section 1B1.3. The fact that defendant was convicted of conspiracy did not establish beyond a reasonable doubt that he conspired with every other person charged in the indictment, it simply meant that he agreed with one other person to violate the drug laws. *U.S. v. Thompson*, __ F.2d __ (7th Cir. Sept. 18, 1991) No. 90-1305.

10th Circuit finds no double jeopardy in counting firearm for both felon in possession and possession in drug offense. (280)(680) The 10th Circuit found no double jeopardy violation in sentencing defendant for being a felon in possession of a firearm where possession of the same firearm was used to enhance his sentence under guideline section 2D1.1(b)(1) for possession of a firearm during the commission of a drug trafficking offense. The two proceedings did not punish defendant for the same conduct. Although both offenses required proof that the accused possessed a firearm, the enhancement under guideline section 2D1.1(b)(1) requires proof that the firearm was possessed during the commission of the drug offense, while the felon in possession offense requires proof that the accused was a felon at the time he possessed the firearm. *U.S. v. Koonce*, __ F.2d __ (10th Cir. Sept. 23, 1991) No. 90-4081.

2nd Circuit bases amount of loss on total defendant could have obtained through telephone solicitations. (300) Defendant set up a commodity futures sales office and employed four to six sales persons who made between 750 and 1000 "cold canvas" calls soliciting potential investors to invest a minimum of $3,000 each. Defendant contended that the actual loss suffered by the victims was only $87,000, and that this was the proper measure of the "loss" his crimes caused under section 2F1.1. The 2nd Circuit rejected this contention. Had all of the telephone solicitations been successful, defendant would have obtained between $2,250,000 and $3,000,000. Through these solicitations, defendant was "attempting to inflict" upon his victims a "probable or intended" loss of that amount. That loss, which the presentence report "conservatively" reduced to one to two million dollars, fully justified the nine-level enhancement. *U.S. v. Lohan*, __ F.2d __ (2nd Cir. Sept. 23, 1991) No. 90-1637.

2nd Circuit rejects claim that criminal contempt was unique crime to which guidelines did not apply. (320)(390) Defendant claimed that the guidelines should not have been applied in his case because the criminal contempt charged was a unique crime requiring individualized sentencing. The 2nd Circuit rejected this contention, since sections 2J1.1 (contempt) and 2X5.1 (other offenses) recognize and provide for the guidelines' application to criminal contempt. "It is not the function of the courts to create exceptions from the Guidelines for contempts that are 'unequal' crimes." *U.S. v. Lohan*, __ F.2d __ (2nd Cir. Sept. 23, 1991) No. 90-1637.

Adjustments (Chapter 3)

3rd Circuit upholds leadership role of defendant who supplied cocaine and recruited co-defendant. (430) The 3rd Circuit upheld a two point enhancement based on defendant's aggravating role in the drug offense. Evidence at trial showed that defendant supplied the cocaine that a co-defendant sold to an undercover agent and that he recruited another co-defendant for surveillance purposes. *U.S. v. Salmon*, __ F.2d __ (3rd Cir. Sept. 17, 1991) No. 90-3355.

7th Circuit rejects claim that enhancement was based on evidence presented at co-defendants' hearings. (430) Defendant claimed that the district court erroneously found him to be a "leader" based upon testimony presented at his co-defendants' sentencing hearings. The 7th Circuit found no merit to this claim, since the district court referred only to interpretations of various guideline provisions which it had adopted during the other sentencing hearing. Moreover, the presentence report contained more than enough information to find that defendant was a leader of the conspiracy. He located the cocaine sources, organized the Milwaukee to Los Angeles shipments, and recruited couriers. He also stored the cash and cocaine in his home, profited significantly from the illegal activity, and he alone was referred to as "the King" and "Big Cheese." *U.S. v. Thompson*, __ F.2d __ (7th Cir. Sept. 18, 1991) No. 90-1305.

7th Circuit finds evidence insufficient to prove drug supplier played managerial role in conspiracy. (430) The district court gave defendant, who supplied cocaine to a drug

conspiracy, a three-level enhancement under guideline section 3B1.1(b) for being a manager or supervisor of the conspiracy. The enhancement was based upon defendant's role in setting the price the conspiracy paid for the cocaine, his role in controlling the deliveries of cash to Los Angeles, and his role in delivering the cocaine to Milwaukee. The 7th Circuit reversed, finding insufficient evidence to support a finding that defendant held a managerial role. All suppliers play some role in establishing price, so that factor alone cannot be dispositive. Although defendant was involved in the Los Angeles and Milwaukee transactions, there was little or no evidence that he controlled the couriers in any manner. The large size of the transactions also influenced the district court. Although defendant's ability to secure a large quantity of cocaine suggested that he may have played a significant role in some drug conspiracy, it failed to show that he played a significant role in the conspiracy to which he sold the cocaine. *U.S. v. Thompson*, __ F.2d __ (7th Cir. Sept. 18, 1991) No. 90-1305.

3rd Circuit affirms that defendant was only minor, and not minimal, participant. (440) The 3rd Circuit held that the district court's determination that defendant was a minor rather than a minimal participant was not clearly erroneous. The evidence showed that defendant promoted the cocaine a co-defendant was supplying an undercover officer and encouraged future transactions. He stated that "We're like All-State; you're in good hands with us." *U.S. v. Salmon*, __ F.2d __ (3rd Cir. Sept. 17, 1991) No. 90-3355.

7th Circuit reverses enhancement for abuse of trust by defendant who processed credit card transactions. (450) Defendant sold credit reporting equipment through his business. He obtained a merchant account with a bank which entitled him to process his company's credit card transactions through the bank. Defendant then used fraudulent and altered credit cards to receive payments from the bank for phantom purchases of merchandise. The 7th Circuit reversed an enhancement under guideline section 3B1.3 for abuse of a private trust. As with all credit transactions, there was an element of reliance present. However, the relationship was a standard commercial relationship, and the fraud was no different from any other commercial credit transaction fraud. *U.S. v. Kosth*, __ F.2d __ (7th Cir. Sept. 25, 1991) No. 90-3233.

7th Circuit affirms obstruction enhancement based upon defendant's denial of violation of condition of bond. (460) The 7th Circuit affirmed a two-point enhancement for obstruction of justice based on defendant's denial that he had slept overnight at a friend's house while awaiting sentencing. A condition of defendant's release on bond pending sentencing was that he reside at his sister's home. Although defendant told a DEA agent that he had spent the night at the friend's house, defendant told his probation officer that he had fallen asleep at the friend's house for only one or two hours. The court rejected defendant's contention that his "fib" was not a material falsehood. The issue was whether defendant violated the conditions of his release. Application note 3(h) states that providing materially false information to a probation officer in respect to a presentence or other investigation for the court is an example where the enhancement applies. The term "investigation" covers a broader range of inquiries than defendant's guilt or innocence. *U.S. v. Thompson*, __ F.2d __ (7th Cir. Sept. 18, 1991) No. 90-1305.

7th Circuit reverses obstruction enhancement despite defendant's denial of drug use while on bail. (460) Based on defendant's denial of his drug use while he was out on bail, the district court enhanced defendant's sentence for obstruction of justice. The 7th Circuit reversed, finding that the 1990 amendments to the guidelines clarify that the enhancement is not intended to apply to those who exercise their constitutional right to refrain from incriminating themselves to authorities by denying wrongdoing. Under the revised section 3C1.1, a defendant's refusal to admit guilt or provide information to a probation officer is not a basis for the enhancement. The court found no basis for distinguishing between statements made to a probation officer and those made to pretrial services officers. *U.S. v. Thompson*, __ F.2d __ (7th Cir. Sept. 18, 1991) No. 90- 1305.

8th Circuit affirms that government proved that defendant attempted to escape from custody. (460) Defendant received a two-level enhancement for obstruction of justice based on the district court's finding that defendant attempted to escape from custody. The 8th Circuit affirmed, ruling that the finding was not clearly erroneous. A deputy marshall testified that during the transfer of nine or ten prisoners, including defendant, he saw defendant standing with his hands on an emergency door trying to open it. He further testified that defendant looked surprised to see him, smiled, shrugged his shoulders and then said "I had nothing to lose by trying." Defendant testified that he had a dislocated ankle, and that he leaned against the emergency doors in order to rest. He also testified that he made the statement, "Well can you blame me for trying," but that he had no intention of escaping, emphasizing that he was shackled and did not know the building. Giving due regard to the district court's credibility determinations, the district court's findings were not clearly erroneous. *U.S. v. Miller*, __ F.2d __ (8th Cir. Sept. 3, 1991) No. 91-1675.

9th Circuit upholds obstruction adjustment where defendant made false statements upon arrest. (460) Defendant made false statements upon his arrest, and generally provided misleading information during the initial interrogation. He denied that Jack Patterson was his alias and made up a whole story about Jack Patterson. He attempted to conceal the fact that a mail box with Patterson's name was used in the fraudulent transactions. The 9th Circuit held that these

facts even when viewed in the light most favorable to the appellant as required by application note 1 of the Commentary to section 3C1.1 were sufficient to support the enhancement for obstruction of justice. *U.S. v. Fine*, __ F.2d __ (9th Cir. Oct. 1, 1991) No. 90-50280.

3rd Circuit denies acceptance of responsibility reduction to defendant who gave excuses for his conduct. (485) The 3rd Circuit affirmed the district court's decision to deny defendant a reduction for acceptance of responsibility. Although defendant submitted a statement to the probation officer in which he admitted his participation in the offenses for which he was convicted, he also gave a number of excuses for his conduct. He claimed that he was addicted to drugs and only became involved in the transactions at the request of a government informant. He also denied that he was ever in the business of selling cocaine for profit. *U.S. v. Salmon*, __ F.2d __ (3rd Cir. Sept. 17, 1991) No. 90-3355.

7th Circuit denies credit for acceptance of responsibility where defendant attempted to flee after failing to appear. (485) Defendant was convicted of failing to appear for sentencing. The district court denied a reduction for acceptance of responsibility because he disappeared for seven months, and when U.S. Marshals eventually found him, he attempted to flee. The 7th Circuit rejected defendant's claim that the denial of credit for acceptance of responsibility was improperly based on a factor that was a necessary prerequisite to the offense. Unlike the crime of escape, failure to appear is not a continuing offense. Defendant's crime was complete when he failed to appear for sentencing. He could have demonstrated his acceptance of responsibility by surrendering, but he did not. In fact, when U.S. Marshals approached him, he attempted to flee. The district court properly considered his flight, which was not a prerequisite to the crime, as grounds for denying the reduction. *U.S. v. Knorr*, __ F.2d __ (7th Cir. Sept. 16, 1991) No. 90-2422.

9th Circuit denies credit for acceptance of responsibility where defendant obstructed justice. (485) Under application note 4 of the commentary to guideline section 3E1.1, conduct resulting in an enhancement for obstruction of justice ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. The 9th Circuit agreed that this was not an extraordinary case and upheld the district court's denial of credit for acceptance of responsibility as not clearly erroneous. *U.S. v. Fine*, __ F.2d __ (9th Cir. Oct. 1, 1991) No. 90-50280.

Criminal History (§ 4A)

2nd Circuit rejects 6th Amendment challenge to use of uncounseled prior convictions in criminal history. (500) In *Baldasar v. Illinois*, 446 U.S. 222 (1980), a plurality of the Supreme Court held that an uncounseled misdemeanor conviction may not be used to convert a second misdemeanor into a felony. Based on *Baldasar*, defendant argued that it violated the 6th Amendment to use his prior uncounseled conviction for driving while intoxicated in calculating his criminal history score. The 2nd Circuit rejected the challenge, finding *Baldasar* not controlling. First, there was no common denominator upon which a majority of the *Baldasar* justices agreed. Moreover, in *Baldasar*, the defendant's prior conviction materially altered the substantive offense, by converting it from a misdemeanor to a felony with a prison term. Here, however, the court used an uncounseled misdemeanor conviction to determine the appropriate criminal history category for a crime that was already a felony. *U.S. v. Castro-Vega*, __ F.2d __ (2nd Cir. Sept. 16, 1991) No. 90-1087.

2nd Circuit holds contempt conviction for violating injunction was not part of conduct that led to injunction. (500) As a result of a civil action brought against defendant by the Commodities Futures Trading Commission, defendant was enjoined from conducting further fraudulent activities as a commodity futures broker. Defendant was also convicted of securities fraud in state court. Shortly after his release from state custody, defendant violated the terms of the injunction and was convicted of criminal contempt. The district court refused to include the state securities fraud conviction in defendant's criminal history because it found that the facts in the criminal contempt offense were part of the fraudulent conduct upon which the injunction was based. The 2nd Circuit disagreed, holding that the facts in the criminal contempt offense were not a part of conduct that led to the injunction. The state conviction punished defendant for his pre-injunction activities, while defendant's violation of the injunction constituted the present offense. *U.S. v. Lohan*, __ F.2d __ (2nd Cir. Sept. 23, 1991) No. 90-1637.

3rd Circuit considers more than 10-year-old drug offenses as predicates for career offender purposes. (500)(520) Section 4A1.2(e)(2) states that prior sentences of less than one year and one month should not be counted for career offender purposes unless imposed within 10 years of the instant offense. Thus defendant contended that his 1975 conviction for the sale of heroin, for which he received a suspended sentence, should not have been counted. The 3rd Circuit rejected the argument, noting that defendant's probation on the 1975 conviction had been revoked, and that section 4A1.2(k)(1) authorized the court to add the sentence imposed upon revocation to the original sentence. When the 500 days defendant served upon revocation of his probation were added to the original sentence, the total sentence *exceeded* one year and one month. Section 4A1.2(e)(1) provides for a 15-year period for prior prison sentences exceeding one year and one month. Since the 1975 conviction fell within this period, it was properly included as a prior felony drug conviction for career offender purposes under section 4B1.1. *U.S. v. Salmon*, __ F.2d __ (3rd Cir. Sept. 17, 1991) No. 90-3355.

9th Circuit holds that cases consolidated for trial or sentencing are "related" and count as one prior sentence. (500) Noting that *U.S. v. Anderson*, __ F.2d __ (9th Cir. Sept. 5, 1991) (*en banc*) "effectively overruled" *U.S. v. Gross*, 897 F.2d 414 (9th Cir. 1990), the 9th Circuit held that sentences that are consolidated for trial or sentencing are "related" for purposes of guideline section 4A1.2(a)(2) and therefore count as only one prior sentence. Thus the district court should have treated defendant's two prior convictions for fraudulent transactions that took place six months apart as a single prior sentence because they were consolidated for trial and the trial court imposed two concurrent sentences of 113 days each. *U.S. v. Fine*, __ F.2d __ (9th Cir. Oct. 1, 1991) No. 90-50280.

9th Circuit holds that conviction set aside under FYCA cannot be counted in criminal history. (500) The Federal Youth Corrections Act, 18 U.S.C. section 5021, which was repealed in 1984, contained a provision which automatically set aside a conviction if the offender was unconditionally discharged prior to the expiration of the sentence. In *U.S. v. Hidalgo*, 932 F.2d 805 (9th Cir. 1991), the 9th Circuit held that a conviction set aside under a California Youth Offender statute similar to the FYCA could not be counted under in criminal history under section 4A1.2(j). In the present case, the majority ruled that they were bound by the *Hidalgo* court's conclusion that a set aside is equivalent to an expungement. Accordingly, they held that a conviction set aside under the FYCA may not be included in calculating a defendant's criminal history. Judge Wiggins dissented, arguing that application note 10 makes a distinction between convictions set aside for reasons unrelated to innocence and those which are "expunged." *U.S. v. Kammerdiener*, __ F.2d __ (9th Cir. Sept. 23, 1991) No. 90-30199.

9th Circuit treats sentence on revocation of probation as separate from sentence for new conviction. (500) Defendant argued that his sentences for burglary and revocation of probation after a forgery conviction should have been treated as a single prior sentence because they were consolidated for sentencing. The 9th Circuit rejected the argument and upheld treating the sentences separately, ruling that its contrary holding in *U.S. v. Gross*, 897 F.2d 414, 416 (9th Cir. 1990) was no longer good law after *U.S. v. Anderson*, __ F.2d __ (9th Cir. Aug. 6, 1991) No. 89-10059 (*en banc*). Relying on Application Note 11 to section 4A1.2, the court held that "when a sentence is imposed for revocation of probation at the same time as the conviction for a new offense, the sentence on the new conviction is computed separately from the sentence imposed for revocation of probation." In this case, the probation revocation was "simply one part of the forgery case, and the forgery case was not consolidated with the burglary case." *U.S. v. Palmer*, __ F.2d __ (9th Cir. Sept. 27, 1991) No. 91-30004.

2nd Circuit reverses ruling that criminal facilitation is a controlled substance offense for career offender purposes. (520) The 2nd Circuit reversed the district court's determination that defendant's prior state conviction for criminal facilitation was a controlled substance offense for career offender purposes. Unlike the crimes of aiding and abetting, conspiracy or attempt, under New York state law the crime of criminal facilitation does not involve the intent to commit the underlying substantive offense. The prior convictions provision of the career offender guidelines must be interpreted strictly. Given the harsh penalty for being a career offender, the court refused to find, absent "clear guidance" from the Sentencing Commission, that a crime not involving the mental culpability to commit a substantive narcotics offense could serve as a predicate controlled substance offense for the imposition of career offender status. *U.S. v. Liranzo*, __ F.2d __ (2nd Cir. Sept. 5, 1991) No. 90-1675.

3rd Circuit holds that burglary of a dwelling is a crime of violence under the 1988 guidelines. (520) The 3rd Circuit held that under the 1988 version of the guidelines, burglary of a dwelling is a crime of violence for career offender purposes. Although not specifically enumerated in the guideline, Application Note 1 to section 4B1.2 explains that burglary of a dwelling is covered by the definition of a crime of violence. Moreover, the 1989 amendments to the guidelines clarified which offenses are considered crimes of violence by adding burglary of a dwelling to the list of crimes following the definition of a crime of violence and by stating that both the elements of the offense and the conduct underlying the offense may be relevant to determining whether the offense is a crime of violence. *U.S. v. Salmon*, __ F.2d __ (3rd Cir. Sept. 17, 1991) No. 90-3355.

3rd Circuit holds one controlled substance felony and one prior crime of violence satisfy career offender prerequisite. (520) The 3rd Circuit rejected defendant's claim that guideline section 4B1.1 requires a defendant to have either two prior controlled substance felonies or two prior crimes of violence in order to be classified as a career offender. The court held that one felony from each of the two categories fulfills the career offender requirements. *U.S. v. Salmon*, __ F.2d __ (3rd Cir. Sept. 17, 1991) No. 90-3355.

7th Circuit finds no impropriety in probation officer's statements during sentencing hearing. (570) In a pre-guidelines probation revocation case, defendant argued that the district court improperly relied upon the testimony of the probation officer at the sentencing hearing. The probation officer had stated that defendant's particular probation violations made the offenses more aggravated, and that he could not think of anything to say in mitigation. He recommended a substantial period of incarceration. Defendant contended that the probation officer was improperly arguing as if he were the prosecutor. The 7th Circuit rejected this argument. The probation officer merely gave his recom-

mendation to the judge on the basis of the presentence report. *U.S. v. Veteto*, __ F.2d __ (7th Cir. Sept. 17, 1991) No. 90-3421.

Determining the Sentence (Chapter 5)

5th Circuit remands where district court failed to advise defendant of possibility of supervised release. (580)(750) In *U.S. v. Bachynsky*, 934 F.2d 1349 (5th Cir. 1991) (en banc), the 5th Circuit held that a district court's failure to advise defendant of the possibility of a term of supervised release is not necessarily an error mandating reversal. The case may be examined for harmless error under Rule 11(h) if the sentence, including supervised release, does not exceed the statutory maximum explained to defendant. In this case, defendant's sentence was 25 years, plus an additional three years of supervised release, plus possible additional incarceration if his supervised release was revoked. This aggregate was greater than the 25-year statutory maximum explained to defendant. The case was remanded to permit defendant to plead anew. *U.S. v. Bounds*, __ F.2d __ (5th Cir. Sept. 20, 1991) No. 89-4665.

7th Circuit upholds requiring defendant to report wife's financial obligations as condition of supervised release. (580) One of the conditions of defendant's supervised release required him to inform the probation office of any financial transaction by his wife in excess of $250. He was also ordered to pay in excess of $29,000 as restitution. The 7th Circuit found no impropriety in requiring defendant to report his wife's financial transactions. Defendant's family assets were held solely in his wife's name, and defendant conducted many of his transactions through his wife. Significantly, the wife was not required to report her financial transactions, and thus, the condition did not affect the exercise of any of her lawful rights. The condition served a monitoring purpose in light of defendant's history of masking his income and ownership of assets, and was related to evaluating his ability to meet his restitution payment schedule. *U.S. v. Kosth*, __ F.2d __ (7th Cir. Sept. 25, 1991) No. 90-3233.

8th Circuit affirms sentence on revocation of supervised release despite court's failure to consider policy statements. (580) After defendant initially violated the terms of his supervised release, the district court extended it by one year. Defendant then committed the same violation, and the district court revoked his supervised release. Noting that defendant had been given "a break" at his previous revocation hearing, the district court then sentenced defendant to serve in prison his two-year term of supervised release. On appeal, defendant contended that the district court erroneously failed to consider the policy statements in Chapter 7 of the Sentencing Guidelines. The 8th Circuit affirmed the sentence, despite the fact that defendant's sentence was greater than the recommended range set forth in the policy statement's Revocation Table. Although the district court should have considered the policy statements, any error was harmless, given defendant's "blatant defiance" of the terms of his supervised release. *U.S. v. Fallin*, __ F.2d __ (8th Cir. Sept. 23, 1991) No. 91-1017.

1st Circuit refuses to grant credit for time served in home confinement. (600) After sentencing defendant to a 30-month term of imprisonment, the district court granted defendant's motion to extend the period for self-surrender from February 18 to June 1, to enable defendant to undergo necessary surgery and rehabilitation. As a condition of postponing the self-surrender date, defendant volunteered to remain in home confinement (other than physical therapy appointments) until the new surrender date. The 1st Circuit affirmed the district court's refusal to grant defendant credit for time served in home confinement. Contrary to the government's contention, a district court does have authority to order credit for time served. However, home confinement does not constitute "official detention" for which credit for time served is authorized under 18 U.S.C. section 3585(b). While a defendant's movement may be severely curtailed by home confinement, "it cannot seriously be doubted that confinement to the comfort of one's own home is not the functional equivalent of incarceration in either a practical or a psychological sense." *U.S. v. Zackular*, __ F.2d __ (1st Cir. Sept. 24, 1991) No. 91-1482.

9th Circuit holds that, prior to 1990 amendment, VWPA limited restitution to loss caused by offense of conviction. (610) In *Hughey v. United States*, 110 S.Ct. 1979 (1990), the Supreme Court held that restitution under the Victim and Witness Protection Act of 1982, 18 U.S.C. section 3663-64, is limited to the loss caused by the specific conduct that is the basis of the offense of conviction. In *U.S. v. Sharp*, __ F.2d __ (9th Cir. Aug. 5, 1991), the 9th Circuit held that even when the offense of conviction involves a conspiracy or scheme, "restitution must be limited to the loss attributable to the specific conduct underlying the conviction." The *Sharp* court noted that *Hughey* overruled *U.S. v. Pomazi*, 851 F.2d 244 (9th Cir. 1988). In the present case, the defendant had expressly agreed to pay restitution in an amount in excess of that attributable to the offense of conviction. Nevertheless the 9th Circuit reversed, holding that under *Hughey* the district court was without power to order the restitution even if the parties to agreed to it. The court acknowledged however, that the VWPA was amended five months after the *Hughey* decision specifically to allow courts to "order restitution in any criminal case to the extent agreed to by the parties in a plea agreement." The amendment will be codified at 18 U.S.C. 3663(a)(3). *U.S. v. Snider*, __ F.2d __ (9th Cir. Sept. 26, 1991) No. 90-30024.

10th Circuit upholds fine despite district court's failure to make explicit findings, where facts were undisputed. (630)

Defendant claimed that he was unable the pay the $3,000 fine imposed by the district court, and that the district court erroneously failed to make explicit findings concerning the factors to consider under guideline section 5E1.2. The 10th Circuit held that the court's failure to make explicit findings was not plain error where it had before it undisputed facts supporting a substantial fine. The defendant did not challenge the fine range stated in the presentence report nor did he challenge the financial information. He did not mention an inability to pay the fine, although he did allege that he had worked steadily at a well-paying job for 16 years. Since the necessary facts were in the record and the imposition of a minimum fine was unchallenged, the court would not assume the sentencing court failed to consider the factors enunciated in section 5E1.2(d). *U.S. v. Nez*, __ F.2d __ (10th Cir. Sept. 19, 1991) No. 90-2105.

3rd Circuit rejects downward departure based upon work history, family responsibility, role in community affairs. (690)(720)(810) The 3rd Circuit rejected defendant's claim that the district court erred in not departing downward based upon his work history, family responsibility, role in community affairs and lack of criminal history. The Sentencing Commission has determined that factors such as family responsibility, work history and ties to the community may not be taken into consideration in determining an appropriate sentence. Moreover, defendant's lack of criminal history was taken into account in placing him in criminal history category I. Finally, the court lacked jurisdiction to consider the sentencing court's refusal to depart downward, unless the refusal was based on the erroneous belief that it lacked the power to do so. *U.S. v. Salmon*, __ F.2d __ (3rd Cir. Sept. 17, 1991) No. 90-3355.

Departures, Generally (§ 5K)

5th Circuit rules defendant has no right to hearing to determine entitlement to substantial assistance departure. (710) The 5th Circuit found no error in the district court's refusal to hold an evidentiary hearing to determine whether defendant was entitled to a downward departure for substantial assistance. First, a government motion is a prerequisite to any downward departure. In this case the government refused to file such a motion because defendant did not provide substantial assistance. Thus, the district court did not err in refusing to hold an evidentiary hearing on the matter. *U.S. v. Campbell*, __ F.2d __ (5th Cir. Sept. 11, 1991) No. 90-2148.

2nd Circuit affirms downward departure based on defendant's vulnerability to prison assaults. (721) The district court found that defendant had a "feminine cast to his face and a softness of features which will make him prey to the long-term criminals with whom he will be associated in prison." Relying on the decision in *U.S. v. Lara*, 906 F.2d 599 (2nd Cir. 1990), the court sentenced him to 33 months, one-third the applicable minimum term. The 2nd Circuit affirmed. The fact that defendant, unlike the defendant in Lara, was neither gay nor bisexual was not relevant, since homophobic attacks are often based upon the perception that an individual is gay. The fact that defendant had not yet been victimized was also not relevant, since it makes more sense to allow judges to prevent violence before its occurs. Finally, the court rejected the contention that even if the decision to depart was permissible, the district court should only have lowered defendant's sentence to 95 months, which would have ensured that defendant would be placed in a level one "minimum security" prison. Judge Winter dissented, finding that *Lara* held that a departure was warranted only where the sole means of protecting a vulnerable prisoner was solitary confinement. *U.S. v. Gonzalez*, __ F.2d __ (2nd Cir. Sept. 23, 1991) No. 90-1704.

9th Circuit upholds downward departure based on "youthful lack of guidance." (721) The district court departed downward from 30 years to 17 years based on what the appellate court characterized as "youthful lack of guidance." The district court believed that the defendant's youthful lack of guidance had a significant effect both on his past criminality and on his commission of the present rock cocaine offense. Thus the court thought that his criminal history category significantly overrepresented the actual seriousness of his past criminality, and his base offense level overrepresented the actual seriousness of his criminality in the present offense. The government appealed, and the 9th Circuit affirmed the sentence, rejecting the government's argument that lack of youthful guidance as a mitigating circumstance was precluded by the guidelines. The court also found that the extent of the departure was not unreasonable. *U.S. v. Floyd*, __ F.2d __(9th Cir. Sept. 20, 1991) No. 89-50295.

9th Circuit reverses upward departure based on large quantity of cocaine. (746) At the time the defendants were sentenced, the drug quantity table provided for a base offense level of 36 for "fifty KG cocaine or equivalent . . . (or more of any of the above)". The 9th Circuit held that the phrase "or more of any of the above" indicates that the sentencing commission considered the circumstances of higher quantities of cocaine and concluded that the level was to be the same regardless of how much more than 50 kilograms was involved. Thus it was improper for the court to depart upward in this case based on the 530 kilograms of cocaine that were involved here. The court gave no weight to the November 1, 1990 amendment assigning higher levels to larger quantities, ruling that the prior law was clear and the "rule of lenity" required it to be interpreted in favor of the defendants. The sentence was reversed. *U.S. v. Martinez*, __ F.2d __ (9th Cir. Oct. 1, 1991) No. 89-50529.

Sentencing Hearing (§ 6A)

7th Circuit rejects due process challenge to denial of motion for continuance of sentencing hearing. (750) The 7th Circuit rejected defendant's claim that the district court's denial of his motion for a continuance of his sentencing hearing violated due process. The denial of the motion came after the court had already granted defendant's new counsel a one-week continuance. After hearing argument on the second motion, the court stated that there had been sufficient time for counsel to evaluate the presentence report and to determine whether defendant had anything to add. The district judge was in a "unique position" to evaluate the circumstances which affected defendant's action. "The mere possibility that some additional evidence would be obtained to further contest the nature of the defendant's role in the offense [was] insufficient to overcome [the appellate court's] deference to the district judge in this area." *U.S. v. Knorr*, __ F.2d __ (7th Cir. Sept. 16, 1991) No. 90-2422.

10th Circuit remands because court failed to follow Rule 32 concerning defendant's objections to drug quantity. (760) In a series of related cases, defendants objected to the presentence report's conclusion that their organization was responsible for the distribution of at least seven kilograms of cocaine. At sentencing, the district court listened to the statements of counsel, and, in effect, overruled the objections and accepted the report. The 10th Circuit remanded because the court failed to comply with Fed. R. Crim. P. 32(c)(3)(D). The rule requires that when a defendant challenges information in his presentence, report, the district court must either make a factual finding regarding the accuracy of the challenged information or expressly state that it did not consider the challenged information. Defendants' objections to the presentence report were not perfunctory but were specific. *U.S. v. Anthony*, __ F.2d __ (10th Cir. Sept. 11, 1991) No. 90-5039; *U.S. v. Harris*, __ F.2d __ (10th Cir. Sept. 11, 1991) No. 90-5038; *U.S. v. Price*, __ F.2d __ (10th Cir. Sept. 11, 1991) No. 90-5037; *U.S. v. Leroy*, __ F.2d __ (10th Cir. Sept. 11, 1991) No. 90-5036.

7th Circuit refuses to consider allegation that district court only reviewed addendum to presentence report. (760) Defendant claimed that his probation officer informed him after the sentencing hearing that, according to standard filing procedure, the court had before it only the addendum to the presentence report, and not the full report. He asserted that his due process rights were violated, both because the addendum did not contain the matters comprehensively found in the original report, and because the addendum was materially erroneous. The 7th Circuit refused to consider this allegation arising from information outside the record. Defendant offered no evidence to support his allegation and the record refuted his claim. The district court told defendant it had his presentence report, and invited defendant to comment upon it. *U.S. v. Blythe*, __ F.2d __ (7th Cir. Sept. 18, 1991) No. 90-2867.

7th Circuit finds no due process violation in use of offense level set forth in presentence report addendum. (760) In the plea agreement, both parties agreed to recommend a base offense level of 24. After learning that defendant had been dealing drugs while negotiating the plea agreement, the government withdrew from the plea agreement, and a revised plea agreement ommitted the government's recommendation of level 24. When the presentence report recommended an offense level of 12, the government sent a letter to the probation officer explaining why the offense level should be 24. An addendum to the presentence report was filed one day before sentencing, discussing the arguments of both sides. The 7th Circuit rejected defendant's contention that the addendum falsely represented the government's recommended based level as 24 rather than 12, or that the government misled him by originally suggesting 12 as the appropriate guideline level. Defendant was well aware of the government's objection to the original presentence report and of its intention to recommend a level based on the figure which defendant had previously agreed to in the plea agreement. *U.S. v. Blythe*, __ F.2d __ (7th Cir. Sept. 18, 1991) No. 90-2867.

7th Circuit rules defendant waived 10-day notice requirement for presentence report addendum. (760) Defendant complained that his receipt of an addendum to his presentence report on the day of sentencing violated his right under 18 U.S.C. section 3552(d) to receive the presentence report at least 10 days prior to the sentencing hearing. The 7th Circuit ruled that defendant waived his rights by failing to object at the sentencing hearing. Neither defendant nor his attorney asked for additional time, despite numerous opportunities during and before the sentencing hearing. Moreover, defendant was not significantly prejudiced as a result of the hearing being conducted on the same day that the addendum was filed. Nothing in the addendum was new; it merely presented both parties' objections to the presentence report and the probation office's response. *U.S. v. Blythe*, __ F.2d __ (7th Cir. Sept. 18, 1991) No. 90-2867.

7th Circuit finds no violation of Rule 32 despite defendant's claim that he did not review presentence report "in depth." (760) Defendant claimed that because he was not given the opportunity to present a version of events or review the presentence report "in depth" with counsel, the district court violated Fed. R. Crim. P. 32. The 7th Circuit rejected this claim. Rule 32(a)(1)(A) requires that prior to sentencing, the district court determine that the defendant and defendant's counsel have had the opportunity to read and discuss the presentence report. The court must determine whether (a) the defendant has had an opportunity to read the presentence report, (b) defendant and defense counsel have discussed the report, and (c) the defendant wishes to challenge

any facts contained in the report. Here, at the sentencing hearing, the district court posed the proper questions. There was no violation of Rule 32, given defendant's responses to the district court's questions, the factual dispute defendant submitted through prior counsel, and the contacts defendant had with new counsel regarding the presentence report. *U.S. v. Knorr*, __ F.2d __ (7th Cir. Sept. 16, 1991) No. 90-2422.

7th Circuit holds change of attorney nine days prior to sentencing does not restart 10-day period for presentence report. (760) The 7th Circuit rejected defendant's contention that the district court violated Fed. R. Crim. P. 32(c)(3), which provides that the presentence report must be disclosed to a defendant and his counsel 10 days prior to sentencing, unless this period is waived by defendant. Defendant actually received the presentence report nine months prior to sentencing. He had failed to appear for a prior sentencing hearing and was at large for this period of time. After he was apprehended, and nine days prior to his new sentencing date, he retained a different attorney to represent him. This "did not restart the ten-day clock." Moreover, defendant waived his objection by participating in the sentencing hearing without raising it. *U.S. v. Knorr*, __ F.2d __ (7th Cir. Sept. 16, 1991) No. 90-2422.

Plea Agreements, Generally (§ 6B)

5th Circuit finds no grounds to withdraw plea. (790) The 5th Circuit affirmed the district court's denial of defendant's motion to withdraw his guilty plea. In its order, the district court articulated the appropriate standard for considering the request and carefully applied this standard to the facts. Defendant failed to allege facts showing that his withdrawal of the plea was justified, merely asserting "conclusory allegations" that were refuted by the record. *U.S. v. Bounds*, __ F.2d __ (5th Cir. Sept. 20, 1991) No. 89-4665.

7th Circuit holds miscalculation of guideline range does not entitle defendant to withdraw guilty plea. (790) Defendant contended that the district court abused its discretion in denying his motion to withdraw his guilty plea. According to defendant, his guilty plea was not knowingly entered because he did not understand that he might be subject to a four-level increase in offense level for occupying a leadership position in the drug organization. The 7th Circuit found no abuse of discretion. The fact that a defendant underestimates his sentence when entering his plea is not a fair and just reason to permit him to withdraw that guilty plea. At his plea hearing, defendant acknowledged the maximum sentence for his offense, that punishment was governed by the guidelines, that he had discussed the impact of the guidelines with his attorney and that he understood the court would not be able to determine the guidelines sentence until after completion of his presentence report. Defendant also stated that he understood that if the court imposed a sentence more severe than he expected, that fact by itself would not be sufficient to set aside the plea. *U.S. v. Knorr*, __ F.2d __ (7th Cir. Sept. 16, 1991) No. 90-2422.

Appeal of Sentence (18 U.S.C. 3742)

7th Circuit upholds its appellate jurisdiction despite subsequent motion filed in district court. (800) The judgment was entered on October 19. Thereafter, defendant raised the issue of credit for time served. The court ordered defendant to file a motion addressing the issue by November 1. On October 29, defendant filed a timely notice of appeal of the judgment, and on November 1, he filed the motion in the district court. The 7th Circuit upheld its jurisdiction to consider defendant's appeal. Only one tribunal has jurisdiction over a case at a given time. The motion filed in the district court after the timely notice of appeal was filed was "simply a nullity." *U.S. v. Veteto*, __ F.2d __ (7th Cir. Sept. 17, 1991) No. 90-3421.

8th Circuit refuses to review sentencing challenge where two guideline ranges overlap. (800) The 8th Circuit refused to consider defendant' claim that he was erroneously given a two-point enhancement for being a leader. The sentencing ranges with and without the two-point enhancement overlapped at the exact point of defendant's sentence. The district court explicitly noted that it would sentence defendant to the same sentence even without the challenged enhancement. *U.S. v. Riascos*, __ F.2d __ (8th Cir. Sept. 16, 1991) No. 91-1018.

11th Circuit upholds jurisdiction despite government's failure to file proof of Solicitor's General's approval with notice of appeal. (800) Although the government received approval from the Solicitor General to appeal defendant's sentence prior to the government's filing the notice of appeal, it did not include proof of such approval with the notice of appeal. The 11th Circuit upheld its jurisdiction over the appeal. The applicable statute does not require that approval be in writing or that proof of approval be included in the appellate record. Judge Birch dissented. *U.S. v. Hall*, __ F.2d __ (11th Cir. Sept. 25, 1991) No. 90-3074.

2nd Circuit reviews de novo whether criminal facilitation is controlled substance offense for career offender purposes. (820) Defendant challenged the district court's determination that his prior conviction for criminal facilitation was a controlled substance offense for career offender purposes. The 2nd Circuit found that this was a legal issue justifying de novo review. *U.S. v. Liranzo*, __ F.2d __ (2nd Cir. Sept. 5, 1991) No. 90- 1675.

7th Circuit reviews sentence for plain error where defendant failed to raise issues below. (820) Defendant contended for the first time on appeal that his sentencing proceeding vio-

lated due process. The 7th Circuit found that since defendant did not preserve the issue by presenting a proper objection below, the district court's ruling may be reversed only if "plain error" was committed. *U.S. v. Blythe*, __ F.2d __ (7th Cir. Sept. 18, 1991) No. 90-2867.

Forfeiture Cases

4th Circuit affirms summary judgment where claimants admitted they were aware of currency reporting requirements. (900) Claimants appealed the district court's grant of summary judgment for the government in a civil forfeiture action. The district court determined as a matter of law that claimants intentionally structured a series of currency deposits into their bank account for the purpose of evading federal reporting requirements. The 4th Circuit affirmed the summary judgment. Even if claimants were unaware that structuring itself was illegal, the only scienter requirement is that the violating party have knowledge of the reporting requirements and act to avoid them. Here, claimants conceded that a bank teller told them of the reporting requirements. Their belief that the requirements were permissive, rather than mandatory, was belied by the convoluted course of their deposit transactions. It was inconceivable that they believed the requirements were of no more importance than that. *U.S. v. Wollman*, __ F.2d __ (4th Cir. March 21, 1991) No. 90-6376.

8th Circuit affirms forfeiture of firearms and ammunition based upon felon's joint possession of them. (900) The district court ordered the forfeiture of miscellaneous firearms and ammunition based upon their possession by claimant and claimant's son, a convicted felon. The 8th Circuit affirmed, finding the district court's conclusion that claimant and her son jointly possessed the firearms and ammunition was not clearly erroneous. Claimant's contention that two witnesses lied at trial was conclusory and without merit. *U.S. v. Miscellaneous Firearms and Ammunition*, __ F.2d __ (8th Cir. Sept. 17, 1991) No. 91-2104.

4th Circuit holds claimant established "excusable neglect" for failing to file her claim sooner. (920) A forfeiture action against claimant's husband's property was filed in federal court in West Virginia in November 1989. Claimant, who lived in Seattle, was not served, because the government erroneously believed that she was divorced. By January, 1990, the government was aware that the marriage was in effect but still did not serve her. A divorce decree was entered May, 1990, entitling claimant to the funds. On June 21, 1990, claimant's divorce counsel was informed that the government had frozen the assets, but that an Assistant U.S. Attorney would release the money to claimant. The Assistant U.S. Attorney failed to return several telephone calls. Claimant then hired a local attorney, and on September 4, 1990, filed a motion for enlargement of time to file a claim. The 4th Circuit reversed the district court's denial of this motion, holding that defendant's failure to act could be deemed "excusable neglect." The most important factor to consider was the degree of prejudice to the government, and the government never offered "even a hint of insinuation" that it would be unfairly prejudiced by the claim. Judge Wilkinson concurred in the result but disagreed that prejudice to the government was the most important factor to consider. *U.S. v. Borromeo*, __ F.2d __ (4th Cir. Sept. 17, 1991) No. 90-6423.

4th Circuit holds lienholder is entitled to assert innocent owner defense. (960) The 4th Circuit reaffirmed its decision in *In re Metmor Fin., Inc*, 819 F.2d 446 (4th Cir. 1987) and held that a lienholder is an "owner" within the meaning of 21 U.S.C. section 881 and is thus entitled to assert the innocent owner defense. This interpretation was consistent with recent decisions by at least two other courts of appeals and was supported by the legislative history. In this case, because claimants were lienholders, and because the government had conceded their innocence, their interests in the subject property could not be forfeited. The lienholders were entitled to recover outstanding principal, unpaid pre-seizure interest, and post-seizure interest. In addition, if the mortgage documents so provided, costs and attorneys' fees would be available. The case was remanded for a determination of whether claimants' mortgage documents provided for the recovery of attorneys' fees and costs. *U.S. v. Federal National Mortgage Association*, __ F.2d __ (4th Cir. Sept. 26, 1991) No. 91-7012.

OPINION REDESIGNATED AS MEMORANDUM DISPOSITION

(110)(180)(450)(800) *U.S. v. Drabeck*, 905 F.2d 1304 (9th Cir. 1990), *rehearing en banc granted*, 915 F.2d 1404, *opinion redesignated as a memorandum disposition*, (9th Cir. Sept. 26, 1991) No. 89-30237.

Federal Sentencing and Forfeiture Guide
NEWSLETTER

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

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IN THIS ISSUE:

Cruel and Unusual Punishment

8th Circuit upholds 15-month sentence for failing to appear at sentencing hearing against 8th Amendment challenge. (105) The 8th Circuit rejected defendant's argument that his 15-month sentence for failing to appear at his sentencing hearing violated the 8th Amendment. The sentence was not grossly disproportionate to the crime. *U.S. v. Manuel*, __ F.2d __ (8th Cir. Sept. 9, 1991) No. 90-1960.

Guideline Sentences, Generally

6th Circuit rejects 5th Amendment challenge to acceptance of responsibility guideline. (115)(485) Defendant argued that he was entitled to a reduction because he told his probation officer that he accepted responsibility. However, defendant would not provide a detailed statement of his role in the crime. He contended that the failure to grant him the reduction penalized him for exercising his 5th Amendment right against self-incrimination. The 6th Circuit upheld the acceptance of responsibility guideline against this 5th Amendment challenge, and affirmed the district court's decision to deny defendant the reduction. Defendant would not admit his involvement in the conspiracy. The purported acceptance came just before sentencing, and the district court found it to be insincere. *U.S. v. Chambers*, __ F.2d __ (6th Cir. Sept. 10, 1991) No. 89-1879.

8th Circuit holds that requiring uncharged property crimes to be counted in "relevant conduct," violates statute. (120)(170)(220) Defendant pled guilty to one count of theft from an interstate shipment. The government sought to include seven uncharged thefts in the sentencing calculation pursuant to the "relevant conduct" guideline, section 1B1.3. The district court refused to consider the uncharged conduct, finding that section 1B1.3 was unconstitutional. The 8th Circuit found it unnecessary to reach the constitutional issues, holding that the Sentencing Commission exceeded the scope of its authority in promulgating the uncharged conduct provisions of section 1B1.3. In 28 U.S.C. section 994(1), Congress

SECTION

100 Pre-Guidelines Sentencing, Generally
105 Cruel and Unusual Punishment

110 Guidelines Sentencing, Generally
115 Constitutionality of Guidelines
120 Statutory Challenges To Guidelines
125 Effective Date/Retroactivity
130 Amendments/Ex Post Facto
140 Disparity Between Co-Defendants
145 Pre-Guidelines Cases

150 General Application Principles (Chap. 1)
160 More Than Minimal Planning (§ 1B1.1)
165 Stipulation to More Serious Offense (§ 1B1.2)
170 Relevant Conduct, Generally (§ 1B1.3)
180 Use of Commentary/Policy (§ 1B1.7)
185 Information Obtained During Cooperation Agreement (§ 1B1.8)
190 Inapplicability to Certain Offenses (§ 1B1.9)

200 Offense Conduct, Generally (Chapter 2)
210 Homicide, Assault, Kidnapping (§ 2A)
220 Theft, Burglary, Robbery, Commercial Bribery, Counterfeiting (§ 2B)
230 Public Officials, Offenses (§ 2C)
240 Drug Offenses, Generally (§ 2D)
(For Departures, see 700-746)
242 Constitutional Issues
245 Mandatory Minimum Sentences
250 Calculating Weight or Equivalency
255 Telephone Counts
260 Drug Relevant Conduct, Generally
265 Amounts Under Negotiation
270 Dismissed/Uncharged Conduct
275 Conspiracy/"Foreseeability"
280 Possession of Weapon During Drug Offense, Generally (§ 2D1.1(b))
284 Cases Upholding Enhancement
286 Cases Rejecting Enhancement
290 RICO, Loan Sharking, Gambling (§ 2E)
300 Fraud (§ 2F)
310 Pornography, Sexual Abuse (§ 2G)
320 Contempt, Obstruction, Perjury, Impersonation, Bail Jumping (§ 2J)
330 Firearms, Explosives, Arson (§ 2K)
340 Immigration Offenses (§ 2L)
345 Espionage, Export Controls (§ 2M)
350 Escape, Prison Offenses (§ 2P)
355 Environmental Offenses (§ 2Q)
360 Money Laundering (§ 2S)
370 Tax, Customs Offenses (§ 2T)
380 Conspiracy/Aiding/Attempt (§ 2X)
390 "Analogies" Where No Guideline Exists (§ 2X5.1)

400 Adjustments, Generally (Chapter 3)
410 Victim-Related Adjustments (§ 3A)
420 Role in Offense, Generally (§ 3B)
430 Aggravating Role: Organizer, Leader, Manager or Supervisor (§ 3B1.1)
440 Mitigating Role: Minimal or Minor Participant (§ 3B1.2)
450 Abuse of Trust/Use of Special Skill (§ 3B1.3)
460 Obstruction of Justice (§ 3C)
470 Multiple Counts (§ 3D)

SECTION

480 Acceptance of Responsibility (§ 3E)
485 Cases Finding No Acceptance Of Responsibility
490 Cases Finding Acceptance Of Responsibility

500 Criminal History (§ 4A)
(For Criminal History Departures, see 700-746)
520 Career Offenders (§ 4B1.1)
540 Criminal Livelihood (§ 4B1.3)

550 Determining the Sentence (Chapter 5)
560 Probation (§ 5B)
570 Pre-Guidelines Probation Cases
580 Supervised Release (§ 5D)
590 Parole
600 Custody Credits
610 Restitution (§ 5E4.1)
620 Pre-Guidelines Restitution Cases
630 Fines and Assessments (§ 5E4.2)
650 Community Confinement, Etc. (§ 5F)
660 Concurrent/Consecutive Sentences (§ 5G)
680 Double Punishment/Double Jeopardy
690 Specific Offender Characteristics (§ 5H)

700 Departures, Generally (§ 5K)
710 Substantial Assistance Departure § 5K1)
720 Downward Departures (§ 5K2)
721 Cases Upholding
722 Cases Rejecting
730 Criminal History Departures (§ 5K2)
733 Cases Upholding
734 Cases Rejecting
740 Other Upward Departures (§ 5K2)
745 Cases Upholding
746 Cases Rejecting

750 Sentencing Hearing, Generally (§ 6A)
755 Burden of Proof
760 Presentence Report/Objections/Waiver
770 Information Relied On/Hearsay
772 Pre-Guidelines Cases
775 Statement of Reasons

780 Plea Agreements, Generally (§ 6B)
790 Advice\Breach\Withdrawal (§ 6B)
795 Stipulations (§ 6B1.4) *(see also § 165)*

800 Appeal of Sentence (18 USC § 3742)
810 Appealability of Sentences Within Guideline Range
820 Standard of Review *(See also substantive topics)*

860 Death Penalty
862 Special Circumstances
864 Jury Selection in Death Cases
865 Aggravating and Mitigating Factors
868 Jury Instructions

900 Forfeitures, Generally
910 Constitutional Issues
920 Procedural Issues, Generally
930 Delay In Filing/Waiver
940 Return of Seized Property/Equitable Relief
950 Probable Cause
960 Innocent Owner Defense

authorized incremental punishment only where a defendant is convicted of multiple criminal acts. In addition, section 991(b)(1)(B) requires the Commission to establish policies and practices that avoid unwarranted sentence disparities among defendants with similar records "who have been found guilty of similar criminal conduct." This language indicates that Congress sought to equalize sentences based upon convicted criminal conduct. The 8th Circuit limited its holding to "separate property crimes that . . . occurred on separate days, at separate places, targeted separate victims and involved a variety of merchandise." Moreover, its holding does not affect a court's traditional authority to consider unconvicted criminal conduct in sentencing within the guideline range. *U.S. v. Galloway*, __ F.2d __ (8th Cir. Sept. 9, 1991) No. 90-3034.

6th Circuit applies guidelines to defendants who did not withdraw from conspiracy prior to November 1, 1987. (125)(380) Defendants argued that the guidelines did not apply to them because there was no evidence that they committed any illegal act after November 1, 1987, the effective date of the guidelines. The 6th Circuit rejected the argument, noting that the indictment alleged a conspiracy that began before and continued after November 1, 1987. There was no evidence that defendants withdrew from the conspiracy before November 1, 1987. *U.S. v. Chambers*, __ F.2d __ (6th Cir. Sept. 10, 1991) No. 89-1879.

8th Circuit rules sentence on revocation of probation must be under guidelines in effect at time of original sentencing. (130)(560) The district court revoked defendant's probation and sentenced him under the guidelines then in effect, applying policy statements contained in chapter seven of the sentencing guidelines that govern sentencing following probation revocation. The 8th Circuit remanded for resentencing, holding that upon probation revocation, the district court must sentence defendant under the statutes and guidelines that applied when defendant was originally sentenced. *U.S. v. Williams*, __ F.2d __ (8th Cir. Sept. 6, 1991) No. 91-1219.

1st Circuit finds no disparity in enhancing defendant's sentence for possession of firearm. (140)(284) Police recovered a loaded pistol and a quantity of drugs from defendant's residence. The 1st Circuit found no "unjustifiably wide" sentencing disparity in giving defendant, but not his two co-defendants, an enhancement under guideline section 2D1.1(b) for possession of a firearm during a drug trafficking crime. Defendant, unlike his partners, lived in the apartment, which permitted the district court to conclude that he was in constructive possession of the weapon, whether or not he owned it. *U.S. v. Font-Ramirez*, __ F.2d __ (1st Cir. Sept. 11, 1991) No. 90-1809.

9th Circuit upholds enhancement for more than minimal planning in bank fraud case. (160)(300) Defendant argued that because his conviction stemmed from only a single taking, an upward adjustment for more than minimal planning under section 2F1.1(b)(2)(A), was erroneous. The 9th Circuit rejected the argument, noting that the bank embezzlement and conspiracy for which the defendant was convicted involved more than "a single taking accomplished by false book entry." The defendant reopened a previously inactive account into which a miscoded check was to be deposited. Another accomplice then opened a bank account at the same branch using a fictitious name. Most of the money was then withdrawn from the account over the next 15 days. The defendants also took significant affirmative steps to conceal the offense. *U.S. v. Deeb*, __ F.2d __ (9th Cir. Sept. 11, 1991) No. 89-10425.

Offense Conduct, Generally (Chapter 2)

8th Circuit affirms reliance upon laboratory's production capability despite defendant's abandonment. (250) Defendant argued that it was error to base his offense level calculation upon the amount of amphetamine defendant's laboratory was capable of producing since defendant had abandoned the laboratory and had no intention of producing anything further. The 8th Circuit rejected this argument, finding the district court had properly based defendant's offense level on the quantity of drugs defendant's laboratory could have produced. "That [defendant] may have abandoned his efforts to manufacture the drug neither affected

the laboratory's production capacity nor altered the fact that when he set up the laboratory he intended to produce a large quantity of amphetamine." *U.S. v. Fulcher*, __ F.2d __ (8th Cir. Aug. 29, 1991) No. 91-1288.

7th Circuit affirms that drugs handled by co-conspirator was foreseeable to defendant. (275) The 7th Circuit rejected defendant's contention that it was improper to hold him responsible for quantities of cocaine charged to his co- conspirator. The district court did not err in finding that defendant could reasonably foresee the amount of cocaine the co-conspirator was dealing. The two had been friends for 10 years, met socially on a regular basis, and even lived together for a brief time during the conspiracy. They were arrested together for possessing cocaine in 1987. Defendant twice tried to warn the co-conspirator of the FBI's investigation. *U.S. v. Cooper*, __ F.2d __ (7th Cir. Sept. 11, 1991) No. 90-1677.

5th Circuit rules court did not comply with Rule 32 in enhancing sentence for possession of weapon during drug crime. (280)(760) At sentencing, defendant claimed that he had no knowledge that the gun existed, nor that a gun was involved in the offense. The presentence report contained no evidence of who owned or exercised control over the gun. The district court neglected to make a specific finding on knowledge, nor did it indicate that knowledge of the gun's presence would not be considered at sentencing. The court also failed to address defendant's contention that the gun was not found near him or any of his possessions, and that the residence in which it was found was not his. The 5th Circuit found that the district court's summary refusal to address defendant's objections violated Fed. R. Crim P. 32, and required remand. In addition, the court failed to resolve issues required by guideline section 2D1.1. For example, the court never addressed the question of who possessed the pistol, and, if a co-conspirator possessed the gun, whether defendant could have reasonably foreseen that possession. *U.S. v. Hooten*, __ F.2d __ (5th Cir. Sept. 10, 1991) No. 90-8566.

5th Circuit affirms enhancement based on knowledge that laundered money was criminally derived. (360) The 5th Circuit upheld a five-level enhancement under guideline section 2S1.3(b)(1) based upon defendant's knowledge that his money was criminally derived, even though the government did not prove the precise source of defendant's funds. During a two-year period, defendant deposited into his bank accounts four times as much money as he earned from verified legitimate sources. His bank accounts showed a series of large deposits and withdrawals, usually in cash, in denominations smaller than $100. A search of his home uncovered $7,000 in cash and $39,000 worth of jewelry. Defendant admitted he tried to conceal from the government the source of his funds. Moreover, ledgers found at a club he operated indicated the existence of an extensive cocaine distribution network involving thousands of dollars. Defendant claimed that the money came from unspecific sources, such as gambling, an unidentified inheritance and insurance. *U.S. v. Sanders*, __ F.2d __ (5th Cir. Sept. 11, 1991) No. 91-8030.

9th Circuit upholds higher offense level based on false statements to conceal failure to report currency. (360) Defendant was sentenced to 12 months for failing to report currency in excess of $10,000 upon entering the United States, in violation of 31 U.S.C. section 5316. Guideline section 2S1.3(a)(1)(B) provides for a base offense level of 13 if a defendant "made false statements to conceal or disguise" his failure to report currency. Defendant admitted that upon entering the United States he was twice asked by a U.S. Customs inspector whether he was carrying currency in excess of $10,000 and he twice responded that he was not. The 9th Circuit ruled that these statements were false, and the district court could reasonably conclude that defendant's purpose was "to conceal or disguise" his failure to report the currency. Accordingly the district court correctly applied base offense level 13. *U.S. v. Ruiz-Naranjo*, __ F.2d __ (9th Cir. Sept. 5, 1991) No. 89-10391.

Adjustments (Chapter 3)

1st Circuit affirms leadership role for drug dealer who ran meetings. (430) The 1st Circuit found that there was ample evidence to support the conclusion that defendant was a leader or organizer of his drug operation. The conspirators were in defendant's car when they attended their first meeting with a government informant. The second meeting took place in defendant's apartment. The tape recording of the meeting shows that defendant led the informant into the back room of the apartment and showed him the drugs. Defendant also proposed a selling price for the cocaine and discussed arrangements for meeting with possible buyers. *U.S. v. Font-Ramirez*, __ F.2d __ (1st Cir. Sept. 11, 1991) No. 90-1809.

6th Circuit affirms managerial enhancement for defendant who oversaw crackhouses. (430) The 6th Circuit upheld the district court's decision to give defendant a three-point enhancement under guideline section 3B1.1 based upon his managerial role in a drug conspiracy. The evidence showed that defendant was a "drop off and pick up man," a lieutenant who oversaw crack houses, and a recruiter of local youngsters for the conspiracy. *U.S. v. Chambers*, __ F.2d __ (6th Cir. Sept. 10, 1991) No. 89-1879.

7th Circuit affirms leadership role based upon amount of cash and drugs defendant controlled. (430) Defendant raised, for the first time on appeal, the claim that he was not leader of the drug conspiracy under guideline section 3B1.1. The 7th Circuit affirmed the enhancement, finding no clear error. Defendant received frequent telephone calls from co-defendants and other known drug dealers. He also exhibited

a very comfortable lifestyle with no means of employment. When the search warrant was executed, a large amount of cash in addition to cocaine was seized. His leadership role was amply demonstrated by his contact with other conspiracy members, and the amount of drugs and cash he controlled. *U.S. v. Cooper*, __ F.2d __ (7th Cir. Sept. 11, 1991) No. 90-1677.

7th Circuit affirms enhancement based upon either managerial role or use of special skill. (430)(450) The district court gave defendant a two-point enhancement based upon his managerial role in a drug offense under guideline section 3B1.1. In the alternative, the court justified the enhancement under section 3B1.3 based upon defendant's use of a special skill in producing methamphetamine. The 7th Circuit agreed that either guideline was an adequate ground for the enhancement. Defendant directed and controlled his younger brother-in-law's activities. With respect to the special skill enhancement, defendant founded a chemical company which he used to buy and make batches of the drugs. Although not a chemist, defendant had a degree in biology and formerly worked as the chief lab technician for the surgery department at a Texas hospital. He used his knowledge of chemistry to purchase chemicals for his company, and put them together in the "right combination" to make methamphetamine. *U.S. v. Fairchild*, __ F.2d __ (7th Cir. Aug. 15, 1991) No. 90-2637.

7th Circuit rules defendant waived minor participant issue because not raised below. (440) The 7th Circuit ruled that defendant waived the issue of his minor participation because he did not raise the issue below. There was no plain error and no miscarriage of justice. Defendant was not less culpable than other members of the conspiracy, and he was more than a minimal participant. *U.S. v. Cooper*, __ F.2d __ (7th Cir. Sept. 11, 1991) No. 90-1677.

9th Circuit rejects minor or minimal participant adjustment in bank fraud case. (440) Defendant argued that because he did not know how much money was in his account until after his arrest, his role in the offense was only minimal. The 9th Circuit rejected his argument, finding that his involvement and culpability in the offense were significant. He played an integral role in the conspiracy and was "equally culpable" with the other defendants. *U.S. v. Deeb*, __ F.2d __, 91 D.A.R. 11114 (9th Cir. Sept. 11, 1991) No. 89-10425.

9th Circuit upholds rejection of minimal role adjustment despite contrary government recommendation. (440) Pursuant to a stipulation, the government recommended a 4-level reduction in defendant's offense level for her minimal participation in the drug transaction. However, the district court found that her conduct justified only a 2-level reduction for minor participant status. The 9th Circuit upheld the court's ruling, noting that the court made specific findings indicating that the defendant was *not* among the least culpable of the defendants in the heroin transaction. *U.S. v. Madera-Gallegos*, __ F.2d __ (9th Cir. Sept. 18, 1991) No. 90-50108.

5th Circuit affirms that corrections officer who assisted prisoners' drug offenses abused position of trust. (450) Defendant, a corrections officer at a prison, was found to have assisted prisoners in a scheme in which they used unsuspecting civilians to pass altered money orders. The 5th Circuit affirmed a two-level enhancement for abuse of trust under guideline section 3C1.3. The court rejected defendant's contention that the position he abused was akin to the bank teller example listed in the commentary as a position to which the enhancement does not apply. An ordinary bank teller cannot abuse a position of trust because an ordinary bank teller does not hold a position of trust. Following the 9th Circuit's analysis in *U.S. v. Hill*, 915 F.2d 502 (9th Cir. 1990), the question is whether defendant occupied a superior position relative to all people in a position to commit the offense. Defendant did occupy such a position. His job as counselor afforded him the unique opportunity to interact with convicted felons without direct supervision. *U.S. v. Brown*, __ F.2d __ (5th Cir. Sept. 6, 1991) No. 91-1225.

1st Circuit upholds obstruction enhancement where drugs were thrown from apartment windows during police raid. (460) Defendant and two co-defendants were arrested after police noticed a number of bricks of cocaine flying out of windows during the execution of a search warrant. Defendant contended that an enhancement for obstruction of justice was improper because one of the other defendants was seen throwing drugs from the window. The 1st Circuit affirmed the enhancement, noting that at the same time that the co-defendant was observed throwing the drugs, bricks of cocaine were also being thrown from two other sides of the apartment. The co-defendant could not have been in all three places at the same time. Since there were only three conspirators in the apartment at the time, and since defendant was a leader in the operation, it was permissible for the district court to conclude that defendant took an active part in destroying or concealing evidence. *U.S. v. Font-Ramirez*, __ F.2d __ (1st Cir. Sept. 11, 1991) No. 90-1809.

1st Circuit affirms obstruction enhancement based upon defendant's submission of altered passport. (460)(775) The 1st Circuit upheld an enhancement for obstruction of justice based upon defendant's submission of an altered passport to verify his identity to the court. The commentary to guideline section 3C1.1 clearly states that producing an altered document during a judicial proceeding is grounds for an enhancement. The court also rejected defendant's claim that the district court improperly relied upon his alleged false identity in sentencing within the guideline range. The court found only that defendant was not the individual depicted in the photographs and fingerprints in his INS file. This was properly relied on in imposing sentence within the range.

U.S. v. Rojo-Alvarez, __ F.2d __ (1st Cir. Sept. 10, 1991) No. 90-1980.

1st Circuit upholds obstruction enhancement despite judge's failure to identify defendant's perjurious statements. (460) The 1st Circuit upheld an obstruction of justice enhancement based upon defendant's perjury despite the district court's failure to identify what portion of defendant's testimony was perjurious. No specific finding was necessary because "the record [spoke] eloquently for itself." Defendant not only contended that he was unaware that he was in Maine (contending that he thought he was Boston, Massachusetts), but he also contended that he spent the entire day of the arrest in a motel room watching television, when, in fact, he was spotted elsewhere. He also contended that he never knew the true nature of the journey and never questioned anything that occurred -- even when he was instructed to retrieve a black bag from the trunk of a parked car with a key that he obtained from the car's rear tire. *U.S. v. Rojo-Alvarez*, __ F.2d __ (1st Cir. Sept. 10, 1991) No. 90-1980.

1st Circuit finds no difference between "perjury" and "testifying untruthfully" for purposes of obstruction enhancement. (460) The November 1990 amendments to the commentary to section 3C1.1 provide that an enhancement for obstruction of justice is proper for "committing, suborning, or attempting to suborn perjury." The prior comment allowed enhancement for "testifying untruthfully . . . concerning a material fact." Defendant contended that the amendment was meant to "clarify" the standard and the implication of the use of the term "perjury" is that specific proof is now required. The 1st Circuit rejected this interpretation, finding this a distinction without a difference. *U.S. v. Isabel*, __ F.2d __ (1st Cir. Sept. 10, 1991) No. 90-1839.

1st Circuit affirms obstruction enhancement based on concealment of rancid meat from USDA inspectors. (460) Defendant was convicted of eight counts of selling adulterated meat and poultry. The 1st Circuit rejected defendant's argument that an enhancement for obstruction of justice was improper because his conduct obstructing justice did not occur during the investigation or prosecution of his offense. A former employee testified that defendant would instruct him to clean rodent droppings from the poultry case and put rancid chicken in the back of the freezer under other meat prior to USDA inspections. The employee also stated that defendant knew that if the USDA did not return to his market within a few hours from their first visit, they would not come back that day, and thus defendant would instruct his employees to put the rancid meat back in the display case. "Hiding rotten poultry and meat products in the freezer so that Agricultural Department inspectors would not find them and selling them after the danger of detection had passed is a flagrant example of concealing evidence material to an official investigation." *U.S. v. Pilgrim Market Corporation*, __ F.2d __ (1st Cir. Sept. 5, 1991) No. 91-1591.

5th Circuit affirms obstruction enhancement where defendant gave court fraudulent birth certificate. (460) Upon arrest, defendant gave a false name. However, during his presentence interview, he "readily admitted" several prior convictions under different names. Nonetheless, through his sentencing hearing defendant continued to maintain that the alias he gave upon his arrest was his true name. He produced a fraudulent birth certificate in support of this claim. On appeal, he claimed that the enhancement for obstruction of justice was improper because his use of the alias was immaterial. The 5th Circuit rejected the argument, even though the November 1990 guideline amendments state that the obstruction enhancement is not intended to apply where the defendant provides a false name or identification document on arrest, unless the investigation or prosecution is significantly hindered. Here, the defendant provided the *court* with a fraudulent birth certificate. The amended commentary clearly states that the enhancement applies to providing a false or altered document during an official investigation or judicial proceeding. *U.S. v. Rodriguez*, __ F.2d __ (5th Cir. Sept. 11, 1991) No. 90-2969.

7th Circuit affirms obstruction enhancement based on defendant's threats to witnesses. (460) The 7th Circuit held that the evidence supported the district court's enhancement for obstruction of justice. In addition to testifying untruthfully at the trial of co-conspirators, several witnesses testified that defendant attempted to intimidate them into changing their testimony regarding his involvement in the conspiracy. *U.S. v. Cooper*, __ F.2d __ (7th Cir. Sept. 11, 1991) No. 90-1677.

9th Circuit reverses obstruction of justice adjustment even though defendant was a fugitive for nine months. (460) After arresting the codefendants in a hand-to-hand sale, the agents attempted to locate and arrest defendant but could not find him. That evening they searched his residence pursuant to a search warrant and found indications that he had fled in a hurry. During the next nine months, they spent 200 hours searching for him before he was arrested. The district court enhanced his sentence for obstruction of justice under section 3C1.1. On appeal, Judges Pregerson, Goodwin and Alarcon reversed. The court noted that the plain language of Application Note 4(d) provides that the enhancement does not apply to defendant's conduct in "avoiding or fleeing arrest." The Note does not restrict its application to flights of short duration. Moreover, "a defendant's failure to surrender to authorities is already considered under the guidelines in the acceptance of responsibility adjustment." *U.S. v. Madera-Gallegos*, __ F.2d __ (9th Cir. Sept. 18, 1991) No. 90-50108.

1st Circuit reviews grouping decision under clearly erroneous standard of review. (470)(820) The 1st Circuit rejected a de novo standard review of the district court's decision to group defendant's offenses into four groups und

guideline section 3D1.2. Central to the district court's decision to group the counts was a finding that defendant's offenses did not constitute a single ongoing plan. Because this was a finding of fact, 18 U.S.C. section 3742(e) required a clearly erroneous standard of review. The court also found that the statute's requirement that an appellate court give "due deference" to the district court's application of the guidelines to the facts translated into a clearly erroneous standard of review. "This is not a situation where the court has committed pure legal error by misinterpreting the words of the guideline." The issue was "a mixed question of law and fact." *U.S. v. Pilgrim Market Corporation*, __ F.2d __ (1st Cir. Sept. 5, 1991) No. 91-1591.

1st Circuit upholds decision to separately group offenses involving sale of adulterated food. (470) Defendant pled guilty to eight counts involving the sale, storage and transportation of adulterated meat and poultry products. The 1st Circuit upheld the district court's decision to group the eight counts into four different groups. Although the counts involved the same victim, the public, they did not evidence a common scheme or plan. Some of the charges involved selling rodent-infested meat on several different occasions, and unless defendant had "some Pied Piper arrangement," this could hardly be part of a common scheme or plan. There also was evidence that the contamination was caused by several different sources. Finally, the difference in dates between the groups also negated the finding of a common scheme or plan. The court also rejected defendant's claim that the offenses should have been grouped under guideline section 3D1.2(d) as offenses involving substantially the same harm. *U.S. v. Pilgrim Market Corporation*, __ F.2d __ (1st Cir. Sept. 5, 1991) No. 91-1591.

5th Circuit denies acceptance of responsibility reduction where defendant also obstructed justice. (485) The 5th Circuit rejected defendant's claim that he was entitled to a reduction for acceptance of responsibility because he pled guilty. Defendant received an enhancement for obstruction of justice based upon his use of an alias and false birth certificate. This was not an "extraordinary case" in which adjustments under both sections 3C1.1 and 3E1.1 applied. *U.S. v. Rodriguez*, __ F.2d __ (5th Cir. Sept. 11, 1991) No. 90-2969.

5th Circuit denies acceptance of responsibility reduction where defendant failed to comply with conditions of bond. (485) The 5th Circuit found no error in the district court's refusal to grant a reduction for acceptance of responsibility based upon defendant's failure to comply with the conditions of his bond. The guidelines permit the district court to consider relevant facts beyond those enumerated in the guideline commentary. *U.S. v. Hooten*, __ F.2d __ (5th Cir. Sept. 10, 1991) No. 90-8566.

7th Circuit denies acceptance of responsibility reduction based on perjury and obstruction of justice. (485) The district court denied defendant a reduction for acceptance of responsibility because defendant testified falsely at the trial of co-conspirators and had threatened or intimidated witnesses in an attempt to influence their testimony. The 7th Circuit affirmed, finding that the district court's written order thoroughly supported the finding that defendant's testimony was inconsistent and untruthful regarding the amount of cocaine with which he was personally involved. Moreover, his obstruction of justice indicated that he did not deserve an acceptance of responsibility reduction. *U.S. v. Cooper*, __ F.2d __ (7th Cir. Sept. 11, 1991) No. 90-1677.

Criminal History (§ 4A)

8th Circuit rules erroneous assessment of two criminal history points was harmless error. (500) Defendant pled guilty to a federal forgery charge but then failed to appear for his sentencing hearing. He was apprehended at his home the next day. On his subsequent conviction for failing to appear at the sentencing hearing, the district court assessed two criminal history points for committing the offense while under a criminal justice sentence, based on the federal forgery conviction. The 8th Circuit found that defendant was not under a criminal justice sentence at the time of the offense, but that the error was harmless. The error increased defendant's total criminal history points from seven to nine. Criminal history category IV encompasses defendants with seven to nine criminal history points. Therefore, defendant's criminal history category and applicable guideline range would not change. *U.S. v. Manuel*, __ F.2d __ (8th Cir. Sept. 9, 1991) No. 90-1960.

8th Circuit holds state forgery conviction was unrelated to federal forgery conviction. (500) The 8th Circuit rejected defendant's claim that his prior state forgery conviction was related to his prior federal forgery conviction under guideline section 4A1.2. Defendant's claim failed to meet every element listed in the application note to section 4A1.2. First, the state forgery did not occur on the same occasion as the federal forgery, but months later. The crimes were not part of a common scheme or plan and were factually unrelated. The convictions involved two different law enforcement agencies, and defendant pled guilty before different tribunals. Also the cases were not consolidated for sentencing. Concurrent sentences are not necessarily the functional equivalent of consolidation. Moreover, consolidation is only one factor to consider in determining whether convictions are related under the guidelines. *U.S. v. Manuel*, __ F.2d __ (8th Cir. Sept. 9, 1991) No. 90-1960.

Determining the Sentence (Chapter 5)

9th Circuit upholds restitution to FSLIC for losses in a scheme that began before effective date of VWPA. (610) Relying on *U.S. v. Angelica*, 859 F.2d 1390, 1392 (9th Cir. 1988), Circuit Judges Wallace and O'Scannlain and District Judge Burns held that the restitution provisions of the Victim and Witness Protection Act, 18 U.S.C. section 3663-3664, apply to all losses resulting from a fraud scheme that begins before and continues beyond January 1, 1983, the effective date of the Act. Moreover, although "it was not directly harmed, the FSLIC did suffer as a result of [defendant's] conduct and the Act's legislative history makes it clear that the statute is intended to encompass both direct and indirect victims of criminal acts." The panel also rejected defendant's due process argument, noting that the judge held two lengthy restitution hearings and provided funds for defendant to hire appraisal experts for both hearings. Although "this was a complicated case, the procedures used in entering the restitution order were constitutionally sufficient." *U.S. v. Smith*, __ F.2d _ (9th Cir. Sept. 17, 1991) No. 90-30060.

9th Circuit upholds $12.8 million restitution order despite claim of inability to pay. (610) Circuit Judge Wallace and District Judge Burns found no abuse of discretion in ordering a formerly wealthy but now indigent defendant to pay nearly $12.8 million to the FSLIC within five years of his release from prison. The court noted that if the defendant "has not paid the full amount at the end of the five year period but can demonstrate that he has made a diligent, good faith effort to do so, he may petition the district court at that time for either an extension of time period for payment or a remittitur." The court also held that it was proper to include prejudgment interest in the restitution award. However the case was remanded for a new determination of the value of the collateral property. Judge O'Scannlain dissented. *U.S. v. Smith*, __ F.2d _ (9th Cir. Sept. 17, 1991) No. 90-30060.

1st Circuit upholds $200,000 fine for corporate defendant against constitutional and statutory challenges. (630) Defendant corporation was convicted of eight counts of selling adulterated meat and poultry, and received a $200,000 fine, $25,000 for each count. The 1st Circuit upheld the fine against the corporation's claim that the fine violated the 8th Amendment's prohibition against excessive fines. Assuming the prohibition is applicable to a corporation (which the court noted was a tenuous assumption), the fine was not excessive. The fine was less than one-half of the $500,000 statutory maximum. Moreover, the court did not think a $200,000 fine for repeatedly selling rotten poultry and meat products to the public was excessive, and would also serve as a significant deterrent to future violators. The fine also complied with 18 U.S.C. section 3571. The district court was "fully cognizant" of the corporation's financial condition, and refused to impose the $500,000 fine after defense counsel asserted that such a fine would put the corporation out of business. *U.S. v. Pilgrim Market Corporation*, __ F.2d __ (1st Cir. Sept. 5, 1991) No. 91-1591.

10th Circuit rules district court cannot impose larger fine because it disagrees with defendant's disposition of property. (630) Defendant owned a rental property valued at $57,000 which had a first mortgage of $23,000. Defendant attempted to get a second mortgage on the property in order to pay the $10,000 she owed to her attorney, but was unsuccessful. She ultimately entered into a contract to sell the property to a third party for $33,000, which paid her attorneys' fees but left her no equity. Nonetheless, the district court imposed a $21,146.64 fine, relying upon the vanished equity to provide her with the needed money. The court reasoned that defendant could not avoid a fine by "stripping" herself of assets in order to discharge other obligations based on her own "idiosyncratic determination of her priorities." The 10th Circuit reversed, finding that the defendant should not be punished for a financial decision to satisfy "perfectly legitimate obligations" in a priority not endorsed by the district court. However, the court rejected defendant's contention that the district court must make specific findings on each factor when imposing a fine. *U.S. v. Washington-Williams*, __ F.2d __ (10th Cir. Sept. 6, 1991) No. 90-6279.

7th Circuit upholds reliance on age, role in offense and length of criminal activities to sentence at top of range. (690)(775) The 7th Circuit rejected defendant's claim that the district court failed to state with particularity its reasons for imposing a sentence at the top of the guideline range as required by 18 U.S.C. section 3553(c)(1). The district court stated that it was basing defendant's sentence on his age, his role in the offense and the length of time that his criminal conduct lasted. Although age is not ordinarily relevant in sentencing and defendant's managerial role was already taken into account under guideline section 3B1.1, the district court was entitled to consider that defendant's age allowed him to use a younger family member in the conspiracy. The sentence also reflected the district court's conclusion that defendant "should have known better." Moreover, the length of defendant's criminal conduct supported the sentence. Defendant had already been indicted in Texas when he moved to Wisconsin to start the same illegal business, bringing with him a five-year supply of chemicals. *U.S. v. Fairchild*, __ F.2d __ (7th Cir. Aug. 15, 1991) No. 90-2637.

Departures Generally (§ 5K)

1st Circuit rules it has no jurisdiction to review refusal to depart downward. (720)(810) Defendant contended that the district court erroneously refused to consider her reduced culpability as a proper basis for a downward departure under the guidelines. The 1st Circuit found it had no jurisdic-

tion to review the claim. The district court granted defendant a four-level reduction for being a minimal participant under guideline section 3B1.2(a). The court recognized, however, that only "extraordinary, exceptional circumstances" justified a downward departure, and then found that such circumstances were not present here. As the district court was aware of its power to depart in extraordinary circumstances but decided a departure was unwarranted, the appellate court was without jurisdiction to review the downward departure. *U.S. v. Lopez*, __ F.2d __ (1st Cir. Sept. 11, 1991) No. 90-1671.

1st Circuit rules district court knew it had discretion to depart downward. (720)(810) The 1st Circuit rejected defendant's claim that the district court failed to depart downward based on the mistaken belief that it lacked discretion to depart. The district court's statement did not suggest that it had no sentencing discretion under the guidelines, only that it had very limited discretion. Moreover, after considering defendant's request for a downward departure, the court stated that "I don't think that this is a case where I can depart because I do think that the Guidelines have taken into [consideration] what's here, and I'm satisfied that the -- this matter is correctly computed." Therefore, it was clear that the district court knew it could depart but found that circumstances did not justify a departure. The refusal to depart is not reviewable on appeal. *U.S. v. Isabel*, __ F.2d __ (1st Cir. Sept. 10, 1991) No. 90-1839.

8th Circuit affirms upward departure based upon defendant's violent history with guns. (733) Defendant was convicted of being a felon in possession of a firearm. The district court departed upward from a guideline range of 30 to 37 months and sentenced defendant to 60 months. The departure was based upon guideline section 4A1.3, which permits a departure where a defendant's prior criminal conduct is similar to the offense of conviction. Here, defendant's criminal history "demonstrated a willingness to use firearms in the commission of crimes . . ." The 8th Circuit affirmed the upward departure. Defendant was not just in possession of a gun. He had a shotgun sawed off both at the barrel and the stock. He had taped the remaining stock so that it would not take fingerprints. Given the circumstances and defendant's violent history, the 60-month sentence was reasonable. *U.S. v. Gassler*, __ F.2d __ (8th Cir. Sept. 9, 1991) No. 90-5568.

2nd Circuit affirms use of analogy in departing upwards despite error in guideline calculation. (740) On defendant's first appeal, the 2nd Circuit approved the upward departure but remanded for the district court to reconsider the extent of the departure in light of *U.S. v. Kim*, 896 F.2d 678 (2nd Cir. 1990). Kim directed courts to use the structure of the guidelines for guidance in departing. In particular, it is appropriate to use the multi-count analysis in guideline section 3D. In this case, the departure was based on defendant's abducting and threatening to kill a witness if he testified against defendant. On remand, the district court considered the abduction as witness tampering and erroneously calculated the offense level to be 22. In fact, it should have been 20. Despite this error, the 2nd Circuit affirmed the upward departure. The multi-count analysis only provides guidance as to the extent of the departure, not a rigid formula. Here defendant's conduct in threatening to kill the witness was especially egregious and it would not have been unreasonable for the district court to depart upward from level 20 to 22. *U.S. v. Baez*, __ F.2d __ (2nd Cir. Sept. 6, 1991) No. 90-1646.

5th Circuit upholds upward departure based upon large number of aliens involved in smuggling offense. (745)(775) Defendant was convicted of transporting undocumented aliens within the United States. The 5th Circuit affirmed a six-month departure based on the "large number" of aliens involved, in this case 21. Defendant did not dispute that this was a proper ground for departure, that 21 was a large number, or that the departure was unreasonable. Rather, he contended that the trial court must articulate how it determines why a given number of aliens is a large number. The appellate court held that the guidelines do not impose such a requirement. They simply require the sentencing court to state in open court the reasons for the departure. *U.S. v. Hernandez*, __ F.2d __ (5th Cir. Sept. 11, 1991) No. 91-2129.

Sentencing Hearing (§ 6A)

1st Circuit upholds reliance on hearsay at sentencing hearing. (770) The 1st Circuit rejected defendant's contention that the district court relied on the untrustworthy hearsay testimony of a government agent in sentencing. All of the evidence presented at the sentencing hearing by the government agent was corroborated by evidence admitted at trial, under oath and subject to cross-examination. *U.S. v. Rojo-Alvarez*, __ F.2d __ (1st Cir. Sept. 10, 1991) No. 90-1980.

7th Circuit rules defendant's refusal to cooperate may be considered in sentencing within guideline range. (710) The policy statement in guideline section 5K1.2 states that a defendant's refusal to assist authorities in the investigation of other persons may not be considered as an "aggravating sentencing factor." The 7th Circuit held that section 5K1.2 does not prevent a district court from relying upon a defendant's refusal to assist when selecting a particular sentence within the applicable guideline range. The court found that the term "aggravating sentencing factor" referred to a factor justifying an upward departure, rather than a factor considered when sentencing within the guideline range. The court also rejected defendant's claim that the district judge's consideration of defendant's refusal to assist was a violation of the 5th Amendment. Defendant was not given an additional sentence based on his exercise of a 5th Amendment right,

since he received a sentence within the guideline range. *U.S. v. Klotz*, __ F.2d __ (7th Cir. Sept. 9, 1991) No. 91-1149.

Plea Agreements, Generally (§ 6B)

5th Circuit rules government's failure to advise court of defendant's cooperation did not breach plea agreement. (790) Defendant's plea agreement required the government to inform the court of defendant's cooperation. Notwithstanding this provision, the 5th Circuit rejected defendant's claim that the government's failure to advise the court of defendant's cooperation was a breach of his plea agreement. The government's failure to inform the court of defendant's cooperation did not deprive the court of any information that might be relevant to sentencing. The extent of defendant's cooperation was to make a voluntary and truthful admission to the crime charged, a fact made known to the court and confirmed by the government at sentencing. Although the government did not take the initiative to mention defendant's cooperation, its actions did not amount to a breach of the plea agreement. *U.S. v. Hooten*, __ F.2d __ (5th Cir. Sept. 10, 1991) No. 90-8566.

7th Circuit affirms denial of motion to withdraw guilty plea. (790) Defendant appealed the district court's denial of his motion to withdraw his guilty plea to using firearms in relation to a drug trafficking crime. Defendant claimed that he never admitted to using or carrying the guns in relation to the crime of conspiracy to distribute cocaine, so there was no factual basis for the plea. The 7th Circuit affirmed the denial of defendant's motion, finding an adequate factual basis for the plea. The plea agreement stated that defendant had the guns in his residence at the time he was taking delivery of a large quantity of cocaine. At the plea hearing, defendant admitted that the guns were in his home at the time of the drug offense. In addition, the government provided the district court with a summary of its evidence, including testimony regarding the seizure of drugs, firearms and money from defendant's home. Defendant agreed with the government's summary of the evidence. *U.S. v. Cooper*, __ F.2d __ (7th Cir. Sept. 11, 1991) No. 90-1677.

Appeal of Sentence (18 U.S.C. 3742)

1st Circuit rules "abuse of trust" challenge not raised below was waived. (800) On appeal, defendant challenged for the first time the district court's decision to enhance his offense level for abuse of trust. The 1st Circuit ruled that defendant's failure to raise the issue below constituted a waiver. *U.S. v. Pilgrim Market Corporation*, __ F.2d __ (1st Cir. Sept. 5, 1991) No. 91-1591.

Forfeiture Cases

11th Circuit, en banc, outlines procedure for assessing summary judgment motion in forfeiture action. (900) The 11th Circuit, *en banc*, outlined the procedure a court must follow in evaluating a claimant's motion for summary judgment. The court must initially determine whether, as a matter of law, the government has shown probable cause. If not, the court should grant summary judgment for the claimant. If the government has established probable cause, the claimant may still be entitled to summary judgment if he shows the absence of a triable issue of fact on the issues on which he has the burden of proof: that is, taking all of the evidence in the light most favorable to the government, no reasonable jury could award the property to the government. If the claimant fails to make such an affirmative showing, the court should deny claimant's motion. If the claimant does make such a showing, the government, to defeat the motion, must respond with evidence showing that a factual issue exists as to whether the property is forfeitable. The court also discussed the steps to follow in evaluating the *government's* motion for summary judgment in a forfeiture action. *U.S. v. Four Parcels of Real Property in Greene and Tuscaloosa Counties in the State of Alabama*, __ F.2d __ (5th Cir. Aug. 29, 1991) No. 89-7061 *(en banc)*.

7th Circuit rejects statutory and constitutional challenges to forfeiture of entire parcel of land. (910) Claimant contended that the forfeiture of his entire five-acre parcel was not valid under the civil forfeiture statute because only a portion of the property was "substantially connected" to the drug activity. He also contended that the forfeiture violated the 8th Amendment. The 7th Circuit upheld the forfeiture of the entire five acres. First, a substantial connection is not required between the property and the related drug offense for a civil forfeiture of real estate under 21 U.S.C. section 881(a)(7). The court agreed with other courts that have held that section 881(a)(7) contemplates the forfeiture of an entire tract of land based on drug-related activities on a portion of a tract. Claimant's 8th Amendment challenge also failed. The court believed that the 8th Amendment does not apply to civil in rem actions, but acknowledged that the opposing view has some support. However, even if the 8th Amendment did apply, claimant failed to show how the forfeiture was disproportional. He mentioned, but did not discuss, any of the factors which are typically considered in determining proportionality. *U.S. v. Certain Real Property, Commonly Known as 6250 Ledge Road, Egg Harbor, WI*, __ F.2d __ (7th Cir. Sept. 11, 1991) No. 90-3590.

7th Circuit upholds refusal to stay civil forfeiture pending resolution of criminal charges. (910) The 7th Circuit found no error in the district court's denial of claimant's motion for a stay in his civil forfeiture action pending resolution of the state criminal charges. Claimant waived this issue by agree-

ing to try the forfeiture action on stipulated facts. Moreover, even if claimant's failure to object did not constitute a waiver, he would not be entitled to a stay. Although the 5th Amendment privilege against self-incrimination is applicable in civil forfeiture actions, a blanket assertion of the privilege is no defense to a forfeiture proceeding and would not provide a sufficient basis for the issuance of a stay. "The very fact of a parallel criminal proceeding . . . does not alone undercut [claimant's] privilege against self-incrimination, even though the pendency of the criminal action 'forces him to choose between preserving his privilege against self-incrimination and losing the civil suit.'" *U.S. v. Certain Real Property, Commonly Known as 6250 Ledge Road, Egg Harbor, WI*, __ F.2d __ (7th Cir. Sept. 11, 1991) No. 90-3590.

California District Court holds that possessory interest in property is sufficient for standing. (920) District Judge Henderson held that it is not necessary for a claimant to claim *ownership* of the property to maintain standing under the forfeiture statute. A lesser interest, such as a possessory interest, is sufficient. Moreover the court found no authority for the government's position that a claimant's failure to identify the source of the money precluded him from contesting the forfeiture of that money. *U.S. v. $191,910 in U.S. Currency*, __ F.Supp. __ (N.D. Cal. Aug. 5, 1991) No. C90-1276 TEH.

11th Circuit, en banc, upholds its in rem jurisdiction over dozer released to claimant pending government appeal. (920) The district court granted claimant's motion for summary judgment in a forfeiture action against a dozer. In order to induce the court to release the dozer to claimant pending the government's appeal, claimant filed an affidavit promising that he would keep the dozer within the court's territorial jurisdiction so long as any proceeding in the case was pending. The 11th Circuit upheld its in rem jurisdiction over the government's appeal despite the release of the dozer to claimant. Although Circuit precedent is split upon whether such a release deprives the court of jurisdiction, such cases are distinguishable. In this case, the court released the dozer on the condition that claimant keep the dozer within its territorial limits and available for seizure should the government prevail. By doing so, the court "protected its in rem jurisdiction by making [claimant] its bailee for the dozer; in effect it retained custody of the res." *U.S. v. Four Parcels of Real Property in Greene and Tuscaloosa Counties in the State of Alabama*, __ F.2d __ (5th Cir. Aug. 29, 1991) No. 89-7061 *(en banc)*.

11th Circuit, en banc, reverses summary judgment in favor of claimant in forfeiture action against a dozer. (920)(950) In an *en banc* decision the 11th Circuit reversed a summary judgment in favor of claimant in a forfeiture action against a dozer. The government showed that a convicted drug dealer with no legal means of support purchased the dozer with $65,000 in cash. The drug dealer used the dozer for his own purposes, kept it on his property, and led others to believe that it was his. Claimant rebutted this showing with testimony that a dealer had purchased the dozer on claimant's behalf for claimant's logging business, that the dozer was depreciated by the logging business in its state and federal income tax returns, and that claimant permitted the dealer to use the dozer for his own purposes because the dealer operated the dozer in claimant's logging business without compensation. However, there were internal inconsistencies with claimant's story and a jury could choose to disbelieve the explanation. The uncontested facts reasonably suggested that the dealer bought the dozer with the proceeds of drug transactions. Whether claimant's explanation should be believed was a question for the jury, not the district court. Several judges dissented, finding the government failed to produce sufficient evidence. *U.S. v. Four Parcels of Real Property in Greene and Tuscaloosa Counties in the State of Alabama*, __ F.2d __ (5th Cir. Aug. 29, 1991) No. 89-7061 *(en banc)*.

7th Circuit upholds forfeiture order based on 460 marijuana plants and gardening equipment at residence. (950) The 7th Circuit rejected claimant's contention that the district court's forfeiture order concerning his residence was not supported by the evidence. Claimant's argument emphasized what the evidence did not show rather than what it did show. The government established probable cause that claimant's property was used to facilitate the commission of a drug-related offense. The presence in defendant's residence of 460 marijuana plants, together with "sophisticated" home gardening equipment and growing tools provided a reasonable ground for believing that claimant engaged in the intentional manufacture of marijuana, and that the plants were going to be trafficked. Since the government established probable cause, the burden shifted to claimant to refute the forfeitability by a preponderance of the evidence. Claimant failed to meet this burden. *U.S. v. Certain Real Property, Commonly Known as 6250 Ledge Road, Egg Harbor, WI*, __ F.2d __ (7th Cir. Sept. 11, 1991) No. 90-3590.

OPINION WITHDRAWN

(340)(734)(746) *U.S. v. Perez-Magana*, 929 F.2d 518 (9th Cir. 1991), *opinion withdrawn and memorandum disposition filed in its place* (9th Cir. Sept. 5, 1991).